

Bringing Case Management to Complex Litigation — *The Manual for Complex Litigation (Third)*: A Tribute to Judge William W Schwarzer

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I am delighted to participate in this tribute to Judge William W Schwarzer. His retirement as Director of the Federal Judicial Center (FJC) is a loss for the federal judiciary as a whole, although I know that much will be heard from the judge as he continues an academic career at Hastings College of the Law and sits by designation as a member of the Ninth Circuit Court of Appeals.

I have been privileged to know and work with Judge Schwarzer prior to and during his tenure as Director of the Center. I first met Judge Schwarzer when he was a district judge in the Northern District of California, and I participated with him on several American Law Institute-American Bar Association continuing-legal-education seminars dealing with various aspects of civil litigation. After Judge Schwarzer became Director of the Center, I began, in my capacity as Associate Director of the Institute of Judicial Administration (IJA) at New York University School of Law, to work closely with the FJC on judicial education programs. All of us at the Institute — my colleagues Kenneth Starr (President of IJA) and Samuel Estreicher (Executive Director), and myself — benefitted from Judge Schwarzer's guidance as we planned various projects on behalf of the Institute, including research conferences on civil justice reform and class actions, and restructured the summer appellate judicial education programs. Finally, as an academic and civil procedure professor who teaches and writes about the courts, I have been and

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continue to be stimulated and influenced by the ideas and writings of Judge Schwarzer.

I mention my different contacts with Judge Schwarzer because they are representative of the wide influence he has had in all aspects of the profession. Judge Schwarzer has been an influential figure for practicing lawyers, both as an author of several leading practitioners' guides, such as the *California Practice Guide: Federal Civil Procedure Before Trial*¹ and *Civil Discovery and Mandatory Disclosure: A Guide to Efficient Practice*,² and as a judge who handles cases with efficiency, creativity, intellectual honesty, and attention to craft.³ Judge Schwarzer has also been a significant leader of the judiciary. Since both before and after his appointment to head the FJC, Judge Schwarzer has been at the forefront of important judicial reform efforts on such issues as sanctions,⁴ mandatory disclosure,⁵ summary judgment,⁶ scientific

¹ WILLIAM W SCHWARZER ET AL., CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL (1989).

² WILLIAM W SCHWARZER ET AL., CIVIL DISCOVERY AND MANDATORY DISCLOSURE: A GUIDE TO EFFICIENT PRACTICE (2d ed. 1994).

³ Judge Schwarzer's writings have drawn on his practical experience in handling cases. Some of the techniques he adopted in dealing with juries are reflected in William W Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731 (1981), and many of the management techniques and strategies he used in complex cases are advocated in WILLIAM W SCHWARZER, *MANAGING ANTI-TRUST AND OTHER COMPLEX LITIGATION* (1982), reviewed in Edward F. Sherman, *Restructuring the Trial Process in the Age of Complex Litigation*, 63 TEX. L. REV. 721 (1984).

Judge Schwarzer's published opinions, too numerous to mention here, reflect both his judicial philosophy and his craft. I note here, however, several decisions of Judge Schwarzer, as a district judge, that illustrate the careful research and thoughtful analysis that characterize his written opinions. See, e.g., *Salveson v. Western States Bankcard Assoc.*, 525 F. Supp. 566 (N.D. Cal. 1981), *aff'd in part and rev'd in part*, 731 F.2d 1423 (9th Cir. 1984) (providing textbook discussion of artful pleading doctrine, removal jurisdiction, and *res judicata*); *Meadows v. Dominican Republic*, 628 F. Supp. 599 (N.D. Cal. 1986), *aff'd* 817 F.2d 517 (1987), *cert. denied*, 484 U.S. 976 (analyzing Foreign Sovereign Immunities Act); *In re Consol. United States Atmospheric Testing Litig.*, 616 F. Supp. 759 (N.D. Cal. 1985), *aff'd*, 820 F.2d 982 (9th Cir. 1987), *cert. denied*, 405 U.S. 905 (1988) (upholding congressional power to limit remedies for radiation injuries to claims against United States under Federal Tort Claims Act).

⁴ See, e.g., William W Schwarzer, *Rule 11: Entering a New Era*, 28 LOY. L.A. L. REV. 7 (1994); William W Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013 (1988); William W Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181 (1985). Some of Judge Schwarzer's decisions on sanctions are discussed in Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1336-38 (1986).

⁵ See, e.g., William W Schwarzer, *In Defense of "Automatic Disclosure in Discovery"*, 27 GA.

evidence,⁷ fee-shifting,⁸ and multiparty litigation.⁹ In addition, he has played an important role in shaping the education of the judiciary as a whole.¹⁰

Judge Schwarzer's efforts reflect two basic values: a firm belief that good case management is critical for efficient litigation, and a pragmatic sense that empirical research based on the experience of judges is an important starting point for any judicial reform effort. Those themes come together in many of the Federal Judicial Center's studies and publications,¹¹ but never more so than in Judge Schwarzer's contribution to the revision of the *Manual for Complex Litigation (Manual)*. The *Manual*, first published in 1969 and last updated in 1985,¹² was in need of

L. REV. 655 (1993); William W Schwarzer, *Slaying the Monsters of Cost and Delay: Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178 (1991); see also Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393, 1426 n.169 (1994) (noting Judge Schwarzer's efforts to reform discovery practice).

⁶ See, e.g., William W Schwarzer & Alan Hirsch, *Summary Judgment After Eastman Kodak*, 45 HASTINGS L.J. 1 (1993); William W Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441 (1992); William W Schwarzer, *Summary Judgment and Case Management*, 56 ANTITRUST L.J. 213 (1987) [hereafter Schwarzer, *Case Management*]; William W Schwarzer, *Summary Judgment: A Proposed Revision of Rule 56*, 110 F.R.D. 213 (1986) [hereafter Schwarzer, *Proposed Revision*].

⁷ See REFERENCE MANUAL ON SCIENTIFIC EVIDENCE (1994) [hereafter SCIENTIFIC EVIDENCE]; *infra* notes 69-73 and accompanying text (discussing reference manual).

⁸ See, e.g., William W Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147 (1992).

⁹ William W Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992).

¹⁰ See William W Schwarzer & Russell R. Wheeler, *On the Federalization of the Administration of Civil and Criminal Justice*, 23 STETSON L. REV. 651 (1994); see also FEDERAL JUDICIAL CENTER ANN. REP. (1994).

¹¹ See, e.g., SCIENTIFIC EVIDENCE, *supra* note 7; ALAN HIRSCH & DIANE SHEEHY, *AWARDING ATTORNEYS' FEES AND MANAGING FEE LITIGATION* (1994); DAVID RAUMA & CAROL KRAFKA, *VOLUNTARY ARBITRATION IN EIGHT FEDERAL DISTRICT COURTS: AN EVALUATION* (1994); JOE S. CECIL & THOMAS E. WILLGING, *COURT-APPOINTED EXPERTS* (1993); *MANUAL FOR LITIGATION MANAGEMENT AND COST & DELAY REDUCTION* (1992); WILLIAM W SCHWARZER ET AL., *THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT MOTIONS* (1991); BARBARA S. MEIERHOEFER, *COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS* (1990); DONALD S. VOORHEES, *MANUAL ON RECURRING PROBLEMS IN CRIMINAL TRIALS* (3d ed. 1990); *FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES* (1990); THOMAS E. WILLGING, *THE RULE 11 SANCTIONING PROCESS* (1988); THOMAS E. WILLGING, *TRENDS IN ASBESTOS LITIGATION* (1987).

¹² The history of the *Manual for Complex Litigation* is traced in the preface to the *Third Revised Manual*. The *Manual's* origins are found in the *Handbook of Recommended Procedures*

revision to keep pace with numerous substantive statutory changes, developing case law on such issues as attorneys' fees and class actions, and the shifting of complex litigation toward mass torts and parallel federal-state litigation. The new *Manual for Complex Litigation (Third Revised Manual)* represents a change in emphasis and focus, taking account of the changing landscape of federal litigation over the past ten years. As Judge Schwarzer himself observes, "changes in the nature of federal litigation and the courts' need to respond with appropriate management techniques and practices" continue, and are marked by the "emergence of new kinds of claims and processes for litigating them, expansion of the federal courts' jurisdiction, and increases in their workload."¹³ He points to new legislation, case law, and rules as having altered the framework in which litigation is conducted.¹⁴

The *Third Revised Manual*, which is still in draft form¹⁵ and has an expected publication date of May 1995, carries Judge Schwarzer's mark of pragmatism and vision. While the 1985 structure of the *Manual* remains virtually intact,¹⁶ its approach has shifted from a generalized statement about judicial management to a more specific guide offering a menu of options for judges in the management of complex cases. Its new form is that of a hands-on "desk book" for judges in complex cases.

The *Manual* begins with a statement of general principles for the management of complex litigation and offers advice for both

for the *Trial of Protracted Cases*, 25 F.R.D. 351 (1960), itself the outgrowth of the findings of the *Prettyman Report on Procedure in Antitrust and Other Protracted Cases*, 13 F.R.D. 62 (1951). The handbook was superseded by the original *Manual for Complex Litigation*, published in 1969, which generally reflected the experience of judges in large antitrust cases. After a number of editions and interim supplements, in 1985 the manual was updated and revised in recognition of the broader range of cases to which techniques of litigation management could apply. The 1995 third edition is attributed to the "magnitude of new developments and the variety of experiences in complex litigation over the last ten years." MANUAL FOR COMPLEX LITIGATION (3d ed. forthcoming 1995) [hereafter THIRD REVISED MANUAL].

¹³ See *Preface to THIRD REVISED MANUAL*, *supra* note 12.

¹⁴ *Id.*

¹⁵ My observations are based on Tentative Draft #2, which was circulated to judges, lawyers, and academics for comment, and which has since been further refined. Although in general this Tentative Draft was not to be cited or quoted, the Federal Judicial Center has given its approval for use for this Tribute.

¹⁶ The section numbers and organization of the *Third Revised Manual* track the 1985 revision.

judges (the section on judicial supervision)¹⁷ and for lawyers (the section on role of counsel).¹⁸ In the *Third Revised Manual*, these sections have been expanded, and new material has been introduced. The latest revision also moves the issue of sanctions from the end of the *Manual*¹⁹ to the front,²⁰ as part of the judicial supervision section, in order to alert the judge and the parties that the design of the case-management program can anticipate potential problems and introduce prophylactic procedures from the start. With respect to the material on counsel, the section on the court's responsibilities calls for the judge to take an active role in making the decision on the appointment of counsel.²¹ Other new matter covers procedures for selection and approval of lead counsel and committees of counsel, as well as warnings about conflicts of interest that can lead to the withdrawal or disqualification of attorneys.

The introductory provisions of the *Third Revised Manual* are followed by a lengthy chapter on pretrial procedures,²² which takes up issues of conferencing, mandatory (pre-discovery) disclosure, management of issues, discovery, and special referrals. The *Third Revised Manual* considers how the 1993 amendments to the Federal Rules of Civil Procedure on mandatory disclosure affect complex litigation, and how the rules can be adjusted to work best in this context.²³ Not surprisingly, the most substantial section on pretrial is devoted to issues of discovery. In stressing the need for a judge in a complex case to view discovery as a joint responsibility with counsel, the *Third Revised Manual* emphasizes the use of pretrial conferences as the vehicle for case management. The new revision offers an extensive checklist of topics, along with an admonition that any agenda must be tailored to the needs of the particular litigation.²⁴

¹⁷ See THIRD REVISED MANUAL, *supra* note 12, § 20.1 ("Judicial Supervision").

¹⁸ *Id.* § 20.2 ("Role of Counsel").

¹⁹ In the 1985 manual, the last chapter (Chapter 42) deals with sanctions. MANUAL FOR COMPLEX LITIGATION (2d ed. 1985).

²⁰ See THIRD REVISED MANUAL, *supra* note 12, § 20.15.

²¹ See *id.* § 20.224 ("Court's Responsibilities").

²² See *id.* ch. 21 ("Pretrial Procedures").

²³ See *id.* § 21.13.

²⁴ See *id.* § 21.211 ("Case Management Plan").

The section in the earlier *Manual* on privileges and other confidential information has been reworked in a section on protective orders generally.²⁵ The *Third Revised Manual* sets forth guidelines for creating “umbrella orders,”²⁶ discusses particularized protective orders,²⁷ and expressly enumerates the relevant criteria for the release of information, particularly in cases of related litigation.

The new revision suggests other creative options for expediting discovery, including the possibility of allocating discovery costs as a means of implementing the cost-benefit rationale of the discovery rules.²⁸ As the new revision states: “Reference to the court’s cost-related authority will tend to give the parties an incentive to use cost-effective means of obtaining information and a disincentive to engage in wasteful and costly discovery activity.”²⁹ Judge Schwarzer’s hand is clearly visible here.

The *Third Revised Manual* offers practical suggestions about how to make use of the various discovery devices (documents, depositions, and interrogatories) in complex cases. The new revision includes hands-on tips on such matters as the numbering and stamping of documents,³⁰ using central document depositories,³¹ and the effect of computerized data.³²

The new revision contains only brief sections on discovery of experts³³ and on “special referrals”³⁴ to court-appointed experts, special masters, and magistrate judges; however, the revision makes reference to more extensive research projects on these subjects undertaken by the Federal Judicial Center. These FJC projects, namely the work on court-appointed experts³⁵ and the *Reference Manual on Scientific Evidence*,³⁶ are also testaments

²⁵ See *id.* § 21.43 (“Privilege Claims and Protective Orders”).

²⁶ Umbrella orders presumptively protect all disclosed information until challenged.

²⁷ See Arthur Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428 (1991).

²⁸ See THIRD REVISED MANUAL, *supra* note 12, § 21.433 (“Allocation of Costs”).

²⁹ *Id.*

³⁰ See *id.* § 21.441 (“Identification System”).

³¹ See *id.* § 21.444 (“Document Depositories”).

³² See *id.* § 21.446 (“Discovery of Computerized Data”).

³³ See *id.* § 21.48 (“Disclosure and Discovery of Expert Opinions”).

³⁴ See *id.* § 21.5 (“Special Referrals”).

³⁵ CECIL & WILLGING, *supra* note 11.

³⁶ SCIENTIFIC EVIDENCE, *supra* note 7.

to Judge Schwarzer's comprehensive vision of complex case management, and the research leadership he provided at the FJC.

The *Third Revised Manual* includes enlarged and revised sections on trial that offer practical information and guidance. For example, the section on procedures to expedite presentation of evidence³⁷ lists a variety of techniques to facilitate the trial process, and suggests ways of implementing such options. Another section, entitled "Presentation of Evidence,"³⁸ offers specific examples of how communication with the jury can be enhanced through the use of enlargements, computerized imaging systems, and copies and exhibit books. Indeed, the new revision fully embraces the increased role that computers and other technology play in a complex case, and a new and substantial chapter on courtroom technology³⁹ is added at the end. This latter chapter is an excellent primer on a variety of new technological devices, and includes such topics as videos, computer animation, laser discs, CD-ROM, photogrammetry, computer-aided transcription, and simultaneous distributed translation. Each section explains the particular technology, how it can be used, its strengths and benefits, and potential limitations.

The *Third Revised Manual* chapter on settlement⁴⁰ tracks that of the 1985 revision but with a new emphasis on the particular and the concrete. For example, specific techniques that have promoted settlement in other cases, such as the use of confidential discussions, settlement counsel, contribution bar orders, representative trials, and severance, are expressly noted. A separate section on "Alternative Processes to Encourage Settlement"⁴¹ addresses various Alternative Dispute Resolution (ADR) techniques used to facilitate settlement in complex litigation, such as mediation, summary jury trial, and mini-trial. Here again the *Third Revised Manual* draws on other work undertaken by the Center, in this case its *Judge's Deskbook on Court ADR*,⁴² published jointly with the CPR Institute for Dispute Resolution. The

³⁷ See THIRD REVISED MANUAL, *supra* note 12, § 21.64 ("Procedures to Expedite Presentation of Evidence").

³⁸ See *id.* § 22.3 ("Presentation of Evidence").

³⁹ See *id.* ch. 34 ("Courtroom Technology").

⁴⁰ See *id.* ch. 23 ("Settlement").

⁴¹ See *id.* § 23.15 ("Alternative Processes to Encourage Settlement").

⁴² See NATIONAL INST. FOR FED. JUDGES, JUDGE'S DESKBOOK ON COURT ADR (1994).

Third Revised Manual takes up special problems that arise as part of the settlement process, such as agreements about discovery or side agreements, as well as more general ethical considerations.

The *Third Revised Manual's* chapter on attorneys' fees⁴³ reflects much of the latest experience and case law, with greater elaboration on the application of the percentage and lodestar methods of fee calculations. In addition, the new manual sets forth a number of innovative techniques used by judges to expedite hearings on fee applications.⁴⁴ Empirical data, derived from other Center work,⁴⁵ has helped to frame many of the issues.

Part III of the *Third Revised Manual*, like its predecessor, deals with special situations and applications of the principles presented in the earlier chapters. The chapter on class actions⁴⁶ lays out the experience with (b)(1), (b)(2), and (b)(3) class actions, and to some degree highlights the tension between the efficiency of aggregation and concerns with individual fairness.⁴⁷ Of course, this area is one where the revised manual may have trouble keeping current, particularly in the area of mass torts.⁴⁸ The case law continues in a state of flux, and the Seventh Circuit's recent decision in *In re Rhone-Poulenc Rorer, Inc.*⁴⁹ may

⁴³ See THIRD REVISED MANUAL, *supra* note 12, ch. 24 ("Attorneys' Fees").

⁴⁴ See *id.* § 24.23 ("Judicial Review/Hearing and Order").

⁴⁵ See ALAN HIRSCH & DIANE SHEEHY, *AWARDING ATTORNEYS' FEES AND MANAGING FEE LITIGATION* (1994).

⁴⁶ See THIRD REVISED MANUAL, *supra* note 12, ch. 30 ("Class Actions").

⁴⁷ See, e.g., Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 833-41 (1992).

⁴⁸ The *Third Revised Manual* contains special sections on particular types of litigation, including mass torts. See THIRD REVISED MANUAL, *supra* note 12, § 33.2 ("Mass Torts"); see also *infra* notes 60-65 and accompanying text.

⁴⁹ No. 94-3912, 1995 WL 116307 (7th Cir. Mar. 16, 1995). The Seventh Circuit Court of Appeals, in a decision written by Chief Judge Richard Posner, issued a writ of mandamus to reverse a district judge's certification of class-wide issues in a nationwide mass tort action brought by hemophiliacs against drug manufacturers. *Id.* at *4-13. The district judge had certified the suit "as a class action with respect to particular issues" and envisioned the use of a special verdict to determine the issue of negligence class-wide. *Id.* at *4. The plan was that if negligence were found, individual tort suits could then be filed in state or federal court and the issue of negligence would be given preclusive effect. *Id.* But the Seventh Circuit held that where individual suits were feasible, and where the law of many states was likely to apply to different class members, such class treatment was inappropriate. *Id.* The court also found that the attempt to bifurcate issues between different juries would violate the Seventh Amendment right to jury trial. *Id.* at *11.

induce some last minute revisions as the *Third Revised Manual* goes to press. Also, the Advisory Committee on Civil Rules has a Rule 23 proposed revision on its agenda. The Committee has produced a working draft revision for Rule 23 that would eliminate the class-certification categories and introduce a unitary standard, leaving to the trial judge discretion to mold class action structure and notice requirements to fit the needs of particular cases.⁵⁰ That proposal is still at a preliminary stage, and the Committee is looking to gain additional information from an ongoing empirical study by the Federal Judicial Center. The FJC is examining past class action practice to assess the efficiency of class certifications, the variety and impact of notice requirements, and the number and types of settlements receiving judicial approval.⁵¹ Here again the empirical work of the Center has been an important resource not only for its own projects such as the *Third Revised Manual*, but for the Judicial Conference and the judicial branch more generally.

The *Third Revised Manual's* brief discussions with respect to the role of class representatives⁵² and settlement classes⁵³ may also need some embellishment in light of the Third Circuit Court of Appeals' comprehensive and thoughtful decision in the *GMC Pick-Up Truck Fuel Tank Products Liability Litigation*.⁵⁴ The Court of Appeals, in a lengthy opinion by Judge Edward Becker, reversed the district judge's certification of a settlement class of GM truck owners who allegedly were sold pick-up trucks with defective fuel tanks.⁵⁵ The district court had approved a class settlement that provided for members of the class to receive coupons redeemable toward the purchase of a new truck and attorneys' fees in the amount of \$9.5 million. Denying class settlement status in this case because the district judge made no findings as to whether the requirements of Rule 23 had been met,⁵⁶ the Third Circuit ruled that settlement classes would be

⁵⁰ See Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79, 83 (1994).

⁵¹ See Bone, *supra* note 50, at 82 n.9.

⁵² See THIRD REVISED MANUAL, *supra* note 12, § 30.44.

⁵³ See *id.* § 30.45.

⁵⁴ 1995 U.S. App. LEXIS 8815 (3d Cir. Apr. 17, 1995).

⁵⁵ *Id.* at *13.

⁵⁶ The Third Circuit also found that the district court had abused its discretion in

permitted only so long as the requirements of Rule 23(a) and (b) are satisfied.⁵⁷ Judge Becker noted that the first *Manual for Complex Litigation* strongly disapproved of settlement classes, but later versions, including the latest draft of the *Third Revised Manual*, endorse settlement classes under controlled circumstances.⁵⁸ That control could come, the court stated, only from the strict protections found in Rule 23 itself, and not from a court's general assessment of the fairness of the settlement. Warning of the potential abuse of the settlement class device, Judge Becker offered the astute observations of Judge Schwarzer:

[O]ne way to see [the settlement class] is as a commendable example of the law's adaptability to meet the needs of the time — in the best tradition of the Anglo-American common law. But another interpretation might be that it is an unprincipled subversion of the Federal Rules of Civil Procedure. True, if it is a subversion, it is done with good intentions to help courts cope with burgeoning dockets, to enable claimants at the end of the line of litigants to recover compensation, and to allow defendants to manage the staggering liabilities many face. But as experience seems to show, good intentions are not always enough to ensure that all relevant private and public interests are protected. The siren song of Rule 23 can lead lawyers, parties and courts into rough waters where their ethical compass offers only uncertain guidance.⁵⁹

Also included in the *Third Revised Manual* are separate chapters on multiple litigation, criminal cases, antitrust, mass torts, securities litigation, takeover litigation, employment discrimination litigation, patent litigation, CERCLA, and civil RICO. Although a similar organizational structure appeared in the 1985 revision, the *Third Revised Manual* represents an even stronger shift away from "trans-substantive procedure" and a recognition that particular types of substantive litigation carry unique features which need customized treatment.

determining that the settlement was fair and adequate and had overvalued the settlement's worth and overestimated the risk of maintaining class status and establishing liability and damages. *Id.*

⁵⁷ *Id.* at *11.

⁵⁸ *Id.* at *10.

⁵⁹ *Id.* at *62 (quoting William W Schwarzer, *Settlement of Mass Tort Actions: Order Out of Chaos*, CORNELL L. REV. (forthcoming 1995)).

The chapter on mass torts⁶⁰ addresses a type of litigation in which change over the past ten years has been more dramatic than any other. In seeking to provide judges handling these kinds of cases with appropriate judicial management tools, this chapter draws on the experience of other judges in complex mass tort cases. Thus, in the discussion of case management orders, the provisions of the management order in the silicone gel breast implant litigation are described as a means of offering other judges a concrete checklist from which to begin.⁶¹ Similarly, the *Third Revised Manual* includes a set of steps for judges to consider with respect to state-federal coordination of proceedings.⁶² The new revision also identifies various approaches for structuring the trial, and references to cases adopting particular approaches. Although even more of these practical tips might have been desirable, the *Third Revised Manual* is rich with citations and examples providing judges with other sources from which to draw. Thus, for example, a lengthy footnote refers to the problems of "limited-fund" class action litigation in the mass tort context, and a reference to the ethics issues that arise in sorting out present and future claims directs the reader to Judge Weinstein's thoughtful and important article on the subject, along with related commentary.⁶³ Other important literature is referenced throughout the section, including Judge Schwarzer's own article and case study on state-federal coordination;⁶⁴ Thomas Willging's FJC study, *Trends in Asbestos Litigation*,⁶⁵ and the American Law Institute's Complex Litigation Project.⁶⁶

⁶⁰ See THIRD REVISED MANUAL, *supra* note 12, ch. 33 ("Mass Torts"). For a thoughtful and comprehensive view on this subject, see JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* (1994).

⁶¹ See THIRD REVISED MANUAL, *supra* note 12, § 33.22 ("Case Management Orders").

⁶² See *id.* § 33.23 ("State-Federal Coordination"). A more general section on "Multiple Litigation" is found in Chapter 31 of the manual.

⁶³ See Jack B. Weinstein, *Ethical Dilemma in Mass Torts Litigation*, 88 NW. U. L. REV. 469 (1994); Geoffrey Hazard, *Reflections on Judge Weinstein's Ethical Dilemmas in Mass Torts Litigation*, 88 NW. U. L. REV. 569 (1994).

⁶⁴ See Schwarzer et al., *supra* note 9, at 1700-07 (discussing state-federal coordination in air crash cases, asbestos cases, hotel fire cases, building collapse cases, oil spill cases, and investment fraud matters).

⁶⁵ WILLGING, *supra* note 11.

⁶⁶ AMERICAN LAW INSTITUTE, *COMPLEX LITIGATION PROJECT* (1993).

The mass torts chapter can be seen as a microcosm of the entire *Third Revised Manual*. The manual functions as an important research tool, and will be the starting place for a judge and his or her law clerk to find relevant case law and statutory authority as well as the past practices of other courts. The new revision is filled with extensive citations of both legal principle and of practical examples. It collects the experience of judges in prior cases, and offers as illustrations techniques adopted in the past. The *Third Revised Manual* also references for further consideration other sources of information, including law review articles, desk books, FJC publications, standing orders, and practice manuals.

Like the earlier version of the *Manual*, Part IV of the *Third Revised Manual* contains a checklist and index,⁶⁷ as well as sample orders and forms.⁶⁸ New sample orders for particular litigation (mass torts, CERCLA, and civil RICO), and a form for creating an electronic bulletin board, have been added.

The new *Manual for Complex Litigation (Third)* represents only a small part of the legacy of research and reform that Judge Schwarzer leaves as he steps down as Director of the Federal Judicial Center. It would be remiss not to mention such other substantial work as the recently published *Reference Manual on Scientific Evidence*,⁶⁹ which bears a close relationship to complex litigation but is tailored specifically to questions of the management of expert evidence involving scientific issues. In the wake of the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁷⁰ the need for judges to be familiar and comfortable with scientific methodology and subject matter has increased.⁷¹ The scientific evidence manual was the inspiration of Judge Schwarzer and contains a series of papers⁷² which not

⁶⁷ See THIRD REVISED MANUAL, *supra* note 12, ch. 40 ("Checklists").

⁶⁸ See *id.* ch. 41 ("Sample Orders and Forms").

⁶⁹ See SCIENTIFIC EVIDENCE, *supra* note 7.

⁷⁰ 113 S. Ct. 2786 (1993). In *Daubert*, the Supreme Court rejected the earlier *Frye* test of "general acceptance" for determining admissibility of scientific evidence, and held that the Federal Rules of Evidence, notably Rule 702, entrust to the trial judge responsibility for determining whether the reasoning or methodology of such testimony is sufficiently valid to justify admissibility. *Id.* at 2794-95.

⁷¹ See generally PETER HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM (1991).

⁷² The first of these papers, *Management of Expert Evidence*, is written by Judge

only address traditional judicial concerns about the management and admissibility of expert evidence, but also present a primer on the methods and reasoning of selected areas of scientific evidence. Seven papers offer "reference guides" in particular areas of expert testimony: epidemiology, toxicology, survey research, forensic analysis of DNA, statistical inference, multiple regression analysis, and estimation of economic loss. Judge Schwarzer has consistently recognized the important role that science plays and will continue to play in the next century, and he has strived to ease judges into a comfort zone in dealing with esoteric material and new technologies. As part of Judge Schwarzer's longer-term view, the Center has planned seminars over the next few years to help federal judges better use and understand the reference manual and deal effectively with scientific and technical evidence.

As Judge Schwarzer so well understands, judicial education and training are critical to maintaining the excellence of the judiciary. Judge Schwarzer has continued and reinvigorated the Center's many education and training programs for circuit, district, magistrate, and bankruptcy judges. In addition, it has been a source of great pride for me that the Center through Judge Schwarzer has cooperated with the Institute of Judicial Administration at NYU in sponsoring our summer appellate judge programs, and is now conducting its orientation for new circuit judges as part of that program.

As a district judge in California, Judge Schwarzer was himself a great practitioner of case management; also, he preached case management and explained its value in his many writings. Many of the Federal Judicial Center's projects undertaken during his tenure reflect his views on the importance of case management. Recent amendments to the Federal Rules of Civil Procedure⁷³ as well as continuing reform efforts⁷⁴ bear his "case-manage-

Schwarzer. See SCIENTIFIC EVIDENCE, *supra* note 7, at 9-35.

⁷³ See, for example, the 1983 and 1993 amendments to Rule 11 (sanctions) and Rule 16 (pre-trial conferences, scheduling, and management); and the 1993 amendments to Rule 26 on mandatory disclosure and disclosure of expert testimony.

⁷⁴ Some examples of Judge Schwarzer's influence are the various proposals for fee-shifting Congress is debating. See Schwarzer, *supra* note 8. Attempts to revise the rules on summary judgment procedure, although ultimately unsuccessful, were also stimulated by Judge Schwarzer. See Schwarzer, *Case Management*, *supra* note 6; Schwarzer, *Proposed Revision*,

ment" imprint. Judge Schwarzer's philosophy of case management and his faith in past judicial experience as a guide are the foundations for this 1995 revision of the *Manual for Complex Litigation (Third)*. This manual is truly a product of his scholarship, his dedication, and his vision.

supra note 6.