MINUTES

CIVIL RULES ADVISORY COMMITTEE

April 23-24, 2001

The Civil Rules Advisory Committee met on April 23 and 24, 2001, at the Administrative Office of the United States Courts. The meeting was attended by Judge David F. Levi, Chair; Sheila L. Birnbaum, Esq.; Judge John L. Carroll; Justice Nathan L. Hecht; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Dennis G. Linder, Esq., for the Department of Justice; Professor Myles V. Lynk; Judge John R. Padova; Judge Lee H. Rosenthal; Judge Thomas B. Russell; Judge Shira Ann Scheindlin; and Andrew M Scherffius, Esq.. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter. Judge Anthony J. Scirica, Chair, Judge Michael Boudin, liaison, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge John Walker attended as liaison member from the Bankruptcy Rules Committee. Dean Patrick J. Schiltz, Reporter for the Appellate Rules Committee, was present. Peter G. McCabe and John K. Rabiej represented the Administrative Office. Karen Kremer was an additional Administrative Office participant. Thomas E. Willging represented the Federal Judicial Center; Robert Niemic and Shannon Wheatman of the Judicial Center also attended. Ted Hirt, Esq., Department of Justice, was present. Observers included Fred Jacob; Jeffrey Greenbaum (ABA Litigation Section Class-Action Committee); Francis Fox (American College of Trial Lawyers); James E. Rooks, Jr. (ATLA); Alfred W. Cortese, Jr.; Jonathan W. Cuneo (NASCAT); Sol Schreiber; Beverley Moore; and Christopher F. Jennings.

Judge Levi opened the meeting by noting that Judge Carroll has accepted appointment as Dean of the Samford University, Cumberland School of Law.

The Minutes of the October 2000 and March 2001 meetings were approved, subject to correction of typographical errors.

RULES PUBLISHED FOR COMMENT: AUGUST 2000 AND FEBRUARY 2001

Three sets of rules were published for comment in August, 2000. Each was developed in cooperation with other advisory committees and one, Rule 7.1 dealing with corporate disclosure, under the direction of the Standing Committee. The February 2001 publication was limited to a set of technical corrections to conform the forfeiture provisions of the Admiralty Rules to statutory provisions enacted after the affected rules had been transmitted by the Supreme Court to Congress.

Rule 7.1: Corporate Disclosure

Rule 7.1 was published in tandem with nearly identical proposals to amend Appellate Rule 26.1 and adopt a new Criminal Rule 12.4. Development of Rule 7.1 was spurred by two sets of newspaper articles that explored several incidents in which a federal judge had inadvertently acted in a case, often in a

preliminary administrative way, in which disqualification would have been indicated had full information about the identity of the parties been brought home to the judge. Members of Congress who have particular interests in the federal judiciary believe it would be desirable for the judiciary to act to reduce the risk of such events. Within the Judicial Conference structure, the Committee on Codes of Conduct has primary responsibility for interpretation and development of the Code of Conduct for United States Judges. The Codes of Conduct Committee believes that the best response would be to adopt disclosure provisions modeled on Appellate Rule 26.1 in the Bankruptcy, Civil, and Criminal Rules. Working under the coordinating direction of the Standing Committee, proposed amendments of Appellate Rule 26.1 and new Civil Rule 7.1 and Criminal Rule 12.4 were developed and published for comment. The Bankruptcy Rules Committee did not publish a rule, preferring to take additional time to study the possibility that the distinctive characteristics of bankruptcy practice might require different provisions.

As published, Rule 7.1 and the parallel rules made some modest changes in present Appellate Rule 26.1. One is to add a requirement that a nongovernmental corporate party that has no information to disclose file a "null" statement. The other is to add an obligation to supplement the initial report when there is a change in the disclosed information. These features have won ready acceptance.

Another feature of Rule 7.1 and the parallel rules has provoked substantial comment. This feature requires a party to disclose any information that may be required by the Judicial Conference of the United States. This provision arose from a confluence of concerns. The central concern has been reflected throughout the history of Appellate Rule 26.1. The first draft of Rule 26.1 required substantially greater disclosure than the rule actually adopted. This draft provoked strong opposition by a number of chief circuit judges. The Committee Note to Rule 26.1 recognizes that circuits may wish to adopt local rules requiring greater disclosures than the reduced disclosures required by Rule 26.1. Since then, the Rule 26.1 requirements have been scaled back even further by eliminating disclosures as to subsidiaries. Most of the circuits have reacted to the invitation in the Committee Note. Ten of the thirteen circuits require additional disclosures. Some of these circuit rules require far more extensive disclosures than Rule 26.1 requires. The experience of these circuits suggests that the modest Rule 26.1 requirements have been found inadequate by most judges.

Concern that the minimal requirements of Rule 26.1 may not suffice was paired with a strong sense that there is no reason why different disclosure requirements are appropriate in different sections of the country. Uniform disclosure requirements are appropriate within a national court system. Enhanced uniform disclosure requirements, however, must be closely tied to expert familiarity with the practical opportunities for meaningful

disclosure. It is not possible to require disclosure in every case, of all parties and attorneys, of each item of information that might conceivably require disqualification. Nor is it possible for a judge to assure a thorough review of all of the information that would be required for every case that in some way, however fleetingly, comes to the judge for action. The pragmatic judgments that must be made about disclosure are likely to change over time as electronic information systems continue to improve. The best reservoir of information about real disclosure needs and experience is the Judicial Conference Codes of Conduct Committee. The Codes of Conduct Committee must take the lead in prescribing any successful disclosure requirements that may prove feasible.

If detailed disclosure requirements were adopted under this part of Rule 7.1, it would become possible to conclude that local disclosure rules might be superseded. For the moment, it is not possible to deny the judgment made by the Appellate Rules Committee when it created Appellate Rule 26.1 — courts may properly conclude that they must protect themselves and the public by requiring greater disclosure. The Committee Note to Rule 7.1 observed that local rules continue to be permissible, but that the Judicial Conference might in the future promulgate added disclosure requirements through Rule 7.1 that would supersede local rules.

These features of Rule 7.1 provoked considerable comment, much of it unfavorable. One concern was practical — practicing lawyers find it difficult enough to have to keep up with changes in the formally adopted rules of procedure, and would have still greater difficulty in complying with requirements adopted by the Judicial Conference. A second set of concerns was more abstract. There is no apparent source of authority for the Judicial Conference to do anything more than "submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business." Beyond that, the Enabling Act process must be followed. This process includes public advisory and Standing Committee meetings, publication for comment, adoption by the Supreme Court, and transmission to Congress. Rules adopted through this process are readily available to all lawyers. Only the Enabling Act process, moreover, supports supersession of local court rules. The Civil Rules provisions that now enforce requirements to be adopted by the Judicial Conference deal with truly ministerial matters — technical standards for electronic filing (Rule 5(e)) and numbering systems for local rules (Rule 83(a)(1)). These provisions provide no precedent for the fundamental "delegation" or ceding of the rules committees' authority back to the Judicial Conference. The Judicial Conference is supposed to act only after the committees have discharged their responsibilities, and then only to determine whether to submit committee recommendations to the Supreme Court.

Reconciliation of these competing concerns about reliance on the Judicial Conference is difficult. The reality is that the rules advisory committees have not developed any expertise in the codes of judicial conduct. For that matter, disclosure

requirements seem more nearly matters of judicial administration than matters of practice and procedure. The source of any sophisticated disclosure system must begin with the Codes of Conduct Committee. That Committee, however, clearly believes that the most suitable present course is to adopt Appellate Rule 26.1 for all courts and not to require any additional disclosures. It does not seem likely that there soon will be any suggestions for additional disclosure requirements. Present adoption of rules of procedure that refer to requirements to be adopted by the Judicial Conference is likely to lead to an interval of at least several years during which parties constantly search for requirements that do not exist. Little immediate benefit, and some practical costs, will flow from the Judicial Conference provision. If the Codes of Conduct Committee some day concludes that more detailed disclosures are required, the rules committees of that day will be able to rely to a considerable extent on the advice provided by the Codes of Conduct Committee.

After this introduction, Dean Schiltz reported that the Appellate Rules Committee remains "moderately enthusiastic" about the Judicial Conference provisions of the several published rules.

Another reaction was that the "legality" of recognizing and enforcing the effects of future Judicial Conference action through the Enabling Act process is an unanswered question. This tactic seems appropriate as to interstitial questions of the sort addressed by the present Civil Rules provisions that rely on Judicial Conference action. And in reality, sophisticated disclosure rules are likely to emerge only through other Judicial Conference committees, not the rules committees.

Judge Walker noted that the Bankruptcy Rules Committee was not comfortable with the Judicial Conference provisions and did not include them in the draft that is being prepared for publication. The Judicial Conference can suggest disclosure requirements without need for support in the rules of procedure. And the Committee also was uncomfortable with the prospect that Judicial Conference action might preempt local rules

Judge Scirica suggested that it would be a mistake for the several advisory committees to devote much energy at this point to debating the delegation question. There are serious questions that do not have present answers. The Standing Committee must resolve these questions with the advice of the advisory committees, recognizing that the arguments have been clearly drawn.

It was urged that reliance on the Judicial Conference "is a poor precedent." The rules committees should preserve their own responsibilities within the Enabling Act system.

A motion to discard the Judicial Conference provisions of Rule 7.1 as published — Rule 7.1(a)(1)(B) and 7.1(2) — passed without dissent.

Adoption of the motion to delete the Judicial Conference

provisions shortened the discussion of a proposal by the Appellate Rules Committee to revise the wording of those provisions. The Appellate Rules suggestion was that rather than refer to information "required" by the Judicial Conference, the rules should refer to information "publicly designated." The addition of "publicly" was meant to emphasize the need to make the requirements well known, not to imply that the Judicial Conference must act in public. The substitution of "designated" for "required" was intended to soften the tone of the requirement without diluting its force as a requirement. No position was taken with respect these proposed changes.

Turning back to the substance of the disclosure requirements that remain, the distinctive recommendations of the Bankruptcy Rules Committee were discussed briefly. What will become Rule 7.1(a) requires a nongovernmental corporate party to identify "any parent corporation and any publicly held corporation that owns 10% or more of its stock." The Bankruptcy Rules proposal eliminates the reference to "parent" corporation, reasoning that it is not defined and is a vague concept. It relies instead on requiring disclosure of any "nongovernmental corporation that directly or indirectly owns 10% or more of any class of the corporation's equity interests." These changes greatly broaden the disclosures required by present Appellate Rule 26.1 or proposed Civil Rule 7.1. Disclosure would be required even if the corporation that holds 10% or more of the party's securities is closely and privately held. "Indirect" ownership is included, without definition in Rule or Committee Note as to what constitutes indirect ownership — a corporation that owns some part of another corporation that owns 10% might be reached; a remote parent, two or more layers up, might be reached; and so on. Ownership of 10% of any class of equity interests suffices — this change eases the ambiguity created by a need to determine when ownership of one class of stock amounts to 10% of "its stock," but could greatly dilute the level of interest involved.

Judge Walker reported that the Bankruptcy Rules Committee had not relied on any perceived differences between bankruptcy proceedings and other judicial proceedings. Instead, it adopted proposals that seemed desirable for all forms of proceedings.

The uncertain breadth of these changes was set against the process that led to publication of Rule 7.1. Rule 7.1 was adopted in deference to the strong recommendation of the Codes of Conduct Committee that present Appellate Rule 26.1 should be adopted as the uniform model for all sets of rules. There was little independent thought about any of the questions now posed by the Bankruptcy Rules proposals, or by possible alternatives. The changes, moreover, are so substantial that they could not be adopted for Rule 7.1 without publication. Nor has any material been developed to support consideration at this meeting.

It was agreed that the differences between Rule 7.1 and the Bankruptcy Committee proposals should be submitted to the Standing

Committee for resolution.

Rules 54, 58: Separate Judgment Document

The proposals to amend Rule 54(d)(2) and to rewrite Rule 58 began with a project of the Appellate Rules Committee. Rule 58 was amended in 1963 to require that a judgment be set forth on a separate document, and to provide that the judgment "is effective only when so set forth." This change was intended to protect against the forfeitures of appeal rights that had flowed from ambiguous judicial acts that would-be appellants did not recognize as final judgments. In the many years since, appellate courts have often admonished district courts to observe the separate-document requirement. The level of compliance, however, has not been as high as might be. Part of the difficulty arises from failure to understand the insistence that a "separate document" must be limited to a statement of the judgment without offering explanations of fact or law. Another part of the difficulty arises from the sweepingly broad definition of "judgment" in Civil Rule 54(a) — many judicial acts are judgments because they are appealable, even though the true final judgment remains months or even years in the future. But a major difficulty — and the one that concerns the Appellate Rules Committee — is that too often the separate document requirement is entirely disregarded upon final disposition of an action. Responsibility for the failures seems to be evenly divided between judges and clerks, further frustrating efforts at continuing education in these requirements. The result of the separate-document failures is that appeal time never starts to run. The Appellate Rules Committee found hundreds of reported cases dealing with these problems, and has concluded that there are untold numbers of appeal "time bombs" waiting to explode when an aggrieved party discovers, perhaps years after final disposition, that an appeal remains possible. It concluded that this problem should be addressed by provisions that start the appeal-time period at some point after final disposition notwithstanding the lack of a separate document.

The approach suggested by the Appellate Rules Committee works best if it is integrated with the Civil Rules. Appellate Rule 4 integrates appeal-time periods with the disposition of timely post-judgment motions in the district court. The Civil Rules set the times for making these motions by reference to the entry of judgment. Untold grief would flow from an Appellate Rules provision that cuts off appeal time if it remained possible to make post-judgment motions in the district court after the close of appeal time. The published proposals to amend Civil Rule 58 and Appellate Rule 4(a)(7) were an integrated response to this problem.

The first part of amended Rule 58, Rule 58(a)(1), restates the separate document requirement but lists exceptions. A separate document is not required for an order disposing of five enumerated categories of post-judgment motions, beginning with a motion for judgment as a matter of law. These are the motions that suspend appeal time under Appellate Rule 4(a)(4), but the provision in Rule

58(a)(1) is broader. Appeal time is suspended only if the motion is timely; Rule 58(a)(1) does not require that the motion be timely. There are other minor distinctions as well. These differences arise from the conclusion that the demonstrated difficulties in achieving compliance with a separate-document requirement counsel against unnecessary complication. The proposal conforms to the general current view that an order disposing of such motions does not require a separate document, but avoids the many complications that may surround that conclusion. An order denying a new trial, for example, may in some circumstances be appealable — if so, it is a judgment and present Rule 58 requires a separate document.

There was little public comment on Rule 58(a)(1). One comment thought it a "close" question, but concluded that the separate-document requirement should not be excused. The Appellate Rules Committee remains convinced that the published proposal is wise, and conforms to the most general part of present practice. It was pointed out that action on a post-judgment motion may result in an amended judgment. Rule 58(a)(1) requires that every amended judgment be set forth on a separate document. It was agreed that a reminder of this requirement should be added to the Committee Note: "And if disposition of the motion results in an amended judgment, the amended judgment must be set forth on a separate document." With this addition, Rule 58(a)(1) was approved for submission to the Standing Committee for adoption.

Rule 58(a)(2) continues, in revised style, the current allocation of responsibilities between clerk and court for preparing a judgment. Discussion in the Appellate Rule Committee reflected the value of separating out as a separate item the provision in published subdivision (a)(2)(ii) directing the clerk to prepare and enter judgment when the court denies all relief. As revised, subdivision (a)(2) would conclude: "~~or~~ (ii) the court awards only costs or a sum certain, or (iii) the court denies all relief." This change was accepted.

Proposed Rule 58(b) is the heart of the provisions responding to the Appellate Rules Committee's concerns. On its face, it does not directly address the appeal-time problem. Instead, it defines entry of judgment for purposes of the rules authorizing motions that suspend appeal time — Rules 50, 52, 54(d)(2)(B), 59, and 60 — and Rule 62, which governs execution. Appellate Rule 4(a)(7) then adopts for purposes of the Appellate Rules the definition in Civil Rule 58. Rule 58(b) provides separate definitions of the entry of judgment for situations in which a separate document is not required and for situations in which a separate document is required. If a separate document is not required, judgment is entered when it is entered in the civil docket. If a separate document is required, judgment is entered when it is entered in the civil docket and "upon the earlier of these events: "(A) when it is set forth on a separate document, or (B) when 60 days have run from entry on the civil docket under Rule 79(a)." The effect of the 60-day period is to defuse the appeal time bombs by triggering

Appellate Rule 4 60 days after judgment is entered in the civil docket, notwithstanding lack of a separate document.

Two minor revisions were adopted without discussion. As published, Rule 58(b)(2)(B) referred to entry "on" the civil docket; this will be changed to conform to the general usage that refers to entry "in" the civil docket. In addition, the third sentence of the Committee Note will be clarified by adding four words, to begin: "The result of failure to enter judgment on a separate document * * *."

The public comments on Rule 58(b)(2) were often hostile. Bar groups and lawyers with extensive appellate practice experience commonly advanced three propositions: the separate document is an important signal that appeal time has started to run; it is easy for district courts to comply with the separate document requirement; and there is no persuasive showing that real, practical problems have arisen from the abstract possibility of appeal "time bombs" exploding years after final dispositions in the district courts.

The Appellate Rules Committee's response to these concerns was direct. Although it may seem "easy" to comply with the separate document requirement, decades of attempts to enforce it have not succeeded as well as should be. In fact there are numerous incidents of long-delayed appeals that should have been time-barred long before they were taken. The concern for a lawyer who fails to realize that a disposition that has been communicated to the lawyer is final is misplaced in light of the rules that apply when there is no notice to the lawyer at all. Under Appellate Rule 4(a)(6)(B), a motion to revive appeal time is permitted up to 180 days after entry of judgment on showing, among other things, that the moving party was entitled to notice of the entry "but did not receive notice from the district court or any party within 21 days after entry." A system that values finality so highly as to impose a duty of inquiry when there is no notice at all of the court's action should value finality as well when a party who actually has notice fails to comprehend the final nature of the action.

The Appellate Rules Committee recognized that the concerns expressed in the public comments are real. One of the comments observed that a lawyer is not likely to be put on notice of finality by the absence of any further district-court action during the 60 days after action is taken. But if nothing happens within 180 days, a lawyer should inquire whether the earlier action was intended to be the final action in the case. This comment seemed to have it about right. The initial proposal of the Appellate Rules Committee was to start appeal time 150 days after entry in the civil docket. They concluded that the 60-day period should be revised to 150 days, and strongly urged that course on the Civil Rules Committee.

Discussion of the 150-day cap proposal began with a suggestion that no cap should be established — appeal time, and the time for

post-judgment motions, should begin only when a separate document is provided. Dean Schiltz responded that the Appellate Rules Committee's judgment is that the "time bombs" do explode, and cause mischief. If the cap is set at 150 days, the minimum appeal-time period of 30 days gives a total of 180 days to appeal. In comparison to the rules that apply when there is no notice of the judgment at all, the 150-day cap is generous.

Substitution of a 150-day period for the 60-day period of the published proposal was adopted by unanimous vote.

Discussion turned to Rule 58(b). The Appellate Rules Committee fears that it will prove cumbersome for practitioners to follow the trail from Appellate Rule 4(a)(7) through Rule 58 and back to Appellate Rule 4. As published, Rule 4(a)(7) provides that a judgment "is entered for purposes of this Rule 4(a) when it is entered for purposes of Rule 58 of the Federal Rules of Civil Procedure." Rule 58(b) begins: "Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62:" A lawyer encountering these rules for the first time is likely to feel a need to consult each of the enumerated Civil Rules, and to emerge from the survey more confused than before. It would be better to revise Rule 58 to say: "Judgment is entered for purposes of these rules:"

It was pointed out that Rule 58 now defines entry of judgment for all purposes of the Civil Rules, and further provides that a judgment is effective only when set forth on a separate document. Proposed Rule 58 eliminates the "effective only when" provision because it can wreak havoc in circumstances that surely were not contemplated when Rule 58 was adopted. Any order that is appealable as a collateral order is not effective until set forth on a separate document. As one example, the Third Circuit appears to hold that every order enforcing discovery against a privilege claim is appealable — it will not do to hold that all such orders are not effective until someone remembers to analyze collateral-order doctrine and set the order forth on a separate document. As another example, interlocutory injunction orders are appealable; literally, they cannot be enforced, even though entered in full compliance with Rule 65(d), until set forth on a separate document.

The effort to escape the untoward consequences of the rule 58 attempt to define entry of judgment for all Civil Rules purposes will be put at risk if new Rule 58(b) is revised to encompass all situations in which a Civil Rule refers to entry of judgment. A quick survey shows that at least the following Rules refer to entry of judgment: 26(a)(1)(D); 49(b); 55(c); 55(e); 64; 68; 69(b); 71A(i)(2); 71A(j); 77(c); and Admiralty Rules B(2) and C(5). Many of these rules do not present any obvious difficulties. Some do raise interesting questions. Rule 69(b), for example, governs the immunity of a collector or other officer of revenue, or an officer of Congress "when a judgment has been entered." Is it conceivable that there will be a period of 150 days after entry on the civil docket without a separate document during which the protections

established by Rule 69(b) do not apply? Rule 71A(i)(2) provides that before entry of any condemnation judgment vesting the plaintiff with title, the action may be dismissed in whole or in part, without an order of the court. Is dismissal without court order available for 150 days after entry in the civil docket without a separate document? The purpose of the Rule 58 revision has been only to integrate the Civil Rules motions time limits with the Appellate Rules time provisions. The lessons learned in working toward this purpose are that the attempt to establish a general definition of "judgment" in Civil Rule 54(a) is thoroughly unsatisfactory. It would be a mistake, without good reason, to run the risks of adopting a generalized definition of entry of judgment.

Less risky alternatives are available. Although more words would be required, the Appellate Rules objective of easy comprehension would be well served by eliminating any cross-reference to Civil Rule 58. Instead, Appellate Rule 4(a)(7) could set out the same definition for entry of judgment, reducing the burdens on lawyers (and particularly on lawyers who have only the Appellate Rules at hand). If integration with Civil Rule 58 is preferred, it can be accomplished in other ways. The most direct would be to add Appellate Rule 4(a)(7) to the list in Rule 58(b), so it would provide a definition of entry of judgment for " * * * Rule 4(a)(7) of the Federal Rules of Appellate Procedure." A less direct integration would be to draft Rule 4(a)(7) to say that judgment is entered for purposes of Rule 4 when it is entered for purposes of the rules enumerated in Civil Rule 58(b).

Dean Schiltz reported that the Appellate Rules Committee believes it unsuitable for Civil Rule 58(b) to undertake a definition for purposes of the Appellate Rules. Adding Rule 4(a)(7) to the list in Rule 58(b) is not an acceptable alternative. The other alternatives likewise failed to win favor with the Appellate Rules Committee.

General discussion suggested that the published approach is "too much work for the practitioner." The integration should be simple. There may be hypothetical situations in which an all-purposes definition of entry of judgment could cause difficulty with particular rules, but these situations are unlikely to arise and can be resolved by common sense.

The committee agreed to amend Rule 58(b) to read: "Judgment is entered for purposes of these Rules:" A warning will be added to the Committee Note, observing that common sense must be used to avoid any nonfunctional consequences that might flow from literal application of this definition in particular situations.

Finally, a style change has seemed desirable in the wake of the Appellate Rules Committee meeting. Many of the comments on the Rule 58 and Appellate Rule 4 proposals revealed that even people who have engaged with these rules for substantial parts of their professional lives do not understand what they mean now, and do not

understand the ways in which the proposals would change the present meaning. One small and easily corrected reflection is found in the compact drafting of Rule 58(b)(2). The Appellate Rules Committee approved a suggestion that Rule 58(b)(2) be redrafted to say the same thing as the published draft, with more words but also with more clarity. The committee agreed that Rule 58(b)(2) be restyled to read as follows:

(b) Time of Entry. Judgment is entered for purposes of these rules:

(1) if Rule 58(a)(1) does not require a separate document, when it is entered in the civil docket under Rule 79(a); or

(2) if Rule 58(a)(1) requires a separate document, when it is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs:

(A) it is set forth on a separate document, or

(b) 150 days have run from entry in the civil docket under Rule 79(a).

Rule 81(a)(2)

The proposal to amend Rule 81(a)(2) seeks to eliminate inconsistencies between its habeas corpus provisions and the provisions of the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings. The only public comment was a suggestion that the Criminal Rules Committee should do further work on the 2254 and 2255 Rules, a course that might make it appropriate to defer action on the Rule 81 proposal. It also was observed that the Committee Note had inadvertently stated that the 2254 rules govern petitions under 28 U.S.C. § 2241 — in fact Rule 1(b) of the 2254 Rules establishes district-court discretion whether to apply the 2254 Rules.

Discussions between the Reporters failed to disclose any reason to defer adoption of the Rule 81(a)(2) changes pending further work by the Criminal Rules Committee on the 2254 and 2255 Rules. Adoption of the changes will eliminate inconsistencies between the present Rule 81 and the 2254 and 2255 rules. It will not do any harm for § 2241 petitions — § 2243 independently establishes the requirements to be deleted from Rule 81 governing return time and direction of the writ to the person having custody.

It was agreed to recommend adoption of the Rule 81(a)(2) proposals unless the Criminal Rules Committee, which meets after the conclusion of this meeting, provides contrary advice.

Admiralty Rule C

On December 1, 2000, amendments of Admiralty Rule C took effect. The amendments were designed to better meet the differences between forfeiture practice and maritime practice. They were transmitted by the Supreme Court to Congress in April

2000. One week after the Supreme Court transmitted the changes, Congress enacted legislation that revises civil forfeiture practice. The new legislation differed in a number of minor details from the new rules. Because the new rules took effect after the legislation, they technically supersede the legislation. There was no intent, however, to supersede the legislative provisions — the amended rules were crafted and recommended to the Supreme Court long before the legislation was adopted.

The committee responded to these problems by recommending technical changes to the Standing Committee. The Standing Committee concluded that the changes should be published for comment, but for a shortened period that would enable consideration in time for action by the Standing Committee in June 2001. Publication produced no public comments. The Department of Justice believes that the new legislation will require consideration of many provisions of the Admiralty Rules, including consideration whether the time has come to effect a sharper division between maritime and forfeiture practice. But it also believes that the technical conforming changes published for comment should be adopted now.

It was agreed without further discussion that the Admiralty Rules changes should be recommended to the Standing Committee for adoption.

RULE 23: CLASS ACTIONS

Rule 23(c)(1)

Judge Levi introduced the Rule 23 proposals by noting that much of the impetus grew out of the protracted study of Rule 23, and particularly the advice provided by the public comments and testimony on the proposals that were published in 1996. Rule 23 is complicated. Class actions affect important interests, both public and private. The complexity of the questions, the force of the contending interests, and the need to gather as much real-world information as possible have required a very deliberate process. The Federal Judicial Center undertook a helpful study. More recently, the RAND Institute for Civil Justice has provided a helpful general study and an in-depth examination of ten specific "cases." The ad hoc Mass Torts Study Group gathered information at a series of conferences that involved large numbers of lawyers, judges both state and federal, and scholars. Many of the empirical questions that remain important are not likely to yield to further investigation — the nature of the questions makes rigorous research nearly impossible. Large numbers of examples, however, have provided very useful support despite the risk that anything short of impartial social science will be dismissed as mere anecdote.

In its most recent efforts, the Subcommittee has gathered information from practicing lawyers with many different areas of experience and perspective. The Reporter's "phans" letter got responses from a mix of organizations, academics, and lawyers for both plaintiffs and defendants. Practitioners and a scholar advised the Subcommittee during a full day of one of its meetings.

As much work as has gone into these proposals, publication and public comment may lead to further changes. The 1996 proposals engendered comment that caused the committee to draw back for further consideration. That is a good thing. Nor is it only the committee that reconsiders in light of the comment process; those who participate in the process also have occasion to develop their own thoughts further and to reconsider in light of the views expressed by others. Occasionally — and almost miraculously — some consensus emerges.

The Subcommittee hopes that if these proposals are approved for publication, and even if not, part of the October committee meeting will be a conference for further discussion. Hearing from a broad array of people is very enlightening, and the conference setting facilitates two-way exchanges in a way that is not possible at formal public hearings or on receiving written comments. A conference also can be organized with an eye to securing a balanced array of views, without depending on the self-selecting process that may lead to more comments and testimony from critics of proposed rules than from supporters.

A committee member supplemented these observations by saying that after years of uncertainty whether the Rule 23 project will result in any changes beyond the adoption of Rule 23(f), it is

welcome to find this well-conceived package of proposals. The changes made in response to consideration of the package in March are particularly impressive.

Judge Rosenthal then presented the proposals for the Subcommittee. She noted that the proposals represent an effort to capture what we learned from reaction to the 1996 proposals, from the empirical studies, and from the ongoing work of the committee and Subcommittee. The proposals are integrated, but they are not necessarily interdependent — many parts can stand independently if other parts are found wanting.

The focus continues to be on improving the process of class-action litigation. The proposals for dealing with some of the problems that arise from overlapping and competing class actions have drawn the greatest interest. It is easy for people to over-react and over-simplify. Every effort has been made to make these proposals balanced and carefully tailored. The Rule 23(c)(1)(D) certification-preclusion proposal, for example, has been narrowed from earlier versions: as it is presented now, preclusion arises only if the court directs preclusion; the basis of denying certification must go to the merits of the proposed certification rather than the representative's inadequacy or lack of typicality; and a change of fact or law defeats preclusion.

These proposals are designed to have no effect on the cases that are proceeding well under present rules. The many thoughtful comments that have been made already have helped achieve this design.

And there is much in the package that is important apart from the proposals that address overlapping and competing classes.

The Subcommittee, with the committee's help, has spent much time in polishing and refining. The process of polishing and refining should continue. But the next step toward significant improvement will be provided by publication and public comment, as well as the conference being planned for October. Publication will inevitably generate controversy. The committee must be prepared for that, and prepared to learn from it.

General discussion began with an observation that there are elements in the package that plaintiffs will not like, and other elements that defendants will not like. The package has accomplished as balanced a set of proposals as can be proposed. These changes will improve class litigation.

Judge Rosenthal began detailed presentation of the Rule 23 changes with Rule 23(c)(1)(A). This proposal advances again the 1996 proposal to change the requirement that a certification decision be made "as soon as" practicable to a requirement that it be made "when" practicable. The change conforms the rule to the reality of practice. The best practice is emphasized in the Committee Note: the court and parties should take as much time as may be needed to support a thoughtful certification decision, but

no more. There does appear to be some confusion in bench and bar as to the proper extent of merits-related discovery during the pre-certification stage. The Note seeks to address this topic, noting that the court must understand the nature of the dispute likely to be presented in order to determine what issues may be common to the class, whether the representatives are typical of the class, whether the representatives will prove adequate and without disabling conflicts with and among class members, and whether — for purposes of Rule 23(b)(3) — the common issues predominate and class litigation is superior. The Note ends with the summation that the parties should act with reasonable dispatch to gather and present the information needed, and the court should make the determination promptly.

It was asked whether the Committee Note reference to pre-certification disposition of motions to dismiss or for summary judgment is consistent with the advice about discovery to reveal the nature of the issues on the merits. The answer was that the parties and court must manage the appropriate timing of certification-related discovery in relation to disposition of motions that may pretermit the need to consider certification. The FJC study revealed widespread consideration of motions to dismiss or for summary judgment before certification; defendants who make these motions surrender the possible advantages of winning on terms that bind the class in favor of the advantage of early focusing of the plausible issues or even victory on the individual claims. Such pre-certification motions are indeed common.

It also was observed that the length of the pre-certification period is related to the proposals in draft Rule 23(g) for regulating the relationships between courts that encounter competing class actions. The longer the pre-certification period, the greater the tension encountered in undertaking regulation of proceedings in other courts. This observation led to the thought that there is surely an interaction between these proposals, but it may involve mutual support as much as tension. Greater deliberation, with as much speed as possible, is the basic direction.

The proposed Rule 23(c)(1)(B) specifically requires that the order certifying a class define the class and the class claims, issues, or defenses. This requirement will support review when a Rule 23(f) appeal is undertaken. It also will enable class members to know what is at stake, and to understand better the actual dimensions of the class proceeding. It will facilitate later res judicata determinations. Later developments may require modification of the definition, but it is desirable to have careful consideration at the outset. The proposal also requires that an order certifying a Rule 23(b)(3) class state when and how members may elect to be excluded from the class, reducing the anomaly that Rule 23 now establishes the right to be excluded only in the provisions for notice.

It was observed that the proposals have begun to depart from

the present Rule 23(c)(2) reference to a right to "request" exclusion by speaking of the right to "elect" exclusion. The right to elect speaks more directly to the underlying procedure — a "request" must be honored. It was agreed that the proposals should refer uniformly to the right to elect exclusion; the changes will occur in Rule 23(e)(3).

Proposed Rule 23(c)(1)(C) changes the event that closes off alteration or amendment of a determination whether to certify a class at final judgment rather than judgment on the merits. This change does not resurrect the "one-way intervention" practice that allowed class members to decide whether to become class members, and be bound by the judgment, after decision on the merits. There is no thought that a plaintiff ought to be able to win, for example, a summary judgment of liability and then seek class certification. Instead, it is meant to allow alteration of an order granting certification in response to needs that appear after events that may be characterized as decision on the merits. Proceedings to formulate a decree or determine other remedies may show conflicts within a group that had seemed to be a coherent class, or may show other reasons to modify the class definition. Again, the rule change is consistent with common practice.

The provision that a class certification is conditional inspired the comment that it might be wise to say in the Note that careful analysis is required before any certification decision. "Certify now, think later" is not good procedure. All agreed that it is necessary to maintain the freedom both to modify an order granting certification as later developments show the need, and occasionally to reconsider an earlier refusal to certify. But it also is important that careless certifications not be encouraged with the thought that change is always possible.

The most difficult portion of proposed Rule 23(c)(1) is subparagraph (D). This provision would allow a judge who refuses to certify a class for failure to satisfy the prerequisites of Rule 23(a)(1) or (2), or for failure to satisfy the standards of Rule 23(b), to direct that no other court may certify a substantially similar class to pursue substantially similar claims, issues, or defenses unless a difference of law or change of fact creates a new certification issue. The court that denies certification can decide that the circumstances do not warrant preclusion — an example that has been pressed repeatedly is that the arguments for certification may have been poorly presented. The court has to make an affirmative decision that preclusion is desirable, and an express direction. Even then, a second court is free to find that differences of law or developments of fact justify revisiting the certification question. There are strong advantages in permitting this preclusion. Relitigating the certification question can be costly for the party opposing the proposed class. The first certification decision may have rested on a thorough presentation and careful deliberation. It may be asked, however, whether so many "protections" have been built into the proposal that it will seldom make a difference. The hope is that a preclusion direction

will enhance the tendency of most courts to defer to the first careful refusal to certify.

It was observed that neither rule nor Committee Note makes it clear that the effect of a preclusion direction is to be determined by the second court, not by the court that entered the direction. It was suggested that these statements might be added to the Committee Note: "The preclusion effects of a Rule 23(c)(1)(D) direction against class certification will be enforced under the usual rules that apply to res judicata. Ordinarily the court asked to certify a class will determine whether the direction precludes certification."

Discussion continued with the observation that when the committee recommends a proposal for publication, it is implicitly endorsing the proposal, placing the burden on those who disagree with it. It was urged that this proposal should not go forward. Certification preclusion "will simply create a whole new basis for collateral litigation." In addition to arguing the certification question a second time, the parties also will argue the preclusion effects of the direction. And there will be appeals whatever resolution is made. The Committee Note observes that at least two circuits have refused to permit a federal injunction against successive certification efforts in state courts following a federal refusal to certify. This proposal is different from the settlement preclusion proposed in Rule 23(e)(5) — the settlement preclusion attaches only when a class has been certified and has been represented throughout the course of the careful settlement review prescribed by Rule 23(e)(5). Certification preclusion may be a good idea, but it "feels like legislation." Perhaps it should be left for action by Congress.

These remarks were followed by another expression of doubt, "although this as mellow a version of certification preclusion" as could be drafted. Yet this is an area of controversy that might benefit from rulemaking. Publication of the proposal will make it possible to benefit from reasonable debate on all sides. We would benefit by hearing from many voices. Comments already received from defendants and plaintiff groups show that the rule might be a good idea.

The divide between rulemaking and legislation led to the observation that the Standing Committee has urged this committee to attempt to formulate the best rule that can be drawn. Then this committee should consider the fit of the rule with the Enabling Act, and advise the Standing Committee both on the strengths of the proposed rule and the potential Enabling Act doubts. The Standing Committee can consider the Enabling Act question further, and may conclude that the better course is to recommend legislation. But all of that depends first on development of the proposal in this committee.

The observation that publication for comment brings benefits, but also implies some measure of endorsement, was renewed. If

there is not a legal basis for preclusion, we should not accomplish it by confiding to the discretion of the trial court. Often the discretion will be exercised without opportunity for appellate review.

Yet another observation was that certification preclusion will draw many objections. Some of them may prove sympathetic. But it is possible to publish a proposal with caveats making clear the reasons for pursuing the proposal but also recognizing the committee's understanding of the Enabling Act question and sympathetic awareness of the concerns of comity and federalism that inevitably arise. It can be made clear that this remains an open issue.

This suggestion was followed by noting that the 1996 proposals included some that were published knowing full well that vigorous controversy would result. The "just ain't worth it" proposal was one of those. Comment was sought for help in resolving the doubts on both sides.

Another suggestion was that certification preclusion "has evolved rapidly." Perhaps publication should be deferred.

The same doubts were expressed by suggesting that it is troubling that a trial-court decision denying certification should preclude another judgment on the question.

Turning to the portion of the Committee Note that reflects the failure of courts to develop rules of certification preclusion without guidance from a Civil Rule, it was noted that the Note is provided to explain the need to act by rule or statute if preclusion is to be achieved. The traditional requirements of res judicata stand in the way, focusing on the requirement of a "final" judgment with opportunity for appellate review. But these requirements may not reflect the context of contemporary class-action litigation. <u>The Note can be rephrased to make it clear that there is no quarrel with the courts that have enforced traditional doctrine. Rather, certification preclusion, as limited by the proposal, addresses new needs that require new theories based in class-action theory. This is a policy decision to adapt preclusion policy to new needs.</u>

In this vein, analogy was drawn to Rule 23(f). Traditional appeal doctrine, with all of its multiple opportunities to achieve review before a truly final judgment, proved inadequate to the needs of class litigation. A rule was needed to support desirable appeal opportunities. So here, although the setting is different. The current cases draw from general authority, and indeed reflect sympathy for the advantages that might flow from preclusion. The device of allowing a first court to decide whether its judgment is eligible for preclusion may seem novel, but there are analogies in the provisions that in various contexts allow a court to determine whether a dismissal is to be with or without prejudice.

It was suggested that "Rule 23(f) opens a door, while

certification preclusion closes one," and that Rule 23(f) "increases debate, while preclusion closes it off." It was rejoined that even if the first court attempts to close the door the second court can open it on finding changes of law or fact. Moving to a different system of courts — a very common phenomenon — makes it easy for the second court to conclude that its own law is different when certification is proper under its own law.

This flexibility led to the observation that the court directing preclusion "is a prisoner of the second court." This phenomenon, on the other hand, may be seen as simply a second opportunity for review.

It also was suggested that Rule 23(f) creates an opportunity for appellate review when certification is denied and preclusion is directed. Although review is discretionary, the courts of appeals have recognized that review is proper when there is a serious claim of error. Review as a matter of right also may be possible if the denial of certification is followed by prompt entry of final judgment. An order directing preclusion may even operate to enhance the vigor of appellate review.

The suggestion that preclusion will simply increase the number of issues litigated in successive certification attempts was renewed. It was responded that we now face a huge number of successive cases, in part because of the opportunity to shop the certification decision. Preclusion may reduce the total volume of successive attempts.

Another committee member observed that multiple overlapping classes present "an enormous problem." Consolidation of federal cases through the Judicial Panel on Multidistrict Litigation helps as to federal cases. But in state courts, this is no help. Many states have mechanisms for consolidating related cases within the state system, but there is no means for consolidation across state lines, or across the lines between state and federal courts. All the plaintiff wants to do is to find a court that will grant certification; once certification is won, the case settles. Rather than appeal a denial of certification, the plaintiff simply goes to another court. It is troubling to allow a free search for different standards for certifying a nationwide class. These problems have to be addressed by the bench and bar. Although Enabling Act concerns persist, they should not prevent publication in an effort to gain as much information as can be had.

This statement of the problem was found persuasive by another member, who concluded nonetheless that the answer should be found in legislation. Congressional response to like problems is shown by the aftermath of the 1995 Private Securities Litigation Reform Act. The 1995 act led many lawyers to file actions in state courts. Congress responded in 1998 with new legislation designed to force most of this litigation into federal courts. The committee bears the responsibility to decide how confident it is that this proposal will work, and whether Enabling Act authority

extends this far.

Doubts were expressed from a different direction, noting that the proposal seems to reflect an assumption that plaintiffs are engaging in improper forum shopping. It is not clear that this is happening. The question of forum shopping is complicated. It goes too far to give preclusion authority to a federal court. The reasons for going to different courts are complex. A federal court, indeed, will often be acting in a case that calls for application of state law. Even the provision allowing for reconsideration in light of changed law or facts is not enough — there still seems to be a presumption to be overcome.

This observation was met with a report that plaintiffs' lawyers who met with the Subcommittee seemed to feel only that it is important to ensure that the certification question is well and fully presented. Once that has been done, preclusion may be a desirable protection against the burdens of repeatedly litigating the same certification question.

Another committee member echoed the thought, asking why one full and fair opportunity to litigate the certification issue is not enough.

It was suggested that this extensive debate "is premature" within the committee. The proposal should be advanced for public comment. The debate engendered by publication will provide a better foundation for final recommendations.

It also was observed that the first court may decide not to direct preclusion. That will be a signal to later courts that the refusal to certify was not "on the merits" of certification, but rested on different concerns. The same result might be accomplished by moving away from preclusion and toward a requirement that a court state the reasons why certification should not be considered again. The court would say that denial does not rest on concerns about the adequacy of the arguments for certification, or about the suitability of class proceedings in this court rather than another court, or other like grounds. It was responded that a denial of certification is always "on the merits." This approach simply asks the judge to speak to the degree of confidence in the result — "I am right," or "I am really right," or "I am really sure I am really right," and so on.

It was noted that in advising on appeal in habeas corpus proceedings, or in certifying a question for appeal under § 1292(b), a judge may be offering exactly this sort of assessment of the results.

Other observations were that ordinarily a person is bound by a first ruling. And that if an appeal is taken from a federal order denying certification and directing preclusion, a second court can stay parallel proceedings to await the outcome on appeal.

This discussion concluded with separate motions. A motion to recommend publication of Rule 23(c)(1)(A), (B), and (C) passed

unanimously. A motion to recommend publication of Rule 23(c)(1)(D) — the certification preclusion proposal — passed with 8 votes for and 4 votes against. Those who voted to recommend publication noted that it should be made clear that the committee remains open to all arguments on this proposal.

Rule 23(c)(2)

Proposed Rule 23(c)(2) adopts a plain language requirement in line with regular proposals. Actual implementation of this requirement may be bolstered by the well-developed Federal Judicial Center project to develop model notice forms. The proposal also adopts an express notice requirement for (b)(1) and (b)(2) classes, recognizing that the notice need not aim for the comprehensive individual-member notice required in (b)(3) class actions. It also adds a list of a number of topics to be addressed by the notice.

Several changes have been made from earlier drafts. The list of topics to be described in the notice originally included a statement of the consequences of class membership. This element was dropped from concern that it might hopelessly complicate the task of attempting to provide clear notice in a form that does not deter any attempt at reading or understanding.

Earlier drafts of the provision for notice in (b)(1) and (b)(2) class actions attempted to give guidance on the form of notice by stating in the Rule the purposes of giving notice. The purpose is to ensure that enough class members learn of the action to provide a meaningful opportunity for challenges to the certification decision and class definition, for contesting the adequacy of representation, and for monitoring the continuing course of the action. That formulation was thought to be an undesirable invitation to challenge the certification decision already made. A substitute effort suggested notice to a number of class members sufficient to provide an opportunity for effective participation. That effort was found misleading because it is not certain whether class members have an opportunity for "effective" "participation." The current proposal simply requires notice by means calculated to reach a reasonable number of class members. The Committee Note continues to advise that the court should take care to ensure that the costs of notice do not defeat a class action worthy of certification.

Proposed Rule 23(c)(2) was recommended for publication without change.

Rule 23(e)

Rule 23(e) is aimed at enhancing judicial review of proposed class-action settlements. The need for searching review has been urged repeatedly throughout the committee's consideration of Rule 23. It was stated frequently during the testimony and comments on the 1996 proposals. Its importance has been stressed in much academic literature, building on the perception that once class representatives and class adversaries join together in urging

approval the court often lacks the vigorous adversary presentation needed to test the settlement. The RAND study further supports this advice. The Rule 23(e) proposal also is the one that has been longest before the committee and Subcommittee, and has been most frequently revised.

The effort to bolster judicial review of class-action settlements has led in many directions. Three approaches have been explored and put aside.

One approach was to attempt to find ways to support objectors. Early drafts sought to assure that objectors have discovery opportunities sufficient to explore the value of the settlement in relation to the strength of the class position, to direct that attorney fees be awarded successful objectors, and to allow fee awards to unsuccessful objectors. All of these proposals were at first diluted and then abandoned. It was recognized that objections often are made for good reasons, but that objections also are often made in an attempt to seize the strategic value and advantages that flow from a threat to derail a good settlement. It proved impossible to draft a rule that would enhance the support for objections that should be supported without enhancing also the support provided for objections made for unworthy purposes.

Another approach was to authorize the court to appoint an independent investigator to inquire into the settlement and report to the court. In effect, the court-appointed investigator would be an ideal objector, motivated only by a dispassionate quest for information and supported by all parties. This proposal failed for a variety of reasons. There was concern that courts should not become involved in the process of gathering information in this way, whether the process be viewed as inquisitorial or adversarial. There was concern that the court-appointed officer would gain undue credibility by virtue of the apparently neutral role. And it was concluded that the only fair way to present the conclusions to the court would be in the same way as any objections are presented, with full opportunity to respond.

Another draft would have assured appeal "standing" for any class member to challenge an approved settlement, setting aside the requirement in many circuits that appeal can be taken only if the trial court has granted intervention. The class member could present on appeal any objection that had been presented to the trial court, without regard to who presented the objection. This approach was rejected on concluding that the occasional "trap-for-the-unwary" aspect of the intervention requirement is overcome by its advantages. The formal intervention process affords an opportunity for trial-court control, weighing the possible merits of the objections against the great costs that can flow from — and that can be the motivating inspiration for — an appeal. Appeal can be taken from a denial of intervention; victory on appeal will establish standing to appeal the settlement. That is protection enough.

Turning to what is in proposed Rule 23(e), paragraph (1) begins with a statement in subparagraph (A) that court approval is required for settlement, voluntary dismissal, or compromise of an action brought as a class action. Subparagraph (B) requires notice to class members if the settlement, voluntary dismissal, or compromise reaches class claims, issues, or defenses. Subparagraph (C) requires a hearing and findings that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate if it reaches class claims, issues, or defenses.

The purposes of paragraph (1) are clear. The first is to make it clear that a party who advances class allegations is assuming a responsibility that cannot be abandoned unilaterally. An attempt to dispose of individual claims on terms that do not affect the class still must be approved by the court. Approval may be given readily if there is no reason to be concerned about effects on members of the putative class. The action may have been filed and pursued in a manner that drew no attention and was not likely to engender reliance by anyone else. There are many good reasons why early exploration of the action may demonstrate that it does not justify the burdens entailed by further pursuit as a class action. Court approval can be given readily, without substantial burden on the court or parties.

At the same time, a dismissal that purports to affect only individual claims may have an effect on class members. The most obvious concern is that class members may have relied on the pending class action to toll the statute of limitations. Dismissal without notice may cause forfeiture of claims because limitations periods expire before class members recognize the danger. The court has discretionary power to direct notice under Rule 23(d)(2) to protect against this danger. An alternative may be to seek out another class representative — this alternative is most likely to work when it is the original representative, rather than class counsel, who wishes to abandon the proceeding. There may be other concerns. Class allegations may be added to a complaint with the hope of scaring out a larger individual settlement. There is not much that a court can do in these circumstances if the parties wish to settle, unless there is some means of encouraging continued representation of the class by others.

Although the language of present Rule 23(e) is ambiguous, many courts have read it to mean that approval is required for individual settlements before a certification decision is made. The first purpose of proposed Rule 23(e)(1) is to make this rule explicit.

The second purpose of the proposal is to make it clear that notice to the class is required, as under present Rule 23(e), when a settlement, voluntary dismissal, or compromise would dispose of class claims, issues, or defenses. Absent that effect, notice is not required. The court may, as a matter of discretion, direct notice to the class for the reasons that support the requirement that approval be given even for disposition of individual claims

alone.

The third purpose of proposed Rule 23(e)(1) is to address the other procedural requirements for approving a settlement, voluntary dismissal, or compromise that disposes of class claims, issues, or defenses. For the first time, the rule would state the standard that has been adopted in many decisions — the settlement must be fair, reasonable, and adequate. There must be a hearing. And there must be findings to support the conclusion on fairness, reasonableness, and adequacy.

These purposes have been readily approved in earlier discussions. It has proved difficult, however, to devise a clear expression in rules language. The central distinction is between settlements that would affect class members by way of res judicata and settlements that do not legally affect class members. The original drafts drew this distinction by referring to a disposition that would "bind" class members. That term was thought by some to be too informal, too much lacking in received technical definition, to be used in a formal rule. Substitutes were sought. The problem is made complicated by the risks of referring only to settlement of the claims, issues, or defenses of a "certified class." It is very common practice to consider certification at the same time as a settlement is presented for approval. It is common to react to these combined events by provisionally certifying the class for purposes of considering the settlement, provisionally approving the settlement, and providing notice to class members. The limited provisional certification may or may not be read into a reference to a certified class. It is possible, moreover, that some other device will be found — Rule 23 does not speak to the provisional certification tactic, and alternative approaches might take on a still more uncertain status.

Discussion opened by addressing the questions raised by the reference to "voluntary dismissal." Rule 23(e) now requires notice of dismissal. But when dismissal results from court action against the wishes of the class representative — examples would be a judgment after trial, or a summary judgment or dismissal on the pleadings after certification — there is no need for mandatory notice. Discretionary notice under Rule 23(d)(2) provides sufficient opportunity to protect class members when that seems desirable. The distinction is a useful one. But it complicates the drafting of subdivision (e)(1). One drafting approach may be to separate voluntary dismissals out from settlement or compromise, providing parallel paragraphs for each.

The discussion moved on to reach agreement that it is desirable to require approval for settlement of individual claims before certification, and that it is better not to require notice to the putative class.

It was noted that voluntary dismissals may be triggered by a variety of circumstances. A (b)(2) action for an injunction, for example, might be met by the defendant’s agreement to provide the

requested relief without need for adjudication. It was further noted that a voluntary dismissal may be without prejudice, but also may be with prejudice.

Concern was expressed about the class representative who simply "walks away" from the action, without even seeking a voluntary dismissal that would require court approval. Another and rather common event is that the representative simply amends the complaint to delete the class allegations.

It was agreed that the drafting question should be addressed further.

An alternative version of Rule 23(e)(1) was prepared overnight and presented for review. The starting point was an effort to spell out the distinction between a class that has been certified and a class "that would be certified for purposes of the settlement, voluntary dismissal, or compromise." This effort was recognized as ungainly and potentially confusing. Further work led to this proposal:

> **(A)** A person who sues or is sued as a representative of a class may settle, voluntarily dismiss, compromise, or withdraw all or part of the class claims, issues, or defenses[,] only with the court's approval.
>
> **(B)** The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.
>
> **(C)** The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

The Committee Note would explain that a settlement binds a class member through the res judicata effects of a judgment for or against a certified class. A voluntary dismissal with prejudice has that effect. A voluntary dismissal without prejudice does not.

This proposal was approved.

Rule 23(e)(2)

Proposed Rule 23(e)(2) authorizes the court to direct the parties to file a copy or summary of "side agreements." The purpose is to protect the court against being forced to approve without a complete understanding of everything that may have affected the settlement terms. Examples of side agreements are listed in the Committee Note. The Note also recognizes that many of these agreements deserve to be protected as confidential when filing is directed.

Rule 23(e)(3)

Proposed Rule 23(e)(3), which creates a "settlement opt-out,"

is another response to the difficulties that beset judicial review of class-action settlements. The committee has been told for many years, in many ways, that review may be stymied by cooperation of the parties, the lack of forceful objectors, and even by the court's own incentives to approve the settlement and conclude the litigation. The initial drafts that sought to provide support for objectors encountered considerable cynicism, based on the experience that objectors may be motivated by strategic desire rather than concern for protecting the class. The settlement opt-out is an alternative form of protection for class members and information for the court. Many cases already provide an opportunity to opt out at the time of settlement because a (b)(3) class is certified for the first time incidental to settlement review. The new provision applies only to (b)(3) classes and makes a difference only if an earlier opportunity to request exclusion has expired by the time the settlement is proposed for review. The number of opt-outs will give the court some indirect information on the desirability of the settlement.

The opportunity to request exclusion is more meaningful when class members know the actual consequences of the class litigation in the form of a proposed settlement. Until that point, class members may hope for more. Perhaps more often, until that point class members may not pay much attention to the litigation. Members may remain in the class at the time of the first opportunity to request exclusion more as a matter of inertia than informed decision.

The settlement opt-out will generate uncertainty and complicate settlement in the cases where it applies. But many settlements are negotiated before the first opportunity to opt out. Experience suggests that the second opt-out will not cripple settlement opportunities. Uncertainty whether many members will opt out may reduce the settlement terms as a defendant seeks to establish a reserve for future dealings with members who opt out, but even that result may be a good thing if those who opt out have distinctively valuable claims. Settlement may well have a homogenizing effect that trades off stronger claims for the benefit of weaker claims.

Two alternative opt-out versions are presented. The first requires that a second opt-out be allowed unless the court for good cause refuses to allow it. The second leaves the opt-out opportunity to the court's discretion.

The first suggestion was that the settlement opt-out is a good opportunity to educate class members and the court. The "default" position should be that there is a right to opt out, subject to defeat on showing good cause. Another member agreed with this observation, saying that this provision is one of the most important changes being proposed.

In response to this enthusiasm, it was suggested that it will be important to hear more from practicing lawyers about the

probable impact of a settlement opt-out. It is better to publish both alternatives to stimulate comment. The neutral alternative, leaving the opportunity in the court's discretion, grew out of discussion at the March committee meeting. Further support for publishing both alternatives was offered with the comment that no one knows just what the impact will be. Some have thought there will be negative effects, while others believe that people will adjust. The proposals will be controversial, but they are serious, thoughtful, and deserve to be published.

The Committee Note includes a paragraph from lines 44 to 47 on page 15 of the agenda book that states that notice of the settlement opt-out should not be provisional. This paragraph reflects the view that it is unseemly to tell class members that they can tell the court that they do not wish to be bound by the settlement, but that they will be bound if the court decides they should be. But it may be desirable in some circumstances to permit a form of "straw poll" to determine class members' views of a settlement. It was agreed that this paragraph would be deleted from the Note.

Rule 23(e)(4)

Subdivision (e)(4) provides that a class member may object to a proposed settlement, voluntary dismissal, or compromise. It further provides that an objector may settle, voluntarily dismiss, or compromise the objections only with the court's approval. This provision grew out of concern that objectors may utilize the strength of objections made on behalf of the class to win individual advantages that should instead go to the benefit of the class. A resolution of objections that leads to change in the class settlement requires approval. A resolution that benefits the objector without changing the class settlement has not required approval. The approval requirement may deter objections made solely for strategic advantage, and may help ensure that cogent objections result in class gain rather than private advantage.

An earlier version of subdivision (e)(4) included a lengthy provision stating that settlement of an objection made on behalf of the class could be approved only on showing reasons to afford the objecting class member terms different than those available under the class settlement. This version implied a distinction between objections based on class interests and objections based solely on arguments that the individual objector is in a position that is different from the position of other class members in a way that justifies different treatment. Often it is difficult to draw this line in considering actual objections, however, and it is difficult to articulate the approach a court should take to discouraging settlements that seek to benefit a defendant and all class members by recognizing and paying off the strategic value of even very weak objections. The effort was abandoned in favor of a simple court-approval requirement.

The first question was whether a class member can object to a

voluntary dismissal. Objection makes sense if the class has been certified before the dismissal, but what if there is a voluntary dismissal without certification? Is it possible to distinguish between a voluntary dismissal that is in some sense a "settlement" because benefits flow to someone and a voluntary dismissal that reflects nothing more than abandonment of the effort? Perhaps the Note should state explicitly that objections may be made not only by members of a certified class but also by members of a class that would be certified or is affected by the dismissal.

A different question went to a topic opened up by lines 8 to 11 on page 17 of the Committee Note. Class members may communicate with the court in a variety of ways, more or less formal. It is awkward to require court approval when a class member does nothing to follow up an initial communication, which may be nothing more than a letter asserting vague dissatisfaction with the settlement terms or a proposed fee award. It may be better to treat some of these communications as something other than an "objection."

One approach would be to state in Rule 23(e)(4)(A) that objections may be filed. Some judges automatically file, and "serve" on counsel, every letter that is directed to the court about a pending action. And they expect the proponents of the settlement to speak to everything in these communications. This approach is consistent with the draft Rule and Note, but is not clearly directed by it.

The question of voluntary dismissal returned by asking whether the rule should refer to "voluntary dismissal" of an objection. We have formal procedures for voluntarily dismissing a claim, but what of an objection? The difficulty is that an objector may be compensated on terms that are not formally characterized as a settlement or compromise; the reference to voluntary dismissal is meant to capture situations in which the objector wins a benefit not available to other class members and then abandons the objections. The attempt is to require court approval, not to forbid such disposition of an objection. But perhaps this difficulty should be met by treating "voluntary dismissal" and similar abandonment of objections in the ways earlier discussed with subdivision (e)(1).

A separate question was asked about objections filed by a member of a putative class when a settlement is reached before certification. Should subdivision (e)(4)(A) be limited to objections by members of a certified class? What would be done about the situations in which settlement and certification are considered simultaneously? Surely members of the provisional class should be able to object; there is a class, at least for purposes of objecting.

Further discussion focused on the observation that abandonment is different from voluntary dismissal, settlement, or compromise. It is difficult to require a class member to persist in presenting an objection that the class member simply prefers to abandon. For

that matter, how are class objections "settled"?

It was suggested that the draft Committee Note unpacks some of these complications in reasonably effective form. But perhaps it should be provided that objections can be withdrawn only with court approval. The problem is paying off the objector just to disappear. A requirement of approval may help direct all settlement payments to the benefit of the full class, and may act as a deterrent to strategic objections.

So the questions remain: should we deal separately with voluntary settlement? And what is it that the court must approve in allowing an objector to "go away"?

One observation was that we should not care whether an objector is paid off. Once the objection is made the court can consider it. But it may be difficult to get information to evaluate the objection, and without knowing the reasons for an objector's withdrawal it is difficult to guess whether withdrawal rests on a lack of faith in the objection or instead rests on a payoff. Settlement, moreover, may occur on appeal. The court of appeals may be in a weak position to evaluate the settlement.

Uncertainty was expressed about the practicality of considering an objection once the objector has withdrawn. It is not merely the absence of an advocate that creates difficulty. Effective pursuit of the objection might require significant discovery or other investigation; the court cannot undertake that effort.

Support was offered for strengthening the draft to establish more effective incentives to counter strategic objections. What do we do when a class member says frankly: I am going to object unless you cut a deal?

It was noted that a rule "cannot do everything." We can publish the proposal. The rule provides a framework for court review and approval. There are fundamental issues going to the extent of the court's duty to protect absent class members and to supervise the parties and attorneys before it. The rule framework can guide the court toward enforcing an appropriate level of supervision. The Manual for Complex Litigation can point out that the potential for abuse exists.

In the same vein, it was observed that people write letters and make comments. We cannot write all of this into a rule. It is not "abandonment" of an objection to say it once and to fail to repeat it. Nor is that a voluntary dismissal of the objection.

It was asked whether it matters whether consideration flows to the objector who has ceased to pursue an objection. That might be characterized as a settlement rather than abandonment, withdrawal, or voluntary dismissal. Perhaps the Note should say it is a settlement.

These problems are similar to the problems encountered with

the Rule 23(e)(1) distinction between outcomes that bind the class and other outcomes. In the end, it was concluded that subdivision (e)(4) should be framed to integrate with the revised subdivision (e)(1):

> **(4) (A)** Any class member may object to a proposed settlement, voluntary dismissal, or compromise that the court must approve under Rule 23(e)(1)(C).
>
> **(B)** An objector may withdraw an objection made under Rule 23(e)(4)(A) only with the court's approval.

The Committee Note will point out that the provision for objecting addresses only action that will bind the class as covered in Rule 23(e)(1)(C). Court approval is required for "withdrawal," a term that is not equated to voluntary dismissal or abandonment. The event that requires approval is either a change in the terms of the class settlement, requiring approval under subdivision (e)(1), or giving the objector something different than the objector would receive under the terms of the class settlement. An objector is not required to pursue an objection simply because it has been lodged with the court.

Rule 23(e)(5)

Rule 23(e)(5) establishes "settlement preclusion." It is narrowly crafted, providing that refusal to approve a settlement, voluntary dismissal, or compromise on behalf of a class that has been certified precludes any other court from approving substantially the same settlement, voluntary dismissal, or compromise unless changed circumstances present new issues as to the fairness, reasonableness, or adequacy of the settlement. The preclusion rests on the thorough review and evaluation that are mandated by all of Rule 23(e). The result of such review deserves finality. But finality is balanced with flexibility in recognizing that changed circumstances may make reasonable a settlement that did not appear reasonable when originally proposed.

It was urged that again, refusal to approve a voluntary dismissal does not fit well in this rule. But the same problem persists — a settlement should not escape review or, here, preclusion, simply by being framed as a "voluntary dismissal."

It was agreed that the Committee Note should state that ordinarily the preclusion determination is made by a second court when it is asked to approve a settlement. The statement will be parallel to the statement to be added to the Note discussion of certification preclusion under subdivision (c)(1)(D).

It was objected that when the court refuses to approve a settlement, the case goes on. There is no opportunity to appeal. It is troubling to attach preclusion to an unappealable order. But there are opportunities for review: the parties can try the case to see what it is really worth; they can improve the settlement to meet the court's objections; they can try to persuade a second

court that there is a change of circumstances that justifies approval of the very same settlement. These are indirect means of review.

Settlement preclusion was not made a matter of discretion in the manner of the certification preclusion provision because settlement review is a more searching process. A refusal to approve a settlement also is a more momentous step than a refusal to certify. There is every incentive to approve a settlement. The court that rejects a settlement will have done a lot of work. It has concluded that the class deserves to be protected against this settlement. Although disapproval is an act of "discretion," it is a very carefully considered decision that deserves the force of preclusion.

The renewed protest that it is untoward to give preclusive effect to an unreviewed action met the rejoinder that an order approving a settlement precludes class members, and often is not reviewed.

A different perspective was offered by comparing settlement preclusion to consolidation. Often there will be other cases pending. If a federal court is the first one to rule on a proposed settlement, preclusion in effect consolidates all the proceedings — the MDL procedure is circumvented as to other federal actions, and is indirectly extended to state actions. In effect, a renewed effort to settle must be brought back to the court that rejected the first settlement. This perspective was challenged on the ground that the settlement preclusion does not stay proceedings in other courts. The parties can take the proposed settlement first to whatever court they prefer. And they can present a changed settlement to another court. Proceedings can continue in all other courts; the only impact is that the same settlement cannot be approved by another court unless it is prepared to find changed circumstances that present new issues of fairness, reasonableness, and adequacy. A responding hypothetical suggested that two courts might be reviewing the same settlement simultaneously: why should disapproval by the federal court one day before another court was prepared to approve preclude the approval? It was responded that approval by one court a day before the other court was to disapprove precludes disapproval. Perhaps as importantly, there are many means to avoid such close contests — courts can, do, and should seek to coordinate their review proceedings.

It was asked what happens if a second court approves the once-rejected settlement: who is to complain? If indeed no one objects, the approval will stand. But the rule can force the second court to explain why it is approving the settlement.

It was argued that if disapproval is rare, and if careful work will be done before concluding that disapproval is required, the court that disapproves a settlement will write a careful explanation of its action. The explanation will have persuasive force. We do not need to add preclusive force to address the rare

event — initial disapproval is rare, and the prospect that it will be followed by approval in another court is still more rare.

This discussion led to observations that the proposal has been worked out carefully. It deserves publication for comment. What we have heard from practicing lawyers is that settlement shopping is a problem, indeed a pervasive problem. The opportunity to seek approval in successive courts is one of the motives for multiple simultaneous filings.

It was asked what should we do if we think that settlement preclusion is a good idea, but is beyond Enabling Act authority? It was responded that we should not publish a rule that we believe is not authorized. We could suggest the idea to the Standing Committee as a proposal for legislation. It was noted that we have not "fully researched" the Enabling Act question; substantial controversy on the question may be a reason not to inject it into the system.

It was agreed that we should ask two questions separately: Is settlement preclusion a good idea? If it is a good idea, is it one that should be pursued through the Enabling Act process? The proposal is in some ways "bold," but there are strong reasons to conclude that it is indeed within the Enabling Act. Many of them are expressed in the Reporter's memorandum on Enabling Act authority. We are operating in the area of a class action procedure that has been created through the Enabling Act. We assume that Rule 23 is a valid Enabling Act creation. But Rule 23 creates opportunities for abuse. We should have authority to address the consequences of the rule. The proposal is, in all, rather modest. It provides escape opportunities by changing the terms of the settlement, seeking settlement on behalf of differently defined classes, or by showing changed circumstances that affect the review calculus. The RAND study and many others have concluded that effective review of settlements is one of the most important improvements that can be made in class-action practice. The settlement-class proposal published in 1996 drew many comments about bad settlements. We should proceed.

A motion to withhold subdivision (e)(5) from publication failed, 3 votes for and 9 votes against. A motion to recommend publication of subdivision (e)(5) passed without expressed dissent.

Rule 23(g)

Proposed Rule 23(g) is an attempt to address the problems of overlapping and competing class actions in terms more general than the specifically targeted provisions for certification preclusion and settlement preclusion. There is a felt need to establish some means of addressing overlapping and competing class actions. Fulfillment of the purposes of Rule 23 demands no less. Multiple actions can defeat any opportunity to achieve an efficient, uniform, and fair resolution of class claims by any court. The entire purpose of a (b)(1) class is to protect class members against the effects of litigation in their absence, or to protect

a class adversary against inconsistent adjudications. Realization of the purposes of a (b)(2) injunction class may demand comparable protection against competing actions. Similar concerns attach to (b)(3) classes, albeit with reduced force.

Discussions of Rule 23 almost always come back to the problems presented by overlapping classes. The frequent occurrence of multiple filings cannot be denied. It is not certain whether the resulting problems can be addressed through the Enabling Act. And the problems are complex: the need is for a provision that is flexible but that also provides standards to guide and channel discretion.

Both "strong" and "weak" forms have been drafted for consideration. Both forms allow a federal court to regulate litigation in other courts by a class member before as well as after class certification. Both forms require findings that the other litigation will interfere with the court's ability to achieve the purposes of the class litigation; that the order is necessary to protect against interference by other litigation; and that the need to protect against interference is greater than the class member's need to pursue other litigation. These requirements are stated separately to emphasize the importance of each, rather than achieve a more economical form of expression. Careful analysis is required before an order can issue.

The strong form would allow the federal court to address other litigation whether it is in class form or any other form. The weaker form allows the federal court to address only class actions in other courts. The still weaker version would bar a federal court from regulating an action on behalf of a true state-wide class, defined as an action in a state court on behalf of persons who reside or were injured in the forum state and who assert claims that arise under the law of the forum state.

Both stronger and weaker versions include further provisions that emphasize the need to consider the alternatives to the federal class action. Subdivision (g)(2) allows the federal court to stay its own proceedings, and to delay the determination whether to certify a class. Subdivision (g)(3) expressly recognizes that it is proper to consult with other courts in determining the best course of action.

The Subcommittee recommends that both stronger and weaker forms be sent forward with a recommendation for publication. It will be useful to gather reactions to all approaches.

The draft Committee Note expresses the many reasons to exercise restraint in regulating the relationships between individual and class actions. Individual class members may have particularly important reasons to pursue individual actions, and even substantial numbers of individual actions may pose little threat to effective management of the federal class action. The Note also describes the reasons why a decision to defer to state-court litigation is similar to the reasons for staying federal

proceedings recognized in the "Colorado River" doctrine.

The first comment was that the (g)(2) and (g)(3) provisions are reasonable. The strong form of (g)(1), however, is so misconceived that publication would endanger the credibility of the whole package. Before a class is certified the federal court cannot address orders to merely prospective class members. Without a class definition it is impossible to know who will be a class member; there is no basis for personal jurisdiction over class members whose only connection to the forum is the description of a potential class; there is no opportunity to opt out.

The strong form of the proposal was challenged with the observation that the certification and settlement preclusion proposals already cause difficulty. Public debate can be encouraged adequately by publishing the weak form for comment.

The strong form was explained as most needed in mass-tort settings. In mass torts extensive individual litigation is possible. Often litigation that takes the form of individual actions is in reality aggregated through the processes that bring a small number of lawyers to represent thousands of clients. Such coordinated actions can pose problems as acute as parallel actions that are pursued in class-action form. Multiple competing actions, including thousands in individual form, have been filed in every "drug recall" case. Some states have mechanisms for consolidation that concentrate all cases in a single state in a single state court; other states lack such mechanisms and may have actions pending in many different courts. In the fen-phen litigation an attempt was made to coordinate discovery in all actions. One effect of the individual actions is that lawyers with many clients opt the clients with strong claims out of the class, leaving the clients with weak claims in the class. The strong claims are then settled for "full contingent fees." It is sensible to pursue the non-class actions; the present systems works well when everyone cooperates, but that does not always happen. Outside the mass-tort area, this problem seems less acute.

The perception that the genuinely individual litigant does not present a problem was offered as support for the strong form. It is quite unlikely that a federal court would undertake to enjoin individual actions that do not present a problem. Establishing the power does not lead to wanton exercise. To the contrary, the effort will be undertaken only when there is a real need.

The strong form was challenged again as a deep intrusion into a lawyer’s decision on where and how to represent his clients. This intrusion is difficult to justify before certification. After certification, it is a lot easier.

A different perspective on the strong form was offered by asking whether it is possible for a court, early in the litigation, to gather the information needed to determine whether it is necessary to protect the class proceeding against interference by individual actions and to determine that the need for protection is

greater than the need to continue the separate actions. The pre-certification order is more important with respect to competing class actions, and easier to frame.

The draft Committee Note observes that regulation of the relations between a federal class action and state-court actions is affected by the source of law that will govern the actions. The federal interest is stronger when federal law governs, at least in part, and is particularly strong when federal courts have exclusive jurisdiction of some part of the action. It would be possible to limit Rule 23(g) to actions that involve some measure of federal law. But it was suggested that the underlying purpose is to preserve and effectuate the purposes of class litigation — the basic purpose is involved even when state law governs all aspects of the litigation.

A different question was whether the rule should expressly establish authority to direct orders to class counsel as well as class members. As to orders addressed to litigation by individual class members under the "strong" form, it does not seem likely that the individuals will be represented by the attorneys that represent the class. As to class actions, an attempt to provide for orders addressed to counsel likely would lead to filings by formally independent counsel. Orders directed to class members seem cleaner and fully effective.

A question was asked whether the (g)(3) provision for consultation among judges contemplates participation by the parties. The answer was that judges often do decide to involve the parties at some stage of discussions about the coordination of parallel actions, but that lawyers often are not included in the early stages. There is no attempt to establish guidelines on this question in either the rule or the Note. Although many judges have engaged in such informal consultations to good effect, other judges are reluctant to engage in conduct that is not clearly authorized. The proposal is not intended to be a panacea; it will not answer all needs for coordination. But it can be held out as an opportunity to be seized by the willing.

It was asked whether subdivision (g) is severable from the rest of the Rule 23 proposals. It was answered that it is severable, but that it is important. It would be good to publish at least the soft version for comment. The strong version addresses a problem that is serious when it does occur; it is not clear how often the problems in fact do occur. Much will depend on future developments of class-action practice in the mass tort area.

Concern was expressed that publication of the strong version might affect reactions to the other Rule 23 proposals.

A motion to publish the soft version for comment passed. The strong form will not be recommended for publication. The Committee Note will be revised to reflect these changes.

Professor Marcus introduced proposed Rules 23(h) and (i) by noting that appointment of class counsel and the award of class counsel fees are important matters that are not now addressed by Rule 23. The draft of these subdivisions has been revised to reflect the discussion at the March committee meeting.

Rule 23(h) requires appointment of class counsel in any order that certifies a class. It has been implicit that a class must have an attorney, and it has been recognized that the attorney owes an obligation to class members. The proposal makes these matters explicit. The draft also is designed to avoid unnecessary paper work.

Appointment of class counsel occurs at the point of class certification. The draft does not attempt any regulation of the attorney who filed the case before certification. The Committee Note recognizes that the court may wish to appoint lead or liaison counsel before the certification decision. The Note also recognizes that counsel may do things to develop the action for certification, and otherwise engage in orderly development of the action, before the certification determination. These proper activities may include settlement discussions.

Earlier drafts called for discussion of a proposal that the rule provide that class counsel is appointed to represent the class "as the attorney's client." That question proved controversial and raised many difficulties. It has been removed from discussion. Subdivision (h)(1)(B) does continue to say, in terms drawn from the obligation impose on a class representative by present Rule 23(a)(4), that class counsel must fairly and adequately represent the interests of the class. The Committee Note recognizes that the relationship is not the same as the relationship of a lawyer to an individual client.

Rule 23(h)(2) has been revised to omit the requirement that would-be class counsel file an application. The information that earlier drafts required to be set out in an application still must be supplied, but a separate paper is not necessary. Paragraph (2)(B) has been recast to emphasize the matters the court should focus on. Paragraph (2)(A) continues to provide that the court may allow a reasonable period for attorneys seeking appointment as class counsel to apply. The Committee Note recognizes that ordinarily there is a considerable time lag between filing and the decision whether to certify a class, and that the court may defer the certification decision to allow competing applications in cases that may attract competing applications.

The deletion of the formal application requirement entails reframing paragraph (2)(B). Rather than speaking to what an application must include, it now addresses the matters the court must consider — experience, work done on the claims, and resources to be committed — and permits consideration of any other matter pertinent to counsel's ability to fairly and adequately represent class interests. The court may direct potential class counsel to

provide information on any of these matters. The court also may direct that aspirants for appointment as class counsel propose terms for attorney fees and nontaxable costs. The Committee Note recognizes the need for confidentiality as to much of the information that may be required.

Paragraph (2)(C) remains as it was in the March draft. The 1990 Federal Courts Study Committee recommended that it may be helpful to consider the terms of attorney fees at the beginning of an action. The consideration can usefully extend beyond hourly rates or percentages of recovery to include such matters as the level of staffing and the forms of work that will be compensated. This part of the package seems important.

Professor Coquillette noted that the Standing Committee has a task force that is addressing the overlap between federal rules of procedure and state attorney-conduct rules. Civil Rule 11 is an example of the overlap. States have conflict-of-interest rules. They have rules regulating reasonable fees. Many states will view Rule 23(h) as entering into their territory of responsibility, and entering far into the territory. This observation is not to say that Rule 23(h) is a mistaken enterprise. But the parallel work of the subcommittee should be borne in mind, as should the fact that the subcommittee includes representatives from other Judicial Conference committees. In response to a question whether it is fair to say in Rule 23 that class counsel has special duties, and that the court has a heightened responsibility to scrutinize class counsel, Professor Coquillette said yes it is. But he also observed that this is a highly controversial rule; at the same time, the tensions will exist even if Rule 23 remains silent. These issues must be confronted by the federal courts in all class actions, and explicit guidance in the rule simply provides a focus for attention.

A recommendation for publication of Rule 23(h) was moved and approved.

Rule 23(i)

Professor Marcus observed that the draft Rule 23(i) provisions for attorney fees are shorter than earlier drafts. The former identification of factors bearing on a determination of reasonable fee awards has been removed. What remains is authority to award reasonable fees. "Reasonable" is the criterion used in many statutes, and is at the heart of common-fund theory. No attempt is made to define it further in the rule. The Committee Note does offer some observations about the factors that appear most commonly in the various lists provided by appellate decisions.

This draft, including the Committee Note, attempts to emphasize the importance of the court’s role in supervising attorney fees. There is a direct connection to appointment of class counsel under Rule 23(h), and to review of settlements under Rule 23(e).

Subdivision (i)(1) resolves several old issues. One is the time for a fee motion. The draft provides for a motion "under Rule 54(d)(2), subject to the provisions of this subdivision." The motion is to be under Rule 54(d)(2) so that it is integrated with the provisions of Rule 58 that in turn are integrated with the appeal-time provisions of Appellate Rule 4(a)(4). But the motion is made subject to Rule 23(i) because the timing provisions of Rule 54(d)(2) are not well designed for purposes of Rule 23 fee motions. It may be important to require that the fee motion be made before judgment when a class action settles, facilitating the process of review and objection. It also is important to allow fee applications after objections are disposed of — as one example, it may be appropriate to award fees to an objector who succeeds in changing a fee award. Finally, subdivision (i)(1) requires notice to class members only as to fee motions by class counsel. The class has more interest in a motion by class counsel than in motions by others, and requiring notice for these motions entails less risk of unnecessary burden and disruption from multiple notices.

Subdivision (i)(2) provides for objections to fee motions only by a class member or a party from whom payment is sought. Earlier drafts included a provision for objector discovery; this provision was withdrawn for the same reasons that led to deletion of objector-discovery provisions from Rule 23(e). The Committee Note discusses the possibility of discovery.

Subdivisions (i)(3) and (4) have not been changed from the draft considered at the March meeting. Paragraph (3) emphasizes the obligation to provide a hearing and findings, supporting careful consideration by the trial court and informed review by the appellate court. Paragraph (4) serves as a reminder of the value of a "taxing master" in determining a fee award by incorporating the provision of Rule 54(d)(2)(D) that authorize reference of the value of attorney services to a master without regard to the limits of Rule 53(b). (If Rule 53 is amended as proposed, it will be necessary to recommend a conforming amendment of Rule 54(d)(2)(D).)

It was observed that Rule 23(i) includes important provisions, but that they have been considered carefully in the Subcommittee and in earlier Committee discussions. A motion to recommend publication of Rule 23(i) was approved without further discussion.

Thomas Willging described three memoranda prepared on behalf of the Federal Judicial Center for the committee. One describes the number of diversity class actions. The overall data on the number of class-actions in this memorandum were derived by methods that defeat comparison to the data available for earlier years — the seemingly sharp increase may reflect only the differences in the methods used. The second provides data on attorney appointment and fees drawn from the data base for the 1996 study of class actions; the information is limited by the questions asked in that study. For example, it was assumed that every certification implies appointment of a class attorney. The project to develop

model class-action notices is nearing completion. The notices for securities actions will be tested further by using volunteers from 17 investment clubs. The notices will be posted soon on the FJC web site.

There was brief discussion of the Third Circuit Task Force on appointment of counsel in class actions. The Rule 23 Subcommittee is working with the task force. A draft of the task force report should be available for consideration at the fall meeting of this committee. If possible, the reporters will participate in the Rule 23 conference to be held as part of that meeting.

RULE 53: SPECIAL MASTERS

Judge Scheindlin, chair of the Rule 53 Subcommittee, presented a proposed draft that completely rewrites Rule 53. The draft is a substantially revised version of the draft that was studied at the October 2000 meeting. The earlier draft included detailed directions, including a lengthy list of duties that might be assigned to a special master, that have been deleted. The focus is on appointment, including the circumstances that justify appointment of a special master, and review. The aim is to achieve flexible administration within a rule that recognizes the changing nature of judicial practice.

The draft would conform Rule 53 to present practice in the sense that it provides for uses of special masters that are not addressed by present Rule 53. Rule 53 now focuses on "trial" masters, and does not speak to the more frequent appointments of masters to discharge pretrial and post-judgment responsibilities. The draft gives flexibility and breadth in the determination to appoint a master, but sets tight conditions. It is a substantial improvement on present Rule 53.

Draft Rule 53(a) addresses appointment of masters. The first condition that authorizes appointment of a master is consent of the parties. The second condition carries forward appointment of trial masters, and retains the "exceptional condition" requirement of the present rule. As in the present rule, an exceptional condition is not required if the master is to perform an accounting or make a difficult computation of damages. The third condition, which embraces the pretrial and post-judgment functions, is that a master can be appointed to perform duties that cannot be performed adequately by an available district judge or magistrate judge of the district. It is intended to abolish the use of trial masters in jury cases.

The first question was whether a trial master can be appointed in a jury case with the consent of the parties; it was observed that in California there is a "pro tem judge" system under which lawyers act as judges in jury trials; the resulting judgment is appealed through the normal appeal process. It was instantly agreed that Rule 53 should not provide in any circumstance for entry of a final district court judgment by a master, subject to review only in an appellate court and not the district court. But it also was agreed that the consent provision of draft Rule 53(a)(1)(A) would allow the parties to consent to use of a trial master in a jury case. The consent might function as a waiver of jury trial on the issues tried to the master; even then, as with any consent appointment, the district court retains discretion to refuse the appointment. The Committee Note should be clear that party consent does not require appointment of a master in a jury case or any other. It is conceivable that parties might consent to appointment of a master whose "findings" are to be read to the jury

as evidence, conforming to the practice envisioned by present Rule 53(e)(3). This course seems most likely in a case in which at least one party wants a jury, but all parties believe that one or more issues will test the limits of jury comprehension.

It was noted that a special master was used in the litigation that grew out of claims against former Philippines President Marcos for murder, "disappearances," and other wrongs. The master was appointed as an expert witness under Evidence Rule 706, and was available for cross-examination. The depositions on which the master relied were provided to the jury. The jury was instructed that they were free to accept, modify, or reject the master's evaluation of damages, and could make their own determination.

It was noted that the Subcommittee had considered these issues, and had concluded that party consent is a good compromise for the use of a trial master in a jury case. But party consent requires court approval, and the practice should be limited to circumstances in which the parties waive jury trial on the issues submitted to the master or in which the master's findings alone will be presented to the jury as evidence to be considered along with all of the trial evidence.

It was suggested that one reason to consent to appointment of a trial master in a jury case is that the parties want to get away from a particular judge. It was further observed that the practice adopted in the Marcos litigation would be very troubling if it were used in a "real case" in which there was some significant expectation that the judgment actually would be paid. Other courts have rejected the use of sample trials to project damages for other class members whose claims have not been individually presented.

It was concluded that party consent is a proper basis for appointment of a special master in a jury case, provided that the court consents. The master should be used only if the parties waive jury trial on the issues submitted to the master, or to prepare findings that are submitted to the jury as under current Rule 53(e)(3). In no circumstance should party consent support appointment of a master to preside at a jury trial.

Draft Rule 53(a)(1)(B) allows appointment of a special master to hold trial proceedings and recommend findings of fact only on showing "some exceptional condition" or if the appointment is limited to an accounting or resolution of a difficult computation of damages. Draft Rule 53(a)(1)(C) allows appointment of a master to perform other duties "that [clearly] cannot be performed adequately by an available district judge or magistrate judge of the district." (It was agreed that "clearly" should be deleted as an unnecessary form of emphasis.) It is this provision that reaches pretrial and post-judgment masters.

It was asked whether the "exceptional condition" limit imposed on appointment of a trial master should be imposed also on pretrial and post-judgment masters. Routine use of masters to exercise judicial authority must be avoided.

The first response was that the "exceptional condition" term has acquired a special history. The Supreme Court has imposed severe limits on the use of trial masters — indeed it is surprising to find as much use of trial masters as the Federal Judicial Center study actually found. These limits, particularly if fully enforced, seem too narrow for nontrial uses.

Discussion continued with the observation that "the diffusion of judicial power is a big issue." The judiciary does not control the level of social resources devoted to supporting the judiciary. Congress does that. The congressional determination of budgetary support for the judiciary represents far more than a mere expenditure decision. The way in which the law is administered is enormously influenced by the number of judges and by the resources available to the judges. Federal law would have a different reality if there were twice as many federal judges. Federal judges should not undertake to move toward that reality by cloning themselves through appointments of masters with the support of resources extracted from litigants. The simple showing that litigation can progress more efficiently or more rapidly with the appointment of a special master should not suffice. "We should not use Rule 53 to expand the role of the judiciary."

On the other hand, it was noted that judges must allocate their own time by ordering tasks according to the relative importance of direct judicial attention. A former chair of the Rule 53 Subcommittee reported routine use of masters for attorney-fee determinations. Some magistrate judges, who are often the heart and soul of discovery administration, have found the discovery demands of some litigation so overwhelming that appointment of a special master is necessary to fulfill the magistrate judge's responsibilities.

The plea for tight restrictions was repeated. Concern was expressed that parties bear the cost of appointing a master.

It was observed that the rule seems intended to increase the use of special masters, particularly by invoking party consent, but that at least in the consent cases the increased use may not be a bad thing.

One suggestion was that (a)(1)(C) might be amended by taking out "adequately," so that appointment would be authorized only if the master's duties "cannot be performed" by a judge or magistrate judge. Another change would be to delete "of the district," so that it must be shown that the master's duties cannot be performed by a district judge or magistrate judge assigned from another district. The use of "borrowed" judges has become familiar.

In response, it was suggested that these changes would raise the bar too high. The draft rule is based on an examination of existing practices and seeks to confirm them. It looks at the question from the perspective of the particular court, and takes a pragmatic view. By asking whether an "available judge" can perform the proposed duties, it forgoes an inquiry into the possibilities

that might emerge from the most efficient use of all the judges in a particular court. If local assignment practices mean that a judge who has some time available need — and will — not help out in the case of another judge, that judge is not "available."

Another suggestion was that there is sufficient constraint by taking out the reference to "adequately." We should not require a search for appointment of judges from outside the district. One constraint is that visiting judges ordinarily assume responsibility for cases, not for discrete portions of cases that remain the primary responsibility of a local judge. And few visiting judges are likely to be eager to assume the pretrial or post-judgment roles that might be assigned to a master.

The request to expand the "exceptional condition" limit to pretrial and post-judgment masters was renewed.

It was observed that if the limits on appointment are made still higher, the prospect of reversal on appeal is enhanced. How is a judge to show that the tasks that would be assigned to a master cannot be done? Although a reviewing court is not likely to go to the extreme of inquiring about the allocation of a judge's time on weekends, it will be difficult to evaluate determinations of judicial time budgets.

It was suggested that the draft Committee Note is permeated with suggestions for restraint, beginning with the initial discussion of pretrial and post-trial masters and running throughout the entire discussion. But it was agreed to tighten the Note discussion still further by deleting an explicit comparison to the "exceptional condition" limit and also deleting the initial references to limited judicial resources, the usefulness of special expert knowledge, and the excessive demands made by some actions.

It was agreed, with two dissents, to accept the Rule 53(a)(1)(C) draft on general master duties after deleting "adequately" and the bracketed "clearly." And it was unanimously agreed that the Committee Note should say that the court has absolute discretion to refuse an appointment requested by all parties.

The next question was framed by draft Rule 53(a)(2) which applies to masters the disqualification standards set for judges by 28 U.S.C. § 455, but allows the parties to consent to appointment of a particular person who would be disqualified. It was agreed that this provision is appropriate — the policies that underlie the rule that the parties cannot consent to proceed before a judge who would be disqualified under § 455 do not apply to a master. Disqualification may be required under § 455 by interests so attenuated that the parties may reasonably conclude that the special qualities of a particular master outweigh any concern of interest. Here too, the agreement of the parties does not control the judge. If there is any risk that appointment of a particular master may create perceptions of impropriety, the court should refuse the appointment notwithstanding party consent or even strong

party preferences. The Note can observe that the role of consent is different when it is master, not judge, who would be disqualified.

The integration of Rule 53(a)(2) with the affidavit provision of draft Rule 53(b)(4)(B) was faced next. It is important to ensure that waiver of potential disqualification by consent occur only after the parties know of the potential ground for disqualification. Seeking consent "after the Rule 53(b)(4)(B) affidavit is filed" does not fit with the provisions that the appointment takes effect on the date set by the appointment order and after the affidavit is filed. It was agreed that the proper sequence is disclosure of the potential disqualification, consent, and judge approval (which may be withheld notwithstanding the consent). Rule 53(a)(2) should be revised to refer to consent "knowing of a potential ground for disqualification"; the Note can observe that the consent is effective only as to grounds for disqualification known at the time of consent.

Draft Rule 53(a)(3) provides that a master cannot (changed, as a drafting matter, to "must not"), during the period of the appointment, appear as an attorney before appointing judge. The Note suggests that the disqualification does not extend to all lawyers in the master's firm, but in many circumstances special reasons should be found before appointing a master whose firm is likely to appear. It was observed that these questions are likely to be regulated by state law, at least in the many federal courts that invoke state rules of professional responsibility. The caution expressed in the Note was supported by some as the expression of a "good idea," but it was agreed that the caution should be removed from the Note.

Earlier drafts stated a requirement that a master be suited by training, experience, and temperament for the assigned duties. It was agreed that the choice to remove this provision from the draft was proper.

Initial discussion of the provisions in Rule 53(b) relating to the order appointing a master went quickly. The requirement of notice and hearing was readily approved. The decision to eliminate a provision requiring that the order of appointment set the date of the first meeting, the time for the master's report, and like matters was approved as part of the effort to remove "excessive detail" from the rule. An earlier provision would have required the master to post a bond, establishing a basis of compensation for improper performance and doing as much as a rule of procedure can do to affect the determination whether a master is shielded by judicial immunity. Deletion of this provision from the present draft was approved.

It was asked whether there should be a "default" provision governing ex parte communications between the master and either parties or the court. Proposed Rule 53(b)(2)(C) says only that the appointing order should state the circumstances in which the master

may communicate ex parte with the court or a party. But this direction may be overlooked, or unforeseen circumstances may arise. In response, it was noted that the Federal Judicial Center study found that ex parte communication issues were a common source of uncertainty in special master cases. The desirability of ex parte communications is a complicated question because of the wide variety of functions served by masters. A settlement master, for example, may be able to function only if ex parte communications with the parties are allowed; it may be useful to permit as well ex parte communications with the court about the obstacles to settlement. A master reviewing discovery documents for privilege may find ex parte communications important. In other circumstances ex parte communications may be undesirable. A default provision would either be complicated or risk wrong results. It was agreed that no attempt should be made to draft a default provision.

It was agreed that the draft 53(b)(2)(A) should be deleted — there is no need to require that the appointing order state the master's name, business address, and numbers for telephone and other electronic communications.

Turning to draft 53(b)(4), it was suggested that the effective date of the appointment order should be expressed as occurring after filing of the affidavit stating any possible grounds for disqualification, after party consent if a possible ground for disqualification is shown, and on the date set by the order.

Draft subdivisions (c) and (d) provide much-reduced versions of the provisions in present Rule 53 dealing with a master's authority and with hearings. The detail provided in the present rule seems unnecessary, and may at times prove counter-productive.

The first question addressed to subdivisions (c) and (d) was what is meant by the reference to a "hearing." Presumably there are many events before a master that could be characterized as hearings, but that do not entail taking evidence. It would be odd to apply the power to compel evidence to a "hearing" on many routine matters. It was urged that it would be better nonetheless not to refer to an "evidentiary" hearing — that these questions can be addressed in the appointing order, commonly on the basis of "boilerplate" provisions that will be supplied by the parties.

A related question was addressed to the recently added subdivision (c)(3), which would include in the illustrations of authority the authority to "accept written submissions for filing." This provision was added to address the question of what parts of the materials submitted to the master become part of the public record.

It was observed that there must be discretion to determine what items become part of the public record. A public record cannot be made of everything done by a master — some of the master's functions will be too sensitive for that. A settlement master, for example, may need highly confidential information about the parties' positions — and some of the information may be in

writing. A master investigating compliance with a decree may be in a similar position. In framing a rule provision for this topic, the Note should state the need to protect confidential information. It is difficult to express these concerns simply in a provision that addresses "filing." Rule 5(e) says that filing "shall be made by filing [papers] with the clerk of court, except that the judge may permit the papers to be filed with the judge." If we mean to permit "filing" with a master, we will need to integrate the Rule 53 provision with Rule 5(e). One approach would be to have the order appointing the master set the terms on which information provided to the master goes into the record. Or a more general term could be adopted, and the Note could say that the judge should consider whether to include record-keeping directions in the order of appointment. Or the rule could say that the master must retain all things submitted to the master.

Continued discussion of the need to create a record suggested that perhaps a new provision should be added to the appointment-order provisions in subdivision (b)(2), to become a new (b)(2)(C). The provision could direct the master to "keep it all." It was suggested that it would not be wise to allow lodging a paper with a master to establish filing with the court. A party that wants something to be filed with the court can file it directly under Rule 5(e). A different suggestion was that "if it is important, it gets filed with the master's report." A more general expansion of this suggestion was that the master can formally file things with the court. But it was observed that a party should not be authorized to rely on lodging a paper with a master as filing with the court, and that it should be the party's obligation to ensure that a desired filing is accomplished.

A different approach might be to address these questions through the subdivision (f)(3) provision that requires the master to file relevant exhibits and transcripts with the report. The subdivision could be expanded to direct the master to file anything the court directs or the parties request be filed. Or it could provide that the master is to file everything presented to the master unless the master directs otherwise.

Still further discussion observed that current practice is adequate. A party who wants to file something files it with the court. But it was asked whether the clerk is obliged to accept for filing anything that is delivered to the master. One answer was that the party can ask the master to include the paper in the record, and that a refusal can be corrected by motion to the court.

In a different vein, it was suggested that when there is a motion to review a master's report, the parties will put before the court the materials that they want the court to consider. There must be a record to review, but it can be compiled in this way.

Added discussion led to the suggestion that all of these proposals would add unnecessary detail to Rule 53. It was asked whether there is any problem — "are masters losing things"? A

response was that masters do not always keep good records.

Further discussion of the master report provisions in subdivision (f) led to a motion to delete entirely the third paragraph, which directs the master to file with the report any relevant exhibits and any transcript of any relevant proceedings and evidence. The Note will say that filings are to be made as directed by the court or as the parties choose. If there are concerns about public access, the court can order filing of materials that it seems desirable to include in the public record.

Further discussion of the record of master proceedings led to agreement that this question should be addressed by the order of appointment. It was tentatively agreed that a new subdivision (b)(2)(C) would be recommended, providing that the order appointing a master must state: "(C) the nature of the materials to be preserved as the record of the master's activities."

The discussion of the filing provision in (c)(3) led to a motion that all of the illustrative items be deleted from subdivision (c). The first sentence states that: "Unless limited by the appointing order, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties * * *." Everything beyond that in subdivision (c) is illustrative. We do not need it, and there is always a risk that an illustrative list will be applied back to narrow the intended scope of the general authority by relying on such maxims as "noscitur a sociis." The motion passed. A motion was made to reinstate the deleted material, urging in part that it is helpful to distinguish evidentiary hearings from other hearings. The motion failed, after it was agreed to amend the first sentence of subdivision (d) to read: "Evidentiary Hearings. Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence." A motion to delete "evidentiary" from this sentence and tag-line failed for want of a second.

Discussion continued with draft Rule 53(f). It was asked whether it should require that the master circulate a draft report to the parties; it was agreed that a requirement would be inappropriate. Then it was moved to delete the provision that recognizes the master's authority to circulate a draft report to the parties before filing, leaving this practice to an observation in the Committee Note. The motion was adopted.

A related question was whether the court should have the authority, recognized by draft (f)(2), to direct that the report not be served on the parties when it is filed with the court. This authority may prove important in some settings, most obviously with some forms of report that might be made by a settlement master. Drawing a line between a "report" and an ex parte communication, indeed, might prove difficult. It was agreed to retain the court's authority to direct that the report not be served on the parties.

Subdivision (g) provides for court review of a master's order, report, or recommendations. The first subparagraph, (g)(1)(A), provides that the order, report, or recommendations "become the court's action" unless timely action is taken to initiate review. It was asked what it means to "become the court's action": suppose the master suggests something the court thinks is wrong — is there a point at which the court is bound for want of timely action to initiate review? Why make it the court's action if nothing is done to make it so? Perhaps it would better to change the presumption — to provide that the order, report, or recommendation becomes court action only if action is taken to enforce it.

A motion was made to delete draft subdivision (g)(1)(A), and to move draft subdivision (2) up to become (1). This provision for action on the report would incorporate the opportunity for hearing and the power to receive evidence: "**(1) Action.** In acting on a master's order, report, or recommendations, the court may afford an opportunity to be heard and may receive evidence, and may: * * *."

The reorganization of subdivision (g) would continue by transforming draft (g)(1)(B) into a new (2) that provides both for objections and a motion to adopt: "**(2) Time.** A party may file objections, or a motion to adopt or modify the master's order, report, or recommendations, no later than * * *." This expression deletes the provision that would require the court to give notice of intent to act on the master's report, leaving it the responsibility of any party that seeks action to make a motion. The court nonetheless would be free to act on its own, before or after the 20-day period, so long as the right of the parties to object or argue for adoption is preserved.

The provision for review of a master's fact recommendations, (g)(3), establishes a clearly erroneous standard of review unless the order of appointment provides for de novo decision or the parties stipulate that the master's findings will be final. A last-minute addition requires that the court consent to a stipulation for finality, a departure from present Rule 53(e)(4) which provides that a party stipulation limits the court's review to "questions of law." It was agreed that the court's consent should be required. It was suggested that it is difficult to speak of clear-error review if the court exercises the power to receive evidence under (g)(1). To meet this observation, it was agreed that five words would be added to (g)(3): "Unless the order of appointment provides for de novo decision by the court, <u>the court receives new evidence,</u> * * *." It also was observed that the draft Committee Note interprets the authority to amend the order of appointment established by draft Rule 53(a)(3) to mean that the court can establish a de novo standard of review at the time of review, but suggests that an amendment should be made only for compelling reasons.

Subdivision (g)(5) sets out two alternatives for addressing review of a master's procedural orders; the draft Note suggests a third alternative — to say nothing in the rule, but to address the

problem in a few Note sentences. The Subcommittee believes that it would be desirable to publish for comment at least one of the two express alternative provisions. The first alternative would direct that the order appointing the master establish standards for reviewing "other acts or recommendations." The second alternative would allow the court to set aside a ruling on a "matter of procedural discretion" only for abuse of discretion. Support was expressed for the second alternative, but with some uncertainty as to what might be meant by a "matter of procedural discretion." It was agreed that it would be better to refer to "procedural matters."

The question remained whether there is any reason to defer to the discretion of a master who is not a professional judicial officer. The judge should be able to do what seems right. This is the "do nothing" alternative that is flagged in the Committee Note. It was agreed that the two alternatives should be published with brackets in a single combined form, and that the letter transmitting the proposal for comment should identify this question as a suitable subject for advice: "Unless the order of appointment provides a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion."

Subdivision (h) addresses the determination of a master's compensation. The element that is most likely to draw comment is the provision that in allocating payment among the parties the court may consider "the means of the parties." It was agreed that this is a suitable provision.

Subdivision (i), finally, deals with appointment of a magistrate judge as a special master. The magistrate-judge statute specifically authorizes special master appointment. This provision, however, was adopted before the later amendments that substantially increased the direct authority of magistrate judges. Subdivision (i) allows appointment of a magistrate judge "only for duties that cannot be performed in the capacity of magistrate judge and only in exceptional circumstances." It was urged that these limits are an important restriction on the general provision found in present Rule 53(f).

A special problem raised by appointment of a magistrate judge as master arises from the draft Rule 53(a)(2) provision that the parties may consent to appointment of a master who would be disqualified by the provisions of 28 U.S.C. § 455. It was agreed that the Committee Note should say that a magistrate judge who cannot act in a case as magistrate judge because of disqualification under § 455 cannot be appointed with the consent of the parties.

With this change in the Note, subdivision (i) was approved.

The committee then voted to approve Rule 53 for publication with the changes adopted during these deliberations.

RULE 51

The Rule 51 project began with a single issue. The Ninth Circuit observed that many of its districts had local rules that require submission of requests for jury instructions before the start of trial. These local rules seem inconsistent with the Rule 51 provision that a party may file requests "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs." The Committee concluded that the practice of requiring submission before the start of trial is widespread; that it is a good practice; and that it is better to amend Rule 51 to recognize the practice directly than to adopt a provision that simply authorizes local rules that require pretrial submission.

Consideration of this question led to the question whether the time has come to revise Rule 51 to say clearly what it has come to mean in practice. Lawyers of the highest ability, for instance, still can misread the provision that no party may assign error in the failure to give an instruction unless the party objects before the jury retires. This provision seems to imply that it is sufficient to "object" to the failure to give an instruction; in fact, it means something else. There is no duty to give an instruction, outside the "plain error" zone, unless a timely request has been made. A protest that the court failed to give an instruction is a request, and if it is made after the close of the evidence or after an earlier time directed by the court it is untimely. The drafts that sought to restate the present meaning of Rule 51 led to consideration of possible additions. The draft presented at this meeting includes provisions that are not now part of Rule 51 practice.

Subdivision (a)(1) begins with the time for requests by removing the limitation that confines the reasonable time set by the court to a point during trial. The court can set an "earlier reasonable time" without this limit. The draft also expressly provides that requests are to be furnished to every other party, reflecting common practice and the provisions of the Criminal Rules.

Subdivision (a)(2) supplements (a)(1) by allowing requests at the close of the evidence in two circumstances. First, subparagraph (A) permits requests on issues that could not reasonably have been anticipated at an earlier time for requests set under (a)(1). This provision recognizes that despite the value of pretrial requests, trials hold many surprises. Witness testimony is not always as anticipated. New issues may be injected even when the testimony is what was expected; pleading amendments are allowed at trial. A reasonable failure to foresee these surprises should not defeat the opportunity to request instructions. Second, subparagraph (B) recognizes the court's discretion to permit untimely requests despite failure to satisfy the standards of subparagraph (A). Courts frequently permit tardy requests now, and are more inclined to do so when the request raises an important issue. The most compelling reason for

accepting a tardy request appears when the request goes to a matter of plain error that would require reversal even if there were no request at all, but less compelling reasons may suffice.

Discussion of subdivision (a) opened with the observation that it may be wasteful to require pretrial submission of requests. If the time is set more than a day or two before trial, there is a great risk that the entire exercise will be mooted by an eve-of-trial settlement. In many cases it still may not be possible to foresee with any accuracy the issues that actually will emerge from the trial. This observation was immediately followed, however, by surrender. The widespread practice of directing pretrial requests will prevail.

Another question was whether the court can direct the parties to submit requests. It was responded that earlier drafts had raised this question, pointing to a state practice that authorizes the court to direct the parties to submit requests and that leaves the parties free to object to the instructions that they have themselves prepared. There was no direct discussion of this question; it failed for lack of interest.

It was suggested that paragraph (2) should be deleted. It is not necessary to describe the circumstances that justify supplemental requests after the deadline set for initial requests. Courts will allow later requests when there is good cause. It was responded that it is better to address this question in the rule, and that the test should be more specific than "good cause." But it was asked what does it mean to look to issues "that could not reasonably have been anticipated"? Is this setting up a malpractice trap that could be avoided by a more flexible provision?

Another suggestion was that (a)(2) should set the time for late requests with greater precision. It refers only to a time "after the close of the evidence"; perhaps there should be a provision that sets the time no later than the time set in subdivision (b) — before the jury is instructed and before final arguments. But care must be taken in the language because there may be preliminary instructions, followed by the final instructions at a later time — the deadline for late requests should relate to the final instructions on the issue, not the preliminary instructions.

Support for subdivision (a)(2) was voiced on the ground that it eliminates the "gotcha" feature of some current practice. Trials are constantly changing events. We need a middle ground that gives teeth to the earlier submission requirement but that also allows escape.

It also was observed that some courts prepare individual copies of the instructions for each juror. That means that the court must have a reasonable period to consider requests and formulate final instructions. It would be useful, if it is possible, to describe a clear final point for late requests.

Francis Fox stated that the American College procedure committee had considered a report on the Rule 51 draft and liked both the draft (a)(2) reference to "at the close of the evidence" and the test of (a)(2)(A) that refers to issues that could not reasonably have been anticipated at the time initially set for requests. More detailed "seriatim" requirements were resisted; "at the end of trial" is a good time.

It was pointed out that paragraph (2) distinguishes circumstances that establish a "right" to make late requests in subparagraph (A), and establishes in subparagraph (B) a second discretionary authority to permit late requests that are not supported by (A). (B) serves a different function than (A) serves.

There was further discussion of the desire to ensure that requests must be made at a time that permits reasoned consideration before final instructions and final arguments. The difficulty is that cases can move with great speed — there are cases that try in a day or less, in which there is no need for any significant gap between the close of evidence and submission to the jury. And it is important to preserve the opportunity to make interim instructions as a trial progresses without binding the court or the parties by setting an impermeable request barrier at the time of the first instructions directed to an issue. Not every lawyer will think readily of these problems. The Committee Note should say that requests should be made before final instructions and before final jury argument. It also can say that what is a "final" instruction and argument depends on the way the case is tried — if separate issues are tried in sequence, as if a market definition is tried first in an antitrust action, the final instructions, arguments, and verdict on that trial phase may occur long before the trial is completed.

Subdivisions (b), (c), and (d) were described together because they are interrelated. They separate out matters that are run together in present Rule 51: instructions (b); objections (c); and forfeiture (d). The provisions for instructions in (b) first require the court to inform the parties of its proposed instructions and action on instruction requests before instructing the jury and before final arguments related to the instructions. This requirement expands on present practice by requiring that the parties be informed not only about action on their requests but also about instructions on matters that have not been the subject of any request. It also separates the time provisions. The parties always must be informed before instructions are given — if interim instructions are given, this event may occur well before final arguments. The relationship to arguments is framed in terms of final arguments related to the instructions, recognizing that there may be interim arguments and that it may not be feasible to require the court to formulate the actual jury instructions before the issue is submitted to the jury. A plaintiff, for example, may be allowed to deliver an interim argument to help guide the jury as it listens to the evidence before the defendant has even begun its own presentation. The court may have no reason to instruct the

jury at that point or to frame final instructions that will be given later.

Subdivision (b)(2) carries forward the requirement that the parties be given an opportunity to object before instructions are delivered and before final argument. It says explicitly that the opportunity is to object "on the record," an important element left implicit in current Rule 51.

Subdivision (b)(3) expands the present provision that the court may instruct the jury before or after argument, or both. It recognizes instructions at any time after trial begins and before the jury is discharged. In this form it recognizes the increasingly common practice of giving preliminary instructions and the occasional need to give supplemental instructions after the jury has begun its deliberations.

Subdivision (c) begins with the right of a party to object on the record, carrying forward the provisions of present Rule 51 that the objection state distinctly the matter objected to and the grounds of the objection. It distinguishes two criteria for timeliness. An objection is timely under (c)(2)(A) if a party that has been informed of an instruction or action on a request as required by (b)(1) objects under (b)(2). An objection is timely under (c)(2)(B) if a party who has not been informed as required by (b)(1) objects promptly after learning that an instruction or request will be, or has been, given or refused. This provision is addressed to such common events as the inadvertent omission or the unsuccessfully accomplished attempt to give the substance of a requested instruction in a different form. It also addresses events that likely are less common, such as the extemporaneous addition of jury instructions as they are given.

Subdivision (d), finally, addresses the steps a party must take to preserve an instruction issue for review. Paragraph (1) covers any instruction that is actually given; a proper objection under Rule 51(c) preserves the error for review. Paragraph (2) covers omissions — a failure to give an instruction ordinarily can be reviewed only if the party requested the instruction and separately objected to the failure to give it. But an exception is allowed, drawing from many appellate opinions. A request need not be supplemented by an objection if the court has made it clear on the record that the request was considered and rejected. Paragraph (3), finally, sets out for the first time the "plain error" doctrine that has been recognized in almost every circuit. Rule 51 does not now recognize a plain error exception, and the Seventh Circuit has refused to allow review for plain error for this reason.

Discussion of these provisions began with an endorsement of the (d)(2) provision that forgives the requirement that a request be supplemented by an objection. The theory that underlies the need for both request and exception draws both from the language of present Rule 51 and also from pragmatic concerns. It has been

recognized that making a request does not invariably ensure that the court will carefully review the request; a reminder by objection may correct a misunderstanding or inadvertence. A more common phenomenon is that the court seeks to give the substance of a request in clearer or less tendentious language, but loses something in the translation; an objection is important to point out the changed meaning. The circumstances of the trial court's action on a request, however, may make it clear that these purposes have been served. Many appellate opinions have reviewed issues raised only by a request when the record makes it clear that the trial court had considered the request and had deliberately rejected the arguments advanced on appeal. At the same time, other opinions seem to insist on a seconding objection even in circumstances where no purpose is served.

It was suggested that the draft reference in subdivision (d)(1) to a "mistake" in an instruction actually given should be to an error. It was agreed to substitute "an error." It was pointed out that the distinction between matters stated in an instruction and matters omitted is not as clear as it may seem. State courts have struggled with this. Some have moved toward allowing all issues to be raised by objection, without prior request. But there are good reasons for the present Rule 51 requirement that requests be made before the close of the evidence. These reasons are summarized in the draft Committee Note. Adherence to the combined request-object requirement, however, leaves a need to distinguish the circumstances in which an objection alone is enough. The distinction is something like this: If the instructions completely omit a topic, a request is required. But if the instructions say something misleading or incomplete, an objection is sufficient. If the instruction on market definition omits an element, for example, an objection is sufficient to challenge the omission. So if the court says that an instruction is to be given in substance but not in form, an objection is required to raise the failure to give the substance.

It was suggested that the basic concepts are not difficult to understand. We want the court to inform the parties of the instructions before arguments and before the instructions are given. We want lawyers to be diligent in helping the judge to frame the instructions. The drafting complications arise from the need to preserve the values of interim instructions, staged or sequenced trials, and the like.

It was noted that Evidence Rule 103 addresses the question framed by subdivision (d)(2) by excusing the obligation to make later objections if the court "makes a definitive ruling on the record admitting or excluding evidence, either at or before trial." It was agreed that this language should be adopted into subdivision (d)(2), so that it will read: "(2) a failure to give an instruction if that party made a proper request under Rule 51(a), and — unless the court made a definitive ruling on the record rejecting the request — also made a proper objection under Rule 51(c); * * *" It also was agreed that the Committee Note should point out that

present Rule 51 requires both request and objection.

It was suggested that draft Rule 51(b)(2) might be revised to conclude: before the instructions and arguments are delivered ~~and before final jury arguments related to the instructions~~. The decision whether to make this revision was delegated to the chair and Reporter.

ELECTRONIC DISCOVERY

The agenda materials included a report by Professor Marcus on the October conference on electronic discovery issues held at the Brooklyn Law School. These problems remain on the agenda. Although judges and lawyers continue to be divided on the question whether the time has come to develop rules amendments, there is a confluence of concern about spoliation. People need to know the rules. Uncertainty is leading many people to seek to preserve records that never would have been preserved for so long in paper form.

James Rooks noted that ATLA has gathered information from its members and has passed the information on to Ken Withers, who is working on these problems at the Federal Judicial Center. It was observed that the FJC study should be available by October.

Justice Hecht noted that Texas state-court judges have not had any major difficulties yet with the Texas rule provisions for discovery of electronic information. But there is not yet much experience with the rule.

NEXT MEETING

The dates for the fall meeting were set at October 22 and 23. The meeting will be held at the University of Chicago Law School. The second day will be a conference on the current package of Rule 23 proposals — the conference will be useful whether or not the proposals have been published for comment by then.

Respectfully submitted,

Edward H. Cooper, Reporter