

Special Masters in the Pretrial Development of Big Cases: Potential and Problems

Wayne D. Brazil

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This article explores the advantages and disadvantages of referring discovery matters in complex cases to special masters. In the first section Brazil explains how the results of his earlier research into the discovery system exposed problems that the appointment of masters might help solve. He then describes the kinds of pretrial tasks and roles federal courts have assigned to special masters and the ways that using a master can expedite and rationalize the case development process. In the second half of the article, the author assesses the major objections to delegating judicial responsibilities to masters and the problems that frequent appointments might cause. Along the way, Brazil offers practical suggestions to judges about how to avoid potential difficulties and how to maximize the effectiveness of this increasingly popular procedure.

I. INTRODUCTION: THE NEED FOR A NEUTRAL MANAGERIAL PRESENCE¹

The principal purpose of this article is to explore the pros and cons of using special masters² to perform various functions during the discovery stage of large civil lawsuits. Before embarking on that exploration, it is important to explain why it might be worth the effort.

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The author would like to express a special feeling of gratitude to Paul R. Rice and Geoffrey C. Hazard, Jr., for their substantial contributions to this article. The many references in the pages that follow to their perceptive, important essay about their work on the AT&T litigation and to unpublished ideas they have shared with me do not adequately capture the full measure of my obligation to them. Both men began making significant contributions to my work before I went into the field with a questionnaire in the summer of 1981. Both reviewed the questions I proposed asking and suggested additional areas of inquiry. Both also have provided me with extensive data about their experiences as special masters, now in three major lawsuits. Of course, neither is responsible for the content of this article, but I would be worse than remiss if I did not try to acknowledge that much of what is useful herein originated with them.

I also would like to express a special thank you to Ronald E. McKinstry (Seattle, Washington), Stuart R. Pollak (San Francisco, California), and Magistrate Edward A. Infante (United States District Court, Southern District of California) for the lengthy interviews and helpful insights they gave

In the spring of 1979, the American Bar Foundation began sponsoring a series of empirical and qualitative studies of how the discovery system is working in civil matters. These studies have built primarily on extensive interviews of lawyers, judges, magistrates, and referees. The picture of the discovery system that has emerged from these sources is disturbing. Our data offer substantial support for the view that the discovery "system" in larger cases is essentially out of control. In other articles in this series, I have explored in detail the dimensions and causes of this problem.³ It is sufficient here to emphasize the bottom line: big case discovery far too often takes place in what I have characterized as a "responsibility vacuum": none of the principal actors in the discovery arena (lawyers, parties, and magistrates or judges) regularly assume effective responsibility for the system as a system. The result is a process that is inefficient (in terms of both cost and time) and that often fails to achieve its primary purpose: to distribute evenly among the parties the relevant and unprivileged information on which the merits of disputes are supposed to be resolved.

Many of the judges and litigators we interviewed⁴ believe that discovery in big cases cannot be significantly improved without systematic exertion of firm and fair external control over the process. In theory, the machinery to exercise such control already exists. Federal judges and

me. Their contributions have substantially broadened my understanding of the roles masters and magistrates might play in the pretrial period.

I also am indebted to Mark D. Petersen for his conscientious and valuable research assistance, and to Evelyn Baron, Stephen R. Lothrop, and Peggie C. MacDonald for their editorial assistance and patient and careful preparation of the manuscript.

The author would like to add an expression of gratitude to the American Bar Foundation for supporting this project and to Spencer L. Kimball for the encouragement and counsel without which this work would not have been done.

1. I am indebted to Geoffrey C. Hazard, Jr., for sensitizing me to the potential significance of converting masters from passive referees into active managers.

2. A special master is a private attorney, a law professor, or a retired judge who is appointed, with or without the consent of the parties, to assist the judge in performing some of his or her functions. Federal Rule of Civil Procedure 53 is the source of authority most commonly cited by federal judges when making such appointments. Whether Federal Rule 53 was intended to authorize delegations of *pretrial* tasks is a complex question I will address in the next article in this series. In some state courts, an appointee who performs the functions a special master would perform in the federal system is called a "referee." See, e.g., the recently amended versions of the Cal. Civ. Proc. Code §§ 639, 645.1. Section 639 empowers California trial courts to "direct a reference," without the consent of the parties, "[w]hen the court in any pending action determines in its discretion that it is necessary for the court to appoint a referee to hear and determine any and all discovery motions and disputes relevant to discovery in the action and to report findings and make a recommendation thereon."

3. Wayne D. Brazil, Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery, 1980 A.B.F. Res. J. 217; *id.*, Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses, 1980 A.B.F. Res. J. 787; *id.*, Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions, 1981 A.B.F. Res. J. 873.

4. For descriptions of the composition of the groups of lawyers and judges we have interviewed, see Brazil, Views, *supra* note 3, at 220 n.1; *id.*, Civil Discovery, *supra* note 3, at 890-902 apps. B-D; *id.*, Improving Judicial Controls, *supra* note 3, at 876 n.3.

magistrates have ample authority to guide, restrain, and even manage all major aspects of the pretrial development of civil cases. Our data strongly suggest, however, that there is a huge gap between the federal judiciary's theoretical power and its actual behavior. More than 80 percent of the big case litigators we interviewed reported that they did *not* receive adequate and efficient help from the courts in resolving discovery disputes and problems.⁵ Similarly high percentages of big case litigators expressed a desire for greater judicial involvement in the discovery stage of litigation⁶ and more frequent use of the courts' power to sanction parties or counsel who violate discovery obligations.⁷ The big case lawyers we interviewed plainly want the courts to be more knowledgeable about and involved in the pretrial development of big cases and to play a more active, restraining role in discovery.

There is little reason to believe that the judiciary will respond promptly and enthusiastically to this invitation. According to many of the judges and magistrates we interviewed, demands on the courts' resources by more pressing matters (e.g., criminal and civil trials) are so overwhelming that it is impossible to commit significantly more judicial attention to discovery. The judges' belief that they simply don't have the resources to do more is reinforced by their fear that venturing into the discovery realm of a big case is like embarking on a trek across a vast quagmire interspersed with quicksand traps. Courts are afraid of being bogged down or buried in the mass of data (much of which is only marginally relevant) that changes hands during the pretrial development of a major case. Judges with such fears sometimes react by trying to keep a safe distance from cases until they are almost ready for trial. When they have managed to keep their distance, however, these judges realize that they don't know enough about the cases to make efficient and intelligent rulings on discovery matters. That realization intensifies their desire to avoid the entire area. Some judges also frankly admit that they simply aren't very interested in most discovery disputes. They disrespect the attitudes and behavior that provoke many discovery problems, and they believe that, at least occasionally, lawyers (or clients) greatly exaggerate the importance of the matters in dispute.

Thus our interview data simultaneously indicate that there is a need for a neutral managerial presence during the discovery stage of many large cases and that, at least under present conditions, the judiciary is not likely to fulfill that need. It also seems unrealistic to expect magistrates (or,

5. Brazil, *Civil Discovery*, *supra* note 3, at 863-65.

6. *Id.*

7. *Id.* at 865-66.

in state systems, commissioners)⁸ to shoulder all of the sizable burden of monitoring the pretrial development of big cases. There simply are too many competing demands on their time.

Recognizing the fact that neither judges nor magistrates are likely to have the resources to respond adequately to the needs of the discovery system in big cases, several lawyers we interviewed suggested using special masters to perform some of the dispute resolution and management functions that seem essential to improving the discovery stage of large lawsuits. The lawyers who advocated expanding the pretrial use of special masters were sufficiently enthusiastic about the idea to persuade us to explore it more thoroughly. During the summer of 1981, the author gathered information and opinions from judges, magistrates, and lawyers who had used, served as, or been served by special masters during the discovery stage of civil lawsuits.⁹ I also studied the relevant case law and literature. Unfortunately, there are no systematic empirical studies of how masters have functioned during pretrial.¹⁰ The data currently available

8. See, e.g., Cal. Civ. Proc. Code §§ 259, 259a, and Discovery Manual, California Superior Court, City and County of San Francisco § 311 C. (Aug. 1977).

9. The group I interviewed in 1981 included 15 federal district court judges, 4 federal magistrates, 6 state court judges, 2 state court commissioners, 3 court administrators, and 25 lawyers who had had some experience working with or as masters or magistrates.

10. In the late 1950s, Judge Irving R. Kaufman published the results of his examination of the use of special masters during the pretrial stage of three large cases. See Irving Kaufman, Masters in the Federal Courts: Rule 53, 58 Colum. L. Rev. 452 (1958); *id.*, Use of Special Pre-Trial Masters in the "Big" Case, 23 F.R.D. 572 (1958); and *id.*, Use of Masters to Preside at the Taking of Depositions, 22 F.R.D. 465 (1958). Despite its limited scope, Kaufman's work remains the most important contribution to the literature in this area. For a more recent presentation of Judge Kaufman's optimistic views about the contributions special masters could make to expediting pretrial proceedings in big cases see his The Judicial Crisis, Court Delay, and the Para-Judge, 54 Judicature 145 (1970).

Several limited studies of the use of magistrates or standing masters have been published. See, e.g., Joseph C. Zavatt, The Use of Masters in Aid of the Court in Interlocutory Proceedings, 22 F.R.D. 283 (1958) (focusing on the use of standing masters in England); Jack B. Weinstein, Standing Masters to Supervise Discovery in the Southern District, New York, 23 F.R.D. 36 (1958); Steven Puro, Roger L. Goldman, & Alice M. Padawer-Singer, The Evolving Role of U.S. Magistrates in the District Courts, 64 Judicature 436 (1981); Committee on the Federal Courts, The Magistrate System in the Southern District of New York, 33 Rec. A.B. City N.Y. 212 (1978). Because there are substantial differences between magistrates and special masters, one cannot safely generalize from experience with the former to the latter. At least two federal district courts have experimented with "volunteer master" programs, but appointees in both jurisdictions have assumed little responsibility for discovery and have been assigned only to relatively small cases. These volunteer masters have served primarily as mediators or arbitrators. For a preliminary and less than enthusiastic assessment of the first stage of the volunteer master experiment in New York, see Report of the Committee on Federal Courts Concerning the Volunteer Master Program in the Southern District of New York (Jan. 29, 1981) [cited hereinafter as Report on Volunteer Masters, N.Y.]. This report has not been published, but some of its findings were described in Alan Kohn, Study Gives 'Negative' Marks to U.S. Volunteer Program. N.Y.L.J., Feb. 17, 1981, at 1, col. 3. The volunteer master experiment undertaken in the United States District Court for the Western District of Washington appears to have been better run and more favorably received. See, e.g., Western District of Washington Adopts Local Rule to Ease Civil Backlog, Third Branch [bulletin of the federal courts], Apr. 1980, at 3.

About 50 years ago, Wallace R. Lane, a Chicago lawyer, published two articles about practice under the federal equity rules in which he generalized from a largely undisclosed data base about problems associated with use of special masters at the trial stage. See Wallace R. Lane, Federal Equi-

are largely impressionistic, consisting for the most part of participants' observations about individual experiences.¹¹ Considerable additional study, including closely monitored experiments, will be necessary before we can speak with confidence about all the implications of using masters during the pretrial period.

What follows represents a synthesis and distillation of the currently available data and of the insights and arguments produced by the interviews I have conducted. My goal is to present an open-minded, practical assessment of the advantages and disadvantages of using special masters in various capacities during discovery. As the remainder of this essay will demonstrate, this is a subject that admits of few reliable generalizations. There are many different roles special masters might play in big case discovery.¹² It is important to emphasize at the outset that what functions a master might effectively serve can vary dramatically from case to case, depending on a wide range of factors I will identify in this article. It also

ty Rules, 35 Harv. L. Rev. 276, at 295-97 (1922) and *id.*, Twenty Years Under the Federal Equity Rules, 46 Harv. L. Rev. 638, at 654-55 (1933). I discuss Lane's objections to the use of masters in several places in this essay.

More recently, several articles have appeared that examine the roles played by special masters in implementing or enforcing equitable decrees. See, e.g., Samuel J. Brakel, Special Masters in Institutional Litigation, 1979 A.B.F. Res. J. 543; Geoffrey F. Aronow, The Special Master in School Desegregation Cases: The Evolution of Roles in the Reformation of Public Institutions Through Litigation, 7 Hastings Const. L.Q. 739 (1980); Special Project, The Remedial Process in Institutional Reform Litigation, 78 Colum. L. Rev. 784, at 805-9, 831 (1978); Vincent M. Nathan, The Use of Masters in Institutional Reform Litigation, 10 Toledo L. Rev. 419 (1979); Note, "Mastering" Intervention in Prisons, 88 Yale L.J. 1062 (1979).

The recent general scholarly discussions of roles magistrates and masters could play include Linda J. Silberman, Masters and Magistrates Part II: The American Analogue, 50 N.Y.U. L. Rev. 1297 (1975); Comment, Masters and Magistrates in the Federal Courts, 88 Harv. L. Rev. 779 (1975); and Joy Chapper & Paul Nejelski, Non-Judge Officers Providing Assistance in the Resolution of Complex Litigation: A Preliminary Report (prepared under a Ford Foundation grant by the ABA's Action Commission to Reduce Court Costs and Delay, 1981, this study, which has not been published, was based in part on informal interviews of an undisclosed number of litigators, judges, court administrators, and scholars; the essay that summarizes the author's tentative conclusions is broadly focused and quite useful). Another useful but short essay was written by former Supreme Court Justice Tom C. Clark: Parajudges and the Administration of Justice, 24 Vand. L. Rev. 1167 (1971). See also Note, Reference of the Big Case Under Federal Rule 53(b): A New Meaning For the "Exceptional Condition" Standard, 65 Yale L.J. 1057 (1956).

11. Among the most instructive reports of this kind are Ronald E. McKinstry, Use of Special Master in Major Complex Cases, published by the New York Law Journal in *Federal Discovery in Complex Civil Cases: Anti-Trust, Securities and Energy* 213 (New York: Law Journal Seminars Press, Inc., 1980); Nathan, *supra* note 10; Robert M. Marsh, Pre-Trial Discovery in an Anti-Trust Case, 8 Rec. A.B. City N.Y. 401 (1953). For reports of judicial experiences and perspectives see Henry N. Graven, Pre-Trial Discovery Conducted by Masters, 23 F.R.D. 566 (1958); Charles E. Clark, Difficulties Encountered in a System of Masters, 23 F.R.D. 569 (1958); and Kaufman, Masters, *supra* note 10.

12. E.g., special masters have been used to determine the good faith of a party in attempting to comply with discovery orders issued by the court (*Societe Internationale v. Rogers*, 357 U.S. 197 (1958)); in general discovery supervision (*Denton v. Mr. Swiss*, 564 F.2d 236 (8th Cir. 1977)); to make preliminary rulings on privilege claims (*In re Murphy*, 560 F.2d 326 (8th Cir. 1977)); and to rule on discovery disputes arising during efforts to determine the validity of claims in a class action (*Kyriazi v. Western Elec. Co.*, 465 F. Supp. 1141 (D.N.J. 1979)).

is important to recognize that the effectiveness of a master, like that of a judge or magistrate, often will be a function of how well the personality, character, and skills of the person selected to serve are suited to both the specific tasks assigned and the personalities of the lawyers and clients involved in the action. My hope is that this piece will encourage judges and attorneys to think more often and more carefully about using masters during the pretrial development of large civil cases. In a subsequent article I will explore sources of authority to appoint special masters,¹³ and suggest the outlines of a new Federal Rule of Civil Procedure to guide courts in using these quasi-judicial officers.

II. WHAT ARE SPECIAL MASTERS AND WHAT ROLES MIGHT THEY PLAY DURING PRETRIAL

As used in this article, the phrase "special master" refers to an experienced private attorney, a retired judge, or a law professor to whom a federal court delegates front line judicial responsibility either for the entire discovery stage of an action or for specified, discrete tasks. In essence, a special master is an arm of a federal judge—a tool a court can use in a wide variety of ways to help cope with the demands the pretrial preparation of large lawsuits can impose on strained judicial resources. As one federal judge I interviewed phrased it, special masters can help redress the imbalance of resources that demoralizes a court that is confronted by the squads of lawyers and masses of data that invariably accompany major cases.

There are several important characteristics that distinguish a special master from a judge's other assistants. Unlike a magistrate¹⁴ or a law clerk, a special master is not a public employee. Rather, he or she is a private citizen who works for a fee (usually computed on an hourly basis) that is paid by the parties.¹⁵ Unlike a standing master,¹⁶ a special master

13. In addition to Fed. R. Civ. P. 53, federal courts have relied on inherent equitable powers; see, e.g., *Ex parte Peterson*, 253 U.S. 300, 312 (1920) and Kaufman, *Masters*, *supra* note 10, at 462-63, and on the consent of the parties. Some courts have challenged the assumption that the parties' consent is a sufficient premise for some kinds of references. See, e.g., *Wilver v. Fisher*, 387 F.2d 66 (10th Cir. 1967).

14. The federal statutes that create the position of United States magistrate and describe the roles magistrates can play and the scope of the authority they can assume are 28 U.S.C. §§ 631-36 (1976). For an illuminating and thorough discussion of the nature and history of the most recent significant changes in this legislation, see Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 Harv. J. Legis. 343 (1979).

15. Fed. R. Civ. P. 53(a) provides, *inter alia*, that the "compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct."

16. See Fed. R. Civ. P. 53(a) and Weinstein, *supra* note 10. See also 9 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2607 (St. Paul, Minn.: West Publishing Co., 1971 & 1981 Supp.).

is appointed on an ad hoc basis to assist the court with a single case. And unlike other neutral actors in the litigation arena, a special master can be selected through a process in which the parties and their attorneys play a significant, even determinative, role.¹⁷ While it is generally assumed that federal trial courts have the authority, under Federal Rule 53 and under their inherent equitable powers,¹⁸ to impose a master's services on litigants over their objection, our data indicate that federal judges often rely heavily on suggestions from counsel when selecting a person to whom to delegate substantial pretrial responsibilities.¹⁹ In many instances special masters also are distinguishable from other judicial assistants by their specialized expertise, by the status they enjoy in the eyes of litigants and counsel, and by the resources they can commit to a given matter. Moreover, unlike judges and most magistrates, who are compelled by diverse responsibilities to remain generalists, masters can be specialists not only in a particular area of substantive law but also in the real world character of pretrial litigation in that specialized field.

A. Pretrial Tasks Courts Have Assigned to Masters

To appreciate the various kinds of benefits that using a special master might produce, it is important to understand the wide variety of pretrial tasks federal courts have delegated to these quasi-judicial officers. In the paragraphs that follow I will describe some of these tasks, covering the range of special masters' authority (from limited to broad).

One of the judges we interviewed reported that he had appointed a special master to travel to the Orient to observe, on the court's behalf, a particularly sensitive document production in a case that had become infected with unusual levels of acrimony and distrust. In this instance, the court did not empower the master to make even tentative rulings or recommendations about disputes that might arise during the document production (e.g., about which materials fell within the scope of the production order or were protected by privilege). Instead, the master's function simply was to observe and to report to the judge how the parties behaved and what transpired during the production process. Both the judge and

17. In the federal government's recent antitrust action against the American Telephone and Telegraph Company, for example, the parties interviewed prospective masters and agreed on nominees, whom the district court subsequently approved and appointed. Important pretrial issues and the master's roles in this action are discussed in *United States v. American Telephone and Telegraph Company*, 461 F. Supp. 1314, at 1347-49 (D.D.C. 1978) [cited hereinafter as *United States v. AT&T*]. Geoffrey C. Hazard, Jr., and Paul R. Rice served as the masters in this case. Their valuable reflections about their experiences appear in *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, 1982 A.B.F. Res. J. 375.

18. See *Ex parte Peterson*, 253 U.S. 300, 312 (1920), and Silberman, *supra* note 10, at 1310-14.

19. In many cases, counsel for both (all) parties concur in the selection of the special master. See, e.g., *Fisher v. Harris, Upham & Co.*, 61 F.R.D. 447 (S.D.N.Y. 1973).

the attorney who served as the master on this occasion reported that the mere presence of the court's representative had the desired tempering effect: the parties and their lawyers proceeded in an orderly, relatively frictionless, and unemotional manner. Thus the use of the special master conserved judicial resources in two ways: it enabled the judge to remain working in his court instead of making a time-consuming trip to the Orient, and it discouraged the eruption of discovery fights the court would have had to resolve.²⁰

In other cases, courts have delegated broader authority to masters appointed to monitor document productions.²¹ For example, Paul R. Rice, serving as one of two special masters in the federal government's antitrust action against the American Telephone and Telegraph Company, participated actively in negotiations about the manner in which a sensitive and potentially disruptive document production would take place. Rice's role extended not only to facilitating communication between the parties but also to assessing information needs, evaluating the disruptions and burdens that various alternative modes of production would impose on the custodian, recommending compromise procedures, and offering opinions about the scope of the legal obligation to produce. This service resulted in an orderly discovery event and saved considerable time for the judge assigned to the case.²²

Another discrete task courts have assigned to special masters consists of attending oral depositions of parties or important witnesses.²³ Such assignments usually are made when "the spirit of cooperation"²⁴ that is supposed to inform discovery behavior has been replaced by antagonism and obstructionism.²⁵ As in document productions, the master's role sometimes is confined to observing and reporting behavior to the judge. Probably more often, however, the master is authorized to make on-the-spot rulings about the propriety of questions, the validity of objections, and the sufficiency of answers.²⁶ While such rulings are not "binding"

20. In *United States v. Moss-American, Inc.*, 78 F.R.D. 214 (E.D. Wis. 1978), the defendant opposed the testing of soil and water on his property during the discovery phase of an action for alleged pollution. Following a motion by the government, the judge appointed a special master, under the court's general equity powers, to supervise the proposed sampling. The court noted that this resolved the discovery dispute.

21. See, e.g., *Olson Transp. Co. v. Socony-Vacuum Oil Co.*, 7 F.R.D. 134 (E.D. Wis. 1944).

22. See *United States v. AT&T*, *supra* note 17. For other examples of special masters supervising document production, see *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377 (D.D.C. 1978); *United States v. IBM Corp.* 76 F.R.D. 97 (S.D.N.Y. 1977).

23. See, e.g., *United Artists Corp. v. Grinieff*, 17 Fed. R. Serv. 30b.42 (S.D.N.Y. 1952) (Case 1).

24. *Fisher v. Harris, Upham & Co.*, 61 F.R.D. 447, 449 (S.D.N.Y. 1973).

25. See, e.g., *Omnium Lyonnais D'Etancheite et Revetement Asphalte v. Dow Chem. Co.*, 73 F.R.D. 114, 117-18 (C.D. Cal. 1977).

26. For an illuminating account of this kind of service, see Marsh, *supra* note 11. Marsh described the evolution of his authority in the following passage:

(absent a stipulation to the contrary, participants can appeal the master's decisions to the court),²⁷ the lawyers and judges we interviewed reported that even in acrimonious situations it is unusual for a participant in a deposition not to accede to a position taken by a master. According to our respondents, the mere presence of a neutral and experienced attorney who could report misbehavior to the court generally has a moderating influence and encourages more professional conduct.²⁸ The master's contribution in such situations is not confined to reducing the number of questionable positions counsel or witnesses take; he or she also can expedite case development by immediately resolving disputes that might otherwise result in protracted interruption of a deposition (and, in turn, other discovery) while the parties attempt to schedule a hearing before the judge.²⁹

Other discrete tasks related to discovery that judges have assigned to masters arise out of disputes provoked by interrogatories.³⁰ Masters have performed valuable service by ruling on objections to interrogatories and by reviewing the sufficiency of responses to proper questions.³¹ Such rulings can save a great deal of judicial time when the number of interrogatories is very large or when the questions relate to specialized or highly technical matters in which the master has substantially greater expertise than the judge or magistrate. Involving a special master in such circumstances can improve both the reliability and the efficiency of the process

I was appointed special master in this connection on October 1st, 1948, after deposition taking had been in progress for several months. My basic function as described in successive orders of appointment was "to supervise the conduct of the taking of" the depositions, "including the length thereof." At first this applied to a single deposition which was being taken at the time of the appointment, and the taking of which had developed into a situation where the court apparently concluded there was need of someone to act in the capacity of a policeman or sergeant at arms. As often happens, the riot call itself ended the riot before the police actually appeared in the form of a special master, but there turned out to be plenty of work for him to do. My authority to rule on objections to questions at first extended expressly only to the kind of objection deemed waived under Rule 32(c) unless made at the time of the deposition, such as questions of form, but before long by virtue of the necessities of the situation and with the approval of counsel or the court I found myself ruling on points of relevance, privilege and trade secrets. My powers were enlarged from time to time by new formal orders and also expanded informally by consent of counsel, express or implied.

Id. at 403-4. See also *First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas & Elec. Co.*, 245 F.2d 613 (8th Cir. 1957), *cert. denied*, 355 U.S. 871 (1957); *Shapiro v. Freeman*, 38 F.R.D. 308 (S.D.N.Y. 1965).

27. See Fed. R. Civ. P. 53(e), whose language must be strained to cover the kinds of pretrial references discussed in the text. See also *United States v. AT&T*, 461 F. Supp. at 1320 n.15.

28. Also see Marsh, *supra* note 11. For a contrary view, See Report on Volunteer Masters, N.Y., *supra* note 10, where the Committee on Federal Courts suggested that the capacity of the *volunteer (unpaid)* masters to report to the court afforded "some leverage but not much—certainly not enough to encourage cooperation in the more difficult, complex actions." *Id.* at 15. Commenting about the master's capacity to report to the judge, the Committee on Federal Courts declared that it was "strongly opposed to any practice by which the Volunteer Masters would report to the Court on the progress or obstinacy of the litigants or the merits of the litigation, without full notice to the parties." *Id.* at 15 n.10.

29. Also see Hazard & Rice, *supra* note 17, at 389-94.

30. See, e.g., *Zunkel v. Litchfield*, 21 F. 196 (S.D. Iowa 1884).

31. See, e.g., *Xerox Corp. v. BM Corp.*, 75 F.R.D. 668 (S.D.N.Y. 1977); *Sperry Rand Corp. v. Rothlein*, 288 F.2d 245 (2d Cir. 1961).

of resolving the disputed matters, especially when the judge's alternative is to assign the task of formulating initial positions to a law clerk fresh out of school.³²

There is an additional advantage of appointing a master to handle problems with interrogatories (which seem to provoke more disputes than any other discovery tool),³³ namely, discouraging counsel's misbehavior. Lawyers have admitted to us that they have used interrogatories to burden an opponent and that they make studied efforts to provide as little information as possible when they draft responses to questions submitted to them.³⁴ Many litigators feel that when a judge is not familiar with the details of a case or with patterns of attorney behavior in it, counsel may be tempted to abuse interrogatories or not to respond adequately to legitimate questions. That temptation will be even stronger if the litigators know that the judge initially will refer disputes about interrogatories to a young law clerk who has an infirm grasp of the law and no understanding of the tactical subtleties of discovery practice. By contrast, attorneys facing a special master might be discouraged from misbehaving by the knowledge that their use of interrogatories and the quality of their responses will be scrutinized by a seasoned, tough-minded litigator.

Reviewing documents to ascertain whether they are protected against disclosure by an asserted privilege (most commonly the attorney-client privilege),³⁵ or whether they fall within or should be shielded by a protective order (e.g., for trade secrets)³⁶ is the task most frequently assigned to special masters by judges. Several of the judges we interviewed reported being very pleased to have masters perform this work. In big cases, it is not uncommon for privilege to be asserted or for protective orders to be sought for literally thousands of documents. A document-by-document examination of that volume of material can consume hundreds of work-

32. One federal district court judge we interviewed reported using his law clerk extensively for this purpose.

33. See, e.g., American Bar Association, Section of Litigation, Report of the Special Committee for the Study of Discovery Abuse 20 (Chicago: American Bar Association, Oct. 1977); Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 522 (1970); Columbia University School of Law Project for Effective Justice, Field Survey of Federal Pretrial Discovery 12-13 (Discussion draft, 1965).

34. The problem of "evasion" in response to discovery requests provokes more complaints than any other "abuse" in the discovery process. See Brazil, Civil Discovery, *supra* note 3, at 825, 833.

35. See, e.g., United States v. AT&T, 461 F. Supp. 1314, at 1347-49; I.B.M. Corp. v. United States, 493 F.2d 112, 126 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974); Kaufman, Masters, *supra* note 10, at 466-68. For additional examples of the use of a special master to resolve privilege disputes, see *In re* Murphy, 560 F.2d 326 (8th Cir. 1977); MCI Communications Corp. v. American Tel. & Tel. Co., 1979-1 Trade Cas. (CCH) ¶ 62,449 (D. Ill. 1978); Burlington Indus. v. Exxon Corp. 65 F.R.D. 26 (D. Md. 1974); Collins & Aikman Corp. v. J. P. Stevens & Co., 51 F.R.D. 219 (D.S.C. 1971) (special master to review claims of privilege by a nonparty resisting discovery).

36. See McKinstry, *supra* note 11, at 215, 224-25.

ing hours, hours that many judges feel they cannot commit without doing a serious disservice to more pressing duties. A few judges also admitted to us that they find such exercises extremely tedious. These judges suggested that a master who is appointed specifically for the document review task and who is paid by the hour to perform it might well give higher quality consideration to the issues involved than would a busy judge who is bored by the work and distracted by the feeling that he or she should be spending time on other matters. Another reason some judges and attorneys favored appointing a special master to make rulings about the propriety of assertions of privilege is that such appointments enable courts and parties to utilize the expertise of highly trained specialists, including law professors. In several complex cases, judges have successfully assigned professors with substantial scholarly reputations in evidence or procedure the task of making at least initial decisions about the applicability of privilege to large volumes of documents.³⁷ The use of such specialists can expedite the decision-making process and improve the parties' confidence in it, thus reducing the likelihood that they will contest its results.

Special masters also have been used successfully to orchestrate elaborate stipulation procedures in complex cases. In the federal government's protracted antitrust action against the American Telephone and Telegraph Company, for example, the court ordered the parties to exchange a series of detailed position papers, each of which was to include, in addition to a statement of applicable legal principles, a narrative description of factual contentions and a list of witnesses and evidence the parties expected to muster in support of their claims.³⁸ Under the court's initial order, the magistrate or judge was to hold a pretrial conference after each exchange of position papers. At that conference, the judicial officer and counsel for the parties were to proceed through the narratives in an effort to identify all contentions about which there was no substantial disagreement (or which were irrelevant). Thus the purpose of each such conference was to define the dispute more precisely and to narrow its scope. The judicial officer, in turn, was to use the product of each conference to help focus and to set timetables for any additional discovery that might be necessary.

Because of the scope of the issues involved, each "statement of contentions and proof" embraced an immense amount of information. The task

37. See, e.g., Hazard & Rice, *supra* note 17, at 380-81, and *United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603 (D.D.C. 1979).

38. *United States v. AT&T*, 461 F. Supp. at 1345-49. In this opinion the court assigned responsibility to supervise discovery and the stipulation procedure to the magistrate. Subsequently the court shifted these responsibilities to the special masters. See Hazard & Rice, *supra* note 17, at 384-86.

of reviewing these statements with counsel threatened to consume scores of hours of the magistrate's or the court's time. Faced with that prospect, the judge decided to shift the front line responsibility for managing this stipulation procedure from the magistrate to the two special masters who initially had been appointed to help resolve privilege disputes. In part because they already were thoroughly familiar with the case and with counsel, in part because they could commit the substantial amount of continuous time to the matter that was necessary to sustain mastery of its factual and evidentiary intricacies, and in part because they could work more flexibly than the judge or magistrate, the masters handled the stipulation process with considerable success and made a major contribution to expediting trial preparation and reducing the dispute to more manageable proportions.³⁹

Thus far, I have described only the relatively discrete or limited tasks that special masters have performed during the discovery stage of civil actions. Masters also have successfully assumed broader pretrial responsibilities. In fact, some of the lawyers, masters, and judges we interviewed argue that the effectiveness and efficiency of the special master varies directly with the breadth of the responsibility delegated to him or her.⁴⁰ I will explore the theory that supports this view in the next section of this essay. At this juncture I will simply describe some of the broader roles masters have played during the pretrial period.

In some cases, courts have assigned the general task of "supervising" the entire discovery stage to a master.⁴¹ Under such supervisory assignments, some judges have authorized masters to perform virtually every function the court itself might perform during this stage in litigation.⁴²

39. This assessment of the master's contributions is shared by counsel on both sides and by the supervising judge.

40. This view is implicit in Hazard's and Rice's account of their experiences in the AT&T litigation. See Hazard & Rice, *supra* note 17, at 384, 412. There are some influential voices that generally oppose broad delegations of pretrial authority to masters. See, e.g., American College of Trial Lawyers, Recommendations on Major Issues Affecting Complex Litigation 18-19 (1981), and National Commission for the Review of Antitrust Laws and Procedures, Report to the President and the Attorney General, 80 F.R.D. 509, 515 (1979) (fearing that unless masters work in "virtual partnership with judges, their presence in a case may actually add to its complexity and hinder direct supervision by the district judge"). *Id.* at 530. I explore these fears and ways to reduce them at pp. 348-57 *infra*.

41. See, e.g., Kaufman, Masters, *supra* note 10, at 466-68, and cases cited in note 67. See also *Omnium Lyonnais D'Etancheite et Revetement Asphalte v. Dow Chem. Co.*, 73 F.R.D. 114 (C.D. Cal. 1977); and *First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas & Elec. Co.*, 245 F.2d 613 (8th Cir. 1957), *cert. denied*, 355 U.S. 871 (1957).

42. In a civil rights action stemming from an employment discharge, the district court granted plaintiff's motion for summary judgment and appointed a special master to take testimony and make a recommendation regarding a monetary decree. The court granted the master power to supervise all discovery proceedings related to this issue, including ruling on motions, ordering the taking of depositions, and ruling on routine discovery disagreements. The master was also authorized to issue subpoenas duces tecum and order production of documents by either party. *Sprogis v. United Airlines, Inc.*, 308 F. Supp. 959 (N.D. Ill. 1970).

For example, masters have selected and implemented an overall management plan under which discovery is to be conducted.⁴³ One special master we interviewed has imposed what he calls "the expanding concentric circle approach" to discovery.⁴⁴ Instead of permitting counsel to commence discovery with whatever subjects they chose or following the Manual for Complex Litigation,⁴⁵ this master initially confined discovery to the issues and evidence everyone agreed were at the "core" of the matter. After this discovery was completed, the master permitted additional probes into less-central matters, but only after counsel made a showing that exploring data in the next "concentric circle" might well yield relevant evidence.

In addition to selecting the basic schemes for managing the pretrial development of cases, masters have set discovery schedules, sequenced and fixed dates for specific discovery events, and established deadlines for completing subparts of larger discovery plans.⁴⁶ Thus, masters have assumed substantial responsibility for ordering, pacing, and monitoring case development. They have wielded their scheduling authority to keep cases moving and to prevent distractions and dilatory tactics from derailing progress toward trial. Along the way, they also have helped resolve most major types of discovery disputes. Courts even have given special masters authority to hold hearings about and to formulate recommendations for the imposition of sanctions for alleged violations of discovery rules.⁴⁷

Masters also have assisted in settlement negotiations.⁴⁸ One special

43. See, e.g., *Kyriazi v. Western Elec. Co.*, 465 F. Supp. 1141 (D.N.J. 1979). After this class action sex discrimination action was resolved on the merits in favor of the plaintiffs, special masters were appointed to adjudicate claims by individual members of the class. Among other things, these masters were to develop a schedule for conducting the discovery necessary to resolve claims disputes.

44. See McKinstry, *supra* note 11, at 221-22.

45. The Manual is published in several places. See, e.g., 1 Moore's Federal Practice (2d ed. New York: Mathew Bender & Co., 1980 & Cum. Supp. 1980-81). For a discussion of the Manual's approach to managing discovery, see Brazil, *Improving Judicial Controls*, *supra* note 3, at 906-8.

46. See *Omnium Lyonnais D'Etancheite et Revetement Asphalte v. Dow Chem. Co.*, 73 F.R.D. 114, 119 (C.D. Cal. 1977).

47. See, e.g., McKinstry, *supra* note 11, at 227. *Chesa Int'l, Ltd. v. Fashion Assocs., Inc.*, 425 F. Supp. 234 (S.D.N.Y. 1977) (court upheld imposition of sanctions by special master following defendant's failure to comply with master's productions order); *Denton v. Mr. Swiss*, 564 F.2d 236 (8th Cir. 1977) (special master imposed monetary sanctions for discovery failure, and eventually recommended dismissal of the complaint for failure to make discovery. The report and recommendations of the special master were adopted by the district court. The court of appeals held that the district court did not abuse its discretion, but remanded the case on other grounds).

A recent, widely publicized example of a master's involvement in the sanctioning process occurred in *W.T. Thompson Co. v. GNC*, No. 78-3206 (C.D. Cal.). In that case, the master fined the defendant and its counsel \$375,000 for "willfully destroying" relevant documents. The master also concluded that the defendant was in default and therefore dismissed its counterclaim. The defendant has appealed the master's decisions to the district judge to whom the case is assigned. See James S. Granelli, *Gibson Dunn Fined in Document Destruction*, *Nat'l L.J.*, May 10, 1982, at 2, 27.

48. McKinstry, *supra* note 11, at 225.

master we interviewed, for example, reported being asked to participate in a series of formal settlement conferences that were conducted by a judge who had been brought in from another district to try to settle a complex matter. As a newcomer to the litigation, the settlement judge wanted to capitalize on the master's knowledge of the case, the parties, and the lawyers. The judge not only conferred with the master before and during the negotiations; he also had the master participate in each of several separate sessions with different parties. During these sessions, the judge drew directly on the master's knowledge of the case to check the positions the parties were taking. The presence of a sophisticated and neutral person who was thoroughly familiar with the evidence in the matter served to restrain counsel's tendency toward posturing and exaggeration.

One additional note about services masters can perform is warranted here. A special master who has acquired detailed knowledge about a complex case through his or her role during discovery can be a valuable asset to a court during trial. During our interviews, we learned about two examples of such continuity of service. In one case, the attorney appointed special master during the pretrial period also was an engineer with considerable expertise in matters at issue in the litigation. When the case went to trial, the court used the master as a resource to help the court understand technical aspects of the evidence. The other case was the federal government's antitrust action against AT&T. The special masters were two law professors with substantial scholarly backgrounds in the law of evidence and civil procedures. As the case approached the final stages of preparation for trial, the court asked the masters to prepare preliminary rulings about the admissibility of a large volume of documents to which objections had been made.⁴⁹ The rulings on a large portion of the documents turned on interpretation of one or two esoteric statutory provisions. By asking the masters to formulate preliminary positions on the issues presented, the judge was able (1) to draw on the professors' expertise, (2) to have a comprehensive exposition of the relevant legal principles prepared for him, and (3) (because the parties chose not to contest some of the masters' preliminary decisions) to reduce measurably the number of disputes that required a ruling by the court.

B. Why Masters' Contributions Might Be "Special"

The need for a meaningful source of external restraint on the discovery process is a major source of many lawyers' interest in the concept of the special master. Many litigators we interviewed believe that big case dis-

49. Interview with Paul R. Rice, May 1982.

covery needs a firm, sophisticated, and neutral managerial presence. The judiciary is the most logical place to look for satisfaction of that need. Unfortunately, the judiciary's resources and interest seem insufficient for the task. Intelligent and efficient decisions about complex matters that develop slowly over protracted periods require thorough knowledge not only of factual and legal contentions but also of the personalities, behavior patterns, and real world situations of the principal actors in the litigation drama. That kind of knowledge can be developed and maintained during the discovery stage of a large lawsuit only through a close and continuous attention the courts seem unable to provide.⁵⁰ But even if the judges had the time and the will for substantially more thorough involvement in discovery, there would remain reasons to seriously consider, at least in some cases, using a special master instead.

For the foreseeable future, judges and, to a lesser but still significant extent, magistrates seem destined to remain generalists. They will continue to be selected from a wide range of backgrounds, some of which will involve little or no experience litigating large civil matters. Judges and magistrates also will continue to preside over a wide range of both civil and criminal matters and to perform a variety of time-consuming quasi-administrative duties. Given such a wide range of demands on their time, to say nothing of the distance from the front lines their role compels them to maintain, even judges whose practices revolved around big case litigation cannot hope to keep in close and reliable touch with the evolving nuances of litigation strategies and tactics.

In sharp contrast, a master who is specially selected to work on a specific case can be chosen primarily on the basis of his or her fully up-to-date expertise in discovery in a particular kind of litigation. A well-selected master will know the ropes not only in big case litigation in general but also in the area of substantive law that is the subject of the action. In other words, a master can be a specialist both in the relevant substantive law and in the tricks of the trade as practiced in lawsuits within that substantive area. Lawyers we interviewed suggested that assigning responsibility for discovery to specialists of this kind could improve the efficiency of the system in several ways. One is that a litigator who is experienced in a particular field could anticipate some of the tactical devices attorneys who practice in that field are likely to use to gain time, to obscure vulnerabilities, or to secure an advantage over an opponent. For example, a lawyer whose work has made him or her familiar with business practices in a given industry is more likely than a judge or magistrate to know what kinds of records are kept in that industry and thus is better equipped to

50. Geoffrey C. Hazard made this point in a letter to the author dated June 9, 1981.

identify an evasive response to a discovery probe or to know when a party needs protection from overbroad or unduly burdensome demands for information.⁵¹ Several attorneys we interviewed also suggested that counsel and clients who perceive that a special master has a sophisticated grasp of the practical aspects of pretrial litigation are less likely to try to get away with tactical ploys or to take disingenuous positions than they might be if their behavior was subject only to the less knowledgeable and more remote supervision of a judge or magistrate. One attorney, who had conducted substantial discovery in a very large case under the supervision of a master, reported that when the master first was introduced into the suit, counsel for both sides immediately began testing and measuring the master's mettle and worldliness. Both sides wanted to see how much they could get away with and whether they could use the master for their own purposes. The master responded to this testing by making it clear that he understood what the lawyers were doing, that he would tolerate neither sharp nor sloppy practices, and that he would be quick to recommend sanctions for efforts to escape discovery obligations or to harass opponents. This firm, penetrating demonstration of the master's command of the situation had a pronounced effect on counsel's subsequent behavior: they kept their play close to the letter of the rules and were not quick to challenge the master's decisions.

It is worth observing at this point that even this brief period of testing the master's wherewithal could have been avoided if the court had selected a lawyer for the job whose stature and expertise in the field already were well recognized by the attorneys involved in the action. As I will indicate in a subsequent section, there are ways of selecting masters that can significantly improve the likelihood that the person chosen will enjoy from the outset the respect and confidence of the lawyers and clients. Because the master's stature in the eyes of the participants can contribute so much to reducing pretrial gaming and to encouraging stipulations and cooperation,⁵² it is difficult to overemphasize the importance of adopting a selection process that maximizes the likelihood that the appointee enjoys that perception of stature.

Assigning responsibility for discovery matters to a master with obvious expertise in a specialized field of litigation also can reduce the time the litigators commit to educating the person who resolves discovery disputes

51. A variation on this theme can be found in *Coca-Cola Co. v. Int'l Tel. & Tel. Corp.*, 201 U.S.P.Q. 424 (N.D. Ga. 1978). A special master was assigned to reconcile numerous discovery disputes relating to the confidentiality of documents. The court noted that through this process, the special master would develop an expertise in this area generally and so ordered that *any* subsequent motion to compel would be automatically referred to the special master.

52. See Comment, *supra* note 10, at 800 n.139.

and sets the guidelines for case development.⁵³ It will take an expert master substantially less time than a generalist judge or magistrate to get the subtleties of the relevant substantive law under control. A well-selected master also would be thoroughly familiar with discovery rules and local procedural requirements. Because of this specialized expertise, the master could begin influencing the tone of the pretrial environment immediately after his or her appointment. A master with the appropriate background could make managerial decisions and resolve early disputes with far less briefing and argument by counsel. Reducing the need for exchanging briefs and for oral arguments about pretrial matters would conserve resources of both the parties and the court and would remove opportunities for counsel to delay progression of the case toward trial or to burden opponents.⁵⁴

Some of the attorneys we interviewed also noted that the expertise of a respected master might reduce counsel's incentive to use discovery disputes as occasions to try to shape the decision maker's view of the relevant substantive law. According to these respondents, strategizing lawyers are less likely to launch major efforts to capture the mind of a master who enters the case with a firm grasp of the law than of a judge or magistrate who is not as knowledgeable in the area. The fact that the special master will not preside at the trial and probably will not host formal settlement negotiations *also* reduces the lawyers' incentives to use discovery disputes to try to influence the master's overall posture toward the case or his or her perception of the significance of particular evidence. Lawyers who perceive discovery disputes as important early battles in the struggle for the trial judge's mind may be tempted to inflate the briefing and argument that accompany even relatively minor or limited discovery fights. As one experienced master pointed out, however, the incentive to exploit discovery disputes for such longer-range purposes all but evaporates when the dispute will be resolved by a master instead of by the judge before whom the case is scheduled to be tried.⁵⁵

53. See, e.g., Dennis A. Kendig, Procedures for Management of Non-Routine Cases, 3 Hofstra L. Rev. 701, 716-18 (1975). One of the advantages lawyers ascribe to the "rent-a-judge" procedure in California is that it can result in more efficient trials because the litigants can arrange to have their case referred to a retired judge who has developed expertise in the relevant, specialized subject areas. See Barlow F. Christensen, Private Justice: California's General Reference Procedure, 1982 A.B.F. Res. J. 79, at 83-84.

54. See Hazard & Rice, *supra* note 17, at 389-95. One ground for objecting to a delegation of pretrial responsibility to a master is that the delegation deprives counsel of opportunities to educate the court about the case. See, e.g., McKinsty, *supra* note 11, at 215; Patrick E. Higginbotham, The Commission Recommendations Can Work, 48 Antitrust L.J. 475, 480 (1980); American College of Trial Lawyers, *supra* note 40, at 18-19. I assess this objection at pp. 349-52, 355 *infra*.

55. The Report on Volunteer Masters, N.Y., *supra* note 10, at 15, states that "many lawyers with whom we discussed the proposal were opposed to any effort that restricted their access to the Court itself. They pointed out that good lawyers use the pre-trial conference to attempt to educate the

Another lawyer we interviewed added that when attorneys make formal, public appearances before the judge assigned to try the case they are likely to feel more pressure from clients to posture than when they appear less formally before a less powerful master. Apparently because appearances on the record and in open court are more visible to clients, some litigators feel an intensified need to demonstrate the value of their services by staging more ritualized, embellished, and animated performances. It also may be that a judge's power, by itself, makes some attorneys more fearful or aggressive and thus provokes defensive posturing. If intensity of reaction is a function of perceived power, lawyers should be calmer and more tractable when dealing with a master.⁵⁶

Several additional benefits of having special masters rather than judges handle discovery matters stem from the less visible and formal interaction between counsel and masters. By meeting informally and privately with counsel, for example in his or her law office, a master is better situated to set a tone that encourages candor and cooperation than is a judge who meets the lawyers in the courthouse. Two of the lawyers we interviewed who had served as masters said they believe that a master often can get better-quality information more efficiently from counsel than can a judge or magistrate.⁵⁷ These lawyers believe that the picture of a case and the parties that counsel presents to a judge tends to be highly sanitized, formalized, and selective. In this view, the restrictions and distortions on the flow of information to the court are in part a product of counsel's fear of the court's power and in part a product of the limits the system imposes on the ways the lawyers and the judge can communicate. These respondents argue that counsel's communication with a special master can be far less constrained. Litigators are more likely to view a special master as a peer than as a superior and are more likely to approach the master as a source of dispassionate advice than as a threatening overseer.⁵⁸ In other words, master and counsel can converse "lawyer-to-lawyer" more freely and easily off-the-record than can judge and counsel.⁵⁹ Moreover, when an active master is assigned substantial pretrial responsibilities, the very

judges on the merits of the case and to get reactions that are useful in determining future strategy. The program, they claim, would interfere with this process." I know of no one who advocates that special masters, instead of judges, preside over the final pretrial conferences in large lawsuits.

56. The thoughts expressed in this paragraph were inspired in part by conversations with Paul R. Rice.

57. Paul R. Rice is one of the sources of these views.

58. The likelihood of this kind of relationship developing between counsel and master probably increases if the lawyers have a voice in the process by which the master is selected. Of course, if one of the parties or lawyers feels that the master is biased in favor of his or her opponent, the master's presence will be counterproductive. See, e.g., *Maurice A. Garbell, Inc. v. Boeing Co.*, 385 F. Supp. 1 (C.D. Cal. 1973).

59. See Hazard & Rice, *supra* note 17, at 393-96.

frequency of his or her meetings with counsel can help break down barriers to relatively open communication.

One former master we interviewed emphasized that by being freer to communicate *ex parte* with counsel than a judge would be, a master can get data that are less filtered and views that are more candid. This respondent also suggests that talking privately with one lawyer at a time (e.g., by telephone) might enable a master to get a better sense than a judge could of where counsel are prepared to compromise and where they are likely to remain unmovable.

It is not at all clear, however, that *ex parte* communication is an appropriate tool for promoting candor. It is arguable that ethical and constitutional constraints on a master's behavior would prohibit this form of communication in most circumstances. Unfortunately, it is not clear to what extent a master to whom *discovery* matters are referred is subject to the ethical norms applicable to judges. There is substantial authority for the view that a master performing judicial functions at the *trial* stage is subject to most of the "duties and obligations of a judicial officer."⁶⁰ I know of no authorities, however, that address the issue of whether most such duties should be imposed on lawyers serving as special masters in the discovery stage.⁶¹ As I will argue in a subsequent section, subjecting special masters to all of the rules designed to promote the appearance of judicial impartiality and detachment could severely limit the pool of professionals eligible and willing to serve as masters. I suspect that when the drafters of the modern codes of judicial conduct⁶² decided which ethical constraint should apply to a special master they focused on the *trial* stage, assumed that appointments for service at that stage would be rare, and simply did not think about the need for masters during the discovery stage of complex cases.⁶³ As currently written, however, the Code of

60. See, e.g., *In re Gilbert*, 276 U.S. 6, 9 (1928).

61. Vincent M. Nathan should be credited with raising the issue of which ethical rules are applicable to special masters. Nathan assumes that the ABA's Code of Judicial Conduct is the relevant source of norms for the federal judiciary. As pointed out in the text, however, technically the appropriate source is the amended version of the Code of Judicial Conduct for United States Judges that was approved by the Judicial Conference of the United States in 1973 and amended in 1975. See 69 F.R.D. 273 (1976) (cited hereafter as Code). Nathan's very useful writing in this area focuses primarily on roles played by special masters in implementing decrees *after* trials. Nathan, *supra* note 10.

62. Code, *supra* note 61, Introduction, reports that the Judicial Conference version of the Code was "based upon the Code of Judicial Conduct approved by the American Bar Association" and that the language of the ABA's Code was retained to the "extent possible." See American Bar Association, Special Committee on Standards of Judicial Conduct, Code of Judicial Conduct (Chicago: American Bar Association, 1972).

63. Fed. R. Civ. P. 53 seems to contemplate the use of masters only during and after trial. Moreover, that rule explicitly declares that a "reference to a master shall be the exception and not the rule" and that in court-tried actions, "save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it." The Supreme Court had made clear its hostility to frequent references of entire trials to masters well before the current codes of judicial conduct were drafted. See *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) and ABA Code, *supra* note 62.

Judicial Conduct for United States Judges explicitly states that most of its provisions apply to a "special master."⁶⁴ Paragraph A.(4) of Canon 3, which applies to masters, states that "except as authorized by law," a judicial officer should "neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding."⁶⁵ The "commentary" to this section does not elaborate on or explain the qualifying phrase "except as authorized by law."⁶⁶ The only "law" I know of that authorizes *masters* to communicate *ex parte* is in Federal Rule 53(d)(1), which states: "If a party fails to appear [after proper notice] at the time and place appointed [for a hearing before the master], the master may proceed *ex parte*." The fact that this permission to communicate *ex parte* is so limited may imply that masters may resort to this form of communication *only* in the circumstances specified in the rule. But even if the Code and the negative implications of Federal Rule 53(d)(1) did not strictly limit *ex parte* communication by a special master, fundamental requirements of procedural due process would.⁶⁷ Except when extraordinary circumstances or a party's behavior make it necessary, this form of communication undermines confidence in the integrity of the judicial process. For all of these reasons, it strikes me as unwise, at the very least, to encourage masters to resort to *ex parte* communication as a means of improving the quality of the information they receive from litigants and lawyers.

Even without relying on *ex parte* communications, however, a special master can build a close relationship with counsel that could encourage more candid communication. Lawyers who know that their clients' fate during discovery depends on the master's ruling are likely to perceive the importance of earning his or her respect. And if they recognize the master's sophistication, they know they will lose that respect if they are disingenuous or overartful. Our interview data also suggest that there can be a mutually reinforcing relationship between the quality of the information and cooperation a master receives from counsel and the thoroughness of

64. Code, *supra* note 61, penultimate section, Compliance with the Code of Judicial Conduct. When the Judicial Conference adopted the Code in 1973 it explicitly declared that the "adoption of the Code will not restrict any functions or privileges accorded by statute or resolution of the Conference to part-time magistrates, part-time referees in bankruptcy or special masters." Report of the Proceedings of the Judicial Conference of the United States held at Washington, D.C., April 5-6, 1973, at 10. While this declaration indicates that the Conference is aware that special exemptions for masters might be appropriate, I have found neither statutes nor resolutions of the Judicial Conference that would exempt masters who are serving during pretrial from the rules the Code would otherwise impose.

65. Code, *supra* note 61, Canon 3A.(4).

66. *Id.*

67. This inference is supported by due process restraints the Supreme Court has imposed on the issuance of temporary restraining orders *ex parte*; see, e.g., Wright & Miller, *supra* note 16, §§ 2951, 2952.

the master's knowledge of the case referred to him or her. One of the great advantages promised by the use of masters is that a well-chosen master should be able to commit substantially greater time to a case than a judge or magistrate could. As one of our respondents phrased it, a master who has only one assigned case can make that case number-one priority.⁶⁸ It is particularly significant that a master is in a position to devote much closer and more continuous attention to *the early pretrial development* of a given case than it normally would receive from a judge or magistrate. Moreover, a master is not likely to have acquired the distaste for discovery matters that seems common among judges and that stems in part from preoccupation with more pressing duties. A master who is an experienced practitioner is likely to appreciate the significance of discovery to case disposition and to remain interested in the intricacies and nuances of the process in which most of his or her professional time is spent. In addition, a master is paid by the hour for paying attention.

The upshot of all this is that a master is likely to have more time for and be more interested in discovery in a given case than is a judge or magistrate. With more time and interest, a master can build and sustain a deeper, more detailed understanding of a case in its developmental stages. That kind of understanding may well be the single most effective tool for managing and expediting the discovery process. As Hazard has aptly observed: "A major civil action involves two litigation armies on the march, or, to vary the metaphor, two such armies locked in continuous shifting struggle. The struggle is governed by rules, not force, and to apply those [rules] requires the constant presence of an informed referee, much as in a war game. Neither a judge nor a magistrate can provide this kind of continuous involvement." Other lawyers would add that counsel are likely to respond more fully and candidly to discovery probes if the case is being closely monitored by a master whose command of the evidence and law is visible and respected, than if the matter is proceeding under the remote and superficial supervision of a judge. As I noted earlier, some of the judges we interviewed frankly admit that they do not have the resources to comprehend the intricacies of big cases that are in developmental stages. Many of the lawyers we interviewed also are painfully aware of the judiciary's limitations: litigators complain that judges to whom discovery disputes are taken often appear to know too little about the case to rule intelligently or efficiently.⁶⁹ This judicial ignorance

68. Geoffrey C. Hazard, Jr., made the same point in a letter to the author dated June 9, 1981. He wrote: "The chief advantage a special master can have is instant and continuous availability, owing to the fact that he is assigned to one case only and, presumably, gives that case highest priority."

69. Brazil, *Views*, *supra* note 3, at 245-51.

results either in an obvious reluctance to exercise authority at all⁷⁰ or in decisions that appear arbitrary.⁷¹ Neither consequence encourages strict compliance with discovery obligations.

By staying close to the case from its inception, a master can reverse this cycle of ignorance and abuse. A master's thorough knowledge of the evidence, the parties, and their attorneys can greatly reduce room for adversarial maneuvering. Command of the case can equip the master to resolve discovery disputes rationally and quickly. It can eliminate the need for extensive briefing to bring the decision maker up to speed and can reduce the interruptions in case development caused by protracted deliberations.⁷² Moreover, the foreseeability of quick, well-informed decisions reduces counsel's incentive to take unreasonable or weakly supported positions in order to delay case progression or harass an opponent.

A special master's ability to exercise authority quickly is not attributable solely to his or her expertise and knowledge of the case. A master also can function much more flexibly than a judge or magistrate and, therefore, can be much more accessible. While many of the lawyers who would be qualified to serve as masters are as busy as most judges or magistrates, the nature of a judge's or a magistrate's job and the formal environment in which they function can make it far more difficult to contact and to confer with them. Unlike most lawyers, judges are regularly involved in trials, and trials can absorb virtually all of a judge's time and energy. Several lawyers we interviewed complained that when a judge (or magistrate) is in the middle of a trial, it can be particularly difficult to schedule a hearing before him or her on a discovery dispute in an unrelated matter and that even if counsel get the judge's ear for a few minutes, the quality of attention given to their problem is not likely to be high. According to our respondents, many judges compound these access problems by building additional rigidity into their schedules, refusing to hear discovery matters except at specified intervals and in a formal motion setting.

In sharp contrast, a special master is burdened with far fewer institutional restraints and can meet with counsel at a wider variety of times and places and in a wider range of settings and formats than can a judge or magistrate. Lawyers and professors we interviewed who had served as masters reported not only that they had been able to meet with counsel

70. Brazil, *Civil Discovery*, *supra* note 3, at 862, 865-67. See also C. Ronald Ellington, *A Study of Sanctions for Discovery Abuse*, Federal Justice Research Program, Office for Improvements in the Administration of Justice, FJRP-79 1003, at 117-23 (Washington, D.C.: Department of Justice, 1979).

71. Brazil, *Views*, *supra* note 3, at 247.

72. Hazard & Rice, *supra* note 17, at 391-96.

on very short notice but also that they had been willing to expedite matters by hosting meetings in the evenings and on weekends. Masters also reported considerable flexibility about where they held discovery conferences: they would hold meetings in their own offices, in the offices of any participating counsel, or “on location,” that is, at the site of some discovery event.

Several attorneys we interviewed emphasized that one of the great advantages of referring discovery to a master is counsel’s ability to reach the master to resolve a dispute *during* a deposition or document production. Litigators were full of praise for a system that enabled them to telephone a master for an opinion as soon as a potentially disruptive disagreement arose. Even tentative rulings over the phone can prevent the delays that result when a discovery event must be “continued” until counsel can schedule an appearance before a judge or magistrate.⁷³ Even if a judge or magistrate is knowledgeable and flexible enough to agree to hear the matter through a telephone conference call, *scheduling* a time for such a call can be much more difficult with many judges than with a master. And, as I noted earlier, our data indicate that when litigators *know* that a master’s opinion is only a quick telephone call away, they are less likely to take questionable positions or to adopt tactical plans with the objective of disrupting or delaying a discovery event. In short, the proximity of the master reduces the room for game playing.

A master’s flexibility also extends to the nature and duration of meetings with counsel. Conferences with a master can be less rigidly structured and more open-ended than they might be with a judge. In a meeting with a master, there is often less pressure to move quickly through a predefined agenda—less need to get to “the” point and to get “the” problem resolved so that the judicial officer can return to more pressing matters. Counsel and master can conduct more detailed and far-ranging discussions, following leads into unanticipated areas. As important, at least in the opinion of one of our respondents, master and counsel can explore matters that judges might consider irrelevant or that lawyers might be reluctant to raise with the court. One lawyer told us about a case in which counsel for both sides asked the master to take into account a delicate political situation that was confining both parties’ room to negotiate but that technically had nothing to do with the discovery process. This respondent’s story illustrated two potentially significant advantages of using a master: the lawyers felt freer to share their real concerns with the master than they would have with the judge and the master felt freer than the judge would have to accommodate these concerns.

73. See Kaufman, *Masters*, *supra* note 10, at 467.

Thus in several different ways a master's flexibility and the resultant ease of counsel's access to him or her can make a master's contact with a case closer and more continuous than a judge's or magistrate's would be. Closer and more continuous contact equips a master to keep case development under tighter reins.⁷⁴ According to Rice, a master who becomes thoroughly involved with a case is in a good position to earn the respect and confidence, perhaps even the affection, of the lawyers with whom he or she spends scores of hours. A master who has earned that respect may be in a better position than a remote judge would be to influence the litigators' behavior, to encourage them to cooperate, and to persuade them to abandon counterproductive or simply erroneous positions. Moreover, the better a judicial officer knows the parties, their situations outside the litigation, and the personalities and professional styles of their lawyers, the better able that officer will be to perceive where compromise is possible and negotiation likely to be worthwhile.

Rice also has suggested that a master may be able to use methods of influencing attorney or client behavior that a judge or magistrate would be reluctant to employ. Some judges believe that preserving their image of rationality and impartiality requires an evenness of temper that can be assured only by keeping a safe emotional distance from litigants and counsel. Some believe that conduct that even suggests passion or pressure jeopardizes their dignity. Masters, by contrast, are less visible to the public and can be less concerned about images. That fact gives them some freedom from the behavioral restraints many judges feel. That freedom can be especially valuable when a master is trying to facilitate negotiations between the parties (e.g., about fact stipulations or pretrial procedures). Rice suggests that success as a facilitator may depend on the master's ability to play a wide range of emotional roles, roles many judges would eschew. In some situations, for example, anger and a sense of outrage might be the most effective tools for leveraging a recalcitrant attorney into a more reasonable position. Other occasions might call for a supplicating approach. To many judges, recourse to such emotional posturing, for any purpose, would be unseemly.

Emotion is not the only "nonjudicial" resource on which a master might draw during the discovery stage. A master also can turn more freely to candor. While a judge must be very careful not to expose views about the merits of the parties' positions before trial, a master can use a frank preliminary assessment of an attorney's stance as a means of nipping discovery disputes in the bud or of removing obstacles to stipulations. Moreover, as one lawyer we interviewed suggested, a master can

74. Hazard & Rice, *supra* note 17, at 391-96.

use such candid appraisals to encourage a kind of "horse trading" about discovery matters—behavior many judges and in-court litigators would avoid.

There is one additional dimension of a master's flexibility that warrants comment. A master may have a wider range of procedural options than a judge or magistrate would have. The report by Hazard and Rice about their experiences as special masters in *United States v. American Telephone and Telegraph Company* contains some provocative examples.⁷⁵ In that case, the court referred a large number of complex privilege disputes to the masters. Before attempting document-by-document rulings, Hazard and Rice circulated a set of guidelines that reflected their views of the relevant law.⁷⁶ This procedure afforded all counsel an opportunity to comment on and challenge the master's exposition of the applicable legal principles. Where persuaded by counsel's views, the master modified their positions. Through this process the masters fixed in advance the basic ground rules under which disputes about individual documents or groups of documents would be resolved. This procedure was efficient in at least two respects: it obviated the need for extensive briefing and argument about the law with respect to each of the various kinds of documents, and by equipping counsel to predict how the masters would rule, it encouraged the lawyers to abandon hopeless positions and to stipulate whether the materials were privileged or were to be produced. The guidelines also may have prevented additional disputes from erupting by persuading counsel that it was pointless to assert or challenge certain privilege claims.

When the masters turned to the task of ruling on specific groups of documents, they developed a variation on this procedural theme that produced additional efficiencies. Before rendering a formal opinion about significant sets of documents, the masters circulated a draft or tentative ruling and invited comments or objections from counsel. This procedure had several advantages. By giving counsel an opportunity to evaluate the master's preliminary views, this system resulted in well-reasoned rulings that were less likely to be appealed to the supervising trial court. Like the guidelines, this system also inspired some stipulations, which, in turn, eliminated the need for formal opinions by the masters. Because it worked well with respect to privilege disputes, the masters extended use of this "tentative opinion" procedure to other kinds of discovery disputes.

It is important to acknowledge that a judge may use the guideline and tentative opinion techniques described in the proceeding paragraphs. In

75. *Id.* at 390-94, 400, 411, 417-18.

76. *United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603 (D.D.C. 1979).

fact, a few courts have experimented with the use of preliminary ruling procedures in pretrial and in appellate contexts.⁷⁷ It probably will be quite some time, however, before such procedures are commonly used by judges or magistrates. Change comes slowly to the judiciary, especially change that appears to increase the burdens on the courts by replacing a one-step procedure with a two-step alternative. But even if judges were as likely as masters to utilize these methods, there would remain advantages in having masters responsible for the process in big cases. Drafting detailed guidelines to the relevant law and issuing tentative rulings with respect to scores of different categories of documents takes time—a commodity in shorter supply for a judge than for a master. Moreover, a master who is thoroughly familiar with most of the interrelated aspects of a developing case is likely to be in a position to perform these tasks more efficiently than a judge could. A master who already knows the parties' situations and business procedures, for example, could formulate reliable opinions about privilege or the need for protective orders more quickly than could a judge who is less familiar with the case. A master who is in close contact with counsel also would be in a better position than a more remote judge to determine when circulating tentative opinions might encourage stipulations.

There is another aspect of the use of special masters that might improve the efficiency of the pretrial system. Because the parties pay for a master's time by the hour, they normally will have some incentive not to overuse his or her services. The magnitude of that incentive probably will vary considerably from case to case. One lawyer we interviewed suggested that in suits where wealthy institutional litigants are locked in a struggle with great financial implications, concern about the cost of the master's services will not reduce the frequency with which counsel take disputes to the master for resolution. Other lawyers, however, expressed the view that most clients in most cases will be interested in avoiding unnecessary expenditures for a master's time and therefore will encourage their lawyers to settle as many issues as possible directly with opposing counsel, without resorting to a master. Similarly, some clients might pressure their attorneys not to wastefully protract or complicate the matters that are taken to the master. On the other hand, given the size of the stakes that are involved in large lawsuits and given the fact that lawyers in big cases usually are paid by the hour, it probably would be naive to expect the cost of the master's time, by itself, to contribute significantly to improving both the spirit of cooperation and the efficiency of the discovery stage.

77. See, e.g., Philip M. Saeta, *Letting a Little Sunshine into Appellate Decision Making*, 20 *Judge's J.*, Summer 1981, at 20.

There is another, longer-range benefit that the expanded use of masters might be more likely to produce. Because judges are more constrained by elaborate rules of behavior as well as by concern about their image, masters are better situated to conduct *experiments* with new techniques for managing pretrial development, for orchestrating exchanges of information, and for discouraging adversarial excesses.⁷⁸ Moreover, freedom from the constraints a judge would feel is not a master's only significant asset as an innovator. A master to whom substantial pretrial responsibility has been assigned can know parties, counsel, and situations much better than a judge or magistrate could. Equipped with such detailed knowledge, a master is well situated *to identify opportunities* to experiment, to devise new methods that are well tailored to the needs of given situations, and, as important, to evaluate up close how well the chosen methods work. As I will suggest in a subsequent section, some kinds of experimentation cannot be undertaken without the informed consent of the parties. That prerequisite, however, should not prevent the profession from making some effort to capitalize on the unusual opportunity for procedural creativity that a special master brings in terms of flexibility, knowledge, and ability to observe results.

Another indirect benefit resulting from the use of special masters is that lawyers who serve as special masters acquire a unique perspective on our judicial system. Ronald E. McKinstry,⁷⁹ a seasoned litigator who has served as a master in the discovery stage of two complex cases, confirms this. McKinstry's responsibilities as a master encouraged him to think about discovery systematically and to view it as part of a larger whole with larger purposes. As a master, he represented society's interests in the process. Because he represented society's interests, he viewed the process from society's vantage, with its values and needs in mind. In a word, he saw the system much as a judge sees it. He experienced the impatience judges experience when counsel duck discovery obligations, overuse discovery tools, press unimportant points, or stick doggedly to counterproductive positions. He experienced the frustration judges experience with counsel who devote more energy to delay, obfuscation, and clever excuses than to case development. And he gained a new appreciation for the limitations and pressures under which judges must try to do their jobs. Most important, he emerged with a changed attitude about how to conduct litigation as an advocate. McKinstry has described his new perspective in the following words:

78. Hazard & Rice, *supra* note 17, at 416-18.

79. This description of McKinstry's reactions to his experience as a special master is based in large part on telephone interviews of him. See also McKinstry, *supra* note 11, at 227.

Finally, as in so many things, the experience [serving as a special master in pretrial] has probably been more valuable to me personally than to anyone else. It is now easier to abandon marginal arguments in my own suits and to think of what the court must decide in terms of the various viable alternatives open to the court. It has made it easier for me to suggest discovery compromises and to take my own discovery questions before the court only as a last resort.⁸⁰

The spread of attitudes like McKinstry's could help civilize and expedite the litigation process both by tempering adversarial behavior and by improving the dynamic between bench and bar. Experience as a special master also might increase the intelligence and sympathy with which lawyers approach the need for procedural reform.

This is an appropriate place to summarize the principal benefits of delegating much of the judiciary's responsibility for discovery in complex civil lawsuits to a master. As the above discussion suggests, there are many reasons to believe that intelligent use of special masters could substantially increase the efficiency and orderliness of the discovery process in such cases. The keys to the promise of the master system are the master's stature in the eyes of counsel and his or her expertise, knowledge of the case, accessibility, and procedural flexibility. A diligent master charged with responsibility to supervise most discovery matters can acquire and maintain a more thorough understanding of a developing case than a judge could be expected to. By utilizing flexible and informal procedures, a master can stay in closer, more constant contact with an action than could most judges and can get closer to counsel and more effectively restrain their sense of confrontation.⁸¹ A master's knowledge of and proximity to the action equip him or her to keep tighter reins on case development, to resolve disputes faster and more intelligently, and to discourage counsel from seeking tactical advantages through the discovery process. With a detailed, fully current understanding of the action, a master also is in a better position to help plan and pace case development. A master can focus on and help order the discrete elements of larger discovery plans and can impose constructive pressure on counsel by setting realistic but firm, short-term deadlines for specific discovery tasks. Thus the dividends from a master's service in the discovery stage of a big case can include (1) more orderly, rational, and expeditious preparation for trial, (2) earlier settlement (which presumably would result from counsel being forced earlier to systematically face the facts of their position), and—perhaps as important as anything else—(3) more freedom for judges from time-consuming involvement in discovery and thus for the tasks (e.g., presiding over trials)

80. *Id.*

81. See the sensitive exposition of this idea by Hazard & Rice, *supra* note 17, at 395-96.

whose need for direct judicial attention is more obvious and probably more compelling.

This is an alluring vision of improvement. If it reflected all of the implications of the master system, it would be irresistible. Unfortunately, it does not acknowledge the potentially significant costs and disadvantages that referring discovery matters to a special master could involve. In the next section I identify and assess those costs and disadvantages.

III. THE NEGATIVE IMPLICATIONS OF USING MASTERS AND HOW THEY MIGHT BE MINIMIZED

There is a century-old American tradition of objecting to the employment of special masters in civil litigation.⁸² The principal target of the traditional criticism has been the use of masters to receive and analyze evidence at the trial stage.⁸³ While it would be a mistake to assume that the objections to using masters at *trial* apply with equal force to using masters during the *pretrial* period, it is important to acknowledge that referring discovery matters to special masters could provoke some of the problems associated with the traditional use of these quasi-judicial officers.⁸⁴ Historically, critics of the special master device have focused primarily on the costs and delays it can cause and on a constellation of concerns captured in the phrase “abdication of judicial responsibility.”⁸⁵ In the pages that follow, I will explore the dimensions and implications of these and other, less-obvious obstacles to referring discovery matters to special masters. I also will suggest steps courts could take to avoid or to reduce many of the problems that might otherwise make the risks created by use of masters unacceptably high. Even though the list of concerns provoked by the idea of referring discovery matters to masters is long, I believe that, on balance, the device carries sufficient promise in appropriate cases to warrant serious consideration both by litigants and by over-worked judges.

82. See, e.g., Lane, Equity, *supra* note 10, at 295-97; Comment, *supra* note 10, at 790-91; Adventures in Good Eating, Inc. v. Best Places to Eat, Inc., 131 F.2d 809, 815 (7th Cir. 1942). Criticism of the use of masters in the English chancery courts has even more ancient roots. See, e.g., Kaufman, Masters, *supra* note 10, at 452-53 n.4, quoting Jeremy Bentham's vitriolic criticism of the English practice.

83. See, e.g., Los Angeles Brush Mfg. Corp. v. James, 272 U.S. 701 (1927); Note, Reference of the Big Case Under Federal Rule 53(b): A New Meaning for the “Exceptional Condition” Standard, 65 Yale L.J. 1057, 1059-63 (1956); Comment, *supra* note 10, at 789-91; Arthur T. Vanderbilt, Cases and Other Materials on Modern Procedure and Judicial Administration 1240-41 (New York: Washington Square Pub. Co., 1952).

84. Judge Charles E. Clark's criticisms of the use of masters, which focus on problems of delay, expense, and potential bias, would seem to apply to use of masters at any stage of a civil action. See Clark, *supra* note 11.

85. See, e.g., Kaufman, Masters, *supra* note 10, at 453 and accompanying notes; Comment, *supra* note 10, at 791; Adventures in Good Eating, Inc. v. Best Places to Eat, Inc., 131 F.2d 809, 815 (7th Cir. 1942).

A. Cost

The direct, dollar cost of referring substantial discovery matters to a special master can be very large.⁸⁶ According to our respondents, a master often is permitted to charge his or her normal hourly fee (plus expenses) for time committed to a matter.⁸⁷ Thus, the charge for the services of a master with considerable professional stature and expertise easily could reach \$150 per hour, potentially making the price tag for a referral in a complex case a significant figure. And because masters are likely to be most effective and efficient when they are assigned broad and continuing duties, the cost of the most attractive kinds of referrals can easily amount to thousands of dollars. One of the lawyers we interviewed, for example, told us that the masters' fees in a large case in which he had been involved exceeded \$50,000.

Critics of the use of special masters at the trial stage have argued that because masters are paid by the hour, they might be tempted to protract hearings or deliberations, or at least to tolerate pointless presentations by counsel, in order to make more money from the referral.⁸⁸ Unlike some of the other complications that might arise from delegating discovery matters to a master, this one seems rooted more in speculation than in reality. None of the litigators we interviewed who had worked with masters complained about such practices; nor am I aware of any modern

86. For dated but graphic examples of substantial costs caused by referring responsibility for the entire adjudicatory process, see Note, Reference of the Big Case, *supra* note 10, at 1060-61, esp. n.22. See also Clark, *supra* note 11, at 570.

87. Fed. R. Civ. P. 53(a) gives the appointing court discretionary authority to fix the rate (or amount) of the master's compensation, and at least one court has refused to approve compensation at the prevailing rate charged by attorneys in the area for commercial litigation. See *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737 (6th Cir. 1979) (decree implementation). But our respondents indicated that in their experience, judges were inclined to approve hourly fees comparable to those the appointee normally would charge his or her clients.

The Supreme Court has offered the following guidelines for courts setting the fees for masters who serve at the trial stage:

The value of a capable master's services cannot be determined with mathematical accuracy; and estimates will vary, of course, according to the standard adopted. He occupies a position of honor, responsibility, and trust; the court looks to him to execute its decrees thoroughly, accurately, impartially, and in full response to the confidence extended; he should be adequately remunerated for actual work done, time employed and the responsibility assumed. His compensation should be liberal, but not exorbitant. The rights of those who ultimately pay must be carefully protected; and while salaries prescribed by law for judicial officers performing similar duties are valuable guides, a higher rate of compensation is generally necessary in order to secure ability and experience in an exacting and temporary employment which often seriously interferes with other undertakings.

Newton v. Consolidated Gas Co., 259 U.S. 101, 105 (1922). For cases approving substantial fees, as well as cases ordering reductions in the compensation requested by masters, see 9 Wright & Miller, *supra* note 16, § 2608 & nn. 67-69.

88. See the criticism of the role of masters in English chancery courts in the nineteenth century discussed in Kaufman, Masters, *supra* note 10, at 452 n.4. Hints of similar concerns are suggested in Wallace R. Lane's criticisms of the use of masters at the trial stage by American equity courts. See Lane, Equity, *supra* note 10, at 296-97 and Lane, Twenty Years, *supra* note 10, at 654-55, esp. n.51.

cases in which a master's fee for pretrial services was challenged or reduced on this ground.⁸⁹ Moreover, a carefully structured referral system could incorporate sufficient safeguards against this kind of abuse. A thoughtful selection process would assure that referrals would be made only to highly regarded professionals whose income from other sources was secure and substantial. The judge who ordered the reference could monitor the master's work, require the master to submit accounts of how his or her time was spent, and press for explanations of figures or hours that seemed unusual. Moreover, the litigators involved in the case would be in a good position to detect and report excesses. In short, it seems highly unlikely that a master who would be subject to such scrutiny from both above and below would succumb to any temptation to needlessly protract work or pad hours.⁹⁰

Some commentators have suggested that there also can be substantial indirect costs of involving a master in litigation. This view assumes that a master's rein would be looser than a judge's, that counsel would take advantage of the master's relative weakness by seeking evidence and taking positions that no judge would permit, and that the lawyers would be compelled to do much of their work twice: the first time for the master and the second for the court's review of the master's actions.⁹¹ If these assumptions were justified, if masters were significantly less capable than judges of restraining adversarial excesses, and if it were routinely necessary for judges to reconsider most of the decisions made by masters, then the additional expense of a reference would be both huge and pointless. As my discussion of the potential advantages of using masters suggested, however, there is substantial evidence that thoughtful use of a well-selected master can reduce friction between opponents and can rationalize and expedite the trial preparation process. In fact, most of the lawyers we interviewed who had experience with or as a master believe that a well-conceived reference in a large case not only streamlines case development, thus resulting in faster overall disposition, but also produces a net savings of litigation costs for parties by promoting stipulations and reducing wasted attorney time.⁹² Judge Irving R. Kaufman,

89. There are reported cases in which the fees masters generated while serving at the trial or subsequent stages have been ordered reduced. See cases cited in 9 Wright & Miller, *supra* note 16, § 2608.

90. In *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737 (6th Cir. 1979), following dispute over the compensation of a special master, the court suggested that masters might submit monthly vouchers, so that parties will know the actual costs of the reference as they occur. Presumably, use of such a process would provide the parties with an opportunity to object to any unreasonable charges by the master.

91. Again, most such criticism has focused on the master serving at the trial stage. See Lane, *Equity*, *supra* note 10, at 296-97. Judge Clark expresses similar concerns about masters used in the pretrial period. See Clark, *supra* note 11, at 569.

92. The experiences as masters of Judges Robert M. Marsh and Philip J. McCook support this view. See Marsh, *supra* note 11, at 411.

Chief Judge of the United States Court of Appeals for the Second Circuit, has subscribed to this view for 25 years. In 1958, after studying the effects of referring discovery matters to special masters in three complex cases, Judge Kaufman wrote:

Though added costs must be initially borne by the parties, the results of the three cases in question indicate that such charges are more than compensated by the dispatch in which the cases are finally readied for trial. Plaintiff's counsel in one of the three cases has reported that the reference has resulted in such a curtailment of wasted effort and duplication that his client has in fact saved money by the reference.⁹³

While the experiences and opinions of Judge Kaufman and of the lawyers we interviewed offer good reasons to be optimistic about the overall cost efficiency of referring complex discovery matters to masters, we simply do not have sufficient data at this time to test the hypothesis that intelligent assignment of pretrial responsibilities to masters normally would yield a net saving of litigation dollars.

Even if we assume, however, that some kinds of references usually will result in net savings, the direct cost of a master's fee will remain high. That fact creates no major problems in suits where all the parties have deep pockets and all either request or freely consent to the reference. These are the situations where appointing a master is most appropriate. In other situations, however, the high direct cost of the master's services is a consequential factor whose impact a court must carefully consider before ordering a reference.⁹⁴

When the parties do not consent to a reference, may a federal court nonetheless impose the master's services (and responsibility for his or her fee) on the unwilling litigants? Do the federal courts have the authority to take such action? Do civil litigants enjoy a constitutional or statutory "right" to essentially free judicial services?⁹⁵ Could imposing a master's services and fees on litigants violate their right to trial by jury under the Seventh Amendment, their right to due process, or their right to the equal protection of the laws? These are difficult questions which at this juncture I cannot fully address. It is important to emphasize, however, that the answers to at least some of these questions can vary with the cir-

93. Kaufman, *Masters*, *supra* note 10, at 468.

94. *Id.*

95. It is important to distinguish litigants' rights at the trial stage from their rights with respect to pretrial matters that do not significantly affect their capacity to litigate the merits of claims. While these distinctions require difficult exercises in line drawing in some situations, in many others the differences are clear and significant. Delegation of routine pretrial tasks presumably raises far fewer problems than would invasion of the parties' interest in *trial* before a judge. For concern about the latter problem, see *Adventures in Good Eating, Inc., v. Best Places to Eat*, 131 F.2d 809, 815 (7th Cir. 1942).

cumstances in which the questions are presented. For example, a federal trial court appears to be on relatively safe ground when it imposes a master's services during discovery on two equally wealthy institutional litigants who are locked in an unusually acrimonious commercial lawsuit.⁹⁶

The ground appears less firm, however, when the parties are not well-off financially. If both litigants in a two-party action do not have substantial resources, imposing the expense of a special master on them could threaten their access to justice.⁹⁷ Concern about the size of the master's fee could deter them from conducting discovery they otherwise would make, from raising issues they otherwise would press, from asserting valid privilege claims, or from fully presenting arguments. Similarly, such parties might be vulnerable to pressures from the master to accept compromises, to enter stipulations, or even to settle the entire action prematurely. The prospect of liability for part of a master's fee would be especially threatening to a plaintiff whose claim carried no promise of significant financial reward. Thus, imposing responsibility for the cost of a master on parties who could not afford it might violate their right to due process, their right of access to the courts,⁹⁸ and (where it attached) their Seventh Amendment right to a jury trial.

Imposing liability for a master's fee also could trigger substantial due process and equal protection problems in cases in which there were significant disparities between the economic resources of the litigants. To impose this cost equally on both sides could create unfair advantages for the party with the greater economic strength.⁹⁹ The wealthier litigant would feel freer about consuming the master's time—and thus freer to raise issues and objections and to elaborate its positions. The economically stronger party also could use its opponent's liability for half of the master's fee as a tactical weapon, harassing the poorer party with the expense

96. In *U.S. Oil Co. v. Koch Ref. Co.*, 518 F. Supp. 957 (E.D. Wis. 1981), the court decided to appoint a special master to supervise the pretrial preparation of the case. The court acted in response to increasing animosity between the parties that was reflected in opposition to discovery requests. The fees and expenses of the special master were to be borne equally by the parties and limited to \$75 an hour; and the prevailing party would not be permitted to include this expense as an element of recoverable costs. See also *Omnium Lyonnais D'Etancheite et Revetement Asphalte v. Dow Chem. Co.*, 73 F.R.D. 114 (C.D. Cal. 1977), and *First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas & Elec. Co.*, 245 F.2d 613 (8th Cir.), *cert. denied*, 355 U.S. 871 (1957).

97. Kaufman, *Masters*, *supra* note 10, at 453.

98. The scope of a poor citizen's constitutional right of access to the courts in civil matters has not been clearly delimited by the Supreme Court. See, e.g., the Court's different approaches to this issue in *Boddie v. Connecticut*, 401 U.S. 371 (1971), and *United States v. Kras*, 409 U.S. 434 (1973). A comprehensive exploration of the constitutional and statutory aspects of this question is beyond the scope of this essay.

99. See *Fraver v. Studebaker Corp.*, 11 F.R.D. 94 (W.D. Pa. 1950). See also *Graffis v. Woodward*, 96 F.2d 329, 332 (7th Cir.), *cert. denied*, 305 U.S. 631 (1938); *Parker Rust Proof Co. v. Ford Motor Co.*, 23 F.2d 502, 506 (E.D. Mich. 1928); Note, *Reference of the Big Case*, *supra* note 10, at 1061-62 & nn.23, 24.

of unnecessary or protracted appearances before the master and trying to leverage its vulnerable opponent into abandoning the action or accepting a lower settlement figure.¹⁰⁰

Treating the master's fee as part of the taxable litigation costs, which normally are charged only to the losing party,¹⁰¹ is not an adequate solution to these problems. A huge percentage of the civil actions filed in federal court are settled before a final judgment is entered and a "winner" is identifiable.¹⁰² Dissecting settlement packages in order to ascertain which party "lost," and therefore should bear the litigation costs, is a process as fraught with difficulties as it is time consuming and expensive. Poor litigants are not likely to warm to the prospect of having their liability for a sizable master's fee determined in such an unpredictable exercise. More fundamentally, any version of the "loser pays" system would expose poor litigants to a risk many would not dare take. As an experienced public interest lawyer pointed out to us, most poor plaintiffs, no matter how deeply they believe in their claim, simply would refuse to take any risk of incurring liability for a sizable master's fee.¹⁰³ Thus exposing them to such a risk would effectively block their entry into the dispute resolution process. A system with such effects on one class of litigants obviously would be fundamentally unfair.

It does not necessarily follow that special masters can never be used in suits where one of the parties is poor or where there are great differences between the litigants' financial wherewithal. Of course, in many such cases, when a judge identifies a pretrial situation that calls for more detailed or continuous attention than the court can muster, the most sensible solution will be to refer the matter to a publicly paid magistrate. If no magistrate is available, however, or if none has the resources or the specialized expertise called for by a particular situation, the court still might explore the parties' interest in consenting to the appointment of a master. There might be situations in which the contributions of a specialist would so expedite matters that even parties with small litigation budgets would decide that a limited, well-focused reference was in their best interests. If there were significant differences between the parties' resources, they might agree to apportion the master's fee, regardless of the outcome of the litigation, according to their respective abilities to pay (in lieu of the more common 50/50 split).¹⁰⁴

100. Note, Reference of the Big Case, *supra* note 10, at 1061 & n.24.

101. See Fed. R. Civ. P. 54(d); Cal. Civ. Proc. Code § 1032.

102. See, e.g., Annual Report of the Director of the Administrative Office of the United States Courts, 1978, at 196 & app. I, table C4 (Washington, D.C.: Government Printing Office, [1978]).

103. Apparently many poor litigants would be unwilling to risk such liability, even though they probably would be judgment proof.

104. See, e.g., *Omnium Lyonnais D'Etancheite et Revetement Asphalte v. Dow Chem. Co.*, 73 F.R.D. 114, 120 (C.D. Cal. 1977).

There also have been cases where one of the parties has *volunteered* to pay the entire cost of the master. One attorney we interviewed, for example, told us about a complex public interest lawsuit in which the defendant, a city government, agreed to pay all of a master's fee. The story of the special master's role in this litigation is sufficiently instructive to warrant a brief description here. The controversy revolved around the effects a major building project would have on the availability of housing for poor people. By stalling the project, the plaintiffs' suit was costing the city government a great deal of money. Early in the pretrial period the distrust that had helped provoke the litigation developed into an intense mutual animosity that brought discovery and constructive communication between the parties to a virtual halt. Then, at a juncture where both parties believed they desperately needed immediate resolution of a dispute, the judge to whom the case was assigned was out of town. His unavailability at this important point inspired one of the parties to suggest the idea of bringing in a special master. Because the plaintiffs were poor, they could not help pay a master's fee. But because of the logjam in the lawsuit and the money that delaying the construction project was costing the taxpayers, the city agreed to assume full responsibility for the cost of the master, gambling that his involvement would more than pay for itself by breaking the deadlock and by moving the case toward resolution more expeditiously than it would move under the loose supervision of the court. One reason the city was willing to take the risk was that the lawyer who had agreed to serve as master was indeed special. He was thoroughly experienced in complex civil litigation. More important, he had served as governor of the state for two terms and enjoyed tremendous respect and confidence from both parties.

The gamble paid off. The master descended on the case with a vigorous intolerance of game playing and pettiness, quickly making it clear that he knew the tricks of the trade and would not hesitate to expose them on sight. He also made it clear that he was no fan of formalism, technicality, or rigid ritual and that he expected both parties to join him in rolling up their sleeves and getting directly down to business. Because he was firm, fair, flexible, and willing to take into account the political facts of the litigants' lives, he succeeded in introducing a whole new tone to the lawsuit. The level of acrimony dropped measurably. The parties agreed not only to relatively frictionless exchanges of information but even to engage in serious negotiations looking toward settlement. Distracted by fewer obligations than the judge, the master gave the case much more detailed and continuous attention than it had received before he was enlisted. While he was not able to orchestrate a final settlement, he quickly got the case ready for trial, greatly reduced the distance between the parties' positions, and formulated recommendations the judge found useful on both factual and remedial issues.

Of course, one of the keys to the master's success in this situation was the unusually high level of respect with which he entered the case. Fortunately, it is not essential that every master enter public interest litigation with that level of respect. When we interviewed one of the attorneys for the plaintiffs in the case I just described, he insisted that masters need not have the stature of a former governor to serve effectively in public interest litigation. To support this point, he offered an impromptu list of several law professors and local lawyers (including senior partners in large firms) to whom he would freely entrust the master's role in a major public interest case.

There is at least one additional route by which a master might be introduced into a suit in which one of the parties cannot afford to contribute to the master's fee. Federal courts apparently have authority to impose responsibility for all of a master's fee on a party whose behavior, in the court's view, is the principal source of the need for the master's services.¹⁰⁵ While it is not clear that a court has the authority to impose such an obligation on a nonconsenting governmental body, there appears to be no insurmountable obstacle to such action if the recalcitrant or otherwise misbehaving party is private and is so situated that paying for the master would not impair its ability to carry on the litigation.¹⁰⁶

This last qualification leads to a related, precautionary point. There are dangers in making it clear from the outset that one or more of the parties will contribute little or nothing to the cost of the master and that other parties will be responsible for most or all of the fee. The most obvious and probably the most serious of these dangers is that the litigants who are not obligated to contribute will overuse the master's services in an effort to impose economic pressure on the paying parties. It is also possible that the parties who know they will have to bear the full cost will feel either inhibited about taking legitimate matters to the master or deterred from fully presenting their positions.

The other dangers cut in the opposite direction. If all of the master's fee is to be paid by one party, there is a risk that the master will be afraid of alienating that party and thereby increasing the likelihood that he or she will have difficulty collecting the fee.¹⁰⁷ A master who became concerned about this possibility might lose the ability to restrain or to disci-

105. See Fed. R. Civ. P. 53(a). In *Adventures in Good Eating, Inc. v. Best Places to Eat*, 131 F.2d 809, 814-15 (7th Cir. 1942), the court of appeals ruled that the party who petitioned the trial court to appoint a master had to bear the entire cost of the master's services when the opposing party objected to the reference and the trial court abused its discretion when it ordered the reference.

106. See, e.g., *Chesa Int'l, Ltd. v. Fashion Assocs., Inc.*, 425 F. Supp. 234 (S.D.N.Y. 1977).

107. Fed. R. Civ. P. 53(a) provides, *inter alia*, that "when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party."

pline the responsible party or, worse, to be impartial. Even if the master studiously avoided these pitfalls, a problem of appearances could remain—other parties or the public might lose confidence in the master's neutrality if all of his or her wages came from one source. There is one way to reduce these potential problems. The court can order the party responsible for the master's fee to pay in advance. This device has been used successfully in cases in which both sides shared equal responsibility for the master's fee.¹⁰⁸ In the federal government's antitrust action against AT&T, for example, the court ordered the parties to pay \$25,000 into a special trust account before the masters began their work. The masters' expenses and fees were paid from that account, after being approved by the court. When the account was almost depleted but work remained for the masters to perform, the court ordered the parties to deposit an additional sum.¹⁰⁹ Unfortunately, payment devices like these cannot eliminate the fear that a master might favor a party who was responsible for all or a disproportionate share of the fee; nor can such devices deter efforts by nonpaying parties to use their opponent's liability for the fee as a source of leverage. Since there are no obvious means for removing these risks, judges who make one party responsible from the outset for the master's fee should warn both litigants and the master against these dangers and, when monitoring the action, should keep alert for evidence of abuse.

As the preceding paragraphs suggest, the cost of substantial pretrial service by a special master limits the situations in which appointment of a master would be appropriate. In concluding this section, however, there are a few points I wish to emphasize. One is that there are a great many large, commercial cases that pit well-heeled opponents against one another, opponents of roughly equal economic strength who can easily afford their share of a master's fee. Another point is that there is good reason to believe that referring discovery to masters in such cases can so improve the efficiency of the pretrial process that the net effect of employing a special master is to reduce the parties' litigation costs. Finally, since most litigation expenses incurred by corporate litigants presumably are passed along to consumers, it is worth pointing out that society has an interest in compelling parties to use the least expensive fair means to resolve their disputes.

We also should not lose sight of the social cost of permitting the pretrial development of large commercial cases to consume substantial por-

108. *Omnium Lyonnais D'Etanchiete et Revetement Asphalte v. Dow Chem. Co.*, 73 F.R.D. 114, 120 (C.D. Cal. 1977).

109. This description of the fee arrangement is based on telephone interviews of Judge Harold H. Greene, special master Paul R. Rice, and counsel for the parties to the action.

tions of the federal judiciary's time. A comprehensive cost-benefit analysis of the use of special masters should include some effort to take into account that judges freed from supervising the details of discovery in large commercial cases have more time to devote to matters in which the public has a greater direct interest and to lawsuits in which the parties cannot afford a master's services.

This is an appropriate place to acknowledge and to respond to the argument that wealthy litigants should not be permitted to hire special masters because by doing so they gain access to speedier and higher-quality justice than is available to the poor, who have no choice but to rely on the cumbersome, traditional adjudicatory process.¹¹⁰ While this argument has an equal protection ring, it does not follow that permitting wealthy litigants to hire special masters would violate the equal protection rights of those other litigants who are *not* compelled to hire masters because they do *not* have the resources to do so.¹¹¹ Since in a civil action the government has no affirmative constitutional obligation to provide *counsel* for a party who cannot afford to hire a private attorney,¹¹² it would be difficult to argue persuasively that the government has a duty to furnish the clearly less essential services of a special master. The Supreme Court simply has refused to accept the argument that the Constitution confers on poor litigants a fundamental right to be equipped by government with the same litigation resources that wealthier parties enjoy.

Moreover, the rules that apply to the use of masters do not, on their face, create *any* classifications, that is, they do not, in so many words, impose different requirements on or offer different benefits to any identifiable group.¹¹³ An equal protection challenge to these rules presumably would proceed on the theory that despite their facial neutrality, the rules have the effect of discriminating against the poor. Since the Supreme Court has refused to recognize the "poor" as a suspect class,¹¹⁴ the con-

110. Arguments along these lines have been made in attacks on the "Rent-a-Judge" procedure that enables parties with sufficient resources to by-pass the entire system of public adjudication. See, e.g., Christensen, *supra* note 53, at 90-96; 'Rent-a-Judge' Still Generates Conflict, Cal. Law., Feb. 1982, at 17; and Note, The California Rent-a-Judge Experiment: Constitutional and Policy Considerations of Pay-as-You-Go Court, 94 Harv. L. Rev. 1592, 1601-10 (1981).

111. The Supreme Court might well view a system that permitted litigants to hire masters not as an interference with any rights of less wealthy litigants but simply as governmental encouragement of an alternative form of behavior that conforms to government's legitimate policy preferences. If the Court so viewed the matter, it would hold that the permissive use of masters did not even implicate equal protection interests. Cf. Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977).

112. Cf. Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970); and Ortwein v. Schwab, 410 U.S. 656 (1973).

113. See, e.g., Fed. R. Civ. P. 53 and Cal. Civ. Proc. Code §§ 639, 645.1.

114. See, e.g., Dandridge v. Williams, 397 U.S. 471 (1970); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

tention that the burdened class consists of the "poor" could serve as the basis for an equal protection violation only if the challenger could prove that the government could not rationally believe that the rules might help promote some legitimate public interest¹¹⁵ (e.g., improving the efficiency of big case litigation). The likelihood of a challenger being able to satisfy this burden is virtually nonexistent.

Yet another great obstacle would confront a challenger proceeding on the theory that the rules relating to the use of masters discriminate against the poor. When a challenger must rely on the effects of a statute to prove that the government used some criterion to classify, the challenger is required to prove that when the government acted it *intended* to harm the class of which the challenger is a member.¹¹⁶ Thus, a challenger would be required to prove that when the government adopted rules permitting litigants to hire masters, it did so *because* establishing such a system would result in a slower and less reliable adjudicatory process for the poor.¹¹⁷ A challenger would be hard pressed to meet that burden of proof, in part because one of the principal effects of extending the pretrial use of masters should be to enable judges and magistrates to devote *more* time to the needs of cases that are not served by masters.¹¹⁸

This predictable effect of using masters helps focus the remaining policy issue. When addressing a question such as whether or not to extend the use of masters in the discovery stage of civil actions, it is important to study the alternatives. The alternatives most likely to improve the discovery system in big cases are either to significantly increase the number of federal judges or to improve the quality and increase the number of federal magistrates. Both of these alternatives would require sizable increases in direct public expenditures and seem politically infeasible for the foreseeable future. The same can be said for having taxpayers furnish masters in all cases where litigants are unable to pay a master's fee. Yet another alternative might be to try to develop new judicial techniques for pretrial management of big cases, but it is not clear that this approach could generate substantial improvement without a simultaneous increase

115. See, e.g., *Maier v. Roe*, 432 U.S. 464 (1977).

116. See *Washington v. Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.* 429 U.S. 252 (1977).

117. *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979).

118. For an interesting review of the due process and equal protection objections to California's procedure for referring trials of civil actions to retired judges, see Christensen, *supra* note 53, at 90-93. Christensen concludes that the California reference procedure does not offend either the due process or the equal protection clause of the United States Constitution; but because that procedure is consensual and involves trials rather than discovery, we cannot assume that Christensen's analysis resolves the constitutional questions raised in the text. A student writer in the *Harvard Law Review* has concluded that the California reference procedure offends the equal protection clause and might offend the due process clause and the First Amendment. Note, *supra* note 110, 1601-10. Christensen, however, finds this student's arguments strained and, ultimately, unpersuasive.

in judicial resources. Thus, realistically, there are only two alternatives for now: to perpetuate the status quo or to expand the pretrial use of masters in cases where the parties have the resources to pay for the master's services. Certainly from the perspective of a litigant unable to pay a master's fee, the latter alternative is preferable because expanding the use of masters in large commercial lawsuits would free judges and magistrates to attend more carefully to the needs of other kinds of actions, while under the current system the judiciary's effectiveness in all kinds of suits is reduced by the fact that its resources are spread so thin.

B. Delay and Duplication

A criticism traditionally leveled at masters (in the same breath with attacks on their cost) is that they needlessly delay the administration of justice.¹¹⁹ Complaints about delay have focused, for the most part, on the use of masters to help judges at the trial stage.¹²⁰ Nonetheless, several of the reasons masters were said to be sources of delay at trial could apply to the use of masters in the pretrial period. In the paragraphs that follow, I will identify ways in which referring discovery matters to masters might retard or complicate case development. I also will suggest means by which most of these potential sources of difficulty could be countered.

One traditional complaint about special masters was that because they often were distracted by other, perhaps more lucrative obligations, it was difficult to persuade them to set timely dates for hearings.¹²¹ Special masters with private practices were accused of giving higher priority to the needs of their own clients and of not having sufficient control over their schedules to perform their masters' duties punctually. If the complaints about such problems are reliable indicators, in many cases judges did not aggressively monitor or discipline the masters they were supposed to be supervising. It appears that too often the combination of pressure from other commitments and the absence of meaningful judicial oversight resulted in a "system" where a master would force the parties to wait long periods before beginning the presentation of evidence and would interrupt their presentations (sometimes for substantial periods) while he or she attended to his or her own business affairs.

If we assume that these scheduling difficulties were widespread when nineteenth-century equity courts used masters at the trial stage, should we assume that they would resurface if modern judges began referring more

119. *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 815 (7th Cir. 1942); Clark, *supra* note 11, at 569-70; Comment, *supra* note 10, at 791.

120. Lane, *Equity*, *supra* note 10, at 296-97.

121. Cf. Clark, *supra* note 11, at 569-70; Note, *Reference of the Big Case*, *supra* note 10, at 452-53 n.4.

big case discovery matters to special masters? While it is impossible to offer an unequivocal answer to this question, there are reasons for guarded optimism. Before examining those reasons, I should emphasize that resorting to a master almost always involves some risks and that in deciding whether the risks are worth taking in a given situation undoubtedly the biggest single factor to consider is the adequacy of the service available, as an alternative, from the judge or magistrate. If, for example, the court is so busy that scheduling discovery matters before it will be difficult (and will yield only brief hearings), then the risk of encountering scheduling difficulties with a master may be less significant. By contrast, if parties foresee that they will have prompt access to the judge and that he or she will devote substantial attention to their discovery problems, they may decide that the potential advantages of a reference do not outweigh its risks.

Perhaps the most persuasive reason for believing that scheduling difficulties might not plague pretrial references by modern courts is the fact that we have no evidence that this has been a real problem in any of the relatively recent cases we have researched. None of the attorneys we interviewed who had worked with or as masters suggested that access to the master had been a source of difficulty. On the contrary, many of our respondents pointed to the availability of masters as one of their great advantages. Nor have we found a single reported case in which a court has complained that a master's performance of pretrial duties was impaired by the distractions of other commitments or by inaccessibility. This lack of evidence of significant scheduling problems is particularly noteworthy in view of the fact that in some cases the referenced discovery responsibilities have been massive, forcing the masters to remain involved for a year or more.¹²² Obviously, the risk that other obligations will reduce a master's availability and impair job performance increases with the amount of time required to complete the assigned tasks. Despite this fact, well-selected masters have been able to juggle their responsibilities in ways that have permitted them to remain accessible to the litigants.

Several factors account for this success. One is that the tasks assigned to masters in the pretrial period are not likely to require as much continuous attention as does the taking and analyzing of evidence during the trial stage. In addition, resolving discovery disputes, unlike taking evidence at trial, usually requires only the presence of counsel, not of parties, witnesses, and court reporters. That fact gives the master greater flexibility in scheduling hearings for discovery disputes than he or she might have for trial assignments. As I indicated earlier, some masters have used that flexibility to schedule discovery conferences in the evenings and on

122. See, e.g., *United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603 (D.D.C. 1979).

weekends.¹²³ Modern means of communication and transportation also offer modern masters advantages that their nineteenth-century counterparts did not enjoy. Among other things, modern means of communication can greatly reduce the need for face-to-face meetings or personal appearances to resolve discovery problems. Those same technological advances also enable the master to handle the competing demands of his or her private practice more expeditiously.

Modern courts that remain concerned about the possibility that a master will not attend faithfully to his or her duties or will not be sufficiently accessible to the parties can take steps to reduce these risks. The first is to estimate the amount of time necessary for discharging the responsibilities to be referred. The second is to check whether the lawyer or professor selected to serve as master clearly understands the size of the commitment he or she must make and has sufficient freedom from other obligations to be able to serve effectively for that period. Where time demands will be particularly severe, the court might focus its search on three groups whose members are likely to have more time than active litigators: (1) recently retired judges or magistrates, (2) senior partners in large firms who either have already reduced their caseloads or who have the power to do so, (3) and law professors who can arrange for reduced teaching loads and who can devote virtually all of their summer and holiday time to serving as a master.

In extraordinary situations, a court also might consider appointing more than one master in the same case.¹²⁴ In the federal government's antitrust action against AT&T,¹²⁵ the judge agreed to this unusual arrangement when it became apparent that the job the court wanted to refer was too large for one master to handle efficiently. While the use of two masters has some potentially significant disadvantages that I will discuss momentarily, appointing two masters worked well in the AT&T case and can produce substantial benefits. Several factors help explain why the double appointment was so successful in this case. One was the structure of the relationship between the two masters. The parties initially agreed on the appointment of Geoffrey C. Hazard, Jr., a nationally prominent law professor with a considerable reputation in civil procedure and evidence. Hazard's academic and administrative commitments, however, made it impossible for him to relocate to Washington, D.C., where most of the pretrial activity was to occur, or to devote the scores of hours to examin-

123. See also McKinsty, *supra* note 11, at 214.

124. See, e.g., *In re Murphy*, 560 F.2d 326 (8th Cir. 1977) (panel of three masters appointed due to extensive number of documents); *Kyriazi v. Western Elec. Co.*, 465 F. Supp. 1141 (D.N.J. 1979) (class action suit involving thousands of claims of class members; three masters appointed to rule on these claims and to resolve discovery disputes arising out of efforts to fix the amounts involved).

125. See *United States v. AT&T*, 461 F. Supp. 1314.

ing documents that were required to make initial rulings on privilege. Nonetheless, the parties had such respect for and confidence in him that they wanted him to serve. Given the limitations on the time he could commit to the task, the solution that seemed to make the most sense was to appoint a second master, a person in whom he had confidence and who had more time to commit to the day-to-day aspects of the master's role. A search for such a person led to Paul R. Rice of American University. Because Rice lived and worked in the Washington, D.C., area, and because he could arrange for a reduced teaching load, he was perfectly situated to do the lion's share of the frontline work.

Thus the two masters established what Rice has called a "vertical" relationship. At the outset of their term of service, Hazard and Rice spent hours working out the basic substantive and procedural guidelines for performance of their tasks. They identified and fleshed out the law of privilege they would apply and agreed on basic procedures for handling their work. Rice was to run the day-to-day aspects of the master's office in Washington, to respond initially to mechanical or procedural problems raised by the parties, and to conduct the first review of the documents that were the subject of disputed claims of privilege. If the parties presented important, but unanticipated, questions to Rice, he consulted by telephone with Hazard before responding or offering a tentative ruling. When resolving disputes about whether documents were privileged, Rice analyzed the parties' submissions, studied the documents, then prepared tentative opinions about groups of materials. Thereafter, Hazard reviewed both the bases for and product of Rice's work. If disagreements surfaced, the two men discussed the law and the documents until they reasoned to a consensus. Because there were only two masters, they could not resolve their disagreements by vote; instead, they had to reason with each other to arrive at a position to which both could subscribe.

While at first blush this system might seem unduly time consuming and thus unduly expensive, it resulted in several subtle but real benefits, the sum of which might more than compensate for the extra direct costs involved. One such benefit derived from having two different minds debate important questions before ruling on them. Hazard and Rice brought different backgrounds to their joint task. The dynamic between their different perspectives produced judgments that were better balanced, wiser, and more reliable than either man, working in isolation, might have produced. In this respect, the dual appointment gave the special masters an advantage over a judge, who normally would not have a peer with whom he or she could discuss difficult questions before ruling on them.

According to Rice, use of two masters also *improved* the masters' confidence in the positions they took and increased the parties' willingness to

accept those positions. The parties knew that all of the masters' important decisions reflected the considered and combined judgment of *two* experts. Rice believes that that knowledge gave the parties greater reason to accept the masters' rulings and reduced the parties' incentives to appeal to the trial judge. Even though we have no empirical evidence through which to assess Rice's views, common sense suggests that lawyers are less likely to believe that a judge will overturn a conclusion jointly reached by two experts than a decision made by a lone master. Rice also contends that the extra cost of involving a second master can be substantially offset by the fact that two masters produce higher quality rulings that provoke less resistance and fewer appeals by the parties.

On the other hand, there clearly is a risk that appointing more than one master could complicate the pretrial process and increase its costs. A master who is assigned substantial responsibility often will not be able to perform effectively until he or she has learned a great deal about a case;¹²⁶ thus requiring two people to master a complex case obviously could substantially increase the *direct* cost of a reference. Involving two masters also might make it more difficult for counsel to predict rulings on disputes, and the less predictable the system's responses, the less effective it is likely to be as a means of restraining adversarial excesses. In addition, the presence of two masters might invite some lawyers to try to play the masters off against one another. Litigators pursuing more favorable rulings or attempting to delay case development might try to provoke disagreements¹²⁷ or jurisdictional disputes between the masters. These kinds of problems have arisen in cases where the court has divided pretrial responsibilities between masters and a magistrate.¹²⁸ As one of the magistrates we interviewed pointed out, whenever a judge subdivides responsibility for different aspects of a case he or she creates opportunities for counsel to "forum shop." Attorneys who believe they are likely to fare better before one of the officers (e.g., on the theory that that officer does not understand the case as well and is more likely to be satisfied with simplistic explanations or solutions) might attempt to divert a disproportionate share of the work, or particularly sensitive issues, to that officer. And judges might find it difficult to check such efforts or to resolve jurisdictional disputes expeditiously because the subparts of complex lawsuits are interdependent and difficult to separate into distinct categories or spheres.

126. See Report on Volunteer Masters, N.Y., *supra* note 10, at 9 n.7.

127. See *United States v. AT&T*, 461 F. Supp. at 1320, n.15 (reporting that the order of reference "directed that any matter upon which the Special Masters could not agree would be submitted to the Court for resolution.").

128. *Id.* at 1343. See also Hazard & Rice, *supra* note 17, at 384-87.

At this stage in our experience we simply do not know enough to weigh the advantages of appointing more than one master against the disadvantages of this option. It is not likely, however, that the same solution will be appropriate in all cases. When the tasks referred are relatively limited or the case is not unusually complex, the safer course may well be to appoint only one master. By contrast, in more complicated situations where the demands on one master would be very burdensome, courts should consider the feasibility of involving more than one expert. But a court that appoints more than one master should carefully structure the relationship between its appointees and should try to avoid the "horizontal" divisions of responsibility that invite jurisdictional disputes.

Appointing two masters may strike some judges as a risky way of trying to make sure that masters are sufficiently accessible to the parties. There are less adventuresome steps courts can take to promote that objective. One such step is to order the parties to pay the master on an hourly basis and at the same rate he or she normally would command from his or her clients. It is not reasonable to assume that masters will commit the substantial resources required to perform significant tasks in big cases without competitive economic incentives.¹²⁹ The level of compensation that will be sufficiently competitive will vary with the nature of the particular master's opportunity costs: those costs are likely to be greater for senior litigators in large firms than for law professors or retired judges. It would jeopardize the overall effectiveness and cost efficiency of the system, however, to try to reduce direct expenses by undercompensating the master. Judges and litigants should resist such shortsighted approaches to economy. Courts also should take steps to reassure masters that their fees are secured in advance. I already have described what appears to be the most effective means to this end—requiring the parties, at the outset, to deposit a sum equal to the projected cost of the master's services in an account controlled by the court.

Another way a court can reduce the risk that masters will be distracted by competing obligations or opportunities is to establish a relatively simple, inexpensive system for monitoring the master's work. The most effective method probably would be to inform the master at the outset that he or she is required to report case progress to the judge at fixed, relatively short intervals (e.g., at the end of every month). The court could tailor the form of such reports to the needs of given situations, for example, in a case that seemed to be moving well, the court might direct the master to make reports by telephone until either the judge or the master felt the need for a face-to-face meeting or a more formal, written statement. In

129. See Clark, *supra* note 11, at 570.

designing its monitoring system, however, the court should be careful not to establish formal and elaborate reporting requirements that would needlessly increase the master's cost. In most cases, such requirements probably would not increase the master's work incentive enough to warrant the cost and aggravation they would entail.

Critics have contended that another major reason why appointing a master can cause significant delays is that masters generally cannot restrain lawyers and litigants nearly as well as judges or magistrates can.¹³⁰ Masters, it is said, lack the capacity for case control. The arguments advanced to support this criticism expose and emphasize an important point—many of the features of the master system I identified earlier as sources of potential advantages also could be, in some circumstances, sources of serious problems. In other words, in different environments the same features can cut in opposite directions. For example, the fact that counsel's interaction with the master does not take place in public and is not constrained by elaborate rules and behavioral conventions could lead litigators to behave with less discipline and fewer scruples when a master is supervising their work. The relative informality of a master's demeanor, dress (the absence of judicial robes), and the settings in which a master is encountered (private offices instead of public courtrooms attended by uniformed bailiffs) might have similar effects. In part because of the absence of the trappings of judicial office, a master might enjoy less stature and respect in the eyes of the lawyers and parties than a judge or magistrate. Perhaps most significantly, all participants in the litigation process understand that a master has less independent power than a judge has to hurt or help them. In fact, there are often very substantial limitations on a master's power.¹³¹ It appears from our research, for example, that orders referring discovery matters to special masters rarely grant the master even limited authority to impose sanctions for violations of discovery rules.¹³² And some masters have complained that lack of authority to discipline misbehavior has compromised their ability to expedite matters. Similarly, masters generally have no power to formulate or limit the principal issues that a lawsuit embraces. As Judge Kaufman

130. See, e.g., American College of Trial Lawyers, *supra* note 40, at 18; Lane, Equity, *supra* note 10, at 296 and n.74; cf. Report on Volunteer Masters, N.Y., *supra* note 10, at 15–16. In one case, after some three years of discovery disputes, the court dismissed a master who had been appointed by agreement of the parties. The court felt that allowing the case to continue before the master would result in the parties' misuse and exploitation of the special master process. See *Xerox Corp. v. IBM Corp.*, 75 F.R.D. 668 (S.D.N.Y. 1977).

131. See Kaufman, Masters, *supra* note 10, at 464, 466, 468, & n.77; Marsh, *supra* note 11, at 403–5; *United States v. AT&T*, 461 F. Supp. at 1320 n.15, 1348–49. But see *Omnium Lyonnais D'Etancheite et Revetement Asphalte v. Dow Chem. Co.*, 73 F.R.D. 114, 119–20 (C.D. Cal. 1977).

132. Cf. Report on Volunteer Masters, N.Y., *supra* note 10, at 15–17. But see McKinstry, *supra* note 11, at 226–27, and note 137 *infra*.

pointed out almost 25 years ago, want of that power can make it difficult for a master to set effective limits on the scope of discovery.¹³³

In combination, these factors can make a judge substantially more intimidating than a master. They also encourage parties and attorneys to feel greater confidence in actions taken by a court than in those taken by a private attorney who is assisting the court on an ad hoc basis. And counsel might feel a greater temptation to try to take advantage of a master and a greater need to test a master's mettle and sophistication. In short, the involvement of a master could encourage the lawyers to believe there was more room for gaming and could invite them to spend more time probing the outer limits of the restraints on their behavior.

Special masters could compound such discipline problems through the ways they define and act out their roles. For example, a master whose image of his or her role revolves around arbitration and negotiation might become more concerned about preserving the lawyers' and the parties' good will (toward him or her) than about expediting case development. A master with such priorities might find it difficult to be firm with misbehavior or sloppiness and might be too prepared to accept excuses for nonperformance, too willing to take extraneous matters into account, or too timid to check unwarranted or duplicative discovery probes.

Nor is the master's conception of his or her role the only possible source of such difficulties. Critics of the use of masters, concerned that lawyer appointees might regularly lack a judicial temperament and be unable to assume a judicial perspective, emphasize that except when drawn from the ranks of retired judges, most masters will have had no adjudicatory experience whatsoever. The absence of such experience, argue the critics, will make it virtually impossible to predict how lawyer appointees will behave as masters. The critics also contend that lack of judicial experience will make a substantial percentage of the attorneys who serve as special masters uncomfortable with their responsibility and inept at managing their authority. Unfamiliarity with the judicial role coupled with fear of being "appealed" to the trial court and embarrassed by reversals could lead masters into indecisiveness and a counterproductive laxity. One of the lawyers we interviewed who had substantial experience as a master admitted that he had found it difficult to play the part of the disciplinarian and that it took pronounced misbehavior by counsel to move him even to threaten sanctions more serious than tongue lashings.¹³⁴ The same attorney suggested another factor that might make a master hesitant to exercise a firm, restraining authority: litigators serving as masters

133. Kaufman, *Masters*, *supra* note 10, at 468.

134. Cf. McKinstry, *supra* note 11, at 227.

might be overly sympathetic with the pressures and problems that lead attorneys to take unreasonable positions or to bend the rules for the benefit of their clients. A master who is a professional litigator might be so steeped in the adversary tradition, might have absorbed its premises so thoroughly, that he or she might not be able to perceive behavior that offends the spirit of the discovery rules.¹³⁵ In other words, such a master may accept some lawyering practices as "natural" or "inevitable" features of the adversary system where the drafters of the discovery rules and most federal judges would condemn them.

Laxity, of course, is not the only possible product of a lack of judicial temperament and experience. Attorneys appointed to serve as masters could react to their responsibilities in the opposite mode: by making premature or arbitrary rulings or by resorting to highhanded pressure on counsel or litigants to move the case along. A master without experience on the bench could react with aggression to the aggressiveness of the litigants—permitting emotionality to produce intolerance or counterproductive inflexibility. The most likely products of such intemperance are resistance to the master's suggestions and appeals of his or her orders. A master whose behavior provokes significant resistance and numerous appeals obviously would have defeated one of the primary reasons for his or her existence.

As the preceding paragraphs suggest, the risk that a master will not be able to maintain effective and fair case control is real. There are measures a court can take, however, that will improve the likelihood that a master it appoints will be able to cope effectively with the pressures and tests from counsel and parties. The first such step should be taken during the appointment process itself. A master who enjoys the respect and confidence of counsel from the outset will be challenged less often and will be better able to encourage cooperation than will a comparably equipped master with whom the parties are initially unfamiliar. It follows that courts should try to appoint masters who will enter the case with substantial stature in the eyes of the participants. Thus, it is clear that a sensitive procedure for selecting the master is a very important part of a successful system. A selection procedure that ignores or flouts the wishes and suggestions of the parties needlessly risks the alienation of the master even before work begins. By contrast, a selection procedure that encourages counsel to participate and attempts to accommodate their views can create an environment of hospitality for the master that could measurably improve his or her effectiveness. Many of the lawyers we interviewed share the belief that the single most important factor affecting the success

135. Cf. *id.*

of a master is the quality of the person appointed; many also believe that counsels' perception and appreciation of that quality can be significantly affected by how the master is selected.

What procedures have federal courts used for selecting special masters? The simplest, but also the least constructive, method is for the judge to pick a lawyer in whom he or she has confidence and to refer the matter to him or her without consulting anyone else. One litigator we interviewed described a case in which this streamlined procedure had very unhappy results. On its own initiative and without any discussion of the matter with affected parties, the court ordered extensive discovery matters referred to a retired judge with whom the court apparently enjoyed a close friendship. Unfortunately, the lawyers involved in the case did not respect the retired judge, who was in his late seventies and, according to our respondent, both physically and mentally infirm. That infirmity expressed itself early in excessive tolerance of protracted argumentation by counsel, indecisiveness, and erratic rulings. This behavior deepened counsel's disrespect and invited efforts to take advantage of the master's weakness. The result was a bog of acrimony. The master lost meaningful control over counsel or case development, and since the referring court refused to intervene, the case languished for a substantial period.

The same lawyer who recounted this unfortunate experience was involved in another large case where the master had instead played a positive role. Here, the process for choosing the master virtually assured his positive reception by the participants. The trial court permitted the litigants to exchange names of attorneys who would be acceptable candidates for the master's post. As a result of exchanges and discussions, the parties were able to agree on a first-choice candidate. They submitted his name to the judge, who reviewed the nominee's qualifications and interviewed him. Satisfied that the parties had made a wise selection, the judge confirmed the appointment. According to our respondent, the man was an experienced, well-regarded trial attorney whose service as master greatly expedited case development. If our interview data are reliable indicators, it seems fair to infer that of all the possible procedures for selecting special masters, the one just described is the most likely to result in a successful experience. That follows because confidence in the master by counsel and parties is so critical to a master's effectiveness.

Among other methods courts have used to select masters, perhaps the next most promising begins with the judge preparing a list of lawyers whom he or she considers qualified to act as master in a particular lawsuit. The court submits its list to the parties, who study the qualifications of those listed and interview the most likely prospects. Then the parties attempt to agree on a nominee. If the parties cannot agree within a period fixed by the judge, he or she selects the master from the original list.

To improve quality control and to increase party and lawyer acceptance of the masters who are appointed, local district courts probably should make some effort to regularize selection procedures. Standardized procedures that incorporate inputs from members of the local bar not only would reduce the risk of inappropriate appointments but also would help legitimize the master system in the eyes of practitioners. My suggestion is that each district court appoint a committee of judges, magistrates, and attorneys (the latter should have considerable experience in the appointing court) whose task would be to identify the qualifications special masters should have for various kinds of pretrial assignments. The committee also should recommend procedures for identifying local attorneys, law professors, and retired judges who could meet the qualifications and who would be interested in serving as a master in a large lawsuit. Working from the committee's recommendations, the court should attempt to establish panels of well-qualified potential masters. Different panels might be formed for different kinds of pretrial tasks and for different kinds of cases. Regardless of the structure of the panels, however, the screening process should be designed to assure those who use the lists (judges and litigants) that a disinterested committee of judges and lawyers evaluated the background and interviewed each of the persons deemed qualified to serve. The interviews are particularly important to determine judicial temperament. With the panels in place (and a procedure established to keep them current), when a situation arose that called for the services of a master courts could, with confidence, invite the parties to attempt to agree on a nominee from the appropriate list.

After the selection process, the order of reference is the next means a court can use to improve the odds that a master will be able to control the matters referred to him or her and not become a pawn in the litigators' tactical skirmishes. Whenever the master's work might be affected by the nature or scope of the issues presented in the lawsuit, the court's order of reference should attempt to identify those issues with as much specificity as possible. As I indicated earlier, confusion about what the issues are or imprecision in their formulation can significantly impair a master's ability to impose reasonable limits on discovery and to determine when responses to discovery requests are sufficient.

Of course, in some cases it will not be possible to formulate all the issues until the case is almost ready for trial. Courts should not use this as an excuse for not attempting to identify major issues on a general level or on a tentative basis. To survive a motion to dismiss, every lawsuit must have an "issue core" that the court should be able to articulate before discovery commences. I believe that an order of reference that begins with such an articulation is likely to be more effective than an order

whose silence about the issues leaves the master to grope for guidelines.

In addition to defining the relevant issues, the order of reference must precisely describe the tasks the master is to perform, the deadlines for completing those tasks, the scope of the master's authority to discipline, the procedure the litigants may use to seek review of his or her rulings, the standards the court will apply when rulings are appealed, and the system through which the master must make status reports to the court. Each of these elements is essential to an effective order of reference. Unfortunately, federal judges do not always address all of these matters in their orders. Some judges apparently have assumed, for example, that by identifying the tasks they have delegated, they have also specified the master's powers. That assumption is not always well made. For example, to decide whether particular responses to discovery requests are adequate, it might be necessary to decide whether the principal issues in an action embrace certain subissues. A complete order of reference should indicate whether the master has the authority to make such rulings, subject to a right of appeal to the trial judge, or whether the court retains that power exclusively.¹³⁶

As I suggested above, orders of reference often fail to address another set of authority issues that can even more directly affect a master's ability to bring a restraining influence to the discovery process. Those issues revolve around the master's capacity to impose sanctions for violations of discovery obligations.¹³⁷ Our data indicate that many orders of reference say nothing at all about the master's authority to discipline or about what steps a master should take if the parties fail to abide by his or her rulings or to participate in the proceedings he or she establishes. And in cases where some authority to sanction has been delegated or assumed, the scope of that authority often has been left unclear, as have the standards under which the trial court would review a sanction imposed by a master and appealed by a litigant or a lawyer.

The failure of federal trial courts to squarely confront these issues is understandable; neither Federal Rule 53 nor any federal statute offers reliable guidance on these matters.¹³⁸ In fact, it has not been firmly estab-

136. One district judge, in appointing a special master pursuant to Federal Rules of Civil Procedure 53, granted the master all powers allowed by Federal Rule 53, and all powers necessary to effectuate Federal Rules 26-37, and 45(a)-(d). *Omnium Lyonnaise D'Etancheite et Revetement Asphalte v. Dow Chem. Co.*, 73 F.R.D. 114 (C.D. Cal. 1977).

137. There are a few reported cases in which masters were authorized to impose or recommend sanctions; see, *Denton v. Mr. Swiss*, 564 F.2d 236 (8th Cir. 1977); *Chesa Int'l, Ltd. v. Fashion Assocs., Inc.*, 425 F. Supp. 234 (S.D.N.Y. 1977); *Fisher v. Harris, Upham & Co.*, 61 F.R.D. 447 (S.D.N.Y. 1973).

138. Fed. R. Civ. P. 53(c) describes a master's powers in the following general terms:

lished that a federal trial court has *any* authority to delegate to a master any of its power to impose sanctions.¹³⁹ In the next article in this series I will explore the sources of authority on which federal courts might draw in delegating some power to sanction to a master. At this point I think it is fair to assume that there is authority for *limited* delegations of this kind.

The existence of the authority, however, does not necessarily imply that it would be wise to exercise it. Since the larger question we are addressing here focuses on whether masters could effectively control the discovery dynamic, this is an appropriate juncture to explore some important policy issues. Would it be wise to involve masters to any extent in the sanctioning process? If so, should the master's role be confined to

(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

It is not at all clear that the language that declares that a master may have "the power to regulate all proceedings . . . before him and to . . . take all measures necessary . . . for the efficient performance of his duties" was intended to authorize delegation of the court's power to sanction.

Section (d)(2) of Federal Rule 53 describes consequences that can ensue for witnesses who fail, without adequate excuse, to appear or give evidence in proceedings before a master:

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

It is not likely that this provision contemplates anyone other than a judge wielding the powers described. The statute that governs proceedings before federal magistrates, who are public employees, makes it clear that magistrates are not empowered to find parties or litigants in contempt of court. See 28 U.S.C. 636(e) (1976). See also Advisory Committee on Civil Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Note to Proposed Rule 73(a) (June 1981) (cited hereafter as Advisory Committee, Proposed Amendments).

139. Cf. Report on Volunteer Masters, N.Y., *supra* note 10, at 16, where the Committee on Federal Courts reports being "dubious whether [authority to sanction] can or should be given to Volunteer [unpaid] Masters in the program. It is difficult, for example, to predict what sanctions would work or how they should be authorized. Even if a statute or local rule were to be proposed, it would not comport with the 'voluntary,' consensual nature of the program. Moreover, if a statute or local rule gave the Volunteer Master authority to impose sanctions in the absence of consent by the parties, it would also have to provide a hearing to confirm sanctions and thus would undermine one of the very purposes of the Volunteer Master program—helping the judge reduce his or her calendar workload." As I discuss in the text, at pp. 344, 347–50 *infra*, it is not clear that parties or counsel would routinely appeal sanctions imposed by masters, especially if the sanctions were confined to financially compensatory awards and the standard applied by the trial court in reviewing the awards was the "clearly erroneous or contrary to law" standard applicable to review of nondispositive discovery rulings by magistrates. See 28 U.S.C. 636(b)(1)(A) (1976). See also *Citicorp v. Interbank Card Ass'n*, 87 F.R.D. 43 (S.D.N.Y. 1980).

making recommendations, leaving authority to impose sanctions only to the judge? Or, if masters should have some power to impose compensatory awards or disciplinary measures, should that power be limited to certain kinds of sanctions? Or should masters have access to the full range of disciplinary options that are available to federal judges under Federal Rule 37? Should the answers to these questions vary with the kinds of tasks delegated to masters and the kinds of cases or parties involved?

Given the amount of concern that has been expressed about the difficulty masters might have in restraining adversarial excesses, I was surprised when Paul Rice questioned the need to give masters even limited powers to sanction. Two strands of thought underlie Rice's skepticism about the wisdom of conferring a power to sanction on special masters. One is his belief that a master who plays a managerial role effectively and who uses his or her relationship with the judge intelligently may have no need to resort to formal disciplinary action. According to Rice, lawyers and litigants have substantial incentives to avoid angering a master even when he or she has no independent disciplinary power. Parties know that a master to whom substantial pretrial responsibilities have been delegated will make many decisions that can significantly affect their fate in the lawsuit. The visibility of that power pressures litigants to moderate their conduct and to pursue a reasoned course in all contacts with the master. Rice also believes that litigants generally assume that the master's views carry substantial weight with the judge. That assumption inspires the parties to try to avoid provoking the master into requesting the court to initiate disciplinary proceedings. Rice also believes that when a master is perceived as having better access to the judge than the lawyers in the case have, the master often will be able to discourage misbehavior by persuading counsel that the judge would be angered by the conduct in question and would punish the offending party.

The second strand of thought that underlies Rice's skepticism about the wisdom of empowering masters to impose sanctions is based on his views about what kind of relationship between counsel and master is most likely to make the master's service successful. Rice believes that a master's capacity to make a significant contribution to the pretrial process may depend in large measure on the master's ability to get the lawyers *not* to relate to him or her as they relate to a judge. In this view, the dynamic between counsel and court too often is infected by apprehension, formalism, rigidity, and posturing, all of which can limit and distort communication and serve as obstacles to cooperation. Rice believes that a master's success will be, to a significant extent, a function of the master's capacity to develop the nonjudgmental aspects of the role and to build a special kind of relationship with the parties, a relationship that is com-

plex, fluid, and (to mix metaphors) fragile. A master can build this relationship around several attributes of personality and performance, some of which may be incompatible with a disciplinary role. For example, Rice contends that a master can make a major contribution by facilitating communication between the parties, lubricating their relationship, and encouraging constructive negotiations. To be fully effective in such work, the master must induce the lawyers and parties to communicate as openly and candidly with him or her as possible. The master must know a great deal about the parties' version of the facts and about where they might be willing to make compromises. Rice believes that two key prerequisites to maximizing the quality of communication from counsel to master are informality and trust. In his view, both might be jeopardized if the master had (and exercised) even limited authority to impose sanctions. The power to punish can instill fear, and fear is the enemy of confidence, candor, and informality.

Rice also believes that a master's success depends on the ability to play different roles in the same suit, the capacity to shift approaches or adapt his or her style to changes in circumstances, moods, and the personalities of the lawyers. On some occasions the master must be aggressively frank and firm, while on others diplomatic, flexible, and perhaps even supplicating. Thus, a successful master is something of an actor, able to assume such diverse roles as disinterested peer, concerned advisor, or scolding parent, depending on the needs of the situation. A master cannot change roles, however, if he or she has been typecast by the lawyers and parties. If counsel perceive the master as playing the heavy, they are not likely to accept him or her playing other parts.

Rice has worked as a master with considerable self-consciousness and has developed a subtle, well-rationalized theory about which attributes of personality and role equip masters to make unique contributions to the adjudicatory process. His insights deserve considerable attention and respect. Many litigators I interviewed, however, would argue that Rice exaggerates the fragility of the relationship between counsel and master. More specifically, many litigators believe that giving special masters a limited power to impose sanctions would not significantly affect the dynamic between counsel and master. In this view, counsel's attitudes are shaped primarily by two key perceptions: that a master has considerable power to determine the outcome of important discovery disputes and "has the ear" of the trial judge (i.e., can report misbehavior and possibly influence the court's attitude toward the lawyers and litigants).¹⁴⁰ The ad-

140. But see Report on Volunteer Masters, N.Y., *supra* note 10, at 15 n.10 where the Committee on Federal Courts expresses its strong opposition to "any practice by which the Volunteer Masters would report to the court on the progress or obstinacy of the litigants or the merits of the litigation,

dition of a limited power to sanction, according to these respondents, would not measurably affect how litigators would interact with the master and would not trigger all of the emotions and behavioral patterns litigators bring to their relations with a judge. In short, many of the lawyers with whom I spoke believe that a master's need for a limited power to sanction outweighs the risk that conferring such a power would damage his or her relationship with counsel and impair his or her effectiveness as a negotiator or arbitrator.

The key to this conclusion appears to be the assurance that the power to sanction would be limited. I have found almost no support for the idea that masters should be given authority to impose the kinds of sanctions that can affect a party's capacity to litigate the merits of a case.¹⁴¹ I should emphasize, however, that the objections I have heard to granting masters authority to impose potentially case-dispositive sanctions have not been based on how the possession of that kind of power might affect the master-counsel relationship. Rather, lawyers I interviewed simply are afraid of putting that much power in the hands of someone who is not a judge. They assume that there is a substantially greater risk of incompetence or abuse of power by a master than by a judge. That assumption, in turn, stems from the recognition that many masters will have had little or no experience wielding judicial power.

Because we have too little experience using special masters during the discovery stage to discount these fears and concerns, it seems to me that the wisest course would be to adopt rules or statutes that would explicitly confer on federal judges a discretionary power to delegate to masters only a carefully limited authority to impose sanctions. Presumably judges would not delegate such authority when they referred modest, discrete tasks to masters (e.g., when they ask a master to rule on assertions of privilege with respect to specified documents). By contrast, when judges refer broader responsibilities to masters, especially when they delegate the duty to supervise most aspects of discovery in a complex case, they probably should have the option of empowering the master to order a party or

without full notice to the parties." Since a master's reports about alleged misbehavior or about substantive issues could affect the court's thinking about more severe sanctions or about the merits of an action, fairness would seem to require that any such reports be in writing and delivered to all parties at the time they are submitted to the court. By contrast, a master should be free to report privately to the judge about mechanical and procedural matters, e.g., about how certain discovery events are being handled and what percentage of contemplated discovery has been completed.

141. Fed. R. Civ. P. 37(b), for example, empowers federal trial courts to order designated facts "established for the purposes of the action," or to limit a party's ability to introduce designated evidence, or to strike parts of pleadings, or to dismiss an entire action. There is one reported case in which a special master *recommended* in his final report, *inter alia*, that the complaint be dismissed for failure to make discovery. The district court adopted this recommendation, which was affirmed by the circuit court (the case was remanded on other grounds). *Denton v. Mr. Swiss*, 564 F.2d 236 (8th Cir. 1977). See also note 47 *supra*.

an attorney who breaches a discovery obligation to compensate other parties for the reasonable expenses incurred as a result of the breach. Most of the lawyers with whom I discussed the matter agreed that a special master with the authority to make such awards was more likely to be effective.

There also seemed to be a consensus that while litigants should be permitted to "appeal" the imposition of such a sanction to the trial court, the judge should be required to apply a standard of review that would incorporate a substantial presumption in favor of the master's decision. In this view, the rules should require the trial court to uphold the master's ruling unless the challenger could show that the findings of fact on which it was based were "clearly erroneous" or that the decision to sanction was contrary to law or constituted a clear abuse of discretion. Several lawyers suggested that imposing such a deferential (to the master) standard of review encourages parties and lawyers to take the master seriously and discourages them from routinely appealing the expense awards made. It is worth noting that such a standard would contribute to efficiency not only by reducing the frequency of appeals but also by reducing the amount of time required for each review. By contrast, a *de novo* determination would compel the trial judge to re-examine all of the evidence the master considered when making the initial ruling.

Under the system I recommend, if the master or a party believes that additional, more serious sanctions are necessary, the matter would be sent directly to the trial court. If appropriate, the judge could ask the master to testify about relevant facts (e.g., a master's instructions and parties' reactions), but normally the court would not ask the master to hold a hearing on the matter or to file a written report recommending a more serious sanction. The contents of such a report would be subject to challenge and a party should have a right to cross-examine the master about his or her version of the facts. Similarly, due process restraints might prevent a court from creating a presumption in favor of a master's recommendation that the court impose a sanction that would affect a party's ability to litigate the merits. If the judge could accord such a recommendation no special weight, its value would be questionable. Thus it would appear to be more efficient to require the trial court to take on directly the task of deciding whether to impose sanctions other than compensatory financial awards.

While delegating limited authority to impose sanctions probably would improve a master's ability to control discovery dynamics, our interview data suggest that trial courts could contribute more toward this end through other measures. Several of the lawyers we interviewed who had worked with masters reported that the single most important determinant

of a master's ability to exercise a restraining influence over the discovery process was the lawyers' perception that the judge had confidence in the master and was likely to uphold the master's decisions. A court could encourage that perception in several ways. One formal step might be to identify categories of decisions that the master will make and that the court would favor with a formal presumption if appealed. Neither Federal Rule 53 nor case law make clear what standard a court should use when reviewing a master's decisions about pretrial matters. Federal Rule 53(e)(2) indicates that a master's findings of fact at the *trial* stage in non-jury actions must be accepted by the court unless "clearly erroneous." Although this provision as currently structured would not appear to be applicable to most of the kinds of tasks a master would perform during the discovery stage, it does support the notion that it is permissible to create a presumption in favor of some kinds of decisions masters might make.¹⁴² Indeed, since findings of fact at the trial stage are likely to have a much more direct effect on litigants' substantive rights and obligations than are the vast majority of rulings made on discovery matters, it seems reasonable to infer from Federal Rule 53(e) that a federal judge would be on safe ground if, in nonjury actions, he or she reviewed most of a master's discovery rulings under a standard that imposed a substantial burden of persuasion on the challenger.

The situation is less clear in matters scheduled for trial by jury. Since in such actions the judge will not be the fact-finder, he or she has no fact-finding authority to delegate. Moreover, he or she has a special obligation to assure the parties that their rights to present their versions of the evidence to the jury are thoroughly protected. Given that special judicial responsibility, it is at least arguable that the court should decide *de novo* every pretrial dispute (that is appealed from a master's ruling) whose resolution could impair a party's ability to present evidence about material facts to the jury. Even in actions scheduled for jury trial, however, there will be many pretrial decisions by a master with no such effects. Decisions about the sequencing, timing, and mechanics of discovery events generally would fall in this category, as would decisions about the form of questions and about the timeliness of objections. Similarly, masters' rulings that certain documents or conversations were *not* protected by a privilege, or as trade secrets, often would not *impair* any party's ability to present evidence to a jury. Thus even in actions to be tried to a jury the court probably could announce that the master's rul-

142. 28 U.S.C. § 636(b)(1)(A) (1976) creates a presumption in favor of certain nondispositive pretrial rulings by United States magistrates. But since magistrates are *public* employees, one cannot simply assume that because a power may be delegated to a magistrate it also may be delegated to a special master.

ings on these kinds of questions would be upheld unless the challenger could show they were clearly erroneous, contrary to law, or amounted to an abuse of discretion.

After the court decides which categories of decisions by the master it will favor with a presumption, it is important that it formally announce its decision and describe the categories in its order of reference. It also is important that the court remind counsel what standards are being applied whenever a ruling by the master is reviewed. Several of our respondents emphasized that a court's actions are taken more seriously than its words and that a judge could do considerable damage to a master's effectiveness by appearing to pay scant attention to the master's initial resolution of disputes or by routinely overruling the master's decisions. Of course, the court will have no choice if the master's rulings are clearly erroneous. Should a pattern of such errors develop, however, the wisest response probably would be to remove the master.

In addition to announcing a presumption in favor of specified kinds of decisions by the master, there are several other measures a trial court can take to encourage the most constructive perception of the relationship between the judge and the master. When the idea of ordering a reference is first broached, the court can indicate that it will appoint a master only if it has confidence in his or her expertise and temperament. The court can emphasize its view that it would make little sense to bring a master into a case without giving him or her substantial authority and assuming that most of his or her rulings will be respected. The judge also can use the process of selecting the master to foster the perception of support for his or her appointee. The more actively the court participates in the selection process, the more likely it is that counsel will believe that the master enjoys the court's confidence. Toward this end, the court should insist on interviewing and examining the background of any prospective master the parties nominate. After the master is appointed, the court can shore up his or her stature through an order of reference that describes not only the master's duties and powers, but also the system through which the master will keep the court apprised of developments. In particular, the order should announce the schedule for the master's informal, periodic progress reports to the court.¹⁴³

Another important tool for coordinating the pretrial management of a complex case and encouraging respect for the master is the joint status conference. According to federal magistrates and lawyers who have

143. To avoid the appearance of unfairness (and due process problems), the order should make it clear that the master will *not* report his or her perceptions of the merits of substantive claims; instead, the master's report will focus on how the case is progressing procedurally, how close it is to being ready for trial, etc.

served as masters, a judge can do a great deal for the appointee's clout with counsel by cohosting a status conference with the master immediately after ordering the reference. At such a conference the court can explain the master's role and can emphasize to counsel in person that the master's reports will keep the court apprised of developments and that the court expects the master's rulings to be worthy of respect. According to our respondents, such explicit statements by the court can help discourage any incipient instinct counsel might have to mount challenges to the master's decisions on a regular basis.

The measures described in the preceding paragraphs to shore up a master's ability to control the pretrial process also could help prevent the duplication of effort that critics insist is a major cause of delay when masters are involved in a lawsuit. According to some skeptics, to appoint a master is to pointlessly replace a unitary system of adjudication with two largely redundant systems.¹⁴⁴ The redundancy is said to have several dimensions. One is that two judicial officers (the master, then the judge) must learn the same information about the same cases and lawyers. Another is that the court must review and, in essence, remake a substantial percentage of the rulings initially made by the master. A third is that the lawyers (and, to a lesser extent, their clients) must regularly repeat before the judge the work (arguments, etc.) they did before the master.

If such thoroughgoing duplication of effort occurred with any regularity there would be little to commend the idea of using masters. Fortunately, there is little evidence that this specter accurately reflects what occurs when judges delegate pretrial tasks to masters. Nonetheless, the fear the specter provokes seems to be widespread. That fear, in turn, appears to be based on several assumptions about how lawyers and judges would behave if substantial pretrial responsibilities were referred to a master. To assess the magnitude of the potential duplication problem, we must identify and evaluate these assumptions.

Perhaps the most widely shared of these assumptions is that counsel will press the trial court to review a high percentage of a master's discovery rulings. Several thoughts inspire this prediction. One is that lawyers and litigants simply will not have confidence in the quality of a master's decisions and so will appeal to the supervising judge whenever they desire a different result. Some attorneys also assume that litigants often will appeal rulings by a special master simply to harass or impose economic pressure on opponents. In this view, to make any extra step available to litigants is to create opportunities for tactical leverage, opportuni-

144. Cf. Report on Volunteer Masters, N.Y., *supra* note 10, at 14-15.

ties on which wealthier or more desperate parties regularly will seek to capitalize.

Another reason one of our respondents cited for predicting frequent appeals is that in big cases, parties often will want rulings about important discovery disputes to have as much precedential weight as possible. Since more such weight accompanies an opinion by a judge than a ruling by a master (so the argument runs), litigants will routinely appeal consequential matters to the trial court. The incentives to press for review and decision by the judge could be especially strong when many closely related civil actions have been filed or are foreseen (e.g., in products liability or mass disaster cases) and when counsel know that particular discovery issues are likely to resurface in those other matters. In such situations counsel also may believe that favorable resolution of a significant discovery dispute in one court will create settlement leverage in the other actions. Another lawyer we interviewed suggested that litigants might be motivated to press for trial court review of a master's rulings by the desire to build a record to use as the basis for an appeal to a higher court after final judgment.

While it is undeniable that some combination of the considerations described in the preceding paragraphs *could* inspire parties to appeal discovery rulings by masters as a matter of course, we have seen no evidence that that theoretical possibility has occurred in fact. None of the lawyers, judges, or magistrates with whom we discussed the matter reported a single case in which a high percentage of a master's discovery decisions were appealed to the trial court. In fact, all of our respondents with relevant experience reported that appeals of discovery rulings by masters were unusual and had not significantly compromised the overall efficiency of the referencing system.¹⁴⁵ Our data, of course, are limited and certainly are insufficient to wholly dispel concern about the possibility of frequent appeals. At this point, however, the burden of persuasion appears to have shifted to those who fear the worst.

Moreover, there are measures a trial court could take to reduce the size of the pressures and incentives that, in theory, could move litigants to routinely seek review of a master's work. Because I have discussed most of these measures in some detail in other contexts, I need only mention them briefly here. The first is to take care that the master who is appointed is perceived by counsel as an expert of considerable stature. Litigators who respect a master's expertise and who perceive that the supervising judge shares that respect are less likely to challenge the master's

145. See also McKinstry, *supra* note 11, at 6; Marsh, *supra* note 11, at 411-12; Kaufman, Masters, *supra* note 10, at 467-68; Hazard & Rice, *supra* note 17, at 401-2 & n.50.

rulings. Second, a trial judge can host an initial status conference in which he or she expresses confidence in the master and indicates that he or she does not expect and will not look kindly on frequent challenges to the master's rulings. Third, the trial court can describe in the order of reference the categories of decisions by the master that will be favored with a presumption if they are appealed. After announcing these deferential standards, the court should be careful to follow them, especially when responding to the first appeal of a master's decision. Several of the litigators with whom we spoke emphasized that the way the court handles the first challenge to the master's work can have a significant effect on the level of lawyer acceptance of the master's role. A trial judge also can eliminate one incentive to appeal a master's rulings by permitting counsel to hire a court reporter to make a complete, official record of proceedings in which the master rules on discovery issues. Given this opportunity, parties would have no need to seek review of the master's decisions simply to make a record for use on appeal after a final judgment on the merits.

A district judge also has a combination of weapons to use if, in a given case, he or she believes that a lawyer is abusing the right to seek review of a master's rulings. For example, the court can sanction the offender¹⁴⁶ and can ask the appropriate disciplinary body to examine his or her behavior. While our data suggest that courts will rarely need to resort to such measures, a judge who is convinced that a party or lawyer is abusing the review mechanism by making essentially groundless appeals should impose an appropriate sanction. In such instances the court should at least compel the offender to reimburse opponents for the expenses they have incurred in responding to his or her appeals. If it appears that this kind of economic measure is unlikely to deter the misbehavior the court can consider the more severe sanctions authorized by Federal Rule 37.

Critics argue that frequent appeals would not be the only major source of the duplication of effort they believe would debilitate a system of referring responsibility for most discovery matters in big cases to special masters. As I suggested above, some critics also contend that trial courts will be forced to "replow" a substantial percentage of the informational ground the masters have worked while supervising discovery and resolving the disputes it provokes. In other words, this view assumes that the judge who will try the case eventually will have to learn most of what the

146. In addition to courts' inherent authority to control proceedings before them and the powers conferred by Fed. R. Civ. P. 37, courts can invoke 28 U.S.C.A. § 1927 (West Cum. Supp. 1982) as a source of authority to sanction. That statute reads: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

master would learn while fulfilling discovery responsibilities. A corollary to this position seems to be that managing the discovery process and resolving discovery disputes is a relatively efficient way for the judge who will host settlement negotiations and preside at trial to learn what he or she needs to know about the case.¹⁴⁷

Information from lawyers who have worked as or with masters suggests that these assumptions are misplaced. Our respondents contend that managing the discovery process is an extremely inefficient way for judges to learn a case and that much of what a master learns in the discovery trenches either turns out to be irrelevant information or minutiae of marginal importance. Several of the lawyers with whom we have discussed these matters insisted that discovery in complex cases involves a great deal of both blind and fruitless groping and that the percentage of significant information the process yields is very small. Lawyers also pointed out that the discovery process in big cases regularly involves a great deal of repetition: litigators often pursue the same kinds of information through slightly rephrased questions and through various discovery tools. They also repeat the same questions at different stages in the development of a protracted matter (e.g., just before the court closes discovery, counsel often repose many questions asked earlier in order to avoid missing information an opponent has not acquired until just before trial).

There are additional reasons why supervising case development and resolving discovery disputes are not efficient means for a judge to learn a case. The officer who manages the case development process often must perform time-consuming mechanical or managerial functions that teach the officer virtually nothing about the substantive aspects of the action. Fixing deadlines and helping counsel construct discovery schedules, for example, can be important parts of effective case management, but performing these tasks is at best an oblique way to learn a case. Similarly, many discovery disputes involve purely procedural matters or tactical jockeying (e.g., about the sequence in which experts will be deposed, or the proper form of questions)¹⁴⁸ or how much time a party should be given to respond to a demand for a large volume of documents. A judge generally can expect to learn little from deciding such questions.

There is one additional fact of complex litigation life that makes it difficult to argue persuasively that resolving discovery disputes is an efficient way for a judge to prepare to try a big case. While precise figures are not available, it is clear that a significant percentage of large cases are settled before trial.¹⁴⁹ Thus in many cases what the judge has learned

147. Cf. American College of Trial Lawyers, *supra* note 40, at 18.

148. Marsh, *supra* note 11, at 411.

149. See, e.g., Annual Report, *supra* note 102, at 196 & app. I, table C4.

about the matter during the discovery stage is wasted. Of course, judges might try to put what they learn during the pretrial period to good use by helping to orchestrate settlements. Unfortunately, I know of no evidence that supports the notion that judges regularly seek to capitalize on their knowledge in this way.¹⁵⁰ In fact, several judges I interviewed said that they were very reluctant to get involved in settlement negotiations in a case they were scheduled to try. They much preferred to import a judge (sometimes from another district) who had not been involved in the matter to host settlement discussions. If judges who are imported solely for this purpose can be effective, as several of the litigators and judges we interviewed believe, there is reason to doubt the notion that *only* the detailed involvement in a matter that accompanies full responsibility for the discovery stage can prepare a judge to make a meaningful contribution to settlement efforts.

Moreover, judges we interviewed who had delegated substantial responsibility for discovery matters to masters, magistrates, or referees believe that a well-conceived delegation system can significantly expedite the way the judge learns a case in preparation for trial or settlement negotiations. The principal source of this learning efficiency is the fact that the lawyers and the master initially explore, sift, weed, and organize the vast amount of data that are processed through the machinery of discovery in large cases. If the system works well, *the lawyers and the master jointly* discard the data that are irrelevant or of marginal value, then organize the information that is pertinent into a coherent, readily digestible form. And a judge who has conferred regularly, even if briefly, with the master as the case has developed will be in a good position to comprehend the core information about the case that is presented to him or her before a settlement conference or trial.

It would be disingenuous not to acknowledge that this system of selecting and packaging the data that reach the judge creates some risk that the judge will never see some evidence he or she would consider significant or that his or her perceptions of the issues will be skewed (i.e., different from what they would be if the judge delegated no responsibilities and participated thoroughly in the details of case development). The magnitude of that risk, however, is easy to exaggerate. In big cases, sophisticated adversaries will play major roles in painting the picture of the case that is presented to the master and to the judge. It seems reasonable to assume that in the vast majority of such litigation, the interaction be-

150. Cf. Steven Flanders *et al.*, Case Management and Court Management in United States District Courts, at 37-39 (Washington, D.C.: Federal Judicial Center, 1977), where the authors suggested that a significant expenditure of judicial resources in settlement negotiations might not repay the effort.

tween those adversaries will prevent any truly significant information from eluding the court. There also is no reason to assume that a carefully selected, mature master would not make every effort to be sure that everything that is pertinent is available to the judge in as unadulterated a form as possible.

Moreover, in assessing whether "data filtering" will distort the judge's perceptions, it is important to keep alternatives clearly in mind. In a perfect world the alternative would consist of the judge playing the full managerial role and supervising the details of the process of generating and sifting the data. In our imperfect world, however, often the alternative to using a master is a system in which the judge exercises little influence over the pretrial process, remaining remote and largely ignorant of the details of the developing action. Moreover, in this alternative the data *also* are filtered and packaged; the principal difference is that the filtering and packaging tasks are performed entirely by counsel, free from the balancing and expediting influence of a knowledgeable neutral participant. When this scenario represents the alternative, it seems almost silly to object to appointing a master on the ground that he or she will impair the judge's vision of reality by helping the lawyers organize and focus the relevant data.

C. Abdication of the Judicial Function

The fear that referring discovery matters to a special master will significantly interfere with a trial court's ability to learn a case plays a major role in another traditional criticism of the use of masters. That criticism, which embraces several related concerns, is articulated through the ominous phrase "abdication of the judicial function." The notion that a judge could "abdicate" his function by appointing a master was developed as part of an assault on the practice of referring *trials*, or significant parts of trials, to special masters.¹⁵¹ Appreciation of the important, indeed the often critical, role that discovery can play in the resolution of complex civil actions, however, has led at least one judge we interviewed to the conclusion that the risk of abdication is almost as great when the reference occurs during the pretrial period.¹⁵² The basic premise underlying this view is simply stated but less simply understood. The premise is that the "judicial function" is indivisible.¹⁵³ I am not aware of any effort

151. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957); Comment, *supra* note 10, at 793-94.

152. Also see *Wilver v. Fisher*, 387 F.2d 66 (10th Cir. 1967). The appellate court felt that reference by the trial court to a special master to supervise answers to interrogatories was inappropriate. "The order of reference here borders on an abdication of the judicial function and is not justified by the record." *Id.* at 69.

153. See *Puro et al.*, *supra* note 10, at 445.

by people who subscribe to this theory to define the phrase “judicial function.” There have been efforts, however, to flesh out, at least on a general level, the notion of “indivisibility” as it is used in this context. As paraphrased in a recent article about federal magistrates, the concept of indivisibility derives from the assumptions that a “case is shaped so critically at pretrial that the trial judge greatly alters his own role when he gives up the pretrial function.”¹⁵⁴

It is clear that most big cases are “critically shaped” during the pretrial period. It is not clear, however, that in delegating responsibility for most discovery matters to a master a judge would be giving up “the pretrial function” or “greatly altering” his or her overall role. It is indisputable that delegating discovery tasks to a master reduces a judge’s direct contact with counsel and parties during the developmental stage of a case. Such delegations also reduce the court’s knowledge of evidentiary and situational details. The important and by no means self-answering questions remain: is this reduced contact and reduced knowledge of detail likely to significantly compromise either the court’s ability to “shape” the case or the fairness and efficiency of the decision making for which the court will retain primary responsibility?

The argument that appointing a master compromises a court’s capacity to “shape” a case begins by assuming that judges both can and should play a major “shaping” role. These assumptions are not universally shared. Our data indicate that there are many “nonactivist” federal district court judges, that is, judges who leave virtually all of the case shaping to the lawyers. Some judges presumably remain inactive because pressures on their schedules leave them no alternative. Others simply may have nonassertive personalities. But there also are judges who do not try to exercise “control” over the pretrial development of civil actions because they believe it would be improper to do so. They subscribe to the philosophy of *litigant* control that underlies the current American version of the adversary system and informs many of the relevant Federal Rules of Civil Procedure.¹⁵⁵ While that philosophy is under fire from some quarters and might be changing,¹⁵⁶ it remains a major theoretical obstacle to judges taking charge of the “case-shaping” process. Thus, for one or more of several reasons, many federal judges simply will not play major roles in the pretrial shaping of civil lawsuits. For these judges, delegating responsibility for resolving discovery disputes to a special master would

154. *Id.*

155. See Brazil, Improving Judicial Controls, *supra* note 3, at 885–86.

156. Cf. Advisory Committee on Civil Rules, Proposed Amendments, *supra* note 138, Proposed Rule 16 and accompanying note.

represent no threat to whatever unexercised capacity to shape cases they might possess.

Another difficulty with the argument that referring discovery matters to a master would compromise the court's ability to shape the case arises from the imprecision of the concept of shaping. The term is not self-explanatory. What does shaping by a judge consist of, and how much of it can even activist judges expect to do? In our system, even the most assertive courts must rely primarily on counsel to generate the data that elucidate the real world events that gave rise to litigation. Judges also remain heavily dependent on counsel to identify the relevant law and the principal points of contention between the parties. In other words, the role imposed on the judge by the structure of our system is in many important respects essentially passive. For the most part, the court is cast in the role of recipient and respondent—it receives and attempts to respond to an information flow that has a pace, volume, and content largely fixed by lawyers.

Given these basic features of the system, what kind of shaping can even activist judges reasonably expect to accomplish? There appear to be two or three major aspects of the case development process that a court can realistically hope to influence in significant ways. One is timing. A court can fix deadlines and pressure the lawyers to move the case toward trial more quickly than they otherwise would.¹⁵⁷ A court also can help counsel identify and narrow the legal and factual issues that are at the center of a dispute. Finally, an assertive judge can restrain adversarial excesses and improve the order and discipline of the dynamic between counsel and parties.

These are important potential contributions. Recognizing their importance provokes several questions. Do litigants have a right to have these functions performed only by a judge?¹⁵⁸ If so, would the appointment of a master significantly compromise the court's ability to meet these responsibilities? If a litigant does not have a right to insist that *all* of these tasks be performed *exclusively* by a judge, is it significantly less likely that they will be performed adequately if the court delegates discovery tasks to a special master? Is it likely that a judge and master, sharing re-

157. Recent empirical studies support the view that courts can significantly affect the pace of case development by setting firm deadlines for the close of discovery and for trial. See, e.g., Larry L. Sipes *et al.*, *Managing to Reduce Delay* 37-38, 47-53 (Williamsburg, Va.: National Center for State Courts, 1980); Flanders *et al.*, *supra* note 150.

158. It is important to distinguish litigants' interests in having a judge perform nondispositive pre-trial functions from their interest in having a judge preside at trial. The federal magistrate's act makes it clear that, at least in Congress' view, litigants have no "right" to have a judge perform nondispositive pretrial functions. See 28 U.S.C. § 636(b)(1)(A) (1976). By contrast, "[l]itigants are entitled to a trial by the court, in every suit, save where exceptional circumstances are shown." *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F.2d 809, 815 (7th Cir. 1942).

sponsibility, would be less able to perform these functions than a judge working alone?

It is not necessary at this juncture to fully explore the question of whether a litigant has a right to have a judge fix the trial date, identify the major issues, and impose sanctions that affect a party's ability to litigate the merits. The reason we need not answer these questions is that referring front-line responsibility for discovery to a master need not impair the court's capacity to perform these tasks.¹⁵⁹ None of the judges or lawyers we interviewed who had worked on cases in which responsibility for discovery was delegated to a master or magistrate complained that the reference deprived the court of the information it needed to make fundamental, litigation-shaping decisions. Moreover, the appointment of a master does not "block" the lawyers' access to the judge.¹⁶⁰ And when counsel take an issue whose resolution could have a significant effect on the shape or disposition of a case to the judge, counsel can present their version of the relevant information through briefs and oral argument. While it might take a judge who has less contact with the details of a case a little longer to fully comprehend the data counsel offer, it does not follow that that judge will not have access to all the pertinent information or that his or her decisions will be less reliable than if he or she were constantly in the discovery trenches with counsel.

Some lawyers we interviewed pointed out that delegating discovery tasks to a master reduces the number of opportunities counsel have to try to "educate" the judge about the case.¹⁶¹ It is not altogether clear, however, that that consequence is negative. The goal of the system is to assure that the judge has sufficient information to make reliable decisions, *not* to maximize the number of opportunities counsel have to struggle over the court's sympathies and perceptions. Moreover, our interview data suggest that at least occasionally litigators intentionally enlarge discovery disputes because they want to use such disputes as vehicles to in-

159. But see American College of Trial Lawyers, *supra* note 40, at 18, where the authors simply declare, without supporting citation, data, or argument: "Perhaps the greatest danger caused by use of masters and magistrates in the conduct of discovery in complex litigation is that their use will prevent the trial judge from attaining a sufficient degree of familiarity with the case to enable him either to conduct the trial efficiently or to serve as an effective catalyst in bringing about a settlement." None of the judges we interviewed who had delegated substantial pretrial responsibilities to masters or magistrates reported any such difficulty. Even in the massive *United States v. AT&T*, 461 F. Supp. at 1347-49, the judge did not feel that the roles played by the masters and magistrates compromised his ability to preside at the trial. Nor did counsel in this matter report any such complaints.

160. But see Report on Volunteer Masters, N.Y., *supra* note 10, at 15, where the Committee on Federal Courts reports that many lawyers seemed to assume that the appointment of a master would restrict "their access to the court itself."

161. The Committee on Federal Courts reported that the lawyers who feared that the appointment of a volunteer master would restrict their access to the court "pointed out that good lawyers use the pre-trial conference to attempt to educate the judges on the merits of the case and to get reactions that are useful in determining future strategy." *Id.*

fluence the judge's attitude toward a case. If we assume that such enlargements are in substantial measure artificial and unnecessary, delegating front-line responsibility for most discovery matters to a master could expedite pretrial by reducing counsel's incentives to inflate discovery controversies in order to use them to pursue ulterior objectives.

I also should emphasize that it is not at all clear that the presence of a master reduces lawyers' ability to communicate their desires and views to the judge. While the appointment of a master may reduce modestly the amount of direct contact between counsel and the court, Rice argues that the net effect of the master can be to improve the parties' ability to effectively deliver their views to the judge. Rice reports that judges who have confidence in the master they have appointed may make themselves more accessible to that master than they would to counsel in a case where no master was involved. Moreover, a master can communicate with a judge in an informal, nonadversarial setting that encourages the judge to be more relaxed, perhaps more flexible and open-minded, perhaps willing to listen to more extended presentations. As important, a judge who trusts the master is less likely to view with a skeptical or hostile eye requests that originate in the parties but that the master presents and endorses. Many judges greet a request or proposal (e.g., to postpone the trial date) that comes directly from counsel with a deep-seated suspicion that it is inspired not by a perception of what would best serve case development but by the lawyers' laziness, bad scheduling, or pursuit of some tactical advantage.¹⁶² According to Rice, a judge is less likely to respond defensively if the same suggestion comes from a master. Thus, far from blocking their access to the court, a master can intercede with the judge on behalf of the litigants and thus can increase the likelihood that the court will listen sympathetically to their views and respond favorably to their needs.

One additional point should be emphasized in response to the fear that reducing the judge's contact with the details of the case will impair his or her ability to perform important pretrial tasks, such as hosting settlement negotiations and conducting the final pretrial conference. A judge who feels the need for more detailed information on such occasions, or for additional protection against obfuscation or manipulation by counsel, can ask the special master to attend. Through this simple device the court would have immediate access to the master's knowledge of detail and would be able to capitalize on whatever restraining influence might accompany such knowledge.

The possibility of compromising the court's ability to shape case devel-

162. Cf. Marvin E. Frankel's description of the dynamic between court and counsel in *Partisan Justice*, ch. 4, *The Adversary Judge* (New York: Hill & Wang, 1980).

opment is not the only concern that inspires the criticism of the use of masters that is articulated through the phrase "abdication of the judicial function." Another concern focuses on the possibility that judges might use the reference device simply to reduce their workload or to escape some of the responsibilities and pressures that inhere in judging.¹⁶³ One critic of the use of masters at the trial stage under the premerger equity rules feared that some judges would characterize a substantial percentage of their cases as "complex" in order to refer them to special masters.¹⁶⁴

These objections expose two different but closely related potential problems. One is the possibility that individual judges who are lazy or who cannot cope with the pressures of their jobs occasionally will appoint masters without sufficient justification. There is no way to eliminate this possibility. There is a way, however, to reduce the risk that this problem will grow: empower litigants to secure immediate appellate review of decisions by trial courts to delegate *substantial* pretrial responsibilities to masters. Unfortunately, recognizing such a right would create another risk: that litigants would abuse the right for tactical purposes (e.g., to delay case development). Thus two risks would be in tension. Because we do not have the data to determine the relative magnitude of these risks, we must resort to assumptions. I am prepared to assume that the risk of judicial abuse of the power to refer discovery matters to masters is smaller than the risk that attorneys often would appeal orders of reference if there were no deterrent to doing so. It follows from this assumption either that the right to interlocutory review of orders of reference should not be recognized or that some deterrent to its use should be fashioned. I prefer the latter course, at least until there is substantial evidence of abuse of the appellate process. The deterrent I propose is to establish a standard of appellate review of orders of reference that would favor the trial court's exercise of discretion with a substantial (but not insurmountable) presumption.

Occasional abuse of the power to order a reference is a substantially less serious potential problem than the specter of trial judges routinely delegating all responsibility for discovery in all big cases. That specter triggers several related concerns. One judge we interviewed, for example, said he would oppose efforts to make the delegation of discovery tasks to masters standard practice in big cases because he feared that adding a class of quasi-judicial officers to the adjudicatory system would bureaucratize it. This judge felt a vigorous, almost instinctive hostility to any proposal that would add a new layer of decision makers to the system.

163. Cf. *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957) (reference of entire proceedings, including trial itself).

164. Lane, *Twenty Years*, *supra* note 10, at 652 n.37.

He feared that such a change could only complicate and fragment an already awkward process of dispute resolution.

As I have tried to show, complication and fragmentation are not inevitable by-products of using masters. A judge who establishes good lines of communication with a well-qualified master can use him or her to streamline and rationalize a process that otherwise could remain formless and inefficient. This is not to say, however, that there is nothing to the fears of bureaucratization and fragmentation. Those fears easily could become realities if trial courts appointed masters without paying close attention to the selection process and without carefully coordinating the masters' roles. It seems to me that the risk of relatively thoughtless, inattentive, or undisciplined use of masters would increase if judges referred discovery matters routinely or simultaneously in several large lawsuits. It also is important to acknowledge that appointing masters to perform pretrial functions is a relatively new, underdeveloped practice. Substantial experimentation remains to be done before we will have identified the most effective procedures for controlling it. It makes little sense to encourage pell-mell deployment of a device that remains in a developmental stage.

More fundamental objections could be raised to a system in which judges *routinely* referred discovery in big cases to masters. Such a system would permanently remove the judiciary from the front lines of the pretrial process in major litigation. Thus removed, judges gradually would lose sight of the facts of life in the pretrial trenches. A judiciary that lost touch with the realities of the discovery stage in big cases would not be equipped to make fair and reliable rulings on appeals from decisions by masters or on important pretrial motions brought directly to the court. The courts' decisions would be reduced to wooden applications of abstract rules to poorly understood data. Remote judges also would become much more dependent on masters for guidance and, in turn, much more vulnerable to manipulation. In short, judges systematically removed from discovery in large lawsuits would lose their capacity to judge in that important arena. Losing touch with the realities of pretrial practice also would seriously compromise the judiciary's ability to perceive needs for change, to formulate intelligent reform proposals, and to evaluate suggestions from other sources. It follows that removing judges from the front lines in big cases would impair the system's capacity to adapt to changes in circumstances, perceptions, or values.

There is yet another reason why diverting most discovery matters to special masters could impair the system's capacity to generate new rules and procedures. Commentators have described two very different mind sets with which decision makers can approach dispute resolution. One focuses simply on solving presented problems by applying existing rules

to them. The second is more concerned with generating rules that will be applicable in many contexts and will help prevent additional disputes from erupting.¹⁶⁵ It seems reasonable to assume that most special masters will perceive themselves primarily in the former mold, as problem solvers, rather than in the latter mold, as rule makers. Masters are not likely to be given authority to create new rules and are not likely to assume that one of their responsibilities is to formulate new doctrine to guide other litigants in other lawsuits. In other words, most masters are not likely to perceive themselves as structural reformers. While it is not at all clear that most federal district court judges perceive themselves as rule makers, it does seem reasonable to assume that judges as a body are more likely than are special masters to feel that their role includes making creative procedural contributions. Thus another negative consequence of systematically referring responsibility for big case discovery to masters might well be to retard the process of law reform in this important area.

This parade of horrors leaves me convinced that it is imperative that individual judges retain responsibility for most aspects of discovery in *some* big cases. If the use of masters during the pretrial period becomes more widespread, some formal steps probably should be taken to reduce the likelihood that district judges would wholly abandon the discovery arena. If, as I recommend, a new federal rule is adopted to guide judges who refer discovery to special masters, the drafters should include an admonition that district courts may not escape all responsibility for discovery in big cases by ordering a reference in every major civil action.¹⁶⁶

The possibility of a wholesale judicial retreat from front-line responsibility for discovery in big cases points to another concern about the use of masters that is associated in the concept of "abdication of the judicial function." Some critics, focusing on the trial stage, have suggested that delegating judicial tasks to masters might reduce public confidence in the adjudicatory process.¹⁶⁷ Concern that using masters could erode public confidence in the system seems to be based on several related thoughts. One is that a master's work and behavior are likely to be less visible to the public than a judge's and, therefore, are more likely to provoke sus-

165. See, e.g., Note, *supra* note 110, at 1611-12, and authorities cited in nn.105-12. Hazard and Rice obviously combined both of the mind sets described in the text in their work as masters in the AT&T litigation. See Hazard & Rice, *supra* note 17, at 389-96, 416-18.

166. While *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957), makes it clear that Federal Rule 53 prohibits judges from routinely referring complex cases to masters for *trial*, some courts and commentators have taken the view that neither Federal Rule 53 nor *La Buy* prevent references of *pretrial* responsibilities in big cases. See *First Iowa Hydro Elec. Coop. v. Iowa-Illinois Gas Elec. Co.*, 245 F.2d 613 (8th Cir.), *cert. denied*, 355 U.S. 871 (1957); cf. Kaufman, Masters, *supra* note 10, at 465.

167. See *Adventures in Good Eating, Inc., v. Best Places to Eat, Inc.*, 131 F.2d 809, 815 (7th Cir. 1942); Comment, *supra* note 10, at 796 & n.112.

picion. This view assumes that most of the work judges and magistrates do takes place in open court and on the record, while masters function primarily in private offices and off the record. While there is some naiveté in this vision of the judicial role, and some exaggeration of the privacy that surrounds a master's work, the difference between the visibility of the two roles probably would remain great enough to cause the public to feel less informed about how masters behave. Public ignorance about how quasi-judicial officers function would not be healthy for the system.

The suspicion such ignorance could breed might be intensified by concern about the process used to select masters. While the public may not believe that it significantly influences the selection of judges, it might feel twice removed from and wholly powerless in the procedures used to appoint masters. That sense of distance and impotence, coupled with ignorance of how masters in fact were performing, could generate public concern about the competence and impartiality of masters as a group. Some might fear, for example, that masters were nothing more than minions of large corporations or the monied classes (those most able to afford a master's services) and that when performing their tasks masters would be more interested in accommodating the wealthy and the powerful than in safeguarding the public's interest in efficient and impartial enforcement of legal rules.

It is difficult to assess the potential magnitude of the threat to public confidence in the system that might accompany more extensive use of masters, but there are ways that threat could be reduced. One is to use masters primarily for routine discovery matters, avoiding their use as much as possible during trial and in conjunction with the court's handling of potentially dispositive pretrial matters. The bench and bar also could attempt to demystify the use of masters by publishing information about the roles they play, how they are selected, and how they are supervised by the judiciary. Toward the same end, courts could take steps to assure the public that full and presumptively open records were being kept of all consequential hearings and rulings by masters.

But perhaps the most important measure the courts could take to reduce the likelihood of losing the public's confidence in the use of masters would be to develop a sensitive set of criteria for identifying kinds of cases in which it would be presumptively inappropriate to delegate any significant part of the judiciary's responsibility. The notion that underlies this suggestion is that there are some kinds of cases in which the public interest is particularly acute and in which it is especially important that the public have full access to the proceedings and the greatest possible confidence in the expertise and impartiality of the judicial decision

maker.¹⁶⁸ While I am not equipped to identify all the kinds of cases that might belong in this category, I can offer a few examples. One is litigation that raises important issues about the scope of power under the constitution of any branch or level of government. It is particularly important that the public perceives that all significant aspects of such cases are handled directly by publicly appointed judges. Courts also probably should be reluctant to delegate substantial responsibility to a master in any case in which a public official is a party, even if the suit does not involve issues about the scope of governmental power. The use of masters in such cases might provoke suspicion in the public that the courts were offering governmental officers preferential treatment.

Of course, public interest in civil litigation can be intense even when questions about the scope of governmental power or the behavior of government officials are not involved. For example, the public might be especially interested in litigation between private parties that could affect the quality of the environment, the rates charged for utility services, or the structure of an important industry. Unfortunately, these often are the kinds of cases that are so complex or that require the processing of so much data that they would be particularly well suited for a master's services. Thus prohibiting the use of masters in all high-visibility litigation would substantially diminish the contribution masters could make to reducing pressures on judicial resources and expediting pretrial processes in big cases. The wisest course would appear to be to eschew any litmus test for identifying cases in which the courts should not delegate substantial pretrial responsibilities to special masters. In lieu of such a test, a new federal rule (or notes accompanying it) should identify factors trial courts should consider when deciding whether to order a reference. Such factors could include (1) whether the action is likely to involve unusually difficult or consequential issues about the adjudicatory process (either in the pretrial stage or thereafter), (2) whether the suit involves important issues about governmental power or behavior, fundamental constitutional rights, or other politically sensitive matters, (3) whether governmental officers or agencies are named parties or will play visible roles in the litigation, (4) how much publicity the events or circumstances leading to the lawsuit have received, (5) how much publicity the litigation itself has received or is likely to receive, and (6) how many people are likely to be affected in significant ways by the outcome of the suit.

In deciding whether to assign some discovery responsibilities to a master in cases in which the public interest might be substantial, trial courts also should consider whether the public is likely to have different levels of

168. Comment, *supra* note 10, at 796 & n.112.

sensitivity about different types of pretrial tasks that could be delegated. It seems probable, for example, that in any given case the public would be more concerned about a delegation of responsibility to supervise the entire discovery process than about a court asking a master to perform a carefully limited task like reviewing the propriety of specific interrogatories or the sufficiency of the responses to certain discovery requests. Similarly, in some situations the public might care very little about the sequencing of depositions or the mechanics of a document production but be quite sensitive about how privilege disputes are resolved, especially if the government claims to be asserting privileges on the public's behalf.

Finally, a court weighing the pros and cons of appointing a master in a high-visibility case also should consider whether the pool of people available to serve as masters includes someone in whom the public might have an unusually high level of confidence with respect to the tasks to be performed and the kind of lawsuit involved. Recall, for example, the public interest case I described earlier in which the court referred significant pretrial responsibilities to a former governor who enjoyed great respect, both politically and as a litigator, from all of the parties to a very intense dispute. On a less dramatic level, retired judges serving as special masters probably would inspire greater public confidence than would practitioners who have had no experience on the bench. If the tasks to be delegated require resolution of especially esoteric issues or substantial research into thorny theoretical matters, the public might feel most comfortable with the appointment of a well-established law professor. The point, of course, is that the trial court might be able to significantly reduce possible public confidence problems by carefully selecting the tasks to be referred and by appointing a master the public will perceive as well qualified for the assignment.

D. Limits on the Pool of People Qualified to Serve

There are many factors that fix the size of the pool of qualified people who are available to serve as masters. These factors cover a wide range, from mechanical difficulties in accommodating schedules, to the subtle problems of detecting conflicts of interest.¹⁶⁹ As the ensuing discussion will suggest, the net effect of these factors in many situations may be to leave parties and judges unable to find a person to perform the master's function. I should emphasize at the outset, however, that there may be a direct relationship between the formidability of the obstacles to finding a person qualified and willing to serve and the magnitude of the proposed

169. Cf. *Morgan v. Kerrigan*, 530 F.2d 401 (1st Cir. 1976) (masters appointed to assist in implementation of decree challenged on grounds of bias).

assignment. For reasons that will become clear, courts probably will have substantially less difficulty locating and enlisting qualified people for limited, carefully tailored assignments (e.g., ruling on privilege questions or monitoring a document production), than for delegations of broad pretrial responsibilities. The unfortunate irony is that masters with broad responsibilities are likely to make the greatest contributions to improving the discovery process in big cases.

At the most practical level, the pool of potential masters is limited by competing demands for the time of the qualified people. This factor presumably is least significant with respect to retired judges, but for active litigators and law professors it can represent a serious obstacle. Since a lawyer cannot foresee any given appointment as a master, he or she cannot incorporate into his or her schedule such an assignment in advance. Instead, litigators must fill their schedules with commitments to cases for paying clients. In fact, litigators are notorious for overcommitting themselves, in part because they expect the flow of work to be uneven and in part because they have substantially less than complete control over the pace at which individual matters move toward settlement or trial. While these inconstancies in a litigator's work occasionally open unanticipated holes in their schedules, economic pressure will move counsel to try to fill the gaps as soon as they become visible. The upshot is that the odds may be slim that at any given time a highly regarded litigator will have sufficient slack or flexibility in his or her schedule to permit acceptance of an unanticipated call to service as a master. Those odds presumably get worse as the scope and duration of the contemplated assignment increase. To lubricate, coordinate, and help control most aspects of discovery in a complex case is likely to require a substantial commitment of time over a substantial period. At any given moment in any given geographic area there are not likely to be large numbers of sophisticated litigators who are capable of making and honoring that kind of commitment. This fact makes it especially important that judges advise every prospective master about the time demands that a proposed reference is likely to make and emphasize that the appointee's duties as master would have to take precedence over any other matters. Courts also should assess the candidate's other commitments to be sure that they will not prevent effective service.

While the prerequisites of time and willingness to serve undoubtedly will reduce the pool of potential masters significantly, other qualifications might eliminate even greater numbers of lawyers. As I suggested earlier, the effectiveness of a master to whom more than a limited and technical task is referred is likely to depend on that master's esteem in the eyes of opposing counsel, expertise in substantive law and in the practical aspects of discovery, integrity, and temperament. Finding litigators, law

professors, or retired judges who have the specialized experience and personal attributes required to effectively play this role could be a difficult task. That difficulty will be compounded by an additional factor judges should take into account when searching for people to serve. It is obvious that if a master is to enjoy the confidence and cooperation of the litigants, he or she must be perceived as impartial and open-minded. There is a subtle potential threat to that perception when a master is drawn from the ranks of practitioners. Some of our respondents have expressed considerable skepticism about the ability of a litigator to shed the influences of his or her practice and adopt a wholly detached perspective. According to these respondents, the parties and lawyers served by a master are likely to assume that he or she carries, as inescapable baggage, whatever ideas and inclinations about substantive law and pretrial practice he or she has acquired through experience.¹⁷⁰

To reduce the damage that assumption might do to a master's effectiveness, judges should not order references to practitioners whom the litigants identify with strong biases or preformed views about relevant substantive or procedural matters. Judges should be reluctant, for example, to appoint an attorney whose practice has been dominated by one type of client (e.g., insurance companies) or who works almost exclusively for plaintiffs or for defendants. Practitioners with such backgrounds are likely to be identified with certain camps in the politics of litigation. Other lawyers are likely to ascribe to them biases about such issues as the breadth of permissible discovery and the scope of privilege doctrine. For example, of a litigator who typically represented defendants was appointed master, the plaintiff might fear that the master would unjustifiably assume that his or her discovery probes were unwarranted, overbroad, or designed primarily to harass. Similarly, if a practitioner identified primarily with plaintiffs' work were appointed, the defendant might fear that the master would skew his or her rulings in favor of fishing expeditions. Because such suspicions of bias could both provoke resistance

170. Judge Charles E. Clark expressed a similar concern some 25 years ago in the following words:

Finally there is the very important point of bias. Here I do not mean anything so crude as some undue favoritism to individuals. I mean something much deeper and more subtle, a frame of mind or perhaps even a social attitude or way of thought and life. When a lawyer becomes a judge he must and will do everything he can to disabuse himself of his predispositions and to become as fair as he can force himself to be. But how can a lawyer be expected to change his entire mental habits and convictions only for the hours or days of each adjourned hearing? Take an admiralty lawyer on ship valuations against his perpetual opponent, the government, or a company lawyer dealing with an alleged improper labor practice; it is no proper criticism of either their loyalty or good faith to say that they cannot have—or at least cannot be thought to have—the impartiality of a judge. That is why we give the judge the security of life tenure which the ad hoc master cannot have. But are not the parties entitled to the best endeavors of the public magistrates whose job in life it is to render impartial judgments and deserving of not being relegated to the services of a lawyer who, however high grade, has the real job in life of representing distinguished private clients?

Clark, *supra* note 11, at 570.

to a master's rulings and threaten public confidence in the system, judges should not appoint a practitioner to serve as a master unless his or her professional experience is sufficiently balanced and broad to inspire confidence that he or she can appreciate the perspectives of both sides.¹⁷¹

Unfortunately, there may be some tension between the desirability of a master having a well-balanced litigation background and one of the other attributes that appears to be an important premise for effective service as a master—specialized expertise. In acquiring expertise in a given area of litigation, many attorneys (from necessity or simply from situational momentum) may work primarily for one type of client or from one side of lawsuits.¹⁷² If that is the case, insisting that every master both have a balanced background and be a well-regarded specialist could dramatically reduce the pool of people qualified for appointment. Of course, many judges could not satisfy such demanding standards, and some flexibility may be required if the use of masters is to grow at all. It is important to bear in mind, however, that it is precisely because masters are not judges that the qualifications for these positions must be kept high. As the United States Court of Appeals for the Ninth Circuit observed in a related context, “a rational presumption against bias is far less strong in the case of an ad hoc master than in the case of a judge under tenure.”¹⁷³

The requirements of avoiding conflicts of interest and the appearance of impropriety also could reduce significantly the pool of potential masters for any given big case. As the United States Court of Appeals for the Fifth Circuit pointed out in *CAB v. Carefree Travel, Inc.*, “the appointment of masters who were practicing members of the bar raised serious problems of conflict of interest.”¹⁷⁴ Such problems could be sizable even if a master were not subject to the stringent ethical constraints imposed on judges. As noted above, however, it is arguable that those constraints apply even to a master to whom only discovery matters have been referred. The Code of Judicial Conduct for United States Judges declares that a “special master . . . is a judge for the purpose of this Code” and must comply with all but a specified, small number of its provisions.¹⁷⁵

171. Cf. *Maurice A. Garbell, Inc. v. Boeing Co.*, 385 F. Supp. 1 (C.D. Cal. 1973) (plaintiff objected to appointment of lawyer as special master, and discovery problems continued despite the master's presence).

172. Cf. John P. Heinz & Edward O. Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 Mich. L. Rev. 1111 (1978); Edward O. Laumann & John P. Heinz, *The Organization of Lawyers' Work: Size, Intensity, and Co-Practice of the Fields of Law*, 1979 A.B.F. Res. J. 217.

173. *United States v. Lewis*, 308 F.2d 453, 457 (9th Cir. 1962) (despite its characterization of the weight of the presumption against bias, the court held that two commissioners did not have to be disqualified even though they had been associated in the past with the experts who were testifying before them).

174. 513 F.2d 375, 380 (5th Cir. 1975).

175. Code, *supra* note 61, Compliance with the Code of Judicial Conduct, at 286.

The restraints the Code imposes prohibit a master from serving if he has "personal knowledge of disputed evidentiary facts,"¹⁷⁶ if he or someone with whom he practiced has "served as lawyer in the matter,"¹⁷⁷ if he has a financial or "any other" interest that could be substantially affected by the outcome of the action,¹⁷⁸ or if for any other reason his "impartiality might reasonably be questioned."¹⁷⁹ Presumably it would be "reasonable" to question the impartiality of a master if he or his law firm had a business relationship with any of the parties to the action in which he served as master. Similarly, an appearance of impropriety might be created if a master was involved as a litigator in another action where a lawyer who appeared before him in his capacity as master also was involved.¹⁸⁰

Conflicts of interest based on relations with parties or lawyers in other suits or contexts might arise with considerable frequency when masters are sought for cases in highly specialized subfields of complex litigation (e.g., patent or trademark matters, bankruptcy, admiralty, labor, or environmental law). Lawyers we interviewed suggested that the relatively small number of litigators in such specialized fields tend to encounter one another repeatedly in different actions and often form close personal friendships.¹⁸¹ If this is true, it might be difficult to find lawyers with specialized expertise who also would be (and appear) impartial. And while one means of reducing the likelihood of creating the appearance of impropriety is to draw more heavily on the ranks of law professors and retired judges, the cost of that alternative often would be a master with less sophistication about either the subtleties of pretrial maneuvering or the fine points of the relevant substantive law.

The Code of Judicial Conduct contains additional provisions which, if aggressively enforced, would further reduce the pool of potential masters. Even if applicable only during a lawyer's tenure as a master, some of these provisions might be sufficiently disruptive or burdensome to discourage otherwise willing and qualified prospects from serving. For example, Canon 5B would prohibit a master from soliciting funds on behalf of educational, charitable, or civil organizations or from speaking at such an organization's fund-raising events.¹⁸² Canon 5C would restrict the circumstances under which a master or a master's family members could ac-

176. Code, *supra* note 61, Canon 3C.(1)(a).

177. *Id.* Canon 3C.(1)(b).

178. *Id.* Canon 3C.(1)(c).

179. *Id.* Canon 3C.(1).

180. But see Nathan, *supra* note 10, at 458, who observes that the Code does not squarely confront this issue and who seems unsure whether it would compel disqualification.

181. Brazil, Views, *supra* note 3, at 240-43.

182. Code, *supra* note 61, Canon 5B.(2).

cept gifts or loans.¹⁸³ And Canon 7 would prevent a master from playing any active role in politics or contributing to political causes or organizations.¹⁸⁴ Enforcing provisions such as these could make the price of serving as a master too high for many well-qualified people, especially since accepting responsibility for significant aspects of discovery in a big case represents a commitment over a substantial period of time. Prohibitions on involvement in civil or political matters seem especially counterproductive because often the people who could serve most effectively as masters are people who have acquired significant stature in their communities through public service.¹⁸⁵ Such considerations persuade me that courts should be reluctant to apply the Code's restrictions on extrajudicial activities to special masters.

The conflict of interest problem has one additional dimension that might work to reduce the pool of potential masters. That dimension involves the relationship between the lawyers who serve as masters and the judges who appoint them. There is some concern among practitioners and commentators that the relationship between a judge and a master who work together closely on a protracted matter might create doubts about the court's impartiality if the master were to appear as counsel in another lawsuit.¹⁸⁶ The fear is that parties or attorneys in the second action might suspect that the litigator who had been the master would have an edge with the judge for whom he or she had worked.

As Vincent Nathan has argued, the Code of Judicial Conduct can be read as implicitly approving the notion "that a lawyer/master may practice before the court that has appointed him to serve as master."¹⁸⁷ The Code invites this inference by first explicitly prohibiting part-time judges from practicing law in the court on which they serve and then, in the next paragraph, failing to mention any such restriction for judges *pro tempore*, the category into which the Code places special masters. Nathan concludes that this "absence of prohibitory language constitutes a clear expression of the intent of the drafters of the Code to exempt masters from restriction upon their entitlement to practice before the appointing court."¹⁸⁸

183. *Id.* Canon 5C.(4).

184. *Id.* Canon 7.

185. For an example of the potential problems in this area, see *Wood v. McEwen*, 644 F.2d 797 (9th Cir. 1981). A part-time U.S. magistrate was appointed as a special master to supervise discovery, following some two years of pretrial problems in an action alleging copyright infringement, antitrust violations, and defamation. The problems continued, and the matter was eventually dismissed with prejudice. Plaintiff's subsequent effort to set aside the dismissal was based in part on the contention that because the master was a member of a local chamber of commerce he suffered from conflict of interest. The circuit court affirmed the district court's dismissal of the action.

186. See Chapper & Nejelski, *supra* note 10, at 15.

187. Nathan, *supra* note 10, at 458.

188. *Id.*

I am not confident, however, that when the drafters wrote the provisions of the Code that apply to a master they even thought about the close, interdependent relationship that could develop between court and master over a protracted pretrial period. The practice of delegating substantial responsibility for discovery matters to masters was not widespread when the Code was adopted.¹⁸⁹ Moreover, Federal Rule 53, which was in force when the Code was framed, seems to anticipate using masters only during or after trial and then only infrequently. Thus there is good reason to suspect that it simply did not occur to the drafters of the Code that close relationships between judges and masters could develop during the discovery stage of complex litigation. It seems to me that at least in some circumstances those relationships could create the appearance of impropriety and could serve as reasonable grounds for questioning a judge's impartiality.

One basis for this concern is that a master who confers often with a judge about a wide range of procedural and substantive matters is in a unique position to learn how the judge's mind works, what his or her views are about important but unsettled questions of law, and what his or her attitudes are toward different kinds of pretrial behavior (e.g., how tolerant he or she is of tactical maneuvering and how likely he or she is to impose sanctions for the first breach of a discovery obligation). Knowledge of this kind could give a litigator significant advantages over opponents. But even if a litigator during his or her tenure as a master acquires little useful information about a judge, the fact that his or her position as a master appears to create significant opportunities to do so could lead other lawyers to feel unfairly disadvantaged.

There are additional grounds for questioning a judge's impartiality when a lawyer he or she is supervising as a master appears before him or her as counsel of record in some unrelated matter. The fact that the judge appointed the lawyer to be a master, delegated important judicial work to him or her, and has permitted him or her to continue to serve over a substantial period, represents a significant expression of confidence by the judge in the lawyer's knowledge, judgment, and integrity. To the outside world that expression of confidence will appear even more emphatic if the judge regularly reviews the master's performance but rarely overrules the master's decisions. Moreover, it is not likely that such judicial confidence will be wholly a matter of appearances. A judge who delegates substantial power to a master and who perceives no major errors in the way the master wields that power is likely to develop a high level of

189. The Preface to the ABA's Code of Judicial Conduct indicates that the Code was drafted between 1969 and 1972. The Judicial Conference of the United States adopted most of the ABA's version of the Code in 1973. See note 61 *supra*.

trust in his or her appointee. That trust could be accompanied by a sense of dependency or indebtedness if the master is relieving a busy court of a significant amount of work in a case that threatens to continue for some time. More subtly, there might be some ego blur between a judge and the master he or she is supervising. Since the judge has appointed and approved the master and since the master is doing the judge's work, the judge might unconsciously identify with the master (i.e., in some measure view the master as an extension of his or her own personality). For all of these reasons, it is by no means inconceivable that a judge who is pleased with a lawyer's performance as a master in one case might lose some of his or her capacity to evaluate objectively that lawyer's performance in other cases.

Given these possible problems, it seems to me that some restraints should be imposed on a master's ability to appear as counsel in other matters assigned to the judge who is supervising his or her work as a master. The task of deciding how far such restraints should extend promises to be difficult, and a thorough effort to make that determination probably should await additional experimentation and data. At this point, however, a master to whom substantial responsibility has been delegated probably should be prohibited during his or her tenure as master from appearing as counsel before the judge who appointed him or her. When a master will work closely with a court over a long period, the court should consider extending that prohibition to all the lawyers in the firm with which the master is associated.

As the discussion in the preceding paragraphs suggests, there are many possible sources of conflicts and complications when masters are drawn from the ranks of local litigators. While such complications reduce the size of the pool of potential masters, there are steps courts can take to compensate at least in part for the losses. One is to aggressively seek qualified candidates among retired judges and law professors; presumably there is less likelihood—though no guarantee—that their service would be compromised by conflicts of interest. Unfortunately, it is not at all clear that these two groups include a sufficient number of people with the requisite combination of substantive law expertise and practical experience and sophistication. There remains one other place courts might turn for qualified people: the practicing bar in other cities or regions. Of course, enlisting the services of a lawyer from another geographic area would create some problems: the costs of travel and communication would be higher and it would be more difficult to arrange personal appearances before the master. These are not inconsequential considerations. In some situations they could result in unfair disadvantages for a party or impair the master's ability to monitor sensitive interchanges. In

other situations, however, the benefits of bringing in a lawyer from another city might clearly outweigh the costs. By turning to the bar of another city a court might find a lawyer not only who has greater professional stature and more of the requisite specialized expertise than is available in the local bar but also who is untainted by conflicts of interest and unlikely to have a case before the supervising judge.

E. Implications for the Adversary System

The most subtle and perhaps fundamental objections to extending the use and role of the special master in the pretrial period remain to be assayed. The ultimate target of the first of these objections is not the special master *per se*; rather, it is the more basic concept of external case management that the master could be used to implement. To state the matter succinctly, some lawyers and commentators believe that extending the influence of any judicial officer over significant aspects of the discovery process threatens to destroy the essential character of the adversary system.¹⁹⁰ In other words, some may fear that special masters will be used as instruments for transforming basic features of the established system and thus for attacking the values that system symbolizes and is presumed to promote. The intensity of this fear undoubtedly will vary with the breadth of the responsibility delegated to the master. A carefully limited assignment will provoke substantially less concern than will the kind of delegation that appears likely to contribute most to improving pretrial procedures, that is, a delegation of broad managerial authority and supervisory responsibility.

The vision of the adjudicatory process that is the basis of some of the hostility to external case management emphasizes the importance of attorney control. On a general level, the theory behind this vision is that the system functions best when the parties and their counsel are left free to set the basic terms of case development. That freedom enables the litigants to identify needs and to fix priorities by whatever standards they choose. It also permits economic forces to influence behavior and outcome naturally, undistorted by artificial restraints. The advocates of this vision assume that a free enterprise structure encourages the diligent and the skilled by properly rewarding them and that it discourages the lazy and the inept by denying them success. Proponents of these views reject external controls on the ground that such controls introduce a debilitating and wasteful artificiality into the process.

Could the introduction of a special master during the discovery stage

190. Cf. E. Donald Elliott, Statement Before the Standing Committee on Rules of Practice and Procedure, Washington, D.C. (Oct. 16, 1981) (this provocative and thoughtful essay is available from Professor Elliott, Yale Law School).

change the “free form” model of the pretrial system? The answer clearly is yes. A master with an assertive personality and broad authority to manage and monitor the discovery process could exercise considerable influence over its character. There are, for example, many potentially significant ways in which a master could reduce the scope of the pretrial freedom attorneys and parties might otherwise enjoy. A master could control the sequencing and timing of various discovery events, fix deadlines for responding to specific discovery probes and for completing major portions of an overall discovery plan, and speed the pace of case development by attending important discovery events, being readily available for consultation, and issuing orders resolving discovery fights on the spot or within a few days.

On a more structural level, a court might use a master to implement a scheme of discovery orchestration that limited the subject areas the parties could explore at various stages in the case development process. A court might use a special master, for example, to help identify the “core” areas of a dispute, then to target and confine initial discovery activity to those areas.¹⁹¹ As part of the same orchestration scheme, a court might charge the master with at least initial responsibility for determining when data generated by activity in the core areas justified extending discovery probes into additional spheres. A master also might be used to direct and closely supervise a stipulation procedure that would compel adversaries to exchange detailed narratives of key events and to describe the evidence that supported their versions.¹⁹²

The cumulative effect of any such extensive managerial intervention could be substantial. On the one hand it could considerably reduce room for adversarial maneuvering and the waste and friction such maneuvering can entail. It also could reduce counsel’s opportunities to take advantage of oversights and errors by opponents. By rationalizing the case development process a master not only could make it more efficient and less expensive but also could reduce the risk that significant data would remain undisclosed.¹⁹³

On the other hand, there is a risk that an aggressive external manager would distort the priorities the parties would ascribe to various aspects of the litigation. An aggressive judge or master might build into case preparation a momentum and pressure that would push the parties into efforts they otherwise would not make and propel the case beyond the point at

191. See Brazil, *Improving Judicial Controls*, *supra* note 3, at 909–10 & n.122; McKinstry, *supra* note 11, at 221–22.

192. See Hazard & Rice, *supra* note 17, at 405–10.

193. Our interview data suggest that this risk is large in big cases: about half of such matters are settled with at least one lawyer believing that his or her opponents have failed to discover something significant. Brazil, *Civil Discovery*, *supra* note 3, at 812.

which it would have been settled if left alone. Order imposed from without inevitably will be, to some degree, artificial—and artificiality might promote waste. An artificially imposed order also might damage the parties' incentives to pursue leads and to explore fully even the potentially most damning data. If a master's intervention substantially increases the likelihood that all the information uncovered privately by each side will be disclosed to the other, each party might slow or curtail its investigatory efforts in order to escape the feeling of giving too much aid to the enemy.

We do not have the data to assess the size of these risks. It probably would be a mistake to assume, however, that the level of risk involved in using a master is a constant that is beyond the court's power to influence. A court could structure a master's role to insure that the parties' inputs and initiatives would have considerable influence on the master's major decisions. The court, for example, could order a master to make no decisions about the sequencing of discovery events until after consulting with the parties and attempting to set priorities in accordance with their wishes. The court also could formally advise counsel to appeal to the judge if they felt the master was distorting the case or wasting their clients' resources. Given such an invitation, it is unlikely that experienced big case litigators would permit the master's management to become rigidly artificial.

Aggressive managerial intervention is not the only way, however, that a master might change the character of the adversary process in the pretrial period. Some proponents of the use of the special master argue that one of the most significant contributions he or she can make, at least when assigned relatively broad pretrial responsibilities, is to facilitate the communication and lubricate the interaction between adversaries. Taking this notion one step further, one of the masters we interviewed suggested that part of the master's responsibility is to pressure or cajole recalcitrant counsel into a cooperative posture. According to this respondent, a master can influence litigators by capitalizing on the personal feelings of trust, respect, and perhaps even affection that the lawyers develop for him or her over the course of a protracted period of close interaction and dependence.

This vision of a special master attempting to manipulate counsel into more cooperative behavior challenges fundamental assumptions about the role of a neutral and remote judiciary and could provoke hostile reactions from many members of the litigating bar. Such hostility would have at least two targets: the specter of "manipulation" by a quasi-judicial officer and fear of the implications of an aggressive insistence on "cooperation." The specter of being manipulated may be most threatening. Litiga-

tors understand that occasionally a judge will try to manipulate them psychologically, especially during settlement negotiations. Such judicial behavior is resented as an invasion of counsel's freedom and an abuse of judicial power, but it is not perceived as a serious threat to the adversary system because most judges most of the time are too far removed from things to engage in such efforts. By contrast, many litigators would perceive a serious threat to their autonomy and to the integrity of the system if a master were given considerable discretionary power, stayed close to the case over a protracted period, and attempted to use his or her influence to shape their attitudes and behavior to conform to his or her preferences. A master who used his or her power toward such ends might well be perceived as attempting to convert the adversary system into some version of its inquisitorial counterpart. That perception is not likely to win support for the notion that expanding the use of masters will improve the pretrial process in big cases.

As I indicated above, some litigators also would feel considerable discomfort at the prospect of a master pressuring them to be more "cooperative." Even though the federal rules of discovery have been interpreted as imposing on counsel a duty to cooperate,¹⁹⁴ our data indicate that many lawyers believe that they should adopt the "spirit of cooperation" only when it is in their client's best interests to do so. Many litigators firmly believe that their first loyalty must be to their client. For such lawyers, conflict between that fidelity and the spirit of cooperation must be resolved in favor of fidelity. It would follow for attorneys who subscribe to these views that pressure by a master to be more cooperative could threaten the essence of the adversary system.

At first blush, litigators' objections to pressure to be more cooperative would seem to warrant little sympathy. It is arguable, however, that only the thinnest of conceptual lines separates pressure to cooperate from pressure to compromise. And pressure to compromise seems to carry a greater threat to the viscera of the adversary system. The image of the adjudicatory system that underlies many litigators' emotions revolves around the concept of confrontation and the notion that the winner should take all. This vision of litigation assumes that there is a sharp contrast between adjudication and arbitration: the essence of litigation is contest, a headlong pursuit of conquest, whereas the essence of arbitration is perceived as compromise. Significantly, arbitration is viewed not only as fundamentally different but also as thoroughly inferior, a lower form. To lawyers with such views, pressure to compromise would threaten to convert litigation

194. See *Fisher v. Harris, Upham & Co., Inc.*, 61 F.R.D. 447, 449 (S.D.N.Y. 1973).

into arbitration, to replace pursuit of the spoils of victory with the banality of solution by committee.

Such images of the adjudicatory system, building on the theme of the medieval joust, may have little to do with reality. After all, a huge percentage of civil litigation is resolved by settlement, and discovery in most cases seems to include at least some element of give and take. The gap between image and reality, however, does not rob the image of emotional power. That image could inspire heated resistance to the idea that masters should use their powers in ways designed to promote compromise.

It seems to me that permitting a master to aggressively use his or her influence to manipulate or pressure lawyers or litigants into positions they otherwise would not adopt would represent a significant change in the adjudicatory system and would create significant opportunities for abuse of power. To reduce the likelihood that masters might misuse their power, courts should explicitly discuss with all appointees what kind of behavior is acceptable and what objectives the master is to pursue. Simply making a master self-conscious about the implications of his or her role and about the risk of unintentionally overstepping the bounds of judiciousness should help obviate some potential difficulties.

I should add immediately that I do not mean to suggest that masters should be rigidly bound to predetermined roles or that a master should behave only as a judge would under similar circumstances. One of the great promises of the master system is its capacity to adapt old methods and to develop new procedures for coping with the variety of complex problems that can arise during the pretrial stage of large lawsuits. What I do mean to suggest is that there are a few kinds of behavior that would cut so deeply into accepted limits on judicial intervention that they should be put off limits unless the parties freely consent to their use.

As the preceding discussion suggests, it would be naive and disingenuous not to concede that delegating significant responsibility for the discovery stage to a master could affect the character of pretrial adjudication. In conclusion it is important to emphasize, however, that the courts have considerable capacity to control the extent and the nature of a master's impact on the system. A judge who wants to minimize the effect a master might have on the character of the process can do so by attending carefully to the process by which the master is selected and by detailing the limits of the master's powers and responsibilities in a tightly drafted order of reference.