TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable John D. Bates, Chair
Advisory Committee on Civil Rules

DATE: December 11, 2015

RE: Report of the Advisory Committee on Civil Rules

Introduction

The Civil Rules Advisory Committee met at S.J. Quinney College of Law at the University of Utah on November 4, 2015. Draft Minutes of this meeting are included at Tab C.

All items in this Report are presented for information about pending and possible future Civil Rules work. Several of them may advance to recommendations for publication to be made to the Standing Committee in June. These subjects include the steadily developing work on potential revisions of Civil Rule 23, joint work with the Appellate Rules Committee on stays of execution under Rule 62, and joint work with several committees on e-filing, e-service, and e-certificates of service.

Other rules proposals are in different stages of development or have been removed from the Civil Rules agenda. "Requester-pays" discovery rules and the offer-of-judgment provisions of Rule 68 have been on the agenda for some time. The Committee is suspending work on the requester-pays topic and carrying Rule 68 forward. Several new suggestions have been made as well. Most have been removed from the Committee's agenda, while some will be studied further. Each of these matters will be described briefly.

Finally, the Committee has worked on matters that do not directly involve impending rules amendments. The Pilot Projects Subcommittee continues to consider several areas that may prove suitable for pilot projects in one form or another. A subcommittee report is included at Tab B. Work continues to encourage programs designed to educate the bench and bar about the Civil Rules amendments that became effective on December 1, 2015.

RULE 23: CLASS ACTIONS

The Rule 23 Subcommittee of the Advisory Committee on Civil Rules was originally formed in 2011. It was created in recognition of several developments that seemed together to warrant another examination of class-action practice. These included (a) the passage of about a decade since the 2003 amendments to Rule 23 went into effect; (b) the development of a body of Supreme Court cases on class-action practice; and (c) recurrent interest in the subject in Congress, including the 2005 adoption of the Class Action Fairness Act. In addition, some specific topics had emerged in the case law that suggested consideration of rule amendments might be warranted.

The Subcommittee began by developing an initial list of possible topics for serious consideration as rule-amendment possibilities. These ideas were initially discussed with the Advisory Committee during its March, 2012, meeting. Thereafter, the Advisory Committee's work shifted focus to the discovery and related items in the package of amendments eventually published for public comment in August, 2013. That package, as revised, went into effect on Dec. 1, 2015.

In late 2013, the Rule 23 Subcommittee resumed considering possible revisions of Rule 23, and returned to the list of possible topics it had developed initially in 2012. Discussions during 2014 further shaped this list, and a revised list was presented to the Advisory Committee at its Fall 2014 meeting.

Since compiling the topic list discussed by the Advisory Committee at its Fall 2014 meeting, the Subcommittee, or members of the Subcommittee, have made (or will make) presentations about the ideas under consideration at a variety of meetings and conferences. These events include the following:

ABA 18th Class Action Institute (Chicago, IL, Oct. 23-24, 2014).

Lawyers for Civil Justice Membership Meeting (New York, NY, Dec. 4-5, 2014).

The Impact Fund 13th Annual Class Action Conference (Berkeley, CA, Feb. 26-27, 2015).

George Washington University Roundtable on Settlement Class Actions (Washington, D.C., April 8, 2015).

ALI discussion of Rule 23 issues (Washington, D.C., May 17, 2015).

ABA Litigation Section Meeting (San Francisco, CA, June 19)

American Assoc. for Justice Annual Meeting (Montreal, Canada, July 12, 2015)

Civil Procedure Professors' Conference (Seattle, WA, July 17, 2015) (special half-day program devoted to aggregate litigation issues)

Duke Law Conference on Class-Action Settlement (Washington, D.C., July 23-24, 2015)

Defense Research Institute Conference on Class Actions (Washington, D.C., July 23-24, 2015)

Discovery Subcommittee Mini-Conference (DFW Airport, Sept. 11, 2015)

National Consumer Law Center Consumer Class Action Symposium (San Antonio, TX, Nov. 14-15, 2015)

Association of American Law Schools Annual Meeting (New York, NY, Jan. 8, 2016) (Special program of AALS Civil Procedure Section devoted to Rule 23 issues)

In addition, the Advisory Committee has during this period received more than 25 written submissions about possible changes to Rule 23 and related matters. These submissions are posted at www.uscourts.gov via the link "Archived Rules Comments."

As noted above, the Subcommittee held its own mini-conference on pending Rule 23 amendment ideas on Sept. 11, 2015. The notes regarding that mini-conference and the memorandum sent to conferees to introduce the issues are included in this agenda book.

Based on its work, the Subcommittee refined its focus and reported to the Advisory Committee at its November, 2015, meeting. That committee supported the basic outline for proceeding, which identified six subjects for rule amendments, two additional topics the Subcommittee had considered but put "on hold" pending further developments, and three other topics that it had considered at the mini-conference but would be taken off the current agenda.

Since the Advisory Committee meeting, the Subcommittee has held two further conference calls to respond to comments during the Advisory Committee meeting, and has further refined its sketches of possible amendment ideas. This report includes those refinements.

The report is organized in three sections:

I. Topics on which the Subcommittee recommends proceeding now to draft possible amendments. This report includes the current sketches that have emerged from the Subcommittee's discussions. As indicated by the presence of brackets on occasion, and footnoted materials, this drafting process is ongoing, and certain drafting questions about how best to approach the topics remain. These topics are:

1. "Frontloading" in Rule 23(e)(1), requring information relating to the decision whether to send notice to the class of a proposed settlement

2. Making clear that a decision to send notice to the class under Rule 23(e)(1) is not appealable under Rule 23(f)

3. Making clear in Rule 23(c)(2)(B) that the Rule 23(e)(1) notice does trigger the opt-out period in Rule 23(b)(3) class actions

4. Updating Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions

5. Addressing issues raised by "bad faith" class-action objectors

6. Refining standards for approval of proposed class-action settlements under Rule 23(e)(2).

After all six sketches are introduced, the report also includes a mock-up of the entire set of changes as they might appear together, in hopes that will make the overall plan clear.

In addition, the report presents a request from the Department of Justice that Rule 23(f) be amended to extend the time for appealing from 14 to 45 days in any case in which the federal government or a current or former United States officer or employee is a party and is sued for an action occurring in connection with that person's official duties. This request (included in these agenda materials) was submitted in December, 2015, and neither the Rule 23 Subcommittee nor the Advisory Committee has had an opportunity to review and discuss it.

II. Topics the Subcommittee has concluded should remain on its agenda, but be put "on hold" pending further developments. These topics are "ascertainability" and "pick-off" Rule 68 offers of judgment.

III. Topics the Subcommittee has considered in some detail and concluded should be removed from the current agenda. These topics include settlement class certification, cy pres treatment, and "issue classes."

I. Topics on which the Subcommittee recommends proceeding to draft possible amendments

Below are the six topics on which the Subcommittee proposes to proceed with drafting possible amendments, along with the current sketches of possible amendment language and accompanying Committee Notes. At the end of Part I is a composite mock-up of all these changes to show how they might look together. After that, the recent Department of Justice proposal is introduced.

1. "Frontloading"

Rule 23. Class Actions

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class, or a class proposed to be certified as part of a settlement, may be settled, voluntarily dismissed or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to class***

(A) The parties must provide the court with sufficient information to enable it to determine whether to give notice to the class of the settlement proposal.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the parties' showing regarding the prospect of:

(i) approval of the proposal; and

(ii) class certification for purposes of judgment on the settlement proposal.

Sketch of Draft Committee Note

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) in a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court at the time that it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice to the class of a proposed settlement is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The amended rule makes clear that the parties must provide the court with sufficient information to enable it to decide whether notice should be sent. The amended rule also specifies the standard the court should use in deciding whether to send notice—that notice is justified by the parties' showing regarding the prospect of approval of the proposal. The prospect of final approval should be measured under amended Rule 23(e)(2), which provides criteria for the final settlement review.

If the court has not previously certified a class, this showing should also provide a basis for the court to conclude that it likely will be able to certify a class for purposes of settlement. Although the order to send notice is often inaccurately called "preliminary approval" of class certification, it is not appealable under Rule 23(f). It is, however, sufficient to require notice under Rule 23(c)(2)(B) calling for class members in Rule 23(b)(3) classes to decide whether to opt out.

There are many types of class actions and class-action settlements. As a consequence, no single list of topics to be addressed in the submission to the court would apply to each one. Instead, the subjects to be addressed depend on the specifics of the particular class action and the particular proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary in regard to a proposed settlement is whether the proposal calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if class certification has not occurred, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved and certification for purposes of litigation is later sought, the parties' submissions in regard to the proposed certification for settlement should not be considered in relation to the later request for litigation certification.

Regarding the proposed settlement, a great variety of types of information might appropriately be included in the submission to the court. A basic focus is the extent and nature of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details on the nature of the claims process that is contemplated [and about the take-up rate anticipated]. The possibility that the parties will report back to the court on the take-up rate after notice to the class is completed is also often important. And because some funds are often left unclaimed, it is often important for the settlement agreement to address the use of those funds. Many courts have found guidance on this subject in § 3.07 of the American Law Institute, Principles of Aggregate Litigation (2010).

It is often important for the parties to supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. In that connection, information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(A), the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal is often important. [Particular attention may focus on the breadth of any release of class claims included in the proposal.]

The proposed handling of an attorney-fee award under Rule 23(h) is another topic that ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an attorney-fee award to the expected benefits to the class, and to take account of the likely take-up rate. One method of addressing this issue is to defer some or all of the attorney-fee award determination until the court is advised of the actual take-up rate and results. Another topic that normally should be included is identification of any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. It must not direct notice to the class until the parties' submissions demonstrate the likelihood that the court will have a basis to approve the proposal after notice to the class and a final approval hearing.

2. Rule 23(f) and the Rule 23(e)(1) order for notice to the class

Rule 23. Class Actions

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(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders. An order under Rule 23(e)(1) may not be appealed under subdivision (f).

Sketch of Draft Committee Note

Subdivision (f). As amended, Rule 23(e)(1) provides that the court should direct notice to the class regarding a proposed class-action settlement in cases in which class certification has not yet been granted only after determining that the prospect of eventual class certification justifies giving notice. This decision is sometimes inaccurately characterized as "preliminary approval" of the proposed class certification. But it is not a final approval of class certification,

and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

(3) Clarifying that Rule 23(e)(1) notice triggers the opt-out period

Rule 23. Class Actions

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(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

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(2) ***Notice.***

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(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for settlement under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. * * * * *

Sketch of Draft Committee Note

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision is sometimes inaccurately called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions, and it is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this notice practice. Requiring repeat notices to the class can be wasteful and confusing to class members.

(4) Notice in 23(b)(3) class actions

Rule 23. Class Actions

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(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

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(2) ***Notice***

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(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice—by United States mail, electronic means or other appropriate means—to all members who can be identified through reasonable effort. * * * * *

Sketch of Draft Committee Note

Subdivision (c)(2). Since *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts interpreted the rule to require notice by first class mail in every case. But technological change since 1974 has meant that other forms of communication are more reliable and important to many. Courts and counsel have begun to employ new technology to make notice more effective, and sometimes less costly.

Rule 23(c)(2)(B) is amended to take account of these changes, and to call attention to them. The rule calls for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may often be true that online methods of notice, for example by email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to the Internet. Instead of preferring any one means of notice, therefore, courts and counsel should focus on the means most likely to be effective to notify class members in the case before the court. The amended rule emphasizes that the court must exercise its discretion to select appropriate means of giving notice.

Professional claims administration firms have become expert in evaluating differing methods of reaching class members. There is no requirement that such professional guidance be sought in every case, but in appropriate cases it may be important, and provide a resource for the

court and counsel. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), for example, it may often be important to include a report about the proposed method of giving notice to the class.

In determining whether the proposed means of giving notice is appropriate, the court should give careful attention to the content and format of the notice and, if this notice is given under Rule 23(e)(1) as well as Rule 23(c)(2)(B), any claim form class members must submit to obtain relief. Particularly if the notice is by electronic means, care is necessary not only regarding access to online resources, but also to the manner of presentation and any response expected of class members. As the rule directs, the means should be the "best * * * that is practicable" in the given case. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Means, format and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class made up of members likely to be less sophisticated. As with the method of notice, the form of notice should be tailored to the class members' likely understanding and capabilities.

Attention should focus also on the method of opting out provided in the notice. As with making claims, the process of opting out should not be unduly difficult or cumbersome. [At the same time, it is important to guard against the risk of unauthorized opt-out notices.] As with other aspects of the notice process, there is no single method that is suitable for all cases.

This amendment recognizes that technological change since 1974 calls for recalibrating methods of notice to take account of current realities. There is no reason to think that technological change will halt soon, and there is no way to forecast what further technological developments will affect the methods used to communicate. Courts seeking appropriate means of giving notice to class members under this rule should attend to existing technology, including class members' likely access to that technology, when reviewing the methods proposed in specific cases.

(5) Objectors

No other subject discussed in the many conferences and meetings Subcommittee members have attended—and in multiple individual communications—has generated as much concern and apparent unanimity as the problem of "bad faith" objectors. The claim repeatedly made is that such objectors exploit their ability to object and to appeal from approval of a settlement over their objections. The appeal allows them, in essence, to hold the settlement "hostage." The "business model" that has been described sometimes consists of submitting extremely uninformative objections to the district court, often seemingly cobbled together from other cases in which objector counsel has also lodged objections. These objections may not even apply to the settlement in the pending case. Persuading the district judge that the objection is warranted is not a priority. Then, when the uninformative or inapposite objection does not derail the proposed settlement and the court enters judgment on the basis of the settlement, the objector files a notice of appeal and objector counsel demands that class counsel "settle" the appeal by paying a substantial sum to objector counsel. From the perspective of class counsel, this payoff may be justified to ensure timely relief to class members, for the class action settlement ordinarily cannot be consummated until all appeals have been completed.

As amended in 2003, Rule 23(e)(5) included a provision that partly addressed the possibility of such behavior. Although it explicitly recognized the right of class members to object to a proposed settlement, the amended rule also directed that such objections could not be withdrawn unless the court approved. That provision affords a level of scrutiny regarding inappropriate demands of objectors in the district court, but the filing of a notice of appeal seemingly frees the objector from any further judicial scrutiny. Since the delay that can result from an appeal is much greater than the delay that would result from an ill-founded objection, the omission from the 2003 amendment of any ongoing approval requirement has—in at least some cases—produced unfortunate pressures on class counsel to accede to objector counsel's demands.

This post-2003 development has galvanized a significant portion of class-action practitioners to support rule changes to address these objector counsels' "business model." Several years ago, the Appellate Rules Committee received a formal proposal for adoption of an Appellate Rule forbidding any payment under any circumstances to objectors in return for dropping appeals from approvals of class-action settlements. Rule 23 Subcommittee members have received many requests to do something about abuse of the right of objectors to appeal. Even attorneys who often represent objectors favor effective action; some of them vigorously proclaim that they will not settle their own appeals for payoffs.

Despite the widespread agreement in the class-action bar that something should be done to end this practice, the Subcommittee has found it difficult to settle on a potential rule change that would be effective in defeating this "business model." A flat prohibition of any payments to settle objections or appeals seems overbroad. But the possibility that the question straddles proceedings in the district court and the court of appeals introduces complexity.

One possibility would be for the Appellate Rules Advisory Committee and the Civil Rules Advisory Committee to generate a combined amendment package that would deal with the reported problems. The Rule 23 Subcommittee has considered these possibilities, and Judge Colloton and Prof. Maggs have generously given their time to discuss the questions during Subcommittee conference calls. The possibility was also discussed during the Civil Rules Advisory Committee's Salt Lake City meeting in November, and during the Appellate Rules Advisory Committee's meeting in Chicago in October, which was attended by Judge Dow, Chair of the Rule 23 Subcommittee.

A theme that arose from these discussions was that a simpler change would be preferable to a more complicated one. Accordingly, this report presents two possibilities—a simpler one involving only a revision of Rule 23(e) and a more complicated one involving a revision of the Appellate Rules as well, along with further changes to Rule 23(e). Both approaches are sketched below, but it is important to appreciate that the Subcommittee strongly favors the simpler approach that involves only a revision of Rule 23. This proposal makes district court approval necessary for any payment or other consideration in return for forgoing, abandoning, or dismissing an objection to a proposed class-action settlement or an appeal from district court approval of a proposed settlement over an objection. It thus does not in any way affect the court of appeals' authority to rule on whether to dismiss an appeal, but permits payment for doing so only on approval of the district court.

Besides forbidding payments to objectors, the simple model seeks to assist the district court's review of proposed settlements by requiring that objectors provide specifics to support their objections. Bad-faith objectors too often do not, and failure to comply with this feature of the amendment would provide an additional reason to reject an objection.

A. Simple Model
(favored by Subcommittee)

(5) **(A)** Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and state with specificity the grounds [for the objection].

(B) Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal [despite the objection].

Drafting a Committee Note now seems premature, but one thing such a Note might say is that (B)(ii) means that even if an objector appeals and then moves to dismiss the appeal any payment or consideration in connection with that dismissal is forbidden unless approved by the district court.

Another thing a Note could observe is that this amendment means that withdrawal of an objection in the district court requires court approval only if there is a payment or other consideration in connection with it. Thus, the court-approval requirement of current 23(e)(5) is relaxed by this amendment, and the amendment focuses on the problem area we have heard about. There seems no reason, based on the experience under Rule 23(e)(5) since 2003, for requiring a formal court approval of withdrawal of an objection by a good-faith objector who decides not to pursue an objection once the specifics of a proposed settlement are explained.

It may be that research on the treatment of "collateral" matters in connection with appeals would bear on this approach.

Beyond that, some further observations may be in order:

(1) A Note should make it clear that objectors are not normally "bad," but instead provide a valuable service to the court and the parties. And the fact they want to be paid for providing this service does not make them "bad," as recognized in the Committee Note to 23(h) when adopted in 2003.

(2) (e)(5)(B) above does not explicitly require disclosure of the agreement to compensate, but that seems implicit. One cannot ask for approval of something one does not disclose.

(3) This approach does not change the Appellate Rules. The court of appeals will presumably proceed with whatever briefing schedule it would normally expect the parties to follow. That schedule might afford enough time for the parties to reach an agreement for dismissal in return for payment and submit it to the district court for its approval before the due date for the appellant's brief. But it should be noted that the district court may—under the amendment sketch—approve the payment only "after a hearing." So there may not be time to obtain that approval under the court of appeals' schedule. If so, the appellant presumably would have to file a motion in the court of appeals asking for an extension of time. It is hard to see how that motion could fail to explain that a motion has been made to the district court to approve the payment. Unless that happens, it is not clear that there is any need to direct that the parties report the deal to the court of appeals.

B. Changing Appellate Rule 42(c) also
(not favored by Subcommittee)

Sketch of possible Appellate Rule 42(c)

Rule 42. Voluntary Dismissal

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(c) **(1)** Unless approved by the court, no payment or other consideration may be provided to an objector or objector's counsel in connection with dismissing or abandoning an appeal from a judgment approving a proposed class-action settlement despite an objection under Rule 23(e)(5) of the Federal Rules of Civil Procedure. Such payment or consideration must be disclosed to the court.

(2) Before or after ruling on a motion to dismiss [or dismissing for failure to prosecute], the court may itself decide whether to approve a payment or other consideration disclosed under Rule 42(c)(1), or may refer the question whether to approve the payment to the district court for a recommendation, retaining jurisdiction to review the recommendation [on request by any party to the appeal].

This approach seems somewhat incompatible with the sketch of Civil Rule 23(e)(5)(B)(ii), which gives jurisdiction to the district court. So maybe the right way to proceed would be as follows in 23(e)(5):

(B) Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with forgoing or withdrawing an objection[, or forgoing or abandoning an appeal, or seeking dismissal of an appeal under Rule 42(a) of the Federal Rules of Appellate Procedure] {, or forgoing, abandoning, or dismissing an appeal at any time before the appeal is docketed by the circuit clerk}.

(C) If the court of appeals refers to the district court the question whether to approve payment or other consideration for dismissal or abandonment of an appeal [under Rule 42(c)(2) of the Federal Rules of Appellate Procedure], the district court must[, after a hearing,] report its recommendation to the court of appeals.

This approach would be more elaborate. That is one of the reasons why the Subcommittee does not favor it. One question is whether or how to deal with "abandonment" in the court of appeals, or dismissal for failure to prosecute. One might expect that an order to show cause re dismissal would precede dismissal for failure to prosecute, and that is the hook for requiring disclosure of the payoff to the court of appeals in the abandonment situation. Whether that method really is employed (or would be employed) is uncertain. There does not seem to be an Appellate Rule that provides a parallel to Civil Rule 41(b) regarding failure to prosecute. It would seem that class counsel would not be willing to pay off the objector until certain that the appeal is gone, and that the abandonment situation makes that less clear. So maybe the abandonment for payoff problem is not really a problem on appeal.

This approach does not have a hearing requirement in the court of appeals. Should one be added? Is that useful in the court of appeals? The idea of requiring it before the district court is to reduce the prospect class counsel might be willing to stipulate but not to support the payment face-to-face with the judge.

(6) Settlement approval criteria

The centrality of settlement approval criteria probably cannot be overstated. Although a small number of certified class actions go to trial, a much larger number end in settlements, and certification is often only for purposes of settlement.

Rule 23 has, until now, said little about what a court should focus on in reviewing a proposed settlement. The 1966 version of Rule 23 only said that the court must approve any settlement or voluntary dismissal. The 2003 amendment clarified that it must find that the settlement is "fair, reasonable, and adequate," a standard derived from case law under original Rule 23(e). Much of that case law developed during the 1970s and 1980s, and in some places included a large number of factors. The ALI undertook to focus the analysis on core features of concern reflected in the factor lists of all circuits. See ALI, Principles of Aggregate Litigation § 3.05 (2010).

Building on the ALI approach, the sketch of possible revisions below also seeks to focus on a relatively short list of core considerations in the settlement-approval setting. This listing also may inform the decision under Rule 23(e)(1) about what information the court needs to make a decision whether a proposed settlement has enough promise to justify notice to the class.

Rule 23. Class Actions

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise.

* * * * *

(2) If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether: ~~.~~

(A) the class representatives and class counsel have adequately represented the class;

(B) the settlement was negotiated at arm's length;[1]

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the proposed method of distributing relief effectively to the class, including the method of processing class member claims, if required;

(iii) the terms, including timing of payment, of any proposed attorney-fee award; and

(iv) any agreement made in connection with the settlement proposal; and[2] [3]

[1] The Subcommittee has discussed combining (A) and (B) into a single provision as follows:

> **(A)** the class representatives and class counsel have adequately represented the class in prosecuting the case and negotiating its settlement at arm's length;

Consideration of this approach continues. One reason for favoring the approach in text is that it emphasizes the need to focus on the general adequacy of representation and, somewhat separately, on the course of negotiation that led to the settlement proposal. One reason for a combined approach is that all these judgments essentially involve the same criterion—whether there has been adequate representation.

[2] During its discussions, the Subcommittee has also considered an additional factor for what is now (C):

(D) class members are treated equitably relative to each other.

Sketch of Draft Committee Note

Subdivision (e)(2). The central concern in reviewing a proposed class-action settlement is that it is fair, reasonable, and adequate. This criterion emerged from case law implementing Rule 23(e)'s requirement of court approval for class-action settlements. It was formally recognized in the rule through the 2003 amendments. By then, courts had generated lists of factors to shed light on this central concern. Overall, these factors focused on comparable considerations, but each circuit developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal, not to displace any of these factors.

One reason for this amendment is that a lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A particular circuit's list might include a dozen or more separately articulated factors. Some of those factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important than others to the particular case. Yet counsel and courts may feel it necessary to address every single factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of factors, by focusing on the central procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important adjunct to scrutinizing the specifics of the proposed settlement. If the court has appointed class counsel or interim class

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(iii) the probable effectiveness of the proposal in accomplishing the goals of the class action;

Concern has been expressed, however, about what this additional factor means, if it is distinct from the others in (C).

[3] An alternative presentation of factor (C) has recently been proposed:

> (c) the relief awarded to the class—taking into account the proposed attorney-fee award [and the timing of its payment,] and any agreements made in connection with the settlement—is adequate, given the risks, probability of success, and delays of trial and appeal; and

This possible reformulation will be before the Subcommittee as it moves forward.

counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may also be important. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests.

In making this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any attorney-fee award, both as to the manner of negotiating the fee award and its terms.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. A central concern is the relief that the settlement is expected to provide to class members. Evaluating the proposed claims process and expected or actual claims experience (if the notice to the class calls for pre-approval submission of claims) may bear on this topic. The contents of any agreement identified under Rule 23(e)(3) may also bear on this subject, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries might be and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure. And the court may need to assess that settlement figure in light of the expected or actual claims experience under the settlement.

[If the class has not yet been certified for trial, the court may also give weight to its assessment whether litigation certification would be granted were the settlement not approved.]

Examination of the attorney-fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any attorney-fee award must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class is often an important factor in determining the appropriate fee award. Provisions for reporting back to the court about actual claims experience, and deferring a portion of the fee award until the claims experience is known, may bear on the fairness of the overall proposed settlement.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it is suitably receptive to legitimate claims. A claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims. Particularly if some or all of any funds remaining at the end of the claims process must be returned to the defendant, the court must be alert to whether the claims process is unduly exacting.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis other class members. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that affect apportionment of relief.

Composite of whole package
of amendment sketches

The Subcommittee's goal has been to develop a set of rule changes that together operate as a sensible whole. So it seems useful to present a composite of these changes (without the complication of the objector approach including an Appellate Rule change):

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) ***Notice.***

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for settlement under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice—by United States mail, electronic means or other appropriate means—to all members who can be identified through reasonable effort. * * * * *

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class, or a class proposed to be certified as part of a settlement, may be settled, voluntarily dismissed or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to class***

(A) The parties must provide the court with sufficient information to enable it to determine whether to give notice to the class of the settlement proposal.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if it determines that giving notice is justified by the parties' showing regarding the prospect of:~~.~~

(i) approval of the proposal; and

(ii) class certification for purposes of judgment on the settlement proposal.

(2) If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:~~.~~

(A) the class representatives and class counsel have adequately represented the class;

(B) the settlement was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the proposed method of distributing relief effectively to the class, including the method of processing class member claims, if required;

(iii) the terms, including timing of payment, of any proposed attorney-fee award; and

(iv) any agreement made in connection with the settlement proposal; and

(D) class members are treated equitably relative to each other.

* * * * *

(5) **(A)** Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and state with specificity the grounds [for the objection].

(B) Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal [despite the objection].

* * * * *

(f) **Appeals**. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders. An order under Rule 23(e)(1) may not be appealed under subdivision (f).

Department of Justice Proposal

On Dec. 4, 2015, Benjamin Mizer, Principal Deputy Assistant Attorney General, wrote to Judge Dow to submit a proposal that Rule 23(f) be amended as follows:

(f) **Appeals.** A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered, except that any party may file such a petition within 45 days after the order is entered if one of the parties is the United States, a United States agency, a United States officer or employee sued in an official capacity, or a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the order is entered or files the appeal for that person. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

The Department recommends a Committee Note as follows:

Committee Note

Subdivision (f). The amendment lengthens the time for filing a petition for permission to appeal from a class-action certification order from 14 to 45 days in civil cases involving the United States or its agencies or officers. The amendment, analogous to the provisions in Federal Rules of Appellate Procedure 4(a)(1)(B) and 40(a)(1), which extend the time for filing a notice of appeal or a petition for rehearing in cases involving the United States government, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of each case and to assess the government's diverse interests before authorizing a petition for permission to appeal an order granting or denying class certification.

Present posture

Neither the Subcommittee nor the Advisory Committee has had a chance to review or discuss this proposed amendment. A copy of Mr. Mizer's Dec. 4, 2015, letter is included in this agenda book.

II. Issues "on hold"

The two issues described below also drew much attention during the various events attended by Subcommittee members. But the fluidity of current case law, and the prospect of significant change (including at least one seemingly imminent Supreme Court decision), persuaded the Subcommittee that neither issue warrants going forward with developing formal amendment proposals at this time.

A. Ascertainability

Ascertainability has emerged as a prominent issue in the last few years. The Subcommittee received many recommendations about how Rule 23 might be amended to address this concern directly. In particular, several comments urged that the rulemakers counter certain decisions by the Third Circuit about its interpretation of the ascertainability factor in class certification. Some argued that undue attention to the mechanics of distributing a class payout at the certification stage created inappropriate obstacles to class certification, particularly in class actions growing out of purchase of low-value consumer products. But others urged that a strong version of the perceived Third Circuit approach be written into the rule as an absolute prerequisite to certification, even in class actions for injunctive relief under Rule 23(b)(2).

The case law, meanwhile, appears to be fluid and continues to develop. The agenda book for the Advisory Committee's November meeting contained three court of appeals decisions issued since the Advisory Committee's April 2015 meeting that seem to reflect evolution of the courts' attitude toward handling ascertainability—*Brecher v. Republic of Argentina*, 802 F.3d

303 (2d Cir. 2015) (per Wesley, J.); *Mullins v. Direct Digital*, LLC, 795 F.3d 654 (7th Cir. 2015); *Byrd v. Aaron's, Inc.*, 784 F.3d 184 (3d Cir. 2015). And some parties seem to make very aggressive ascertainability arguments to defeat certification. *See, e.g.*, *In re Community Bank of Northern Virginia Mortgage Lending Practices Litigation*, 795 F.3d 380, 396-97 (3d Cir. 2015) (upholding certification and rejecting defendant's ascertainability argument as "mired in speculation").

Supreme Court developments may also affect the handling of ascertainability issues. Two cases in which the Court heard arguments this Term—*Spokeo, Inc. v. Robins*, 742 F.3d 409 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 1892 (2015); *Tyson Foods, Inc. v. Bouaphakeo*, 765 F3d 791 (8th Cir. 2015), *cert. granted*, 135 S. Ct. 2806 (2015)—may bear on ascertainability issues. And two courts of appeals have stayed the mandate on decisions involving ascertainability issues to permit defendants to seek writs of certiorari—*Mullins v. Direct Digital, LLC*, 795 F.3d 654 (7th Cir. 2015), *mandate stayed*, Aug. 18, 2015, *petition for certiorari filed* (no. 15-549), Oct. 28, 2015; *Rikos v. Proctor & Gamble Co.*, 799 F.3d 497 (6th Cir. 2015), *mandate stayed*, Oct. 28, 2015.

In addition to the volatility of current case law, the Subcommittee is not certain what should be in a rule amendment if one is warranted. For its mini-conference, it attempted to draft a "minimalist" approach (included elsewhere in this agenda book), but several participants in that event regarded it as adopting a strong version of the Third Circuit test that many have questioned. It may be that developments in the relatively near future will at least cast more light on how best to approach these issues in a possible rule change. For the present, the Subcommittee regards it as unwise to attempt to devise a reaction without regard to developments reasonably anticipated in the relatively near future.

B. "Pick-off" offers of judgment

For some time, the Subcommittee has considered various ways to deal with the possibility of inappropriate "pick-off" offers of judgment to putative class representatives that would moot their class actions. The Subcommittee does not recommend proceeding with work on an amendment to address this concern.

Until recently, the Seventh Circuit had held that, at least in some circumstances, such offers would moot proposed class actions. *See Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011). In reaction, plaintiff lawyers inside and outside the Seventh Circuit filed "out of the chute" class certification motions to guard against mootness, because the Seventh Circuit regarded making such a motion as sufficient to avoid the potential mootness problem. On occasion, plaintiffs would also move to stay resolution of their own class-certification motion until discovery and other work had been done to support resolution of certification.

The issues memorandum for the mini-conference contained three different possible rule-amendment approaches for dealing with these problems. The memo also raised the question

whether the problem warranted the effort involved in proceeding to amend the rules. After the mini-conference, the Subcommittee decided that proceeding at this time is not indicated.

In *Chapman v. First Index, Inc.*, 796 F.3d 783 (7th Cir. 2015), the Seventh Circuit overruled *Damasco* and a number of its cases following that decision "to the extent they hold that a defendant's offer of full compensation moots the litigation or otherwise ends the Article III case or controversy." Judge Easterbrook noted that "Justice Kagan's dissent in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532-37 (2013) (joined by Ginsburg, Breyer & Sotomayor, JJ.), shows that an expired (and unaccepted) offer of a judgment does not satisfy the Court's definition of mootness, because relief remains possible." He added:

> Courts of appeals that have considered this issue since Genesis Healthcare uniformly agree with Justice Kagan. *See, e.g.*, *Tanasi v. New Alliance Bank*, 786 F.3d 195 (2d Cir. 2015); *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S. Ct. 2311 (2015). The issue is before the Supreme Court in *Gomez*, and we think it best to clean up the law of this circuit promptly, rather than require Chapman and others in his position to wait another year for the Supreme Court's decision.

See also Hooks v. Landmark Indus. Inc., 797 F.3d 309 (5th Cir. 2015) (holding that "an unaccepted offer of judgment cannot moot a named-plaintiff's claim in a putative class action").

As noted by Judge Easterbrook, the Supreme Court has this issue before it in the *Campbell-Ewald* case (*Campbell-Ewald*, 768 F.3d 871 (9th Cir. 2015), *cert. granted*, 135 S.Ct. 2311 (2015)). The oral argument in that case occurred on Oct. 14, 2015. It seems prudent to await the result of the Court's decision, and it is quite possible that the issue will recede from the scene after that decision. It could recede even if the Court ultimately does not decide the case, or the decision leaves some questions open.

III. Issues Subcommittee is removing from its current agenda

During the Advisory Committee's November meeting, the Subcommittee presented three additional issues that it did not favor retaining on its agenda. The Advisory Committee approved the decision not to proceed presently with amendment ideas on these three topics, all of which were discussed in many meetings Subcommittee members have attended with the bar and bench, and included in the issues memorandum for the mini-conference.

A. Settlement Class Certification

The question whether certification standards should apply differently when the question is certification only for settlement rather than certification for trial has emerged on occasion since Rule 23 was amended in 1966. In 1995, a Third Circuit decision stating that settlement

certification could not be granted in any case in which the court would not certify for full litigation prompted a published proposal to add a new Rule 23(b)(4) permitting certification for settlement in a 23(b)(3) case even though the case would not satisfy the full Rule 23(b)(3) requirements for certification for trial.

The amendment proposal proved controversial, and meanwhile the Supreme Court decided *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), which noted that the settlement class action had become a "stock device," and held that at least the manageability requirement of Rule 23(b)(3) need not be satisfied when certification only for settlement was sought. But the Court did not say that the predominance requirement was relaxed in the settlement setting.

The materials for the mini-conference included a sketch of a new Rule 23(b)(4) that would relax the predominance requirement. Several commented that this relaxation would produce dangerous results, and might prompt the filing of inappropriate proposed class actions. But few urged that such a change is acutely needed. It seemed that experienced lawyers have found the current state of the practice to afford sufficient flexibility to handle settlement class certification without the need for an amendment.

Instead, it seemed that emphasis on careful scrutiny of settlements under Rule 23(e)(2) was a more important focus for rule amendments, something that is included on the Subcommittee's list of topics to develop at present.

Given the ambivalence of many in the bar, and the existence of serious concerns about whether any rule change is really needed to enable class settlements when they are appropriate, the Subcommittee decided after the mini-conference not to proceed further with this idea.

B. Cy Pres

Chief Justice Roberts articulated concerns about cy pres provisions in his separate opinion regarding denial of certiorari in *Marek v. Lane*, 134 S. Ct. 8 (2013). Petitions seeking certiorari continue to request Supreme Court review of cy pres provisions. The ALI Aggregate Litigation Principles, in § 3.07, offer a series of recommendations about cy pres provisions that many courts of appeals have adopted. Indeed, this provision is the one from the Aggregate Litigation Principles that has been most cited and followed by the courts.

Beginning with several ideas from the ALI recommendations, the Subcommittee developed a fairly lengthy sketch of both a possible rule amendment and a possible Committee Note that were included in the issues memo for the mini-conference. That sketch has drawn very considerable attention, and also raised a wide variety of questions.

One question is whether there is any need for a rule in light of the widespread adoption of the ALI approach. It is not clear that any circuit has rejected the ALI approach, and it is clear that several have adopted it.

Another question is whether adopting such a provision would raise genuine Enabling Act concerns. The sketch the Subcommittee developed authorized the inclusion of a cy pres provision in a settlement agreement "even if such a remedy could not be ordered in a contested case." The notion is that the parties may agree to things in a settlement that a court could not order after full litigation. Yet it might also be stressed that, from the perspective of unnamed members of the class, the binding effect of the class-action settlement depends on the force of Rule 23 and the court's decree, not just the parties' agreement. So it might be said that a rule under which a court could substitute a cy pres arrangement for the class members' causes of action is subject to challenge. That argument could be met, however, with the point that the court has unquestioned authority to approve a class-action settlement that implements a compromise of the amount claimed, so assent to a cy pres arrangement for the residue after claims are paid should be within the purview of Rule 23.

At the same time, some submissions to the Subcommittee articulated reasons for caution in the area. Some urged, for example, that cy pres provisions serve valuable purposes in supporting such worthy causes as providing legal representation to low-income individuals who otherwise would not have access to legal services. Examples of other worthy causes that have benefitted from funds disbursed pursuant to cy pres arrangements have been mentioned. *See, e.g.*, Cal. Code Civ. Pro. § 384(b) (directing that the residue left after distribution of benefits from class-action settlements should be distributed to child advocacy programs or nonprofit organizations providing civil legal services to the indigent, or to organizations supporting projects that will benefit the class).

It seems widely agreed that lump-sum settlements often produce a residue of undistributed funds after the initial claims process is completed. The ALI approach favors attempting to make a further distribution to class members who have submitted claims at that point, but it may be that the very process of trying to locate more class members or make additional distributions would use up most or all of the residue.

Items included on the Subcommittee's list of topics for present action can partly address some of these concerns. The proposed sketches for Rules 23(e)(1) and 23(e)(2) (items (1) and (6) on the list in Part I of this report) both call attention to the need to address the possibility of a left-over surplus after the claims period, and to plans for dealing with that surplus. Those sketches and the one on notice (item 4)) also emphasize the need for the court to attend to the effectiveness of the notice campaign and the way in which claims may be presented. Together, these measures may improve the handling of issues that have raised serious questions about provisions put forward as cy pres arrangements without encountering the difficulties outlined above.

Ultimately, the Subcommittee concluded that the combination of (a) uncertainty about whether guidance beyond the ALI provision and judicial adoption of it is needed, (b) the challenges of developing specifics for a rule provision, and (c) concerns about the proper limits of the rulemaking authority cautioned against adopting a freestanding cy pres provision.

C. Issue classes

The Subcommittee included in its memorandum introducing its mini-conference several sketches of possible amendments to Rule 23(b) or (c) designed to integrate Rule 23(b)(3) and 23(c)(4). For a time it appeared that there was a conflict among the circuits about whether these two provisions could both be effectively employed under the current rule. But it is increasingly clear that the dissonance in the courts has subsided. At the same time, there have been some intimations that changing the rule along the lines the Subcommittee has discussed might actually create rather than solve problems.

The Subcommittee also circulated a sketch of a change to Rule 23(f) to authorize discretionary immediate appellate review of the district court's resolution of issues on which it had based issue class certification. This sketch raised a variety of potential difficulties about whether there should be a requirement for district court endorsement of the timing of the appeal, and whether a right to seek appellate review might lead to premature efforts to obtain review.

The Subcommittee eventually concluded that there was no significant need for rule amendments to deal with issue class issues, and that there were notable risks of adverse consequences.

RULE 62: STAYS OF EXECUTION

Introduction

The Rule 62 provisions for a stay pending appeal came on for discussion in both the Civil Rules Committee and the Appellate Rules Committee. A district judge asked the Civil Rules Committee whether there is authority to order a stay after expiration of the 14-day automatic stay provided by Rule 62(a) but before any party has filed any of the motions that, under Rule 62(b), authorize a stay "pending disposition of" those motions. The Committee initially decided that the court's inherent authority over its own judgments is so clearly adequate to the occasion that there was no need to amend the rule. But it was recognized that amendment might be desirable if doubts arose in practice. The Appellate Rules Committee was concerned that Rule 62 does not clearly support the useful practice of posting a single bond (or other security) that supports a stay that lasts from post-judgment proceedings in the district court on through final disposition of any appeal. It also thought it would be useful to adopt a clear provision that security may be provided in a form other than a bond. The Appellate Rules Committee's concerns prompted both Committees to take up Rule 62.

Deliberations by the Appellate and Civil Rules Committees have been supported by the work of a joint Subcommittee chaired by Judge Scott Matheson. Reports of the Subcommittee have been considered at earlier meetings of the Advisory Committees. Discussion at this Committee's meeting last May provided helpful guidance. With this guidance, the Subcommittee worked through the summer to develop a draft that addressed the questions that

began the work, and took up a number of new issues. Each Committee considered a draft submitted by the Subcommittee at their meetings this fall. The Subcommittee has revised its draft in response to the conclusions reached at those meetings. The revised Subcommittee draft has not been considered by either Committee. But what remains is material that has been fully considered and tentatively approved by each Committee. If time allows, it will be useful to explore the draft fully at this meeting. The guidance provided by a full discussion will facilitate confident preparation of a recommendation to publish Rule 62 amendments for comment next summer.

The purposes of the amendments are described in the Committee Note.

The Proposed Amendments

The current draft addresses the three issues that prompted the initial revision project. The "gap" between expiration of the automatic stay and the time allowed to make a post-trial motion is eliminated by extending the automatic stay to 30 days. Security for a stay may be posted either as a bond or in some other way. And security may be provided by a single act that covers both post-judgment proceedings in the district court and all further proceedings through completion of the appeal. These changes are discussed here. The further proposals that have been withdrawn are described briefly at the end.

REVISED DRAFT

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay. Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after its entry, unless the court orders otherwise.

(b) Stay by Other Means.

(1) ***By Court Order*****.** The court may at any time order a stay that remains in effect until **a** designated time [, which may be as late as issuance of the mandate on appeal], and may set appropriate terms for security or deny security.

(2) ***By Bond or Other Security.*** At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.

(c) Stay of Injunction, Receivership, or Patent Accounting Orders. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or a receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(d) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

* * * * *

COMMITTEE NOTE

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply to both interlocutory injunction orders and final judgments that grant, refuse, or otherwise deal with an injunction.

The provisions for staying a judgment are revised to clarify several points. The automatic stay is extended to 30 days, and it is made clear that the court may forestall any automatic stay. The former provision for a court-ordered stay "pending the disposition of" enumerated post-judgment motions is superseded by establishing authority to order a stay at any time. This provision closes the apparent gap in the present rule between expiration of the automatic stay after 14 days and the 28-day time set for making these motions. The court's authority to issue a stay designed to last through final disposition on any appeal is established, and it is made clear that the court can accept security by bond or by other means. A single bond or other form of security can be provided for the life of the stay.

The provision for obtaining a stay by posting a supersedeas bond is changed. New subdivision (b)(2) provides for a stay by providing a bond or other security at any time after judgment is entered; it is no longer necessary to wait until a notice of appeal is filed. The stay

takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security.

Subdivisions (a) and (b) address stays of all judgments, except as provided in subdivisions (c) and (d). Determining what the terms should be may be more complicated when a judgment includes provisions for relief other than—or in addition to—a payment of money, and that are outside subdivisions(c) and (d). Examples include a variety of non-injunctive orders directed to property, such as enforcing a lien, or quieting title.

Some orders that direct a payment of money may not be a "judgment" for purposes of Rule 62. An order to pay money to the court as a procedural sanction, for example, is a matter left to the court's inherent power. The decision whether to stay the sanction is made as part of the sanction determination. The same result may hold if the sanction is payable to another party. But if some circumstance establishes an opportunity to appeal, the order becomes a "judgment" under Rule 54(a) and is governed by Rule 62.

Special concerns surround civil contempt orders. The ordinary rule is that a party cannot appeal a civil contempt order, whether it is compensatory or coercive. A nonparty, however, can appeal a civil contempt order. If appeal is available, effective implementation of the contempt authority may counsel against any stay. This question is left to the court's inherent control of the contempt power and the authority to refuse a stay.

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay "pending disposition of" motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. Thirty days of automatic stay also suffices in cases governed by a 60-day appeal period.

Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate execution of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay under Rule 62(b)(1) that lasts longer or requires security.

Subdivision (b)(1) recognizes the court's broad general and discretionary power to stay, or to refuse to stay, execution and proceedings to enforce a judgment. The court may set terms for security or deny security. An appellant may prefer a court-ordered stay under (b)(1), hoping for terms less demanding than the terms for obtaining a stay by posting a bond or other security under (b)(2). A stay may be granted or modified with no security, partial security, full security, or security in an amount greater than the amount of a money judgment. Security may be in the form of a bond or another form. In some circumstances appropriate security may inhere in the events that underlie the litigation—for example, a contract claim may be fully secured by a payment bond.

Subdivision 62(b)(2) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b)(2) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule text makes explicit the opportunity to post security in a form other than a bond. The stay remains in effect for the time specified in the bond or security—a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari.

Rule 62(b)(2), like former Rule 62(d), does not specify the amount of the bond or other security provided to secure a stay. As before, the stay takes effect when the court approves the bond or security. And as before, the court may consider the amount of the security as well as the form, terms, and quality of the security or the issuer of the bond. The amount may be set higher than the amount of a monetary award. Some local rules set higher figures. [E.D. Cal. Local Rule 151(d) and D.Kan. Local Rule 62.2, for example, set the figure at one hundred and twenty-five percent of the amount of the judgment.] The amount also may be set to reflect relief that is not an award of money but also is not covered by Rule 62 (c) and (d). And, in the other direction, the amount may be set at a figure lower than the value of the judgment. One reason might be that the cost of obtaining a bond is beyond the appellant's means.

Rule 62 applies no matter who appeals. A party who won a judgment may appeal to request greater relief. The automatic stay of subdivision (a) applies as on any appeal. The appellee may seek a stay under subdivision (b), although a failure to cross-appeal may be an important factor in determining whether to order a stay. And, if the judgment awards money to the appellee as well as to the appellant, either may seek a stay.

Withdrawn Proposals

Subcommittee discussions over the summer generated a draft that included provisions designed to confirm the district court's broad authority to regulate the choices governing a stay, the terms of the stay, denial of a stay accompanied by security for damages caused by

enforcement pending appeal, and simple denial of any stay. Two basic sets of reasons appeared in the advisory committee discussions for omitting these provisions.

One set of reasons reflected the basic premise that the Enabling Act should be used to revise court rules only when a substantial need appears. Earlier discussions in the advisory committees and in the Standing Committee asked whether any problems with stay procedure have been encountered beyond the problems that launched the project. No other problems were identified. That does not of itself foreclose consideration of possible problems to ensure that present revision does not leave the work half-finished, so that new problems will require additional revisions in the near future. But once the possible problems are identified in the abstract, and efforts are made to draft solutions, it remains important to consider whether the risks of imperfect foresight and flawed implementation will generate real problems while solving only theoretical problems. That concern weighed heavily in the discussions.

The other reason was more direct, and thoroughly familiar. The Subcommittee repeatedly considered and reconsidered the question whether there should be a nearly absolute right to a stay on posting a bond. The sense of the advisory committee discussions, particularly as informed by the understanding of appellate lawyers, is that there is a right to a stay. The right may not be absolute. The language of present Rule 62(d) says that "the appellant may obtain a stay by supersedeas bond." This language is carried forward only by making it more general to encompass cross-appeals: "a party may obtain a stay." Whether "may obtain" encompasses an absolute right may be debated. But in conjunction with the requirement that the court approve the bond or other security, there is at least an ambiguity that may leave the way open for a court to deny any stay for compelling reasons.

The nearly absolute right to a stay on posting a bond or other security, moreover, does not defeat all (or nearly all) discretion. It seems to be accepted now that a court may approve security in an amount less than the judgment. The revised draft Rule 62(b)(1) makes this authority explicit by allowing the court to order a stay and set terms for security or deny security.

Omission of the provisions spelling out several details of a court's inherent power to control its own judgments does not imply any determination as to the scope of that power. The court's power is left where it is, and as it may be developed and articulated by the courts as need arises.

Post-Script

The Committee decided to dispense with the antique-sounding description of the appeal bond as a "supersedeas" bond. If that style decision is accepted, it will be appropriate for the Appellate and Bankruptcy Rules Committees to consider deleting "supersedeas" from their sets of rules.

e-FILING, e-SERVICE, AND NEF AS CERTIFICATE OF SERVICE

The Appellate, Bankruptcy, Civil, and Criminal Rules Committees have worked to develop common proposals to advance electronic filing and electronic service. Recognizing a notice of electronic filing as a certificate of service has become part of this effort. The Criminal Rules Committee faces the most challenging task because it has decided that it is time to create a Criminal Rule that directly addresses filing and service. Present Criminal Rule 49(a) provides simply that filing and service are made as in a civil action. The Criminal Rules Committee and its Subcommittee are working carefully to prepare an independent Rule 49. Their work includes consideration of the possibility that criminal practice is sufficiently different from civil practice to justify differences between the Criminal and Civil Rules. Representatives of the Civil Rules Committee are working with them in this task. There is every hope that all advisory committees will be prepared to recommend rules for publication next June.

REQUESTER-PAYS DISCOVERY

For a few years, the Discovery Subcommittee carried on its agenda the question whether to propose rules that would set a general framework for requiring payment by the party requesting discovery of some part, or all, of the response costs. The question was raised by groups interested in the rulemaking process, and some members of Congress showed interest. Accepting a recommendation by the Subcommittee, the Committee has concluded that current work on this subject should be suspended. It will remain open for future consideration if developing discovery experience seems to show a need.

The assumption that the costs of responding to discovery are borne by the responding party is deeply entrenched. The system of civil litigation that we know would be dramatically changed by reversing course to adopt a general rule that the requesting party ordinarily must pay the costs of responding. Less dramatic alternatives are easier to contemplate, but perhaps more difficult to carry into practice. A common version would allow the requesting party to get some "core" of discovery at the expense of the responding party, but would require the requesting party to pay for the costs of responding to requests beyond the core. That approach could be made to work under judicial direction on a case-by-case basis, and has been used by some judges. But any attempt to define core discovery in a general court rule would be extraordinarily difficult.

A more optimistic reason supplements these reasons to conclude that work on requester-pays issues would be premature. The case-management and discovery rules amendments that took effect on December 1, 2015, are designed to make discovery proportional to the needs of the case. If they can achieve in practice the high ambitions that they reflect, then the concern that disproportionate discovery costs can be reined in only by a requester-pays system will be substantially reduced. In addition, the 2015 amendments include a modest provision that calls attention to the power, already recognized in the cases, to enter a protective order under Rule 26(c) that adopts some measure of payment by the requesting party. This provision is not designed to become a general requester-pays provision, but it does recognize a safety valve when needed in a specific case.

RULE 68

The Rule 68 scheme for offers of judgment has prompted study at regular intervals. Specific proposed amendments were published for comment in 1983 and, with substantial revisions, in 1984. They were withdrawn from further consideration. The Committee studied Rule 68 again a decade later, but abandoned an intricate draft without proceeding to publication. Rule 68 continues to be addressed by more outside proposals than any rule other than the discovery rules. So it has reappeared on the agenda at regular intervals over the last twenty years without generating any specific proposals for consideration.

Rule 68 is back on the agenda again. Recognizing the challenges that have confronted earlier work, the Committee has concluded that similar state practices should be explored. It may be that practices exist that achieve the goal of encouraging earlier and fair settlements, initiated by plaintiffs as well as defendants, without coercing unwanted settlements for fear of rule-imposed consequences and without encouraging strategic posturing.

Committee resources have been absorbed by other projects. The study of state practices will be launched when resources are freed up for the work.

PRE-MOTION CONFERENCES: SUMMARY JUDGMENT

Judge Zouhary suggested consideration of the practice that requires a party to request a conference with the court before filing a motion for summary judgment. He and other judges find that this practice generates several benefits. The conference is not used to deny "permission" to make a motion—it is accepted that Rule 56 establishes the right to do so. But a conference with the court can work better than a conference between the parties alone (if one were to happen) in illuminating the facts and the law. The result may be that the motion is not made, or that the motion is better focused. The nonmovant may recognize that there is no basis for disputing some facts, further focusing the motion.

Committee members have experienced the benefits that Judge Zouhary describes. Important benefits can be gained at a pre-motion conference with a judge who is interested in actively assisting the parties as they develop the case.

A note of restraint qualified this enthusiasm. The pre-motion conference practice was actively explored by the Subcommittee that generated the package of case-management and discovery proposals that became the 2015 amendments. Rule 16(b)(3)(B)(v) was added to provide that a scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court." Two compromises are reflected in this amendment. The first was to emphasize that the conference is an option available to the judge, not a mandate for all cases. This compromise responded to advice that a significant number of judges would resist a practice requiring a pre-motion conference for all discovery disputes. The second was to limit the encouragement to discovery motions. This compromise reflected a spirit of caution, even as the general benefits of pre-motion conferences were recognized. This quite recent work may suggest that further rules changes be deferred for a while.

Drafting a pre-motion conference rule would not be difficult, whether by simply expanding Rule 16(b)(3)(B)(v) to add summary judgment motions as a suitable scheduling-order topic or by amending Rule 56 to require a conference in all cases. The Committee concluded that the question should be held open, without yet moving toward developing a specific rule proposal, and with the hope that pre-motion conferences can be encouraged as a best practice.

DISCARDED PROPOSALS

Several outside proposals were considered and put aside. Brief descriptions should suffice.

One proposal, modestly enough, suggested only an addition to the Committee Notes to Rule 30. The Note would observe that it is improper to object to a question on oral deposition by saying only "objection as to form." Additional explanation would be required. Whether or not anything could be accomplished by adding a Note statement, a Note cannot be written without a simultaneous rule amendment. Amending the Rule 30(c)(2) directions on improper objections does not seem worthwhile.

Another proposal focused on a Rule 12(b)(6) motion to dismiss only part of a complaint, and went on to address the same question when the motion is converted to one for summary judgment. The concern is that some courts employ Rule 12(a)(4) to extend the time for a responsive pleading only as to the portions of the complaint challenged by the motion to dismiss. The proposed solution is to write into rule text the practice that seems to be followed by most courts, suspending the time to respond as to the whole complaint. This practice avoids duplicative pleadings and confusion over the proper scope of discovery. This subject was removed from the docket, but it was recognized that it will deserve study if it becomes apparent

that many judges require a partial response within the original time limits, unaffected by the pending motion.

The geographic reach of trial subpoenas was addressed by a proposal that went further to suggest that an entity should be subject to a trial subpoena just as it can be subjected to a deposition. The suggestion that a representative of a nonresident corporate defendant could be commanded to appear at trial was considered in broader terms during the work that led to the still-recent amendments of Rule 45. No new reason appears to reconsider the amended rule. The suggestion that a trial subpoena could name an entity as a trial witness, directing it to produce one or more real persons to appear to testify on designated subjects, was found too fraught with problems to justify further work.

The final set of suggestions addressed four topics, each of which affects several of the advisory committees. One topic is e-filing by pro se litigants, a matter under active consideration by four advisory committees. A second is a proposal that Rule 5.2(a)(1) be amended to prohibit filing any part of a social-security or taxpayer identification number. The concern is that it is not difficult to generate a complete social security number from the final four digits if combined with additional information about a person that is often available. This concern was considered in developing Rule 5.2(a)(1), and put aside because filing the final four digits seemed important in bankruptcy practice. This question seems worthy of further consideration, beginning with the Bankruptcy Rules Committee, although the initial suggestion has been that it continues to be useful to have the final four digits. The third suggestion is for a new rule that would direct that any affidavit made to support a motion to proceed in forma pauperis under 28 U.S.C. § 1915 be filed under seal and reviewed ex parte. Initial Committee discussion suggested that this practice would impose significant burdens on the court, and that the privacy interests involved in the details of showing entitlement to forma pauperis status may not be troubling when a grant of forma pauperis status itself suggests a lack of substantial assets. The final suggestion is that when counsel cites cases or other authorities that are unpublished or reported exclusively on computerized data bases, counsel must furnish copies to any pro se party. Counsel would be similarly required to provide copies on request of such citations by the court. This practice seems useful—the proposal is modeled on a local rule for the Eastern and Southern Districts of New York—but the Committee thought it a matter too detailed to be adopted as a national rule.

APPENDIX

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U. S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

December 4, 2015

The Honorable Robert Michael Dow, Jr.
Chair, Rule 23 Subcommittee
Advisory Committee on Civil Rules
c/o United States District Court
Everett McKinley Dirksen U.S. Courthouse
219 South Dearborn St., Room 1978
Chicago, IL 60604

Dear Judge Dow:

As discussed at the November 5, 2015, meeting of the Civil Rules Advisory Committee, the United States Department of Justice is pleased to submit to the Committee's Rule 23 Subcommittee, for consideration and approval for submission to the Committee, a proposal to amend existing Rule 23(f).

Rule 23(f) of the Federal Rules of Civil Procedure authorizes a permissive interlocutory appeal from a district court order granting or denying certification of a class. The rule requires that a petition for permission to appeal such an order must be filed in the court of appeals within 14 days after the certification order is entered. As explained below, the Department of Justice recommends that additional time—specifically, a 45-day deadline—should apply to petitions for permission to appeal under Rule 23(f) in civil cases when the federal government is a party.

Any appeal by the United States government must be authorized by the Solicitor General. 28 C.F.R § 0.20(b). That deliberative process requires substantial time to consult with components of the Department of Justice and other government agencies with an interest in the issues presented. The consultation process is particularly time consuming and searching because multiple agencies and offices within the government might have different interests implicated by a specific case. Moreover, the role of the United States is not limited to defending particular litigation. The Solicitor General must also take account of the government's interest in enforcing federal law. Those interests are sometimes in tension, particularly in cases involving class actions. Because the government's diverse interests need to be reconciled before the Solicitor General can reach a decision concerning appeal, the need for consultation and deliberation requires additional time.

The current 14-day appeal deadline in Rule 23(f) is particularly challenging because the court of appeals is expressly precluded from granting an extension of time, and it is not clear whether the district court would have the authority to extend the 14-day deadline. See *Delta Airlines* v. *Butler*, 383 F.3d 1143, 1145 (10th Cir. 2004). Moreover, unlike a notice of appeal, a petition under FRCP 23(f) is not a mere placeholder. Instead, the petition for permission to appeal is a substantive filing that must set forth reasons and arguments for reversing the class certification decision; that petition must be drafted by Justice Department attorneys, and authorized by the Solicitor General, in a very short period.

The United States government does not often seek permission to appeal under Rule 23(f), but in the circumstances where an appeal is warranted, the 14-day deadline creates serious problems of practicability and imposes extraordinary burdens on government officials. Fourteen days is not sufficient to permit the consultations and deliberations required to take account of the diverse government interests that often affect the issues and arguments the government might seek to present to the court of appeals.

Because of the time required for the Solicitor General to determine whether to authorize appeal, and to avoid unnecessary protective appellate filings that might later need to be voluntarily dismissed, other provisions of the federal rules provide additional time to appeal in cases where the United States government is a party. For example, Appellate Rule 4(a)(1)(B) provides that any party may file a notice of appeal within 60 days (rather than the usual 30 days) when the United States is a party to a civil case. Similarly, Appellate Rule 40(a)(1) provides that a petition for rehearing or rehearing en banc in a civil case may be filed within 45 days (instead of 14 days) when the United States government is a party.

The example of the deadline for rehearing petitions is closely analogous here. There, as in Rule 23(f), a 14-day period had been prescribed and was retained for non-government cases, but the rules were amended to accommodate the additional time needed for the Solicitor General to determine whether to pursue rehearing en banc when the government is a party. Also, like a rehearing petition, a petition for permission to appeal under Rule 23(f) is a substantive articulation of the government's position, requiring more time for consultation and authorization. Although the additional time may not be necessary for a non-government party that seeks to appeal, the Department of Justice recognizes that the rules should provide parity to all parties in a case where the government is a party, as in the examples of the deadlines to file a notice of appeal or a rehearing petition in civil cases.[1]

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[1] The rules provide different deadlines for the government and non-government parties in criminal cases, see FRAP 4(b)(1), but there is no reason for different treatment in the class-action context.

The Department's proposal to extend the deadline to 45 days represents a compromise resolution of the timing problem—an extension beyond the current 14-day period but less than the full 60 days permitted to file a notice of appeal in a civil case in which the government is a party. The proposal thus reflects the need to avoid undue delay in the class-action certification context, while accommodating the government's need to consider whether an appeal would be appropriate. The final sentence in Rule 23(f), providing that an appeal does not automatically stay proceedings, would also remain unchanged under the Department's proposal.

The Department therefore recommends that Rule 23(f) be amended as follows:

> (f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered, except that any party may file such a petition within 45 days after the order is entered if one of the parties is the United States, a United States agency, a United States officer or employee sued in an official capacity, or a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the order is entered or files the appeal for that person. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

The Department also recommends the following Note to accompany the amended Rule:

> **Subdivision (f).** The amendment lengthens the time for filing a petition for permission to appeal from a class-action certification order from 14 to 45 days in civil cases involving the United States or its agencies or officers. The amendment, analogous to the provisions in Federal Rules of Appellate Procedure 4(a)(1)(B) and 40(a)(1), which extend the time for filing a notice of appeal or a petition for rehearing in cases involving the United States government, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of each case and to address the government's diverse interests before authorizing a petition for permission to appeal an order granting or denying class certification.

* * *

We appreciate the Subcommittee's consideration of the Department's proposal, and we will be happy to respond to any questions you have concerning it. Please feel free to contact either me or Ted Hirt of the Civil Division at Theodore.Hirt@usdoj.gov or (202) 514-4785.

Sincerely,

Benjamin C. Mizer
Principal Deputy Assistant Attorney General

cc. The Honorable John D. Bates
Chair, Advisory Committee on Civil Rules
c/o United States District Court
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave. N.W. Room 4114
Washington, D.C. 20001

MINI-CONFERENCE ON CLASS ACTIONS
Rule 23 Subcommittee
Advisory Committee on Civil Rules
Dallas, Texas
Sept. 11. 2015

Participating as representatives of the Rule 23 Subcommittee were Judge Robert Dow (Chair, Rule 23 Subcommittee), Elizabeth Cabraser, Dean Robert Klonoff, and John Barkett. Also participating were Judge David Campbell (Chair, Advisory Committee), Judge Jeffrey Sutton (Chair, Standing Committee), Judge John Bates (Chair-designate, Advisory Committee), Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Reporter, Rule 23 Subcommittee). Emery Lee represented the Federal Judicial Center. Representing the Administrative Office were Rebecca Womeldorf, Derek Webb, and Frances Skillman.

Invited participants included David M. Bernick (Dechert LLP), Sheila Birnbaum (Quinn Emanuel), Leslie Brueckner (Public Justice), Theodore H. Frank (Center for Class Action Fairness), Daniel C. Girard (Girard Gibbs LLP), Jeffrey Greenbaum (Sills Cummis & Gross, P.C.), Theodore Hirt (Department of Justice), Paul G. Karlsgodt (Baker Hostetler), Prof. Alexandra Lahav (Univ. of Connecticut), Jocelyn Larkin (Impact Fund), Brad Lerman (Medtronic), Gerald Maatman (Seyfarth Shaw LLP), Prof. Francis McGovern (Duke), Prof. Alan Morrison (G.W.), Prof. Martin Redish (Northwestern), Joseph Rice (Motley Rice LLC), Stuart Rossman (Nat. Consumer Law Center), Eric Soskind (Department of Justice), Hon. Amy St. Eve (N.D. Ill.), Hon. Patti Saris (D. Mass. and U.S. Sentencing Comm'n), Christopher Seeger (Seeger Weiss), Hon. D. Brooks Smith (3d Cir.), and Ariana Tadler (Milberg LLP).

Observers included Alex Dahl (LCJ), Prof. Brendan Maher (Univ. of Connecticut), Roger Mandel (Lackey Hershman LLP), and Mary Morrison (Plunkett Cooney and LCJ).

Judge Dow welcomed and thanked all the participants, and announced that the morning session would be focused on the first three of the Subcommittee's nine topics for possible rule amendments, with the next four topics occupying most of the time after lunch and the last two topics touched upon only if time allowed. He also invited participants to introduce themselves and indicate which topics they felt were most important. Among the topics so identified by several invitees were ascertainability, cy pres, settlement approval criteria, and settlement class certification.

Topic 1 -- Disclosures regarding class-action settlements

This idea has been known as "frontloading," and emerged from the Subcommittee discussions with interested groups during the past year about possible class-action reforms. It is designed to focus more on the decision whether or when to send notice to the

class of a proposed settlement under Rule 23(e)(1) rather than as "preliminary approval" of the proposed settlement or (if the class has not yet been certified) of class certification. The ALI Aggregate Litigation Project and others have cautioned against the "preliminary approval" nomenclature, since the court should have an open mind until objectors have had an opportunity to state their views. In addition, the effort is designed to blunt arguments that Rule 23(f) review is available at the time of the decision to send notice to the class, while ensuring that the notice can call for class members in Rule 23(b)(3) cases to make their opt-out decisions.

Discussion began with the suggestion that it might be desirable to promote a more adversarial presentation at the "front end" of the class settlement process. In the Silicon Gel litigation, for example, Judge Pointer promoted an open process that got many class members involved at an early point. Is there a way to have the judge reach out to members or putative members of the class to solicit their views at this point?

A reaction to this suggestion was there is a serious problem with relying on the judge to take the place of the adversary process. There are strong reasons for getting objectors involved as soon as possible to ensure that the judge has an adversary process to evaluate the proposed settlement.

That idea brought the reaction "This is not doable. You don't know who the objectors are." Right now, counsel proceed on the basis of "preliminary approval." But there is no articulated standard for granting such preliminary approval. Instead, the parties themselves make sure that there are solid grounds to support the settlement proposal, and to support class certification if that has not yet been granted. They very much want to avoid final disapproval.

Putting aside the concern about the term "preliminary approval," a different concern was with a "laundry list" rule like the sketch in the materials, with fully 14 different topics to address. Many of those topics would not be relevant in many cases. In different types of cases, different concerns exist.

Another participant announced strong support for frontloading. This could "shift the paradigm," making the judge more inquisitorial. That is consistent with the view of courts that say that the judge has a fiduciary obligation to protect the interests of the unnamed class members. Indeed, it has been said that in most class actions the judge is "main objector," because there may not be any others.

Another reaction was that a detailed list of topics to address is useful for many of the lawyers who now are bringing class actions in federal courts. The lawyers invited to this

event are the leaders of the bar, and have broad experience in the field. They already know what they have to present to the judge. Many, many lawyers do not know, and judges need help in getting the information that is necessary to making the decision whether to send notice and, later, whether to approve the proposed settlement.

A judge applauded efforts to frontload, an important adjunct to the "contingent certification" that often attends a decision to send notice to the class. Even though it is long, the 14-factor list might be expanded. One thing that is not specifically raised is the basic fairness of the settlement -- why is this damage number appropriate? Actually, although there is no articulated standard for whether to send the notice, it is a reasonableness test; one might even call it a "blush" test.

Another participant agreed that it is good to prompt disclosure of more information. Nonetheless, a laundry list rule should be avoided. That sort of detail is more appropriate in a Committee Note or a Manual.

A note of caution was sounded. This sort of requirement will compound costs. Some factors are not relevant in many cases. How much does it help to have the parties say "We produced 4.2 million documents"? Does that mean that all the members of the class get access to all those documents? How about protective orders that apply to those documents? And the reference to insurance seems far too broad; insurance is simply not relevant in many cases. The inclusion of take rates creates difficulties because that is always hard to estimate at the outset, although calling for disclosure at the end would not be a problem. Requiring disclosure of side agreements could raise many difficulties. Consider agreements with "blow provisions" that permit the settling defendants to withdraw if more than a certain number of opt outs occur. That could produce serious problems. The 2003 amendments have worked pretty well in organizing and focusing the settlement-approval process; having this laundry list is not warranted.

Another participant reported that "We have high take rates." Laundry lists are not useful and can cause problems. And something like this one is not needed now. "Judges are beginning to do this right." For example, in the NFL concussion cases the judge promoted outreach early in the process. There was a even a liaison for the objectors. That sort of good and creative management of a class action cannot be mandated by rule. It was asked whether such outreach could be required by a rule, prompting the answer that the NFL concussion case was the first time this lawyer had seen such an aggressive effort on this front.

Another participant expressed disapproval of laundry list

rules, and worried that this might seem like "piling on" on this topic. But it is important to note that in (b)(2) cases many of these factors simply do not apply. More generally, the idea that the information this rule would require will be of use to class members is not persuasive. It will not be comprehensible to class members. For example, how many of them can interpret complicated insurance policies? The average American reading level is about the sixth grade, and if you want to provide class members with information that is useful to them you need to keep that in mind.

A judge observed that the idea of early notice to the court is very attractive. It is important, however, to say that the judge can insist on any information that seems likely to be useful, whether or not it is on the list. And even though there are instances of judges becoming active in soliciting input from class members, that sort of initiative is not true of all judges, perhaps not of most judges. A rule like this would likely produce more early involvement by judges.

Another lawyer participant expressed misgivings about laundry list rules. Guidance in some form for judges and for less experienced lawyers would be useful, but this lawyer is not confident that even this (rather costly) effort of assembling information will be useful to many objectors.

A competing view was that too often critical information does not surface until it is too late or almost too late for class members to act on it. The concern with costs is valid, but providing potential objectors with needed information need not raise costs too much. Nobody is going to want to look at 4.2 million documents. And if there is a protective order, the objectors would have to be bound by it with regard to documents covered by the order. Moreover, focusing on the claims process is very important. Having that front and center is valuable.

A suggestion was offered for those who dislike checklist or laundry list rules: How about a rule with a general direction to the court to require appropriate and pertinent information from the proponents of the settlement, coupled with a Committee Note offering a variety of ideas about topics that might be important in individual cases? That concept produced support from many participants.

A different concern emerged, however: "Why do this under the heading of notice. It's not about notice. It's about preliminary approval."

Another idea emerged: An ideal process in many cases is scheduling or case management conference with the judge when the possibility of a settlement proposal looks likely. Then the parties and the judge can review what's needed. After that's

done, the parties should prepare and file all their materials supporting approval of the settlement up front. There's no need to do this whole briefing effort twice. Then, if there are objections or if additional issues arise, supplemental briefing is available to address these matters. That is the way to go; laundry lists are not helpful, particularly in (b)(2) cases.

This suggestion drew support. At least it is critical that all pertinent materials be on file well before the date when class members must decide whether to opt out or object. Too often in the past, it has happened that such things as the attorney fee application come in only after it's too late to opt out or object.

Another participant noted that CAFA sometimes produces involvement by state attorneys general, particularly in consumer class actions. Having access to details on the case and the settlement would be useful for the AGs.

Another voice was raised for keeping the rule open textured and short. It was suggested that perhaps local rules or standing orders could be used to provide pertinent specifics instead of a rule with a laundry list. But a concern was expressed: Adding frontloading may not work without some specifics. Nonetheless, if one wants to do this by rule, it probably should be simple. That drew the response that the default position should be that all supporting materials should be filed up front.

Another participant asked "How can you fight the idea of notice to judges?" On the other hand, this participant did not understand how there could be an obligation to decide whether to opt out unless the class has already been certified. The opt out must follow certification.

That drew concerns. The way this is done is to combine all notices into one notice program. One question is what the judge's action should be called -- "preliminary approval" or "ordering notice." On that score, it seems important not to hamstring the judge. The other is to recognize that this should be done only once; the possible need for a second notice should be avoided.

Another reaction was that "This is certainly certification. You call them class members." That drew the reaction that this highlights the problem. Unless this is certification there's no authority to require an opt-out decision.

An effort to summarize the discussion suggested that a shift to a more general rule or a shorter list seemed indicated. On that score, one could compare the more general orientation of the second topic -- settlement review criteria -- in which one might say that the current reality is that each circuit has its own

laundry list for settlement review. Beyond that, it might be said at least that the best practice is to get all the specifics on the table early.

That drew a warning that one must be careful about the possibility that such a rule would lead to Rule 23(f) appeals from this preliminary or contingent decision.

Another participant suggested that the goal should be a rule that (1) prompts initial care in compiling information that will be needed; (2) makes it clear that notice can call for opt-out decisions; and (3) includes "preliminary certification." This approach will "make the documents" flow. At the same time, it should avoid wasteful and costly activity. Doing discovery just to be able to say that you did discovery is not sensible.

Topic 2 -- Expanded treatment of settlement-approval criteria

This topic was introduced as involving "11 dialects" of settlement review in the federal courts today. Indeed, considering the reaction to laundry lists in relation to Topic 1, one might suggest that Topic 2 seeks to replace competing laundry lists with a single set of considerations. The sketch before the group has four (and perhaps three) "core" factors that seek to consolidate and simplify the variety of expressions adopted in various circuits.

An initial reaction was skeptical: "This is a solution in search of a problem. The courts of appeals have developed their lists to make sure judges are careful. The lists we have now do the job."

A differing view was expressed: "I generally like this approach, but would add a catch-all." Certainly one could simplify too much. For example, if one argued that "fair, reasonable, and adequate" uses too many words, one answer would be that some courts have found that "fairness" and "adequacy" are different things. Meanwhile, the current lists include things that are not useful. For example, in the Third Circuit, the Gersh factors include several things that really don't often, or ever, matter.

It was observed that one thing that is not explicitly included is consideration of take rates and payouts to the class, and relating those to the attorney fee award. This is a difficult problem from the defense side, where the goal is to get the case resolved.

A reaction was that considering the take-up rate is very important. Indeed, a proposal has been submitted to the Subcommittee to mandate reports at the end of the claims period

on the take-up rate. That's where it's needed -- on the back end. That could come with some sort of hold-back of a portion of the attorney fee award.

Discussion returned to the standard for initial Rule 23(e) notice. The suggestion was that Alternative 4 on p. 5 of the materials expresses what should guide the court, looking to whether the court "preliminarily determines that giving notice is justified by the prospect of class certification and approval of the proposal." That would not be a "preliminary approval" supporting immediate review under Rule 23(f), but should suffice to support a requirement that class members decide whether to opt out.

A judge agreed. This reflects what is happening, and it is what should be happening.

That idea drew opposition: "What governs the opt-out is real certification." One can't skip that step. This same sort of problem comes up again with the settlement-class certification proposal. The fact that something is convenient does not mean that it is justified or proper.

Another participant shifted focus to the choice between Alternative 1 and Alternative 2 on p. 9 of Topic 2, expressing support for Alternative 2 because it permits the court to approve the settlement only when it can find that all four requirements are satisfied. Separate consideration of each and separate findings would be better than generalized "consideration" (as directed by Alternative 1) of all four sets of concerns. This participant also thought that it would be good to standardize the factors.

Another participant agreed with the skepticism of the first speaker on this topic. "I'm not sure these factors are better than the current lists." This participant would certainly keep "fair, reasonable, and adequate" as a standard for the overall consideration of the factors (as in Alternative 1). This participant also does not like the bracketed language in (D) on p. 10. It also seems dubious to focus so heavily on collusion; that is not a frequent concern.

The question whether this listing is exclusive was raised. One reaction was that even if such a rule is adopted, rote listing of existing circuit factors will continue.

Another participant noted that the Third Circuit Gersh factors are also aimed at collusion. In addition, factor (C) -- the adequacy of the benefits to the class, and comparison to the amount of the attorney fee award -- is very important. Emphasizing the importance of this factor is a good idea. In addition, this participant favors the Alternative 1 approach --

calling for an overall fairness assessment rather than discrete affirmative attention to each of the four factors. This participant agrees that it is important to avoid a rule that would permit a 23(f) appeal from these preliminary settlement review activities.

Topic 3 -- Cy pres provisions

This topic was introduced with a quick summary of some comments received from participants before the conference began. Several participants favored dropping the bracketed phrase "if authorized by law" and also favored removing any reference to making distributions to class members whose claims were rejected on grounds of timeliness. Other topics that have been raised in recent comments include reversion provisions, and the tightness of the nexus between the goals of the class action and the goals of a potential recipient of cy pres funds. Finally, some raised questions about whether cy pres amounts should count in making attorney fee awards.

The first participant raised two levels of problems. (1) It is troubling that the Civil Rules might be amended to include a substantive remedy. The "if authorized by law" proviso would be an important way to steer clear of this risk. But it's contradicted by the very next phrase -- "even if such a remedy could not be ordered in a contested case." (2) The whole idea presents great difficulties unless it is limited to cases involving trivial claims where delivering relief to class members would obviously not be possible. The procedure rules can't be used as a way to create or justify civil fines. Claims in federal court arise under the pertinent substantive law, and the procedure rules cannot augment the remedies that substantive law provides. Moreover, cy pres provisions in settlements are used too often to create faux class actions -- vehicles for enrichment of lawyers and "public interest" organizations affiliated with the lawyers.

Another participant disagreed. The "if authorized by law" phrase is inappropriate. These provisions are a matter of agreement. Certainly we want to avoid Enabling Act problems, but this is not necessary for that purpose. It's not right to say that the sole purpose of a suit is to compensate. It is also a method to enforce the law. Cy pres fulfills that private enforcement function. But there must be a significant nexus between the rights asserted in the lawsuit and the objectives and work of the cy pres recipient.

It was asked whether there is really any need for a rule. The ALI section on cy pres has gotten much support in the federal courts. Would that suffice without a rule?

One reaction was that there is a division between the state

and federal courts on these points. This speaker would favor applying the ALI standards, but they are not universally invoked even in the federal courts. Another participant noted that there are many state law provisions that deal, in one way or another, with these issues. That drew the question whether federal courts had ever applied those standards in cases governed by state law, and the answer was that there might be a Washington case that does so, but that it surely has not been frequent.

It was suggested that empirical data on the frequency of cy pres provisions would be useful. This participant has attempted to determine how often reported instances have occurred in the last seven years, and believes there have been about 550 cases.

One approach that was suggested is class member consent. Surely class members could consent to using their claims to support public service activities. Perhaps the class notice would support the conclusion that the class has consented to such use if it specifies the cy pres provisions and enables class members to object. If some do object, that shows that others do not.

Another participant expressed considerable concern about the use of cy pres. With "leftover money," this is not really troubling, so long as it's not a huge amount. But these sorts of provisions seem to invite what might be called the "classless class." Particularly troublesome is the possibility that some lawyer would devise a "claim" about a product and claim that everyone who bought it suffered some "harm," so that the solution is that the court should direct that the defendant pay a considerable sum to a "public interest" organization selected by the lawyer. This participant would worry that any rule provision would promote such activity. It would be better to leave this to the courts, particularly under the guidance of the ALI Principles.

A judge noted that in more than ten years on the bench, only two cases had involved cy pres provisions. That drew the reaction that "there's always leftover money."

Concern was expressed about reversionary provisions, under which the defendant gets back unclaimed money. One could read the Committee Note sketch on p. 16 as endorsing such provisions. It was asked whether a rule should forbid a reversion. That drew the response that in some districts, such as the N.D. Cal., the experience is that having such a provision will lead to disapproval of the settlement.

A response was offered to the idea that class member consent can be assumed from lack of objection to cy pres provisions in settlement agreements. The purpose of litigation is to compensate. If class members want to make donations, they can do

that on their own. But having this alternative to getting the money to class members raises very troubling issues. Whether or not this rises to a due process level, it would seem much better to give class counsel an incentive to make sure the money mainly gets to the class instead of the lawyer's pet charity. Indeed, it's odd that nobody has suggested the fluid class recovery concept. That is more like compensation than simply imposing a "civil fine" that is paid to a public interest outfit.

This prompted the observation that sometimes, particularly in some consumer class actions, the amounts left over are huge. It's very difficult to get the class members to make claims.

That prompted the reaction that, in such situations, reversion to the defendant is the logical answer. What this rule proposes instead is that the class's money can be used for public policy purposes the judge endorses. Why can't companies insist on a reversion? That facilitates settlements. The company knows that if the class members don't bother to claim the money, it will get the money back. In bankruptcy reorganizations, reversions occur all the time; why not here also? The class is not a judicial entity that can make a donation to a public interest outfit.

A reaction to this idea was that the Committee Note bracketed material on p. 16 seems to endorse reverter, but that endorsing it is a bad idea. To the contrary, the Enabling Act concern and the concern about the faux class action enabled by cy pres are both based on a false premise. The reality is that the defendant has been found to have violated the law, and the class consists of the victims. True, the defendant says that it does not concede violating the plaintiffs' rights, but usually the payment is enough to show that something wrong has occurred.

A different point was made: Usually there is money left after the initial claims process is completed. Speaking the realistically, the choice is between giving that money to the claims administrator or to the cy pres recipient.

That prompted the reaction that this is the place for reversion to the defendant. Indeed, there is no right to these funds unless the claimants come forward and claim them. Their failure to make claims does not make this a pot of money for "do good" purposes. But it was asked: What if the defendant has agreed to this arrangement. Why wouldn't that provide a sufficient basis for cy pres uses?

Another participant reacted that if defendant wants to insist on a reversion provision, that can be a target for objectors. A defense attorney participant reported that "I have been a proponent of reverters. I will push for them." Not all settlements are lump sum settlements. Some are claims made

settlements. Then a reversion provision makes perfect sense. The amount to be paid is determined by the amount that is claimed. It was asked how one presents a claims made settlement to the court. The answer that it is really about attorney fees. From the defendant's perspective, one looks to the maximum amount that could be awarded, and that is used for the fee award. But the amount paid to the class depends on claims actually made.

The question whether a rule amendment was needed returned. "This is the most cited section of the ALI Principles. Do we need to put it into a rule? It's already being adopted in the courts."

The response was that the district courts are "all over the map." A recent Eleventh Circuit case dealt with a situation in which the class got $300,000 and the lawyers got $6 million in fees.

Another response was that cy pres is not compensation. Even fluid recovery is compensatory in orientation, but cy pres is not. If there is a substantial amount left after the claims process is completed, that indicates that the case should not have been certified. The right solution is to add a new Rule 23(a)(5), saying that a class should not be certified unless it is determined that there will be an effective method to distribute relief to the class members.

That idea drew strong disagreement: The bottom line is that defendant has violated the substantive rights of the class members, even if they are hard to identify and do not all seek compensation. Defendant must disgorge its unjust benefits. The bankruptcy comparison offered earlier is not analogous. That does not involve law enforcement, as is often the case in consumer class actions where many class members do not claim what they could claim under the settlement. Under CAFA, attorney fees are a separate consideration. Claims made is not an alternative in consumer cases. Having a reverter is anathema.

A different reaction was that the right question is the substantive law question. The procedural rules should not be distorted in order to "punish" "bad" defendants. Defendants agree to cy pres provisions because they want settlements approved and expect that a reverter would not be accepted. That is "agreement" with a gun to your head.

A response was that there already are rules that deal with "remedies." Rule 64 deals with some, and Rule 65 addresses TROs and preliminary injunctions. Moreover, this is really a common law development. If state law requires escheat, for example, the federal courts must obey that state law. But we must avoid getting caught up in formalist distinctions.

That prompted the question why the Advisory Committee should not simply leave these matters to common law development. Does anyone favor rulemaking in this area?

One reaction was to agree that the rules committees need not venture into this area. Another participant agreed. Consider the Third Circuit Baby Products decision. The court dealt with the problem creatively using common law principles. What actually happened in that case was that another outreach effort located additional claimants; the massive cy pres provision proved unnecessary.

A contrasting view was expressed: There is a value in having a rule. We need to squelch arguments about what is permissible and how these recurrent issues should be handled. It would be good to have a rule saying (1) cy pres is allowed, and (2) reversion is disfavored.

Another plaintiff-side lawyer reported being "very much on the fence." It is good to have clarity. But these are really tough issues. The problem of nexus is serious; class action settlements are not a form of taxation to do public good. But it is also true that entities like legal aid have very worthy goals and very serious needs that cy pres may partly satisfy.

One approach was offered: Is there a case in the last few years in which the ALI approach was rejected by a court? Maybe that proves we don't need a new rule. A participant identified three -- an Eleventh Circuit case that declined to adopt the ALI approach, a Google case, and a Facebook case.

An observer observed that this discussion is missing a key point. This is in Rule 23(e). It is only about the parties' agreement. The reason to have a rule is to achieve consistent treatment, not to create important new authority for such arrangements.

A reaction was that "this is not really a private contract. It requires court approval, which shows that it is not entirely private. And it achieves the goals of the court (and the parties) only if the court order is binding on both sides, including the absent plaintiffs."

Topic 4 -- Objectors

This topic was introduced as involving two general subjects, disclosure by objectors and a ban on payments to objectors or objector counsel.

One participant reported seeking test cases to try to claw back payments to bad faith objectors on behalf of the class. Rule 23(e)(3) calls for disclosure of all side agreements, and

this should be a way to support such potential litigation.

A response was that the difficulty is with the delay after filing of a notice of appeal. At least the Rule 23(e)(5) requirement for court approval of withdrawal of the objection does not seem to apply then. The reaction was that even that sort of thing could be addressed in the settlement agreement, if one is really concerned about greenmail. Although an Appellate Rule amendment might close the appeal window partly, there would still be a 30-day gap between the entry of judgment in the district court and the filing of the notice of appeal. During that time there would be no policing.

Another participant noted that the big problem is that it makes great sense for class counsel to pay off the objectors to get the benefits to the class. Class members may be dying or in dire need of the relief that is being held up by the objector. But the proposed disclosure requirements are not effective. They are just a burden on the objector. The main solution is to require court approval of the payment to the objector or objector counsel.

That prompted the point that the amendment proposal made to the Appellate Rules Committee was that there be a flat ban on any payments to objectors or objector counsel, which would not alow payments even with court approval. Are all payments to be off limits after an appeal is taken, even those approved by the court? The response was that the important goal is to improve settlement agreements and avoid freeloading on them.

Another participant noted that there are surely good objectors, and this lawyer has recently seen several examples. A problem is that one often sees a mix of objectors. Requiring court approval is a way to shed light on this bad activity. Ideally, the courts of appeals would name names, and list the bad faith repeat-objector lawyers. But for class counsel to do this asks a lot. "Do we want to be in the business of name calling?"

Another plaintiff-side lawyer agreed. Hedge funds are stepping into this area and financing objections in hope of payoffs. We need as much transparency as possible. As a result, this lawyer likes the disclosure requirements, even though they may be burdensome to objectors, particularly good faith objectors.

Another plaintiff attorney agreed. There has to be a response. We need to know who these people are and do something about them.

A question was raised about the 2003 addition of the requirement in Rule 23(e)(3) about "identifying" side agreements. That did not require that the contents of the agreement be

revealed. For true transparency, revealing the details would be desirable. But it was observed that some things are properly and importantly kept secret. An recurrent example is the "blow factor," the level of opt-outs that will permit the defendant to withdraw from the settlement. 15 years ago "opt-out farmers" were thought to misuse such information.

Another reaction was that "the limitation on payments on page 25 is very appealing." Sunlight is desirable, and may be an antidote to the public disdain in many quarters for class actions. Suspicions are fed by secrecy.

A judge asked what the standard is for approving payments to objectors. Those who opt out can make whatever deal they prefer. Compare frivolous objectors. The judge suspects a hold up. What standard should the judge use in deciding whether to approve the payment that counsel has agreed to make?

A plaintiff-side lawyer said: "The only way to do it is to refuse to approve."

Another plaintiff-side attorney noted that the idea is that the court approval requirement will support court scrutiny. The district court could approve under some circumstances, but if the district judge refuses to approve the objector is really without a leg to stand on before the appellate court.

Another idea was suggested: What if a rule said the district court must not approve any payment to an objector unless it finds that the payment is reasonable in light of changes or improvements to the settlement resulting from the objection? That would be consistent with the orientation of Rule 23(h).

A first reaction to this idea was that often the improvement is hard to measure. "Cosmetic" improvements might be contrived. And on the other hand, changes in injunctive relief, for example, might be quite significant but difficult to value.

A defense-side lawyer noted that this is more a plaintiff-side problem. For the defendant, the delay in consummating the settlement may not be similarly urgent. Also, why can't the court approve the added payment even though it's not keyed to an "improvement" in the settlement?

Another participant warned "Be very careful what you ask for." Satellite litigation could easily occur about whether there has been an improvement. It's not always easy to determine what is a good faith objection. Indeed, the whole area is probably not typified by binary choices.

A counter to that was the example of the one-sentence objection to really says nothing. That robs the process of the

legitimate purpose of class member objections. The basic goal is to inform the district court about possible problems with the deal. The one-sentence objection is a ticket to the appellate court, where the objector attorney can play the delay game.

That prompted the objection that courts of appeals wouldn't credit a one-sentence objection. That would lead to summary affirmance.

A different topic arose: requiring objector intervention to appeal. That would, of course, require a close consideration of Devlin v. Scardeletti, but the desirability of such a rule would be dubious anyway. If that can be litigated, it will be litigated. This lawyer has confronted such litigation three times already, even though he offers to stipulate that he will not accept any side payments and wants only to get an appellate ruling on the merits of his objections. Disclosure, on the other hand, is o.k. so long as it does not create additional things to litigate.

A defense-side lawyer said he was not in favor of a separate intervention or standing requirement for objectors. "If you're bound, how can you not have standing?"

A judge expressed support for a standard that was keyed to improvements in the settlement. That could recognize that more money was not the only way in which a settlement could be improved, but would provide the judge guidance.

But another participant pointed out that this created another appealable issue -- where the payment is rejected, the propriety of that rejection under the rule's standard could be appealed.

Topic 5 -- Ascertainability

This topic was introduced as having received much attention and somewhat divergent treatment lately. A key question is whether a rule change should be pursued, or alternatively that the committee should await a consensus in the courts.

A plaintiff-side lawyer said that the "minimalist" sketch the Subcommittee had circulated seemed to adopt the Third Circuit standard from Carrera. But the Seventh Circuit decision in Mulins "takes apart" Carrera. Carrera should be rejected insofar as it requires that certification turn on whether the court is certain that the identity of each class member can be ascertained later, and that the method of ascertaining it will be administratively feasible. All that should be required at the certification stage is that there is an objective definition of the class. The sketch relies on the phrase "when necessary" to do too much work. Moreover, any rule should be addressed only to

(b)(3) class actions; even the Third Circuit has recognized that Carrera does not apply in (b)(2) cases. The Third Circuit standard makes identifiably a stand-alone factor for certification, and it should not be. The Committee should not proceed this way.

It was asked whether a rule change is needed. The answer was that it is needed. The Third Circuit decision in Bird v. Aaron's preserves the problem. "The Third Circuit has made it clear that you can't have a consumer class action." And the Eleventh Circuit seems to be siding with the Third Circuit on this subject.

A judge asked whether it might be that Carrera has been somewhat over-read in some quarters. A footnote in the case emphasizes that it was not announcing a new or additional requirement.

Another question was raised: Does this apply to settlements also? If so, that's a ground a for objections to settlements.

A defense-side attorney urged that any effort to address this question must take account of what happens after class certification is granted -- it is necessary to confront the question how you distribute the fruits of the suit.

Another response was that the Tyson case in the Supreme Court raises some of these issues.

Another defense lawyer argued that this "goes to the heart of what is a class action." Is it just about one person's gripe? Consumer fraud cases are good examples. It should be implicit in the rule that the objection is actually shared by others who can be identified. Indeed, typicality might be urged to require something of the sort. This lawyer supports the proposal, but thinks "it probably is a bit too early."

Another defense-side lawyer noted that trial plans also call for a relatively specific forecast of how a case will be handled. That drew the point that Judge Hamilton in Mullins said that the current rule has all the pieces needed to deal with these issues.

A plaintiff-side lawyer responded that "If you agree with Hamilton, the rule should be written to make it clear that at the certification stage only an objective definition is required." And it would be valuable to say that a Carrera-style ascertainability requirement is not a prerequisite for certification, and that self-identification is o.k.

Another plaintiff-side lawyer agreed.

Topic 6 -- Settlement class certification

The initial reaction expressed was skepticism from a defense-side lawyer. The settlement class dynamic has been in place for a long time. It reflects a fundamental tension about the proper role of class actions, and in particular about the centrality of the concept of predominance in the (b)(3) setting. Common question class actions are a precise exception to the normal course of business for American courts. They produce a quantum change in the dynamics of litigation. Though they may be very efficient for resolving multiple claims, they also exert huge leverage for compromise from defendants that have a strong basis for resisting claims on the merits. The 1990s experience emphasized mass torts, and involved quick certification decisions. First the courts of appeals put on the brakes. Then the Supreme Court emphasized in Amchem that predominance under (b)(3) is more than commonality under (a)(2). Since Amchem, the rules have tightened, but the problem of pressures has not gone away in the class action marketplace. The recent interest in issue classes and settlement class certification is evidence of this recent pressure. But the core point is that only with a vigorous predominance check can the collective pressure exerted by a (b)(3) class action be suitably cabined and focused. Weakening that check weakens the entire structure.

That statement produced the reaction "I'm not sure that's right. For example, the Third Circuit in Sullivan v. DB Investments struggled with the concept of predominance in the settlement class context." That reaction drew the response that there really is no way to try these cases. The Florida state court litigation following the Engle class action ruling, in effect an issues class outcome, proves that this effort produces a total mess. A judge that certifies for the "limited" purpose of resolving an issue will inevitably look for a settlement after that issue is resolved, at least if it is resolved in favor of the plaintiffs. We need a standards-driven activity, and removing predominance from its central position is the wrong way to go. Don't institutionalize this settlement urge.

Another participant added that there are serious Article III questions regarding a settlement class. "Contingent" certification in regard to a possible settlement destroys the adversarialness that is vital to American litigation. Similar Article III issues arise with regard to issue class certification. That produces an advisory opinion.

A defense-side lawyer responded that settlement classes are used all the time. If the courts shut down one avenue for resolving cases, lawyers will find another one. For examples, inventory settlements come into vogue if in-court resolutions are not possible. But there's no judicial involvement at all in relation to inventory settlements. That is not an improvement. With class settlements the court has a role to play, and these possible amendments can shape that role. Amchem is not really

illustrative of the issues that arise today. That case presented critical future claims problems. Compare the NFL concussion litigation. There is no comparable futures problem there.

A plaintiff-side lawyer identified the problem: Defendants don't have tools that can be used to settle cases. That is a reason to support the settlement class idea. We need more flexibility. If the Florida situation after the Engle decision is a mess it's a mess because this set of defendants won't settle. That prompted the question whether there is any need for a rule on this subject. One could say that the courts are not following Amchem. The response was "I strongly support a rule. We need to have this in the rule book rather than relying on judicial improvisation."

Another participant said the proper attitude had a lot to do with the type of case involved. Two things are important: (1) The reverse auction problem must be kept constantly in mind, and (2) Whatever the rules, there may be courts that in essence play fast and loose with the rules. It is clear that defendants want global peace and want to use settlement classes to get it. But they also want to make litigation class certification difficult to obtain. There is an innate tension between these two desires, which tempts one to regard settlement class certification as worlds apart from litigation class certification. But that view is often hard to maintain when claims are based on class members' very varied circumstances, or on significantly different state laws. Fitting mass tort class actions into a class-action settlement with a transsubstantive rule is a great challenge.

Another participant had no strong view about the necessity of a settlement class rule, and was not troubled by the question of different standards for the settlement and litigation settings. The real concern should be fair treatment of class members. That is the weakness of settlement classes -- how the settlement pot is divided up.

Another participant recalled opposing the 1996 Rule 23(b)(4) proposal, particularly because of the reverse auction problem. How can a plaintiff lawyer drive a hard bargain when there's no way to go to trial? Inevitably the defendant is in the driver's seat, and various plaintiff lawyers are tempted to "bid" against each other by undercutting other plaintiff lawyers.

This discussion produced a question: Should there be a rule forbidding settlement in any case unless a class has already been certified? That resembles the Third Circuit attitude that prompted the publication of the 1996 Rule 23(e)(4) proposal. It also corresponds to some mid 1970s interpretations of the "as soon as possible" language then in Rule 23 about when class certification should be resolved. The idea was that class certification was the absolute first thing that should be

resolved. That primacy has been removed, but maybe Rule 23(e) should forbid settlements in any case that cannot qualify for certification under existing Rules 23(a) and (b).

A reaction was that it's simply true that courts will try to achieve settlements. MDLs are like that; the judge regards reaching a settlement as a big part of the job. The point is that this existing pressure becomes overwhelming if the bar is lowered for certification. To offer a lower threshold for settlement certification will mean that there will be even more pressure to settle. The inventory analogy is not an apt comparison. With inventory settlements, one begins with clients who contact lawyers and have cases. That's the MDL model. Acting for the clients who have hired them, those lawyers can push for a settlement. But in a class action the "clients" don't hire the lawyer or otherwise initiate the process. They don't even know about it. The court deputizes the lawyer to make a deal for the "clients." Where is there another rule that is designed for settlement purposes? The class action setting is not the place to start.

A reaction to these points was that Rule 23 has a variety of protections in the settlement context that are not in place for MDLs. Doesn't that argue for favoring the class-action setting? The response was that the situations are qualitatively different -- in the MDL setting the client initiates the process, but in the class action the initiative belongs entirely to the lawyers.

A judge noted that the defendant can insist on a full-blown certification process. Then if that results in certification, the defendant can settle, and that sequence would not trouble those unnerved by the settlement class possibility. The reality, however, is that the parties -- including the defendant -- want resolution without that extra step. Indeed, the plaintiff lawyers could rebuff settlement overtures until the case is certified in order to strengthen their hand in settlement negotiations. But that does not happen much of the time. The parties are pushing for settlement before a full-dress certification decision.

A settlement-class skeptic responded that making a formal rule inviting settlement class certification will cause ripple effects. The process just described will be magnified. This prospect will affect how and whether cases are brought.

A settlement-class proponent noted that Rule 23(e) says that settlement is a valid outcome for a class action, albeit with the conditions the rule specifies. That drew the response that every other time settlement is referred to in the rules it is as an adjunct to the adversary proceedings that are the norm of American litigation. In this situation, that adversarialness is missing.

A reaction to this point was that it would make consent decrees unconstitutional. The response to that point was that consent decrees are a different category because they involve governmental enforcement. That is not the same as the settlement classes we should expect under this rule. In those cases, private profit-oriented lawyers are initiating and controlling the cases. Coupled with cy pres possibilities, they may even support a deal that involves absolutely no direct payments to the class members they "represent."

Topic 7 -- Issue class certification

This topic was introduced as involving two sorts of issues. (1) Is there a split in the courts that justifies some effort to clarify how courts are to approach the option provided by (c)(4) in cases certified under (b)(3)? (2) In any event, should there be an amendment to Rule 23(f) to deal with immediate review of the court's resolution of a common issue under (c)(4)?

An initial reaction was that the effect on MDL proceedings is an important consideration. This participant's bias is to "leave the matter to the marketplace."

Another participant (defense-side) agreed. "There are so many issues with issue classes. They are really very hard to do."

A plaintiff-side participant agreed. The case law is actually fairly stable. And it bears noting that (c)(4) is also used in (b)(2) cases. This sketch might disrupt that valuable practice.

Another plaintiff-side participant agreed. In consumer cases, the issue may be the same for all class members, and (b)(2) treatment may be preferred.

A defense-side participant said that changing the rule would be "very dangerous." There would be an explosion of issue classes." Such treatment raises important 7th Amendment jury trial issues, with the jury seeing only part of the case.

Another defense-side participant did not disagree, but mentioned that the sketch's invocation of a "materially advance the litigation" standard for using this device seemed a valuable gloss on the current rule. But the courts may well be embracing this attitude on their own. Rule 23(c)(4) already says that the court should use this route only "when appropriate." That seems the most important consideration in determining whether (c)(4) certification is appropriate.

No voices were raised to support moving forward on the possible revisions to (b)(3) or (c)(4), and the modification to

Rule 23(f) did not receive attention.

Topic 8 -- Notice

This topic was introduced with the widely shared view that everyone thinks that being flexible about ways to give notice makes sense, and that taking the 1974 Eisen decision as interpreting the current rule as requiring first class mail seems inflexible.

An initial reaction was that some public interest lawyers say the poor do not have easy access to the Internet, so email or other online notice may not reach them.

A public interest participant agreed. Consumers too often are not able to access online resources. But there may be another concern of at least equal importance -- the cognitive capability of the members of a consumer class. Even if notice "reaches" them, they may not be able to understand or interpret it. Finding ways to ensure that notices are understandable to such class members may be just as important as flexibility in method of delivery.

Another public interest participant said that electronic notice can usually be useful. But it would be important -- whatever the form of notice -- that the rule direct that it be in easily readable format. And creative use of online communications must be approached with suitable caution. For example, one might be intrigued by the possibility of opting out by email, but that raises concerns about verification of who is doing the purported opting out.

Another participant noted that first class mail is far from foolproof. Particularly with the vulnerable groups mentioned by others, is it clear that first-class mail is more likely to reach them and be understood than alternative means of communication? Don't people who have email actually change their email addresses must less frequently than their residential addresses? Many in the most vulnerable groups probably move often.

A different concern was introduced -- spam filters. As the volume of email escalates, those are increasingly prominent. How can one make sure that email notice of a class action certification or settlement does not end up in spam? A response was: How do you make sure first class mail is not discarded without being opened?

It was suggested that claims administrators actually have considerable experience and data about these very subjects. A participant with extensive experience in claims administration observed that people i the claims administration business are very resistant to revealing this information. The effectiveness

of various methods of reaching class members is regarded as proprietary information.

Beyond simply reaching people at all, it was emphasized, there are serious issues about what you reach them with, and what they actually will understand. The goal should be to write the communications in a way that makes it easy for a recipient to make a decision. That will increase the response rate. Another comment was that one needs to tailor the notice to the case involved. A securities fraud case and a consumer class action may call for very different strategies in communicating with class members. The fundamental issue is that the judge should be paying attention to the practicalities of notice to the class in the case before the court; that focus may be more important than what any rule says.

Attention shifted to what the amendment sketch on p. 46 said. It invites "electronic or other means" to give notice. But that seems to give electronic means priority. Is that right? For one thing, it's difficult to foresee what new means of communication may arise in the future; perhaps some of them may become almost universal but not be "electronic." For another, it is not clear that electronic means should be preferred to others across the board. The discussion thus far shows that class actions are not all the same, and that tailoring the notice program to the case before the court is important. Perhaps this amendment would send the wrong signal.

Another participant suggested that "appropriate" might be more appropriate in the rule than "electronic." Then the Committee Note could say that for many Americans electronic communications are the most utilized method of communicating, but that for others more traditional means continue to predominate.

A reaction to these suggestions about phrasing of a rule change was to note the Eisen interpreted the current rule to prefer, perhaps to require, first-class mail. Should that really be privileged over other forms in the 21st century?

A response was that you can make a case for use of email in many cases. But there is no reason to throw out first class mail altogether. At the same time, another participant cautioned, one would not want the rule to appear to require the court to use first class mail where it does not make sense. It's quite expensive, and can be cumbersome and time-consuming.

An observer suggested that the rule should direct that notice be given "by the most appropriate means under the circumstances." Then the Committee Note could say that Eisen's endorsement of first class mail no longer makes sense. The Note could also add a discussion of the manner of presentation and content of the notice. Claims administrators do have data on

what works, and it makes sense to prefer evidence-based decisions about such matters.

Another reaction focused on the method of opting out. At present, the norm still is that class members must mail in something to opt out. In practice, that can operate as a disincentive to opting out. Can this be done electronically instead?

A reaction was that things are evolving very rapidly on these techniques. Sometimes it seems that the preferred way of handling these topics changes between the time the settlement is negotiated and the time that it is presented to the court.

Another comment reminded the group to keep one more thing in mind -- the distinction between reach and claims rate. It is important for a realistic assessment of differing notice strategies to attend to the matters of greatest importance.

Topic 9 -- Pick-off offers and Rule 68

This topic was introduced by noting that the Seventh Circuit announced a month before the conference that it was abandoning its prior interpretation of the effectiveness of pick-off offers, and that the Supreme Court has granted certiorari in a case that may resolve some or all issues surrounding this topic. So the question presently is how the Advisory Committee should approach the issues.

The first response was that the Committee should "pass" -- not take amendment action at this time.

A second response was that the Rule 68 sketch has appeal. Since the Kagan dissent in the FLSA case, no circuit has embraced pick-off maneuvers, but there are a couple of circuits in which this continues to be a potential issue. But there's a considerable likelihood that the Supreme Court will decide the issue in the Campbell-Ewald case.

Another participant favored the "Cooper approach." Rule 68 is not the only place where this problem can arise. It would be desirable to direct in Rule 23 that if a proposed class representative is found inadequate the court must grant time to find a substitute representative. Another thing that might warrant attention is that some district courts are entertaining motions to strike class allegations. But Rule 12(f) is not designed for such a purpose, and the rules should say that it is not.

A judge agreed that it is prudent to see what the Supreme Court does with the case in which it has granted certiorari. That prompted a prediction from another participant that the

Court will not contradict what the lower courts have done. At the same time, this defense-side participant noted, a class action is extremely expensive to defend, and it's not at all clear that nullifying the pick-off offer possibility is important to protect significant interests of the class. That drew the response that this is a putative class upon filing of the proposed class action, and there has to be time to find another class representative if the defendant tries to behead the action at this point.

Other issues

Finally, participants were invited to suggest other topics on which the Advisory Committee might focus its attention.

One suggestion was back-end disclosures. Courts should order the parties to report back on take-up rates and other settlement administration matters when it approves a class-action settlement. This might link up to a court order deferring some of the attorney fee award until the actual claims rate is known. That might tie in somewhat with the cy pres discussion, and the question whether moneys paid to a cy pres recipient should be considered to confer a benefit on the class sufficient to warrant an award based on the "value" of the settlement.

Another topic was whether there should be a second try outreach effort if the initial claims process seems not to have drawn much response. There have been instances in which such second efforts very significantly increase the claims rate. A plaintiff-side participant reacted by saying that "I have a duty to the class to ensure delivery to class members of the agreed relief in an effective manner." Indeed NACA has guidelines on this very topic. See Guideline 15 at 299 F.R.D. 228. This is important.

* * * * *

The mini-conference having concluded, Judge Dow reiterated the hearty thanks with which he opened the event. The participants' contributions have been critical to a careful analysis of the various possible amendment ideas, and the Subcommittee is deeply indebted for the participation of each person who attended the event.

INTRODUCTORY MATERIALS
RULE 23 SUBCOMMITTEE
ADVISORY COMMITTEE ON CIVIL RULES
MINI-CONFERENCE ON RULE 23 ISSUES
SEPT. 11, 2015

This memorandum is designed to introduce issues that the Rule 23 Subcommittee hopes to explore during its mini-conference on Sept. 11, 2015. This list of issues has developed over a considerable period and is still evolving. The Subcommittee has had very helpful input from many sources during this period of development. The Sept. 11 mini-conference will provide further insights as it develops its presentation to the full Advisory Committee during its Fall 2015 meeting.

Despite the considerable strides that the Subcommittee has made in refining these issues, it is important to stress at the outset that **the rule amendment sketches and Committee Note possibilities presented below are still evolving. It remains quite uncertain whether any formal proposals to amend Rule 23 will emerge from this process. If formal proposals do emerge, it is also uncertain what those proposals would be.**

The topics addressed below range across a spectrum of class-action issues that has evolved as the Subcommittee has analyzed these issues. They are arranged in a sequence that is designed to facilitate consideration of somewhat related issues together. As to each issue, the memorandum presents some introductory comments, sketches of possible amendment ideas, often a draft (and often brief) sketch of a draft Committee Note and some Reporter's comments and questions that may help focus discussion. This memorandum does not include multiple footnotes and questions of the sort that might be included in an agenda memorandum for an Advisory Committee meeting; the goal of this mini-conference is to focus more about general concepts than implementation details, though those details are and will be important, and comments about them will be welcome.

The topics can be introduced as follows:

(1) "Frontloading" of presentation to the court of specifics about proposed class-action settlements -- Would such a requirement be justified to assist the court in deciding whether to order notice to the class and to afford class members access to information about the proposed settlement if notice is sent?;

(2) Expanded treatment of settlement approval criteria to focus and assist both the court and counsel in evaluating the most important features of proposed settlements of class actions -- Would changes be helpful and effective?;

(3) Guidance on handling cy pres provisions in class-action settlements -- Are changes to Rule 23 needed, and if so what should they include?;

(4) Provisions to improve and address objections to a proposed settlement by class members, including both objector disclosures and court approval for withdrawal of appeals and payments to objectors or their counsel in connection with withdrawal of appeals -- Would rule changes facilitate review of objections from class members, and would court approval for withdrawing an appeal be a useful way to deal with seemingly inappropriate use of the right to object and appeal?;

(5) Addressing class definition and ascertainability more explicitly in the rule -- Would more focused attention to issues of class definition assist the court and the parties in dealing with these issues?;

(6) Settlement class certification -- should a separate Rule 23(b) subdivision be added to address this possibility?;

(7) Issue class certification under Rule 23(c)(4) -- should Rule 23(b)(3) or 23(c)(4) be amended to recognize this possibility, and should Rule 23(f) be amended to authorize a discretionary interlocutory appeal from resolution of an issue certified under Rule 23(c)(4)?;

(8) Notice -- Would a change to Rule 23(c)(2) be desirable to recognize that 21st century communications call for flexible attitudes toward class notice?; and

(9) Pick-off offers of individual settlement and Rule 68 offers of judgment -- Would rule amendments be useful to address this concern?

(1) Disclosures regarding proposed settlements

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(A) When seeking approval of notice to the class, the settling parties must present to the court:

(i) the grounds, including supporting details, which the parties contend support class certification [for purposes of settlement];

(ii) details on all provisions of the proposal, including any release [of liability];

(iii) details regarding any insurance agreement described in Rule 26(a)(2)(A)(iv);

(iv) details on all discovery undertaken by any party, including a description of all materials produced under Rule 34 and identification of all persons whose depositions have been taken;

(v) a description of any other pending [or foreseen] {or threatened} litigation that may assert claims on behalf of some class members that would be [affected] {released} by the proposal;

(vi) identification of any agreement that must be identified under Rule 23(e)(3);

(vii) details on any claims process for class members to receive benefits;

(viii) information concerning the anticipated take-up rate by class members of

benefits available under the proposal;

(ix) any plans for disposition of settlement funds remaining after the initial claims process is completed, including any connection between any of the parties and an organization that might be a recipient of remaining funds;

(x) a plan for reporting back to the court on the actual claims history;

(xi) the anticipated amount of any attorney fee award to class counsel;

(xii) any provision for deferring payment of part or all of class counsel's attorney fee award until the court receives a report on the actual claims history;

(xiii) the form of notice that the parties propose sending to the class; and

(xiv) any other matter the parties regard as relevant to whether the proposal should be approved under Rule 23(e)(2).

(B) The court may refuse to direct notice to the class until the parties supply additional information. If the court directs notice to the class, the parties must arrange for class members to have reasonable access to all information provided to the court.

Alternative 1

(C) The court must not direct notice to the class if it has identified significant potential problems with either class certification or approval of the proposal.

Alternative 2

(C) If the preliminary evaluation of the proposal does not disclose grounds to doubt the fairness of the proposal or other obvious deficiencies [such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation for attorneys] and appears to fall within the range of possible approval,

the court may direct notice to the class.

Alternative 3

(C) The court may direct notice to the class only upon concluding that the prospects for class certification and approval of the proposal are sufficiently strong to support giving notice to the class.

Alternative 4

(C) The court should direct notice to the class if it preliminarily determines that giving notice is justified by the prospect of class certification and approval of the proposal.

(D) An order that notice be directed to the class is not a preliminary approval of class certification or of the proposal, and is not subject to review under Rule 23(f)(1). But such an order does support notice to class members under Rule 23(c)(2)(B). If the class has not been certified for trial, neither the order nor the parties' submissions in relation to the proposal are binding if class certification for purposes of trial is later sought.[1]

Sketch of Draft Committee Note

Subdivision (e)(1). The decision to give notice to the class of a proposed settlement is an important event. It is not the same as "preliminary approval" of a proposed settlement, for approval must occur only after the final hearing that Rule 23(e)(2) requires, and after class members have an opportunity to object under Rule 23(e)(5). It is not a "preliminary certification" of the proposed class. In cases in which class

[1] To drive home the propriety of requiring opt-out decisions at this time, Rule 23(c)(2)(B) could also be amended as follows:

(B) *For (b)(3) classes.* For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances. * * * * *

certification has not yet been granted for purposes of trial, the parties' submissions regarding the propriety of certification for purposes of settlement [under Rule 23(b)(4)] are not binding in relation to certification for purposes of trial if that issue is later presented to the court.

Paragraph (A). Many types of information may be important to the court in deciding whether giving notice to the class of a proposed class-action settlement is warranted. This paragraph lists many types of information that the parties should provide the court to enable it to evaluate the prospect of class certification and approval of the proposal. Item (i) addresses the critical question whether there is a basis for certifying a class, at least for purposes of settlement. Items (ii) through (xiii) call for a variety of pieces of information that are often important to evaluating a proposed settlement, [although in some cases some of these items will not apply]. Item (xiv) invites the parties to call the court's attention to any other matters that may bear on whether to approve the proposed settlement; the nature of such additional matters may vary from case to case.

Paragraph (B). The court may conclude that additional information is necessary to make the decision whether to order that notice be sent to the class. In any event, the parties must make arrangements for class members to have access to all the information provided to the court. Often, that access can be provided in some electronic or online manner. Having that access will assist class members in evaluating the proposed settlement and deciding whether to object under Rule 23(e)(5).

Paragraph (C). The court's decision to direct notice to the class must take account of all information made available, including any additional information provided under Paragraph (B) on order of the court. **[Once a standard is agreed upon, more detail about how it is to be approached might be included here.]**

Paragraph (D). The court's decision to direct notice to the class is not a "preliminary approval" of either class certification or of the proposal. Class certification may only be granted after a hearing and in light of all pertinent information. Accordingly, the decision to send notice is not one that supports discretionary appellate review under Rule 23(f)(1). Any such review would be premature, [although the court could in some cases certify a question for review under 28 U.S.C. § 1292(b)].

Often, no decision has been made about class certification for purposes of trial at the time a proposed settlement is submitted to the court. [Rule 23(b)(4) authorizes certification for purposes of settlement in cases that might not satisfy the requirements of Rule 23(b)(3) for certification for trial.]

Should certification ultimately be denied, or the proposed settlement not approved, neither party's statements in connection with the proposal under Rule 23(e) are binding on the parties or the court in connection with a request for certification for purposes of trial.

Although the decision to send notice is not a "preliminary" certification of the class, it is sufficient to support notice to a Rule 23(b)(3) class under Rule 23(c)(2)(B), including notice of the right to opt out and a deadline for opting out. [Rule 23(c)(2)(B) is amended to recognize this consequence.] The availability of the information required under Paragraphs (A) and (B) should enable class members to make a sensible judgment about whether to opt out or to object. If the class is certified and the proposal is approved, those class members who have not opted out will be bound in accordance with Rule 23(c)(3). This provision reflects current practice under Rule 23.

Reporter's Comments and Questions

The listing in Paragraph (A) is quite extensive. Some language alternatives are suggested, but a more basic question is whether all of the items should be retained, and whether other items should be added. The judicial need for additional information in evaluating proposed class-action settlements has been emphasized on occasion. See, e.g., Bucklo & Meites, What Every Judge Should Know About a Rule 23 Settlement (But Probably Isn't Told), 41 Litigation Mag. 18 (Spring 2015). The range of things that could be important in regard to a specific case is very broad, so Paragraph (B) enables the court to direct additional information about other subjects, and item (xiv) invites the parties to submit information about other subjects.

How often is this sort of detailed submission presently provided at the time a proposed settlement is submitted to the court? Some comments suggest that sophisticated lawyers already know that they should fully advise the court at the time of initial submission of the proposal. Other comments suggest that the "real" briefing in support of the proposed settlement should occur at the time of initial submission, and that the further briefing at the time of the final approval hearing is largely an afterthought. This sketch does not compel that briefing sequence. Would that be desirable, or unduly intrude into the flexibility of district-court proceedings? Then further submissions by the settling parties could be limited to responding to objections from class members.

Do class members already have access to this range of information at the time they have to decide whether to opt out or object? At least some judicial doctrine suggests that on occasion important information has been submitted only after the time to opt out or object has passed. For example, information

about the proposed attorney fee award may not be available at the time class members must decide whether to object.

Are there items on the list that are so rarely of interest that they should be removed? Are there items on the list that are too demanding, and therefore should not be included? For example, information about likely take-up rates (item (viii)) may be too difficult to obtain. But if so, perhaps a plan for reporting back to the court (item (x)) and/or for taking actual claims experience into account in determining the final attorney fee award (item (xii)) might be in order.

How best should the standard for approving the notice to the class be stated? To some extent, there is a tension between saying two things in proposed Paragraph (D) -- that the decision to send notice is not an order certifying or refusing to certify the class that is subject to review under Rule 23(f), and that it is nonetheless sufficient to require class members to decide whether to opt out under Rule 23(c)(2)(B).

(2) Expanded treatment of settlement criteria

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise.

* * * * *

Alternative 1

(2) If the proposal would bind class members, the court may approve it only after a hearing and [only] on finding that it is fair, reasonable, and adequate~~.~~, considering whether:

Alternative 2

(2) If the proposal would bind class members, the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~[2]

(A) the class representatives and class counsel have [been and currently are] adequately represented the class [in preparing to negotiate the settlement];

[(B) the settlement was negotiated at arm's length and was not the product of collusion;]

(C) the relief awarded to the class -- taking into account the proposed attorney fee award and any ancillary agreement made in connection with the

[2] These two alternatives offer a choice whether a rule should be more or less "confining." Alternative 1 is less confining for the district court, since it only calls for "consideration" of the listed factors. It may be that a court would regard some as more important than others in a given case, and conclude that the overall settlement is fair, reasonable, and adequate even if it might not find that all four were satisfied. Alternative 2, on the other hand, calls for separate findings on each of the four factors, and thus directs that the district court refuse to approve the settlement even though its overall judgment is that the settlement is fair, reasonable and adequate. This difference in treatment might also affect the scope of appellate review.

settlement -- is fair, reasonable, and adequate, given the costs, risks, probability of success, and delays of trial and appeal; and

(D) class members are treated equitably relative to each other [based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole] and the proposed method of claims processing is fair [and is designed to achieve the goals of the class action].

Sketch of Draft Committee Note

Subdivision (e)(2). Since 1966, Rule 23(e) has provided that a class action may be settled or dismissed only with the court's approval. Many circuits developed lists of "factors" to be considered in connection with proposed settlements, but these lists were not the same, were often long, and did not explain how the various factors should be weighed. In 2003, Rule 23(e) was amended to direct that the court should approve a proposed settlement only if it is "fair, reasonable, and adequate." Nonetheless, in some instances the existing lists of factors used in various circuits may have been employed in a "checklist" manner that has not always best served courts and litigants dealing with settlement-approval questions.

This amendment provides more focus for courts called upon to make this important decision. Rule 23(e)(1) is amended to ensure that the court has a broader knowledge base when initially reviewing a proposed class-action settlement in order to decide whether it is appropriate to send notice of the settlement to the class. The disclosures required under Rule 23(e)(1) will give class members more information to evaluate a proposed settlement if the court determines that notice should be sent to the class. Objections under Rule 23(e)(5) can be calibrated more carefully to the actual specifics of the proposed settlement. In addition, Rule 23(e)(5) is amended to elicit information from objectors that should assist the court and the parties in connection with the possible final approval of the proposed settlement.

Amended Rule 23(e)(2) builds on the knowledge base provided by the Rule 23(e)(1) disclosures and any objections from class members, and focuses the court and the parties on the core considerations that should be the prime factors in making the final decision whether to approve a settlement proposal. It is not a straitjacket for the court, but does recognize the central concerns that judicial experience has shown should be the main focus of the court as it makes a decision whether to approve the settlement.

Paragraphs (A) and (B). These paragraphs identify matters

that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

Rule 23(e)(1) disclosures may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may also be important. For example, the involvement of a court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests.

In making this analysis, the court may also refer to Rule 23(g)'s criteria for appointment of class counsel; the concern is whether the actual conduct of counsel has been consistent with what Rule 23(g) seeks to ensure. Particular attention might focus on the treatment of any attorney fee award, both in terms of the manner of negotiation of the fee award and the terms of the award.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. A central concern is the relief that the settlement is expected to provide to class members. Various Rule 23(e)(1) disclosures may bear on this topic. The proposed claims process and expected or actual claims experience (if the notice to the class calls for simultaneous submission of claims) may bear on this topic. The contents of any agreement identified under Rule 23(e)(3) may also bear on this subject, in particular the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast what the likely range of possible classwide recoveries might be and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure. And the court may need to assess that settlement figure in light of the expected or actual claims experience under the settlement.

[If the class has not yet been certified for trial, the court may also give weight to its assessment whether litigation certification would be granted were the settlement not approved.]

Examination of the attorney fee provisions may also be important to assessing the fairness of the proposed settlement. Ultimately, any attorney fee award must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class is often an important factor in determining the appropriate fee award. Provisions for deferring a portion of the fee award until the claims experience is known may bear on the fairness of the overall proposed settlement. Provisions for reporting back to the court about actual claims experience may also bear on the overall fairness of the proposed settlement.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it is suitably receptive to legitimate claims. A claims processing method should deter or defeat unjustified claims, but unduly demanding claims procedures can impede legitimate claims. Particularly if some or all of any funds remaining at the end of the claims process must be returned to the defendant, the court must be alert to whether the claims process is unduly exacting.

Ultimately, the burden of establishing that a proposed settlement is fair, reasonable, and adequate rests on the proponents of the settlement. But no formula is a substitute for the informed discretion of the district court in assessing the overall fairness of proposed class-action settlements. Rule 23(e)(2) provides the focus the court should use in undertaking that analysis.

Reporter's Comments and Questions

The question whether a rule revision along these lines would produce beneficial results can be debated. The more constrictive a rule becomes (as in Alternative 2), the more one could say it provides direction. But that direction may unduly circumscribe the flexibility of the court in making a realistic assessment of the entire range of issues presented by settlement approval. On the other hand, a more expansive rule, like Alternative 1, might not provide the degree of focus sought.

Another question revolves around the phrase now in the rule -- "fair, reasonable, and adequate," which receives more emphasis in Alternative 1. That is an appropriately broad phrase to describe the concern of the court in evaluating a proposed settlement. But to the extent that a rule amendment is designed to narrow the focus of the settlement review, perhaps the breadth of that phrase is also a drawback. Changing that phrase would vary from longstanding case law on Rule 23(e) analysis. Will a new rule along the lines sketched above meaningfully concentrate analysis if that overall description of the standard is retained?

At least a revised rule might obviate what reportedly

happens on numerous occasions -- the parties and the court adopt something of a rote recitation of many factors deemed pertinent under the case law of a given circuit. Would the sketch's added gloss on "fair, reasonable, and adequate" be useful to lawyers and district judges addressing settlement-approval applications?

If this approach holds promise to improve settlement review, are there specifics included on the list in the sketch that should be removed? Are there other specifics that should be added?

(3) Cy pres provisions in settlements

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(3) The court may approve a proposal that includes a cy pres remedy [if authorized by law][3] even if such a remedy could not be ordered in a contested case. The court must apply the following criteria in determining whether a cy pres award is appropriate:

(A) If individual class members can be identified through reasonable effort, and individual

[3] This bracketed qualification is designed to back away from creating new authority to use cy pres measures. It is clear that some courts have been authorizing cy pres treatment. Indeed, the Eighth Circuit's opinion in In re BankAmerica Corp. Securities Lit., 775 F.3d 1060 (8th Cir. 2015), suggested that it is impatient with their willingness to do so. It is less clear where the authority for them to do so comes from. In some places, like California, there is statutory authority, but there are probably few statutes. It may be a form of inherent power, though that is a touchy subject. Adding a phrase of this sort is designed to make clear that the authority does not come from this rule.

On the other hand, one might say that the inclusion of cy pres provisions in the settlement agreement is entirely a matter of party agreement and not an exercise of judicial power. Thus, the sketch says such a provision may be used "even if such a remedy could not be ordered in a contested case." That phrase seems to be in tension with the bracketed "authorized by law" provision. One might respond that the binding effect of a settlement class action judgment is dependent on the exercise of judicial power, and that the court has a considerable responsibility to ensure the appropriateness of that arrangement before backing it up with judicial power. So the rule would guide the court in its exercise of that judicial power.

In any event, it may be that there is no need to say "if authorized by law" in the rule because -- like many other agreements included in settlements -- cy pres provisions do not depend on such legal authorization, even if their binding effect does depend on the court's entry of a judgment.

distributions would be economically viable, settlement proceeds must be distributed to individual class members;

(B) If the proposal involves individual distributions to class members and funds remain after initial distributions, the proposal must provide for further distributions to participating class members [or to class members whose claims were initially rejected on timeliness or other grounds] unless individual distributions would not be economically viable {or other specific reasons exist that would make such further distributions impossible or unfair}];

(C) The proposal may provide that, if the court finds that individual distributions are not viable under Rule 23(e)(3)(A) or (B), a cy pres approach may be employed if it directs payment to a recipient whose interests reasonably approximate those being pursued by the class.

(4~~3~~) The parties seeking approval * * *

Sketch of Draft Committee Note

Because class-action settlements often are for lump sums with distribution through a claims process, it can happen that funds are left over after the initial claims process is completed. Rule 23(e)(1) is amended to direct the parties to submit information to the court about the proposed claims process and forecasts of uptake at the time they request notice to the class of the proposed settlement. In addition, they are to address the possibility of deferring payment of a portion of the attorney fee award to class counsel until the actual claims history is known. These measures may affect the frequency and amount of residual funds remaining after the initial claim distribution process is completed. Including provisions about disposition of residual funds in the settlement proposal and addressing these topics in the Rule 23(e)(1) report to the court (which should be available to class members during the objection/opt out period) should obviate any need for a second notice to the class concerning the disposition of such a residue if one remains.

Rule 23(e)(3) guides the court and the parties in handling such provisions in settlement proposals and in determining disposition of the residual funds when that becomes necessary. [It permits such provisions in settlement proposals only "if authorized by law." Although parties may make any agreement they prefer in a private settlement, because the binding effect of the

class-action judgment on unnamed class members depends on the court's authority in approving the settlement such a settlement may not bind them to accept "remedies" not authorized by some source of law beyond Rule 23.]

[One alternative to *cy pres* treatment pursuant to Rule 23(e)(3) might be a provision that any residue after the claims process should revert to the defendant which funded the settlement program. But because the existence of such a reversionary feature might prompt defendants to press for unduly exacting claims processing procedures, a reversionary feature should be evaluated with caution.[4]]

Paragraph (A). Paragraph (A) requires that settlement funds be distributed to class members if they can be identified through reasonable effort when the distributions are large enough to make distribution economically viable. It is not up to the court to determine whether the class members are "deserving," or other recipients might be more deserving. Thus, paragraph (A) makes it clear that cy pres distributions are a last resort, not a first resort.

Developments in telecommunications technology have made distributions of relatively small sums economically viable to an extent not similarly possible in the past; further developments may further facilitate both identifying class members and distributing settlement funds to them in the future. This rule calls for the parties and the court to make appropriate use of such technological capabilities.

Paragraph (B). Paragraph (B) follows up on the point in paragraph (A), and directs that even after the first distribution is completed there must be a further distribution to those class members who submitted claims of any residue if a further distribution is economically viable. This provision applies even though class members have been paid "in full" in accordance with the settlement agreement. Settlement agreements are compromises, and a court may properly approve one that does not provide the entire relief sought by the class members through the action. Unless it is clear that class members have no plausible legal right to receive additional money, they should receive additional distributions.

[As an alternative, or additionally, a court may designate residual funds to pay class members who submitted claims late or otherwise out of compliance with the claim processing

[4] Is this concern warranted?

requirements established under the settlement.[5]]

Paragraph (C). Paragraph (C) deals only with the rare case in which individual distributions to class members are not economically viable. The court should not assume that the cost of distribution to class members is prohibitive unless presented with evidence firmly supporting that conclusion. It should take account of the possibility that electronic means may make identifying class members and distributing proceeds to them inexpensive in some cases. When the court finds that individual distributions would be economically infeasible, it may approve an alternative use of the settlement funds if the substitute recipient's interests "reasonably approximate those being pursued by the class." In general, that determination should be made with reference to the nature of the claim being asserted in the case. Although such a distribution does not provide relief to class members that is as direct as distributions pursuant to Paragraph (A) or (B), it is intended to confer a benefit on the class.

Reporter's Comments and Questions

A basic question is whether inclusion of this provision in the rules is necessary and/or desirable. One could argue that it is not necessary on the ground that there is a growing jurisprudence, including several court of appeals decisions, dealing with these matters. And several of those decisions invoke the proposal in the ALI Aggregate Litigation Principles that provided a starting point for this rule sketch. On the other hand, the rule sketch has evolved beyond that starting point, and would likely be refined further if the rule-amendment process proceeds. Moreover, a national rule is a more authoritative directive than an ALI proposal adopted or invoked by some courts of appeals.

A different sort of argument would be that this kind of provision should not be in the rules because that would somehow be an inappropriate use of the rulemaking power. That argument might be coupled with an argument in favor of retaining the limitation "if authorized by law." It could be supported by the proposition that the only reason such an agreement can dispose of the rights of unnamed class members is that the court enters a judgment that forecloses their individual claims. And the only reason the class representative and/or class counsel can negotiate such a provision is that they have been deputized to

[5] This follows up on bracketed language in the sketch. Would this be a desirable alternative to further distributions to class members who submitted timely and properly filled out claims?

act on behalf of the class by the court.

One might counter this argument by observing that class-action settlements often include provisions that likely are not of a type that a court could adopt after full litigation. Yet those arrangements are often practical and supported by defendants as well as the class representatives. From this point of view, a rule that forbade them might seem impractical.

And it might also seem odd to regard certain provisions of a settlement agreement as qualitatively different from others. Assuming a class action for money damages, for example, one could contend that a primary interest of the class is in maximizing the monetary relief, via judgment or settlement. Yet nobody would question the propriety of a compromise by the class representative on the amount of monetary relief, if approved by the court under Rule 23(e). So it could be said to be odd that this sort of "plenary" power to compromise on monetary relief and surrender a claim that might result in a judgment for a higher amount is qualitatively different from authority to make arrangements for disposition of an unclaimed residue. Put differently, if the class representative and class counsel can compromise in a way that surrenders the potential for a much larger recovery, is there a reason why they can't also agree to a *cy pres* provision that creates the possibility that some of the money would be paid to an organization that would further the goals sought by the class action?

Another argument that might be made is that alternative uses for a residue of funds should be encouraged to achieve deterrence or otherwise effectuate the substantive law. Under some circumstances, a remedy of disgorgement may be authorized by pertinent law. And the law of at least some states directly addresses the appropriate use of the residue from class actions. See Cal. Code Civ. Pro. § 384. Whether a Civil Rule should be fashioned to further such goals might be questioned, however.

The sketch is not designed to confront these issues directly. Instead, it is inspired in part by the reality that cy pres provisions exist and have been included in class-action settlements with some frequency. One could say that the rules appropriately should address practices that are widespread, but perhaps treatment in the Manual for Complex Litigation is sufficient.

A related topic is suggested by a bracketed paragraph in the Committee Note draft -- whether courts should have a bias against reversionary clauses in lump fund class-action settlements. The sketches of amendments to Rule 23(e)(1) and 23(e)(2) both direct the court's attention to the details of the claims processing method called for by the settlement. Fashioning an effective and fair claims processing method is a challenge, and can involve

considerable expense. To the extent that a defendant hoping to recoup a significant portion of the initial settlement payment as unclaimed funds might be tempted to insist on unduly exacting requirements for claims, something in the rules that encouraged courts to resist reversionary provisions in settlements might be appropriate.

A related concern might arise in relation to attorney fee awards to class counsel. Particularly when those awards are keyed to the "value" of the settlement, treating a lump sum payment by the defendant as the value for purposes of the attorney fee award might seem inappropriate. Particularly if there were a reversionary provision and the bulk of the funds were never paid to the class, it could be argued that the true value of the settlement to the class was the amount paid, not the amount deposited temporarily in the fund by the defendant. But see Boeing Co. v. Van Gemert, 444 U.S. 472 (1980) (holding that the existence of the common fund conferred a benefit on all class members -- even those who did not submit claims -- sufficient to justify charging the entire fund with the attorney fee award for class counsel).

(4) Objectors

The problem of problem objectors has attracted much attention. Various possible responses have been suggested, and they are introduced below. They have reached different levels of development, and likely would not be fully effective without adoption of some parallel provisions in the Appellate Rules. The Appellate Rules Committee has received proposals for rule amendments that might dovetail with changes to the Civil Rules.

Below are two approaches to the problems sometimes presented by problem objectors. The first relies on rather extensive required disclosure, coupled with expanded court approval requirements designed to reach appeals of denied objections as well as withdrawal of objections before the district court, covered by the present rule. The second is more limited -- seeking only to forbid any payments to objectors or their attorneys for withdrawing objections or appeals, and to designate the district court as the proper court to approve or disapprove such payments.

Objector disclosure

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e)~~.~~ ~~:~~ ~~the objection may be withdrawn only with the court's approval.~~ The objection must be signed under Rule 26(g)(1) and disclose this information:

(A) the facts that bring the objector within the class defined for purposes of the proposal or within an alternative class definition proposed by the objector;

(B) the objector's relationship to any attorney representing the objector;

(C) any agreement describing compensation that may be paid to the objector;

(D) whether the objection seeks to revise or defeat the proposal on behalf of:

(i) the objector alone,
(ii) fewer than all class members, or
(iii) all class members;

(E) the grounds of the objection, including objections to:
(i) certification of any class,
(ii) the class definition,
(iii) the aggregate relief provided,
(iv) allocation of the relief among class members,
(v) the procedure for distributing relief[, including the procedure for filing claims], and
(vi) any provisions for attorney fees;

[**(6)** The objector must move for a hearing on the objection.]

[**(6.1)** An objector [who is not a member of the class included in the judgment] can appeal [denial of the objection] {approval of the settlement} only if the court grants permission to intervene for that purpose.]

(7) Withdrawal of objection or appeal

(A) An objection filed under Rule 23(e) or an appeal from an order denying an objection may be withdrawn only with the court's approval.

(B) A motion seeking approval must include a statement identifying any agreement made in connection with the withdrawal.

Alternative 1

(C) The court must approve any compensation [to be paid] to the objector or the objector's counsel in connection with the withdrawal.

Alternative 2

(C) Unless approved by the district court, no payment may be made to any objector or objector's counsel in exchange for withdrawal of an objection or appeal from denial of an objection. Any request by an objector or objector's counsel for payment based on the benefit of the objection to the class must be made to the district court, which retains jurisdiction during the pendency of any appeal to rule on any such request.

(D) If the motion to withdraw [the objection] was referred to the court under Rule *XY* of the Federal Rules of Appellate Procedure, the court must inform the court of appeals of its action on the motion.

[As should be apparent, this would be a rather extensive rule revision, and would likely depend upon some change in the Appellate Rules as well. That possible change is indicated by the reference to an imaginary Appellate Rule *XY*[6] in the sketch above. As illustrated in a footnote, such an Appellate Rule could direct that an appeal by an objector from a court's approval of a settlement over an objection may be dismissed only on order of the court, and directing that the court of appeals would refer the decision whether to approve that withdrawal to the district court.]

Sketch of Committee Note Ideas

[The above sketches are at such a preliminary stage that it would be premature to pretend to have a draft Committee Note, or even a sketch of one. But some ideas can be expressed about what points such a Note might make.]

Objecting class members play an important role in the Rule 23(e) process. They can be a source of important information about possible deficiencies in a proposed settlement, and thus provide assistance to the court. With access to the information regarding the proposed settlement that Rule 23(e)(1) requires be submitted to the court, objectors can make an accurate appraisal

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[6] The Advisory Committee on Civil Rules does not propose changes to the Appellate Rules. But for purposes of discussion of the sketches of possible Civil Rule provisions in text, it might be useful to offer a sketch of a possible Appellate Rule 42(c):

> **(c) Dismissal of Class-Action Objection Appeal**. A motion to dismiss an appeal from an order denying an objection under Rule 23(e)(5) of the Federal Rules of Civil Procedure to approval of a class-action settlement must be referred to the district court for its determination whether to permit withdrawal of the objection and appeal under Civil Rule 23(e)(7). The district court must report its determination to the court of appeals.

As noted above, any such addition to the Appellate Rules would have to emanate from the Advisory Committee on Appellate Rules, and this sketch is provided only to facilitate discussion of the Civil Rule sketches presented in this memorandum.

of the merits and possible failings of a proposed settlement.

But with this opportunity to participate in the settlement review process should also come some responsibilities. And the Committee has received reports that in a significant number of instances objectors or their counsel appear to have acted in an irresponsible manner. The 2003 amendments to Rule 23 required that withdrawal of an objection before the district court occur only with that court's approval, an initial step to assure judicial supervision of the objection process. Whatever the success of that measure in ensuring the district court's ability to supervise the behavior of objectors during the Rule 23(e) review process, it seems not to have had a significant effect on the handling of objector appeals. At the same time, the disruptive potential of an objection at the district court seems much less significant than the disruption due to delay of an objector appeal. That is certainly not to say that most objector appeals are intended for inappropriate purposes, but only that some may have been pursued inappropriately, leading class counsel to conclude that a substantial payment to the objector or the objector's counsel is warranted -- without particular regard to the merits of the objection -- in order to finalize the settlement and deliver the settlement funds to the class.

The goal of this amendment is to employ the combined effects of sunlight and required judicial approval to minimize the risk of possible abuse of the objection process, and to assist the court in understanding objections more fully. It is premised in part on the disclosures of amended Rule 23(e)(1), which are designed in part to provide class members with extensive information about the proposed settlement. That extensive information, in turn, makes it appropriate to ask objectors to provide relatively extensive information about the basis for their objections.

Thus, paragraphs (A), (B), and (C) of Rule 23(e)(5) seek "who, what, when, and where" sorts of information about the role of this objector. Paragraph (B) focuses particularly on the relationship with an attorney because there have been reports of allegedly strategic efforts by some counsel to mask their involvement in the objection process, at least at the district court.

Paragraph (D) and (E), then, seek to elicit a variety of specifics about the objection itself. The Subcommittee has been informed that on occasion objections are quite delphic, and that settlement proponents find it difficult to address these objections because they are so uninformative. Calling for specifics is intended to remedy that sort of problem, and thus to provide the court and with details that will assist it in evaluating the objection.

Paragraph 6 suggests, in brackets, that one might require an objector to move for a hearing on the objection. It may be that the ordinary Rule 23(e) settlement-approval process suffices because Rule 23(e)(2) directs the court not to approve the proposed settlement until after a hearing. Having multiple hearings is likely not useful.

Paragraph 6.1, tentative not only due to brackets but also due to numbering, suggests a more aggressive rein on objectors. It relies on required intervention as a prerequisite for appealing denial of an objection. Anything along those lines would require careful consideration of the Supreme Court's decision in Devlin v. Scardeletti, 534 U.S. 1 (2002), in which the Court held that an objector in a Rule 23(b)(1) "mandatory" class action who had been denied leave to intervene to pursue his objection to the proposed settlement nevertheless could appeal. The Court was careful to say that the objector would "only be allowed to appeal that aspect of the District Court's order that affects him -- the District Court's decision to disregard his objections." Id. at 9. And the Court emphasized the mandatory nature of that class action (id. at 10-11):

> Particularly in light of the fact that petitioner had no ability to opt out of the settlement, appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate.

The Court also rejected an argument advanced by the United States (as amicus curiae) that class members who seek to appeal rejection of their objections must intervene in order to appeal. The Government "asserts that such a limited purpose intervention generally should be available to all those, like petitioner, whose objections at the fairness hearing have been disregarded," id. at 12, and the Court noted that "[a]ccording to the Government, nonnamed class members who state objections at the fairness hearing should easily meet" the Rule 24(a) criteria for intervention of right. Id. The Court reacted (id.):

> Given the ease with which nonnamed class members who have objected at the fairness hearing could intervene for purposes of appeal, however, it is difficult to see the value of the government's suggested requirement.

But it is not clear that the Court's ruling would prevent a rule requiring intervention. Thus, the Court rejected the Government's argument that "the structure of the rules of class action procedure requires intervention for the purposes of appeal." Id. at 14. It added that "no federal statute or procedural rule directly addresses the question of who may appeal from approval of class action settlements, while the right to

appeal from an action that finally disposes of one's rights has a statutory basis. 28 U.S.C. § 1291." Id.

And it may be that reports about allegedly abusive recent experience with objectors would provide a basis for adopting such a rule. Thus, in *Devlin* the Court noted that the Government did not cite the concern with abusive appeals that has been highlighted by commentators (id. at 13):

> It [the Government] identifies only a limited number of instances where the initial intervention motion would be of any use: where the objector is not actually a member of the settlement class or is otherwise not entitled to relief from the settlement, where an objector seeks to appeal even though his objection was successful, where the objection at the fairness hearing was untimely, or where there is a need to consolidate duplicative appeals from class members.

Court approval requirement

As an alternative to the objector disclosure sketch, the following sketch relies entirely on judicial approval of any payment to an objecting class member of the objector's lawyer. It is possible that this simpler approach would be effective in dealing with inappropriate behavior by objectors. But it should be borne in mind that court approval is also an integral feature of the objector disclosure approach.

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval. Unless approved by the district court, no payment may be made to any objector or objector's counsel in exchange for withdrawal of an objection or appeal from denial of an objection. Any request by an objector or objector's counsel for payment based on the benefit of the objection to the class must be made to the district court, which retains jurisdiction during the pendency of any appeal to rule on any such request.

Sketch of Committee Note Ideas

Many of the general comments included in the sketch of Committee Note ideas for the objector disclosure draft could introduce the general problem in relation to this approach, but it would emphasize the role of judicial approval rather than the utility of disclosure. The reason for taking this approach would be that the prospect of a financial benefit is the principal apparent stimulus for the kind of objections that the amendment is trying to prevent or deter.

A starting point in evaluating this approach could be the 2003 amendment to add Rule 23(h), which recognized that "[a]ctive judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process." That involvement is no less important when the question is payment to an objector's counsel rather than to class counsel. Although payment may be justified due to the contribution made by the objector to the full review of proposed settlement, that decision should be for the court to make, not for the parties to negotiate entirely between themselves.

The sketch focuses on payments to objectors or their attorneys because that has been the stimulus to this concern; instances of nonmonetary accommodations leading to withdrawal of objections have not emerged as similarly problematical.

The rule focuses on "the benefit of the objection to the class." Particularly with payments to the objector's attorney, that focus may be paramount. If the objection raises an issue unique to the objector, rather than one of general application to the class, that may support a payment to the objector. As the Committee Note to the 2003 amendment to Rule 23(e) explained, approval for a payment to the objector "may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members." But compensation of the objector's attorney would then ordinarily depend on the contractual arrangements between the objector and its attorney.

Ordinarily, if an objector's counsel seeks compensation, that compensation should be justified on the basis of the benefits conferred on the class by the objection. Ordinarily, that would depend in the first instance on the objection being sustained. It is possible that even an objection of potentially general application that is not ultimately sustained nonetheless provides value to the Rule 23(e) review process sufficient to justify compensation for the attorney representing the objector, particularly if such compensation is supported by class counsel. But an objection that confers no benefit on the class ordinarily should not produce a payment to the objector's counsel.

[Objections sometimes lack needed specifics, with the result that they do not facilitate the Rule 23(e) review process. It may even be that some objections raise points that are actually not pertinent to the proposed settlement before the court. Such objections would not confer a benefit on the class or justify payment to the objector's counsel.[7]]

Reporter's Comments and Questions

Both of these rule sketches are particularly preliminary, and should be approached with that in mind. Obviously, a basic question is whether the disclosure approach (coupled with court approval) or the court approval approach should be preferred. Requiring disclosures by objectors may be helpful to the court in evaluating objections as well as determining whether to approve payments to objectors or their lawyers. It may even be that the disclosure provisions would assist good-faith objectors in focusing their objections on the issues presented in the case.

One significant question in evaluating the court-approval approach is whether Rule 23(e)(5)'s current court-approval requirement has been effective. If it has not, does that bear on whether an expanded court-approval requirement, including a parallel provision in the Appellate Rules, would be effective? Perhaps Rule 23(e)(5) has not been fully effective because filing a notice of appeal after denial of an objection serves as something like an "escape valve" from the rule's requirement of judicial approval. If so, that may suggest that the existing rule is effective, or can become effective with this expansion.

A different question is whether the requirements of the disclosure approach would impose undue burdens on good-faith objectors. The Committee gave some consideration to various sanction ideas, but feedback has not favored that approach. One reason is that emphasizing sanctions has the potential to chill good-faith objections. The rule sketch says the disclosures must be signed under Rule 23(g)(1), which does have a sanctions provision. See Rule 26(g)(1)(C). Would that deter good-faith objectors? Except for some difficulty in supplying the information required, it would not seem that the disclosure requirements themselves would raise a risk of *in terrorem* deterrence of good-faith objectors.

Yet another question is whether such an elaborate disclosure regime could burden the court, the parties, and the objectors with disputes about whether "full disclosure" had occurred. Should there be explicit authority for a motion to require fuller

[7] This point may be worth making if the objector disclosure provisions are not included. If they are included, these points seem unnecessary.

disclosure? Rule 37(a)(3)(A) could be amended as follows:

> **(A)** *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), or if a class member fails to make a disclosure required by Rule 23(e)(5), any other party may move to compel disclosure and for appropriate sanctions.

But it might be said to be odd to have a Rule 37(a) motion apply to a class member, and also unnerving to raise the possibility of Rule 37(b) sanctions if the order were not obeyed (although one sanction might be rejection of the objection). This approach would have the advantage of avoiding the procedural aspects of Rule 11, such as the "safe harbor" for withdrawn papers, given that Rule 23(e)(5) says that an objection may be withdrawn only with the court's approval.

Alternatively, should the rule simply say that the court may disregard any objection that is not accompanied by "full disclosure"? Should satisfying the "full disclosure" requirement be a prerequisite to appellate review of the objection? Some comments have stressed that delphic objections sometimes seem strategically designed to obscure rather than clarify the grounds that may be advanced on appeal, or as a short cut to filing a notice of appeal without actually having identified any real objections to the proposed settlement, and then inviting a payoff to drop the appeal. Disclosure could, in such circumstances, have a prophylactic effect. Should the court of appeals affirm rejections of objections on the ground that full disclosure was not given without considering the merits of the objections? Could that appellate disposition be achieved in an expedited manner, compared to an appeal on the merits of the objection?

Although not principally the province of the Civil Rules Committee, it is worthwhile to note some complications that might follow from an Appellate Rule calling on the district court to approve or disapprove withdrawals of appeals. The operating assumption may be that the district court could make quick work of those approvals, while the appellate court would have little familiarity with the case. That may often be true, but not in all cases. A 2013 FJC study of appeals by objectors found that the rate of appellate decision on the merits of the objector's appeal varied greatly by circuit. Thus, in the Seventh Circuit, none of the objector appeals had led to a resolution on the merits in the court of appeals during the period studied, while in the Second Circuit fully 63% had. Had the parties in the Second Circuit cases reached a settlement after oral argument, one might argue that the court of appeals would by then be better positioned to evaluate the proposed withdrawal of the appeal than the busy district judge, who may have approved the settlement two years earlier.

Finally, it may be asked whether focusing on whether the objector "improved" the settlement might be useful. It seems that such a focus might invite cosmetic changes to a settlement that confer no significant benefit on the class. And it also may be that some objections that are not accepted may nonetheless impose significant costs on the objector that the court could consider worth compensating because the input was useful to the court in evaluating the settlement.

(5) Class Definition & Ascertainability

Relatively recently, the issue of ascertainability has received a considerable amount of attention. There have been assertions that a circuit conflict is developing or has developed on this topic. The concept that a workable class definition is needed has long been recognized; "all those similarly situated" is unlikely to suffice often. In 2003, Rule 23(c) was amended to make explicit the need to define the class in a meaningful manner. The amendment sketch below builds on that 2003 amendment.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

(1) Certification Order:

* * *

(B) *Defining the Class~~; Appointing Class Counsel~~*. An order that certifies a class action must define the class ~~and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g)~~ so that members of the class can be identified [when necessary] in [an administratively feasible] {a manageable} manner.

(C) *Defining the Class Claims, Issues, or Defenses.* An order that certifies a class action must define the class claims, issues, or defenses.

(D) *Appointing Class Counsel*. An order that certifies a class action must appoint class counsel under Rule 23(g).

(E~~C~~) *Altering or Amending the Order*. * * *

Initial Sketch of Draft Committee Note

A class definition can be important for various reasons. Rule 23(a)(1) requires that the members of a class be too numerous to be joined, so some clear notion who is included is necessary.. Rule 23(c)(2) requires notice to the Rule 23(b)(3) class after certification. Rule 23(c)(3) directs that the judgment in the class action is binding on all class members. Rule 23(e)(1) says that the court must direct notice of a proposed settlement to the class if it would bind them. Rule 23(e)(5) directs objectors to provide disclosures showing that they are in fact class members. And Rule 23(h)(1) requires that

notice of class counsel's application for an award of attorney's fees be directed to class members. So a workable class definition can be important under many features of Rule 23.

But the class definition requirements of the rule are realistic and pragmatic. Thus, the rule also recognizes that identifying all class members may not be possible. For example, Rule 23(c)(2)(B) says that in Rule 23(b)(3) class actions the court must send individual notice to "all members who can be identified through reasonable effort." And in class actions under Rule 23(b)(2) -- such as actions to challenge alleged discrimination in educational institutions -- there may be instances in which it is not possible at the time the class is certified to identify all class members who might in the future claim protection under the court's injunctive decree.

Under these circumstances, Rule 23(c)(1)(B) calls for a pragmatic approach to class definition at the certification stage. As a matter of pleading, a class-action complaint need not satisfy this requirement. The requirement at the certification stage is that the court satisfy itself that members of the class can be identified in a manner that is sufficient for the purposes specified in Rule 23. It need not, at that point, achieve certainty about such identification, which may not be needed for a considerable time, if at all.

[The rule says that the court's focus should be on whether identification can be accomplished "when necessary." This qualification recognizes that the court need not always provide individual notice at the certification stage, even in Rule 23(b)(3) class actions, to all class members. Instead, that task often need be confronted only later. If the case is litigated to judgment, it may then become necessary to identify class members with some specificity whether or not the class prevails. If the case is settled, the settlement itself may include measures designed to identify class members.]

Ultimately, the class definition is significantly a matter of case management. [It is not itself a method for screening the merits of claims that might be asserted by class members.[8]] As with other case-management issues, it calls for judicial resourcefulness and creativity. Although the proponents of class certification bear primary responsibility for the class definition, the court may look to both sides for direction in fashioning a workable definition at the certification stage, and in resolving class-definition issues at later points in the action. In balancing these concerns, the court must recognize that the class opponent has a valid interest in ensuring that a claims process limits relief to those legally entitled to it,

[8] Is this a pertinent or helpful observation?

while also recognizing that claims processing must be realistic in terms of the information likely to be available to class members with valid claims. And the court need not make certain at the time of certification that a perfect solution will later be found to these problems.

Reporter's Comments and Questions

Would a rule provision along the lines above be useful? One might regard the sketch above as a "minimalist" rule provision on this subject, in light of the considerable recent discussion of it. It avoids the use of both "ascertainable" and "objective," words sometimes used in some recent discussions of this general subject.

Some submissions to the Advisory Committee have urged that rule provisions directly address some questions that have been linked to these topics,[9] including:

> *Ensuring that all within the class definition have valid claims*: A class definition that is expressed in terms of having a valid claim can create "fail safe" class problems, because a defense victory would seem to mean that the class contains no members. A class definition that "objectively" ensures that all class members have valid claims may routinely present similar challenges.
>
> *Use of affidavits or other similar "proofs":* Another topic that has arisen is whether affidavits or similar proofs can suffice to prove membership in the class. This problem can be particularly acute when the class claim asserts that defendant made false or misleading statements in connection with inexpensive retail products. A requirement that class members present receipts proving purchase of the product may sometimes be asking too much.
>
> *"No injury" classes:* Somewhat similar to the two points above is the question whether the class includes many who have suffered no injury. Such issues may, for example, arise in data breach situations. In those cases, there may be a debate about whether the breach actually revealed confidential information from class members, and what use was made of that information. The Supreme Court has granted certiorari in a case that may present some such issues. See Bouaphakeo v. Tyson Foods, Inc., 765 F.3d 791 (6th Cir. 2014), cert. granted, 135 S.Ct. 2806 (2015).

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[9] In case these submissions might be of interest, an Appendix to this memorandum presents some of the suggestions that the Advisory Committee has received.

The rule sketch above does not purport to address directly any of these issues. There are likely additional issues that have been discussed under the general heading "ascertainability" that this sketch does not directly address. Would that mean a rule change along these lines would not be useful?

If it appears that a rule change requires an effort to confront the sorts of issues just identified, could it be said that those issues can be handled in the same way across the wide variety of class actions in federal courts?

The courts' resolutions of these issues appear to be in a state of rapid evolution. For one recent analysis, see Mullins v. Direct Digital, ___ F.3d ___, 2015 WL 4546159 (7th Cir. No. 15-1776, July 28, 2015). Would it be best to rely on the evolving jurisprudence to address these issues rather than attempt a rule change that could become effective no sooner than Dec. 1, 2018? If the courts are genuinely split, is there a genuine prospect that the split will be resolved by judicial decisionmaking?

(6) Settlement Class Certification

As noted again below, a key question is whether a settlement-certification addition to Rule 23(b) is needed to deal with difficulty in obtaining such certification under *Amchem*. A subsidiary issue is whether such additional certification authorization should be added only for actions brought under 23(b)(3).

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * * *

(4) the parties to a settlement [in an action to be certified under subdivision (b)(3)] request certification and the court finds that the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).[10]

Sketch of Draft Committee Note

Subdivision (b)(4) is new. In 1996, a proposed new

[10] The Subcommittee has also discussed an alternative formulation that would invoke criteria proposed in the ALI Aggregate Litigation project:

> (4) the parties to a settlement [in an action to be certified under subdivision (b)(3),] request certification and the court finds that significant common issues exist, that the class is sufficiently numerous to warrant classwide treatment, and that the class definition is sufficient to ascertain who is and who is not included in the class. The court may then grant class certification if the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).

This approach does not fit well with the current lead-in language to Rule 23(b), which says that class actions may be maintained "if Rule 23(a) is satisfied." But the reformulation appears either to offer substitute approaches to matters covered in Rule 23(a) ("significant common issues" and "sufficiently numerous") or to call for more exacting treatment of topics also covered in Rule 23(a).

subdivision (b)(4) was published for public comment. That new subdivision would have authorized certification of a (b)(3) class for settlement in certain circumstances in which certification for full litigation would not be possible. One stimulus for that amendment proposal was the existence of a conflict among the courts of appeals about whether settlement certification could be used only in cases that could be certified for full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4) amendment proposal was not pursued after that decision.

Rule 23(f), also in the package of amendment proposals published for comment in 1996, was adopted and went into effect in 1998. As a consequence of that addition to that rule, a considerable body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and (h) were added to the rule to govern the appointment of class counsel, including interim class counsel, and attorney fees for class counsel. These developments have provided added focus for the court's handling of the settlement-approval process under Rule 23(e). Rule 23(e) is being further amended to sharpen that focus.

Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlement. Some report that alternatives such as multidistrict processing or proceeding in state courts have grown in popularity to achieve resolution of multiple claims.

This amendment is designed to respond to those concerns by clarifying and, in some instances, easing the path to certification for purposes of settlement. Like the 1996 proposal, this subdivision is available only after the parties have reached a proposed settlement and presented it to the court. Before that time, the court may, under Rule 23(g)(3), appoint interim counsel to represent the interests of the putative class.

[Subdivision (b)(4) addresses only class actions maintained under Rule 23(b)(3). The (b)(3) predominance requirement may be an unnecessary obstacle to certification for settlement purposes, but that requirement does not apply to certification under other provisions of Rule 23(b). Rule 23(b)(4) has no bearing on whether certification for settlement is proper in class actions not brought under Rule 23(b)(3).]

Like all class actions, an action certified under subdivision (b)(4) must satisfy the requirements of Rule 23(a). Unless these basic requirements can be satisfied, a class settlement should not be authorized.

Increasing confidence in the ability of courts to evaluate proposed settlements, and the tools available to them for doing so, provides important support for the addition of subdivision (b)(4). For that reason, the subdivision makes the court's conclusion under Rule 23(e)(2) an essential component to settlement class certification. Under amended Rule 23(e), the court can approve a settlement only after considering specified matters in the full Rule 23(e) settlement-review process, and amended Rules 23(e)(1) and (e)(5) provide the court and the parties with more information about proposed settlements and objections to them. Given the added confidence in settlement review afforded by strengthening Rule 23(e), the Committee is comfortable with reduced emphasis on some provisions of Rule 23(a) and (b).

Subdivision (b)(4) also borrows a factor from subdivision (b)(3) as a prerequisite for settlement certification -- that the court must also find that resolution through a class-action settlement is superior to other available methods for fairly and efficiently adjudicating the controversy. Unless that finding can be made, there seems no reason for the court or the parties to undertake the responsibilities involved in a class action.

Subdivision (b)(4) does not require, however, that common questions predominate in the action. To a significant extent, the predominance requirement, like manageability, focuses on difficulties that would hamper the court's ability to hold a fair trial of the action. But certification under subdivision (b)(4) assumes that there will be no trial. Subdivision (b)(4) is available only in cases that satisfy the common-question requirements of Rule 23(a)(2), which ensure commonality needed for classwide fairness. Since the Supreme Court's decision in *Amchem*, the courts have struggled to determine how predominance should be approached as a factor in the settlement context. This amendment recognizes that it does not have a productive role to play and removes it.

Settlement certification also requires that the court conclude that the class representatives are typical and adequate under Rule 23(a)(3) and (4). Under amended Rule 23(e)(2), the court must also consider whether the settlement proposal was negotiated at arms length by persons who adequately represented the class interests, and that it provides fair and adequate relief to class members, treating them equitably.

In sum, together with changes to Rule 23(e), subdivision (b)(4) ensures that the court will give appropriate attention to adequacy of representation and the fair treatment of class members relative to each other and the potential value of their claims. At the same time, it avoids the risk that a desirable settlement will prove impossible due to factors that matter only to a hypothetical trial scenario that the settlement is designed

to avoid.

Should the court conclude that certification under subdivision (b)(4) is not warranted -- because the proposed settlement cannot be approved under subdivision (e) or because the requirements of Rule 23(a) or superiority are not met -- the court should not rely on any party's statements in connection with proposed (b)(4) certification in relation to later class certification or merits litigation. See Rule 23(e)(1)(D).

Reporter's Comments and Questions

A key question is whether a provision of this nature is useful and/or necessary. The 1996 proposal was prompted in part by Third Circuit decisions saying that certification could never be allowed unless litigation certification standards were satisfied. But *Amchem* rejected that view, and recognized that the settlement class action had become a "stock device." At the same time, it said that predominance of common questions is required for settlement certification in (b)(3) cases. Lower courts have sometimes seemed to struggle with this requirement. Some might say that the lower courts have sought to circumvent the *Amchem* Court's requirement that they employ predominance in the settlement certification context. A prime illustration could be situations in which divergent state laws would preclude litigation certification of a multistate class, but those divergences could be resolved by the proposed settlement.

If predominance is an obstacle to court approval of settlement certification, should it be removed? One aspect of the sketch above is that it places great weight on the court's settlement review. The sketch of revisions to Rule 23(e)(2) is designed to focus and improve that process. Do they suffice to support reliance on that process in place of reliance on the predominance prong of 23(b)(3)?

If predominance is not useful in the settlement context, is superiority useful? One might say that a court that concludes a settlement satisfies Rule 23(e)(2) is likely to say also that it is superior to continued litigation of either a putative class action or individual actions. But eliminating both predominance and superiority may make it odd to say that (b)(4) is about class actions "certified under subdivision (b)(3)." It seems, instead, entirely a substitute, and one in which (contrary to comments in *Amchem*), Rule 23(e) becomes a supervening criterion for class certification. That, in turn, might invite the sort of "grand-scale compensation scheme" that the *Amchem* Court regarded as "a matter fit for legislative consideration," but not appropriate under Rule 23.

Another set of considerations focuses on whether making this change would actually have undesirable effects. Could it be said

that the predominance requirement is a counterweight to "hydraulic pressures" on the judge to approve settlements in class actions? If judges are presently dealing in a satisfactory way with the *Amchem* requirements for settlement approval, will making a change like this one prompt the filing of federal-court class actions that should not be settled because of the diversity of interests involved or for other reasons? And could this sort of development also prompt more collateral attacks later on the binding effect of settlement class-action judgments?

(7) Issue Class Certification

This topic presents two different sorts of questions or concerns. One is whether experience shows that a change in Rule 23(b) or (c) is needed to ensure that issue class certification is available in appropriate circumstances. Various placements are possible for this purpose. An overarching issue, however, is whether any of these possible rule changes is really needed; if the courts are finding sufficient flexibility in the rule as presently written to make effective use of issues classes, it may be that a rule change is not indicated.

The second question looks to proceedings after resolution of the issue on which certification was based. Particularly if the class is successful on that issue, the resolution of that issue often would not lead to entry of an appealable judgment. But to complete adjudication of class members' claims might require considerable additional activity which might be wasted if there were later a reversal on appeal of the common issue. So a revision of Rule 23(f) might afford a discretionary opportunity for immediate appellate review of the resolution of that issue.

A. Revising Rule 23(b) or (c)

Rule 23(b) approaches

Alternative 1

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, except when certifying under Rule 23(c)(4), and finds that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: * * * *

Alternative 2

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

(4) the court finds that the resolution of particular issues will materially advance the litigation,

making certification with respect to those issues appropriate. [In determining whether certification limited to particular issues is appropriate, the court may refer to the matters identified in Rule 23(b)(3)(A) through (D).]

Rule 23(c)(4) approach

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

(4) ***Particular issues.*** ~~When appropriate, a~~An action may be brought or maintained as a class action with respect to particular issues if the court finds that the resolution of such issues will materially advance the litigation. [In determining whether certification limited to particular issues is appropriate, the court may refer to the matters identified in Rule 23(b)(3)(A) through (D).]

Sketch of Committee Note Ideas

[Very general; would need to be adapted to actual rule change pursued]

Particularly in actions brought under Rule 23(b)(3), there are cases in which certification to achieve resolution of common issues would be appropriate even if certification with regard to all issues involved in the action would not. Since its amendment in 1966, Rule 23(c)(4) has recognized this possibility. This amendment confirms that such certification may be employed.

The question whether such certification is warranted in a given case may be addressed in light of the factors listed in Rule 23(b)(3)(A) through (D). A primary consideration will be whether the resolution of the common issue or issues will materially advance the resolution of the entire litigation, or the entire claims of class members. When certifying an issues class, the court should specify the issues on which certification was granted in its order under Rule 23(c)(1)(B) and, for Rule 23(b)(3) classes, include that specification in its notice to the class under Rule 23(c)(2)(B)(iii).

[Resolution of the issues for which certification was granted may result in an appealable judgment. But even if those issues are resolved in favor of the class opponent, that may not mean that all related claims of class members are also resolved. Should resolution of the common issues not result in entry of an

appealable judgment, discretionary appellate review may be sought under Rule 23(f)(2).]

Reporter's Comments and Questions

These sketches are obviously at an early stage of development. At a point in time, it appeared that there was a circuit split on whether (c)(4) certification could be sought in an action brought under Rule 23(b)(3) even though predominance could not be satisfied as to the claims as a whole. It is uncertain whether that seeming split has continued, and whether amendments of this sort are needed and helpful in resolving it.

If a rule change is useful, which route seems most promising? Alternative 1 may be the simplest; it seeks only to overcome preoccupation with overall predominance. It could be coupled with a revision of Rule 23(c)(4) that recognizes that the "materially advances" idea is a guide in determining whether it is appropriate to certify as to particular issues. At present, Rule 23(c)(4) says only that such certification may be granted "when appropriate." Alternatively or additionally, one could refer to the factors in Rule 23(b)(3)(A) through (D). But would they be appropriate in relation to issue certification under Rule 23(b)(1) or (2)?

Is issue certification really a concern only as to Rule 23(b)(3) cases? It may be that, particularly after *Wal-Mart*, Rule 23(b)(2) cases are not suited to (c)(4) certification. Rule 23(b)(2) says that certification is proper only when the class opponent has "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." It may be that this definition makes issue certification unimportant. In (b)(1) classes, it may be that there is a common issue such as whether there is a "limited fund" that would warrant (c)(4) certification, but if that produced the conclusion that there is a limited fund certification under (b)(1)(B) seems warranted.

B. Interlocutory Appellate Review

(f) Appeals.

(1) *From order granting or denying class-action certification.* A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders

(2) *From order resolving issue in class certified under Rule 23(c)(4).* A court of appeals may permit an appeal from an order deciding an issue with respect to which [certification was granted under Rule 23(c)(4)] {a class action was allowed to be maintained under Rule 23(c)(4)} [when the district court expressly determines that there is no just reason for delay], if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Sketch of Draft Committee Note Ideas

In 1998, Rule 23(f) was added to afford an avenue for interlocutory review of class-certification orders because they are frequently of great importance to the conduct of the action. That provision is retained as Rule 23(f)(1).

Rule 23(f)(2) is added to permit immediate review of another decision that can be extremely important to the further conduct of an action. Rule 23(c)(4) authorizes class certification limited to particular issues when resolution of those issues would materially advance the ultimate resolution of the litigation. In some cases, the resolution of the common issues may lead to entry of an appealable final judgment. But often it will not, and even though that resolution should materially advance the ultimate resolution of the litigation a great deal more may need to be done to accomplish that ultimate resolution.

Before the court and the parties expend the time and effort necessary to complete resolution of the class action, it may be prudent for the court of appeals to review the district court's resolution of the common issue. Rule 23(f)(2) authorizes such review, which is at the discretion of the court of appeals, as is an appeal of a certification order under Rule 23(f)(1). Such an

appeal is allowed only from an order deciding an issue for which certification was granted. That would not include some orders relating to that issue, such as denial of a motion for summary judgment with regard to the issue.

[But to guard against premature appeals, an application to the Court of Appeals for review under Rule 23(f)(2) must be supported by a determination from the district court that there is no just reason for delay. For example, if the court has resolved one of several issues on which certification was granted, it may conclude that immediate appellate review would not be appropriate.]

Reporter's Comments and Questions

A basic question is whether adding Rule 23(f)(2) would produce positive or negative effects. Related to that is the question "What happens now when an issue is resolved in an issues class action?"

One answer to that second question is that if the defendant wins on the common issue judgment is entered in the defendant's favor and the class action ends. That may not mean that class members may not pursue individual claims, but they would likely be bound by the resolution of the common issue and limited to claims not dependent on it. Cf. Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867 (1984) (after court ruled that there was no general pattern or practice of discrimination in defendant's operation, class members could still pursue claims of individual intentional discrimination but could not rely on pattern or practice proof). But it would ordinarily mean that immediate review is available under 28 U.S.C. § 1291 with regard to the class action.

Another answer is that common issue certification often involves multiple issues, so that even if some are definitively resolved in the district court others may remain to be resolved. Under those circumstances, it may be that the district court would conclude that there is just reason for delay. Is it important to condition immediate review on the district court's determination that there is no just reason for delay? That seems to afford the appellate court useful information about whether to allow an immediate appeal, but may also give the district court undue authority to prevent immediate review.

Yet another answer is that if the class opponent loses on the common issue, that might invariably lead to a settlement essentially premised on that resolution of that issue. It could be that the settlement sometimes preserves the class opponent's right to seek appellate review, but may often be that it does not. Is that an argument for adopting Rule 23(f)(2)? One view might be that it would become a "free bite" for the class

opponent.

Could appellate courts develop standards for decisions whether to grant review under Rule 23(f)(2)? Under current Rule 23(f), they have developed standards for review. But it may be that a similar set of general standards would not be easy to fashion. Would input from the district court be useful in making decisions on whether to permit immediate appeals? If so, is the bracketed provision calling for a district court determination that there is no just reason for delay in the appeal a useful method of providing that assistance to the court of appeals? Would it actually be more of a burden to the district court than boon to the court of appeals?

(8) Notice

This topic has received limited attention in discussion to date. Therefore this memorandum presents the discussion that appeared in the agenda memo for the April 9 Advisory Committee meeting and adds some comments and questions.

April 2015 Agenda Materials

In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Court observed (id. at 173-74, emphasis in original):

> Rule 23(c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members not requesting exclusion. To this end, the court is required to direct to class members "the best notice practicable under the circumstances *including individual notice to all members who can be identified through reasonable effort*." We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.
>
> The Advisory Committee's Note to Rule 23 reinforces this conclusion. The Advisory Committee described subdivision (e)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class procedure is of course subject." [The Court discussed Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Schroeder v. City of New York, 371 U.S. 208 (1962), emphasizing due process roots of this notice requirement and stating that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable."]
>
> Viewed in this context, the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort.

Research would likely shed light on the extent to which more recent cases regard means other than U.S. mail as sufficient to give "individual notice." The reality of 21st century life is that other means often suffice. The question is whether or how to alter Rule 23(c)(2) to make it operate more sensibly. Here are alternatives:

1 **(2) Notice**

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice by electronic or other means to all members who can be identified through reasonable effort. * * * * *

It is an understatement to say that much has changed since Eisen was decided. Perhaps it is even correct to say that a communications revolution has occurred. Certainly most Americans are accustomed today to communicating in ways that were not possible (or even imagined) in 1974. Requiring mailed notice of class certification seems an anachronism, and some reports indicate that judges are not really insisting on it.

Indeed, the current ease of communicating with class members has already arisen with regard to the cy pres discussion, topic (3) above. It appears that enterprises that specialize in class action administration have gained much expertise in communicating with class members. Particularly in an era of "big data," lists of potential class members may be relatively easy to generate and use for inexpensive electronic communications.

For the present, the main question is whether there is reason not to focus on some relaxation of the current rule that would support a Committee Note saying that first class mail is no longer required by the rule. Such a Note could presumably offer some observations about the variety of alternative methods of communicating with class members, and the likelihood that those methods will continue to evolve. The likely suggestion will be that courts should not (as *Eisen* seemed to do) embrace one method as required over the long term.

Notice in Rule 23(b)(1) or (b)(2) actions

Another question that could be raised is whether these developments in electronic communications also support reconsideration of something that was considered but not done in 2001-02.

The package of proposed amendments published for comment in 2001 included a provision for reasonable notice (not individual notice, and surely not mandatory mailed notice) in (b)(1) and (b)(2) class actions. Presently, the rule contains no requirement of any notice at all in those cases, although Rule 23(c)(2)(A) notes that the court "may direct appropriate notice to the class." In addition, Rule 23(d)(1)(B) invites the court to give "appropriate notice to some or all class members" whenever that seems wise. And if a settlement is proposed, the

notice requirement of Rule 23(e)(1) applies and "notice in a reasonable manner" is required. But if a (b)(1) or (b)(2) case is fully litigated rather than settled, the rule does not require any notice at any time.

It is thus theoretically possible that class members in a (b)(1) or (b)(2) class action might find out only after the fact that their claims are foreclosed by a judgment in a class action that they knew nothing about.

In 2001-02, there was much forceful opposition to the proposed additional rule requirement of some reasonable effort at notice of class certification on the ground that it was already difficult enough to persuade lawyers to take such cases, and that this added cost would make an already difficult job of getting lawyers to take cases even more difficult, and perhaps impossible. The idea was shelved.

Is it time to take the idea off the shelf again? One question is whether the hypothetical problem of lack of notice is not real. It is said that (b)(2) classes exhibit more "cohesiveness," so that they may learn of a class action by informal means, making a rule change unnecessary. It may also be that there is almost always a settlement in such cases, so that the Rule 23(e) notice requirement does the needed job. (Of course, that may occur at a point when notice is less valuable than it would have been earlier in the case.) And it may be that the cost problems that were raised 15 years ago have not abated, or have not abated enough, for the vulnerable populations that are sometimes the classes in (b)(2) actions.

The Subcommittee has not devoted substantial attention to these issues. For present purposes, this invitation is only to discuss the possibility of returning to the issues not pursued in 2002. If one wanted to think about how a rule change might be made, one could consider replacing the word "may" in Rule 23(c)(2)(A) with "must." A Committee Note might explore the delicate issues that courts should have in mind in order to avoid unduly burdening the public interest lawyers often called upon to bring these cases, and the public interest organizations that often provide support to counsel, particularly when the actions may not provide substantial attorney fee or cost awards.

Reporter's Comments and Questions

Recurrent references in cases mainly addressing other issues to use of electronic means for giving notice and giving class members access to information about a class action or proposed settlement suggest that creative work is occurring without the need for any rule change. The sketch of additions to Rule 23(e)(1) in Part (1) above directs that the resulting information be made available to class members, and the likely method for

doing so would be some sort of electronic posting. In at least some cases, electronic submission of claims is done.

No doubt participants in the Sept. 11 mini-conference are more familiar with these developments than those who only read the case reports. But these developments raise the question whether there is really any need for a rule change.

If changes are warranted for Rule 23(b)(3) actions, the question remains whether the time has come for revisiting the question of required notice of some sort in (b)(1) and (b)(2) actions.

(9) Pick-Off and Rule 68

This topic has received limited attention since the April 9 Advisory Committee meeting. Accordingly, the material below is drawn from the agenda materials for that meeting.

One development is that the Supreme Court has granted cert. in a case that may address related issues. Gomez v. Campbell-Ewald Co., 768 F.3d 871 (9th Cir. 2014), cert. granted, 135 S.Ct. 2311 (2015). Another is the Seventh Circuit decision in Chapman v. First Index, Inc., ___ F.3d ___, 2015 WL 4652878 (7th Cir. No. 14-2772, Aug. 6, 2015). See also Hooks v. Landmark Indus., Inc., ___ F.3d ___, 2015 WL _____ (5th Cir. No. 14-20496, Aug. 12, 2015) (holding that "an unaccepted offer of judgment cannot moot a named-plaintiff's claim in a putative class action"). Below in the Reporter's Comments and Questions section, a key inquiry will be whether the present state of the law calls for rule changes.

April 2015 Agenda Materials

First Sketch: Rule 23 Moot
(Cooper approach)

(x) (1) When a person sues [or is sued] as a class representative, the action can be terminated by a tender of relief only if
(A) the court has denied class certification and
(B) the court finds that the tender affords complete relief on the representative's personal claim and dismisses the claim.
(2) A dismissal under Rule 23(x)(1) does not defeat the class representative's standing to appeal the order denying class certification.

Committee Note

A defendant may attempt to moot a class action before a certification ruling is made by offering full relief on the individual claims of the class representative. This ploy should not be allowed to defeat the opportunity for class relief before the court has had an opportunity to rule on class certification.

If a class is certified, it cannot be mooted by an offer that purports to be for complete class relief. The offer must be treated as an offer to settle, and settlement requires acceptance by the class representative and approval by the court under Rule 23(e).

Rule 23(x)(1) gives the court discretion to allow a tender of complete relief on the representative's claim to moot the action after a first ruling that denies class certification. The tender must be made on terms that ensure actual payment. The

court may choose instead to hold the way open for certification of a class different than the one it has refused to certify, or for reconsideration of the certification decision. The court also may treat the tender of complete relief as mooting the representative's claim, but, to protect the possibility that a new representative may come forward, refuse to dismiss the action.

If the court chooses to dismiss the action, the would-be class representative retains standing to appeal the denial of certification. [say something to explain this?]

[If we revise Rule 23(e) to require court approval of a settlement, voluntary dismissal, or compromise of the representative's personal claim, we could cross-refer to that.]

Rule 68 approach

Rule 68. Offer of Judgment

* * * * *

(e) Inapplicable in Class and Derivative Actions. This rule does not apply to class or derivative actions under Rules 23, 23.1, or 23.2.

This addition is drawn from the 1984 amendment proposal for Rule 68. See 102 F.R.D. at 433.

This might solve a substantial portion of the problem, but does not seem to get directly at the problem in the manner that the Cooper approach does. By its terms, Rule 68 does not moot anything. It may be that an offer of judgment strengthens an argument that the case is moot, because what plaintiffs seek are judgments, not promises of payment, the usual stuff of settlement offers. Those judgments do not guarantee actual payment, as the Cooper approach above seems intended to do with its tender provisions. But a Committee Note to such a rule might be a way to support the conclusion that we have accomplished the goal we want to accomplish. Here is what the 1984 Committee Note said:

> The last sentence makes it clear that the amended rule does not apply to class or derivative actions. They are excluded for the reason that acceptance of any offer would be subject to court approval, see Rules 23(e) and 23.1, and the offeree's rejection would burden a named representative-offeree with the risk of exposure to potentially heavy liability that could not be recouped from unnamed class members. The latter prospect, moreover, could lead to a conflict of interest between the named representative and other members of the class. See, Gay v.Waiters & Dairy

Lunchmen's Union, Local 30, 86 F.R.D. 500 (N.D. Cal. 1980).

Alternative Approach in Rule 23

Before 2003, there was a considerable body of law that treated a case filed as a class action as subject to Rule 23(e) at least until class certification was denied. A proposed individual settlement therefore had to be submitted to the judge for approval before the case could be dismissed. Judges then would try to determine whether the proposed settlement seemed to involve exploiting the class-action process for the individual enrichment of the named plaintiff who was getting a sweet deal for her "individual" claim. If not, the judge would approve it. If there seemed to have been an abuse of the class-action device, the judge might order notice to the class of the proposed dismissal, so that other class members could come in and take up the litigation cudgel if they chose to do so. Failing that, the court might permit dismissal.

The requirement of Rule 23(e) review for "individual" settlements was retained in the published preliminary draft in 2003. But concerns arose after the public comment period about how the court should approach situations in which the class representative did seem to be attempting to profit personally from filing a class action. How could the court force the plaintiff to proceed if the plaintiff wanted to settle? One answer might be that plaintiff could abandon the suit, but note that "voluntary dismissal" is covered by the rule's approval requirement. Another might be that the court could sponsor or encourage some sort of recruitment effort to find another class representative. In light of these difficulties, the amendments were rewritten to apply only to claims of certified classes.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) **Before certification.** An action filed as a class action may be settled, voluntarily dismissed, or compromised before the court decides whether to grant class-action certification only with the court's approval. The [parties] {proposed class representative} must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(2) **Certified class.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(A~~1~~) The court must direct notice in a reasonable

manner * * * * *

(3) **Settlement after denial of certification.** If the court denies class-action certification, the plaintiff may settle an individual claim without prejudice to seeking appellate review of the court's denial of certification.

The Committee Note could point out that there is no required notice under proposed (e)(1). It could also note that prevailing rule before 2003 that the court should review proposed "individual" settlements. The ALI Principles endorsed such an approach:

> This Section favors the approach of requiring limited judicial oversight. The potential risks of precertification settlements or voluntary dismissals that occur without judicial scrutiny warrant a rule requiring that such settlements take effect only with prior judicial approval, after the court has had the opportunity to review the terms of the settlement, including fees paid to counsel. Indeed the very requirement of court approval may deter parties from entering into problematic precertification settlements.

ALI Principles § 3.02 comment (b).

Proposed (e)(3) seeks to do something included also in the Cooper approach above -- ensure that the proposed class representative can appeal denial of certification even after settling the individual claim. Whether something of the sort is needed is uncertain. The issues involved were the subject of considerable litigation in the semi-distant past. See, e.g., United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980); United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). It is not presently clear whether this old law is still good law. It might also be debated whether the class representative should be allowed to appeal denial of certification. Alternatively, should class members be given notification that they can appeal? In the distant past, there were suggestions that class members should be notified when the proposed class representative entered into an individual settlement, so that they could seek to pursue the class action.

Reporter's Comments and Questions

The above materials suggest a variety of questions that might be illuminated by discussion on Sept. 11. A basic one is the extent of the problem. One view is that (at least pending the Supreme Court's decision in the case it has taken) this problem was largely limited to one circuit, which has seemingly

overruled the cases that had presented the problem.

But another view might be that the existence of this issue casts a shadow over cases filed in other circuits. It has happened that parties in such cases have felt obligated to file out-of-the-chute certification motions, and some district judges have stricken such motions in the ground they are premature.

Assuming there is reason to give serious consideration to a rule change, there are a variety of follow-up questions. One is whether anything more than "the minimum" change is needed. And if the minimum is all that is needed, would a change to Rule 68 saying that it is inapplicable in actions under Rules 23, 23.1, and 23.2 suffice?

As illustrated by the above sketches, a number of other issues might be addressed. These include:

(1) Undoing the limitation of Rule 23(e) to settlements that purport in form to bind the class. This limitation was added in 2003. Before that, most circuits held that court review was required for "individual" settlements as well as "class" settlements, but that notice to the class was not.

(2) A rule could require court approval of a dismissal and also require that the parties submit details of the deal to the court.

(3) A rule could affirmatively preserve the settling individual's right to seek appellate review of the district court's denial of class certification.

(4) A rule could specify that the parties must seek judicial approval of an individual settlement before certification, but leave notice to the class to the discretion of the court.

There surely are additional possibilities.

APPENDIX
Selected Ascertainability Suggestions

This listing does not purport to exhaust the submissions on this topic.

No. 15-CV-D, from Professors Adam Steinman, Joshua Davis, Alexandra Lahav & Judith Resnik, proposes adding the following to Rule 23(c)(1)(B):

> A class definition shall be stated in a manner that such an individual could ascertain whether he or she is potentially a member of the class.

No. 15-CV-I, from Jennie Anderson, proposes adding the following to Rule 23(c)(1)(B):

> An order must define the class in objective terms so that a class member can ascertain whether he or she is a member of the class. A class definition is not deficient because it includes individuals who may be ineligible for recovery.

No. 15-CV-J, from Frederick Longer proposes addressing the "splintering interpretation" of ascertainability by adding the following to Rule 23(c)(2)(B)(ii):

> the definition of the class in clear terms so that class members can be identified and ascertained through ordinary proofs, including affidavits, prior to issuance of a judgment.

No. 15-CV-N, from Public Justice, proposes adding the following to Rule 23(c)(1)(B)

> In certifying a class under Rule 23(b)(3), the court must define the class so that it is ascertainable by reference to objective criteria. The ascertainability or identifiability of individual class members is not a relevant consideration at the class certification stage.

No. 15-CV-P, from the National Consumer Law Center and National Assoc. of Consumer Advocates proposes adding the following to Rule 23(c)(1)(B):

> A class is sufficiently defined if the class members it encompasses are described by reference to objective criteria. It is not necessary to prove at the class certification stage that all class members can be precisely identified by name and contact information.

TAB 7B

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M E M O R A N D U M

To: Standing Committee

From: Civil Rules Pilot Project Subcommittee

Date: December 12, 2015

One of the conclusions reached in the process of developing the rule amendments that became effective on December 1, 2015, was that additional innovations in civil litigation may be more likely if they are tested first in a series of pilot projects. To pursue the possible development of such pilot projects, a subcommittee was formed to investigate pilot projects already completed in other locations and to recommend possible pilot projects for federal courts.

The subcommittee began its work by collecting information. Contact was made with the National Center for State Courts, the Institute for Advancement of the American Legal System, the Conference of State Court Chief Justices, and various innovative federal courts. Exhibits A, B, C, and D contain summary memos prepared by members of the subcommittee regarding pilot projects undertaken in various state and federal courts. Exhibit E describes a pilot project undertaken at the direction of Congress in the early 1990s.

After considering a number of alternatives, the subcommittee has focused on two possible pilot projects: one on enhanced initial disclosures, and another that calls upon judges to set more aggressive schedules for completion of litigation and, at the same time, trains them on case management techniques needed to adhere to such schedules.

A. Enhanced Disclosures.

This is a rule-driven project that would make more robust the voluntary disclosures already required by Civil Rule 26(a) at the beginning of a case to include helpful *and* hurtful information known by each party. It is similar to an Arizona state court rule that has been used with some success for over a decade, as well as an analogous rule in Colorado and the federal employment law protocols currently used by many federal judges. It also is akin to a proposed amendment to Civil Rule 26(a) that failed to pass in the late 1990s.

As you may know, the Civil Rules actually required mandatory disclosure of unfavorable information in the version of Rule 26(a)(1) that was in effect from 1993 to 2000, but it permitted individual districts to opt out. So many districts opted out that the Committee eventually concluded that elimination of the opt-out provision was needed, and the only way to get such a change through the full Enabling Act process was to dial back the Rule 26(a)(1) disclosure requirements to information a party may use to support its own claims or defenses.

Nevertheless, as shown in Exhibits A-D, many state court pilot projects have included enhanced initial disclosures. The idea, of course, is to get information on the table that otherwise would be found only through expensive discovery. The discovery protocols for federal employment cases appear to have shown that enhanced disclosures can improve the efficiency of litigation. Exhibit F is a summary of a study recently completed by the Federal Judicial Center on the effect of the employment protocols. It finds significantly fewer discovery disputes in cases where the protocols are used.

Some states require more substantial initial disclosures. One example is Arizona Rule 26.1(a), a copy of which is included as Exhibit G. The idea behind Rule 26.1(a)(9) is to require parties to produce all documents relevant to the case, including unfavorable documents, at the outset of the litigation. The Rule also requires parties to identify all persons with knowledge of the case, and to provide a general description of their knowledge. This Rule, combined with other Arizona innovations (depositions limited to parties and experts, depositions limited to four hours, only one expert per issue) appears to have produced favorable results. In a survey completed for the Advisory Committee's May 2010 conference, 73% of Arizona lawyers who practice in federal and state court said that they prefer state court, as compared to 43% of lawyers nationally.

Exhibit H includes a draft set of initial disclosure rules prepared by one of the subcommittee's groups. It includes portions of the Arizona rule, but is not as aggressive. The subcommittee feels that this draft must be more specific in its description of the documents to be disclosed. Otherwise, lawyers will provide only the most general descriptions of "categories" of documents and little that is helpful will be revealed. The subcommittee is working on more specific language, and welcomes any suggestions.

In considering such a pilot project, we should keep in mind the experience from the 1990s. Attached as Exhibit I is a summary of some of the arguments made in opposition to the enhanced disclosure rule proposed at that time.

We would appreciate your thoughts on several questions: Should the Advisory Committee promote a pilot project that tests the benefits of initial disclosures? Alternatively, should the Committee proceed directly to drafting and publishing a rule amendment requiring more robust initial disclosures? If a pilot project were undertaken, what would we measure to determine its success?

B. Case Expedition.

The goal of the Civil Rules is to further the "just, speedy, and inexpensive determination of every action." Case dispositions that are not speedy and inexpensive often are not just.

Under this pilot, judges would use the initial case management conference to set a firm time cap on discovery and a firm trial date no more than 12 to 14 months from the filing of each case. For such a schedule to work, judges would be required to resolve discovery disputes and dispositive motions promptly. Exceptions to the 12-14 month trial date would be needed for some complex cases, but the subcommittee is inclined to limit the exceptions to narrowly defined categories of cases, such as patent cases, MDLs, and class actions. Pilot judges would still be required to set firm caps on discovery and firm trial dates in these cases, and to resolve discovery disputes and dispositive motions promptly.

Building on the work of several federal and state courts, this project would attempt to seize on the increased reasonableness associated with discovery that must be finished within a discrete time period. A similar dynamic is at play when trial judges allocate a set amount of time for each party to present its case at trial; redundancy is lessened and efficiency increases.

To increase the odds of success with this pilot, and to develop materials that might be used in general judge training if more aggressive schedules were to be proposed broadly, the pilot would include significant judicial training, in conjunction with the FJC, to educate the pilot judges on the kinds of tools that would make the pilot goals achievable. The pilot project could examine, over time, the ability of judges to set expeditious and effective litigation schedules as they are trained, gain experience, and share ideas in meetings with colleagues.

There are several premises for such a pilot: (1) the longer a case takes to resolve, the more expensive it is for the parties; (2) the combination of tight timetables for discovery, prompt resolution of discovery and dispositive motions,

and firm trial dates is more likely to prompt lawyers to be reasonable in their discovery requests and litigation behavior than any rule; and (3) lawyer cooperation should increase when both parties must conduct discovery within a relatively short period of time.

C. Another Possible Pilot Project.

The subcommittee has considered a pilot project that would divide cases into separate tracks for simple, standard, and complex cases. Such case-tracking was tried in federal courts during the 1990s Congress-initiated CJRA pilots, and has been tried in several states. Case tracking is still used in some courts, but has at other times encountered difficulty in efficiently and accurately identifying cases for specific tracks. The Conference of State Chief Justices is currently preparing a tracking recommendation, and an initial draft is likely to be available in the spring. We will continue to watch that effort and consider the possible role of case tracking in our pilot project proposals.

D. Other Thoughts.

Any pilot effort would require not only the participation of the Civil Rules and Standing Committees, but also CACM and the FJC. We have made a report to CACM, which was received favorably, and CACM plans to designate one or two liaisons for our pilot project effort. Jeremy Fogel of the FJC has also been an active participant in our pilot project conference calls.

We are considering the following possible timetable:

- April 2016—approval by Civil Rules Committee.
- June 2016—approval by Standing Committee.
- September 2016—approval by Judicial Conference.
- Early 2017—initial implementation.
- End of 2019—completion.

Our current thinking is that pilot districts must be willing to make the pilot requirements mandatory, all judges in the district must be willing to participate, and at least three to five districts will be needed.

This is a work in process. We would very much appreciate your thoughts and suggestions.

EX. A

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MEMORANDUM

To: Simplified Procedures Working Group, Pilot Project Subcommittee

From: Virginia Seitz

Re: Summary of CO, MN, IA and MA Projects and Reforms

Date: October 2015

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To assist the Simplified Procedures working group of the Pilot Project Subcommittee, this memorandum summarizes recent reforms and pilot projects undertaken by courts in Colorado, Massachusetts, Iowa and Minnesota. The Colorado, Iowa, and Massachusetts pilots all focused on "business cases." Minnesota conducted an expedited case pilot project which focused on particular types of cases (e.g., contract and consumer injury cases). Generally, all of these actions were the product of study done by task forces within the states. As was true in the state reforms discussed in Judge St. Eve's memorandum, the purpose of the reforms and the pilots was to improve access to justice by decreasing costs and time to resolution in civil cases. I reviewed the task force recommendations, the pilot projects, available evaluations and the helpful material on the website of the Institute for the Advancement of the American Legal System's ("IAALS'") Rule One initiative project. As you will see, there was far more information about the Colorado pilot than any of the other three states' pilots which were less ambitious and which did not have the benefit of an IAALS evaluation.

I. Colorado Civil Access Pilot Project ("CAPP"). Based on the recommendations of a Task Force, Colorado implemented a pilot project that applied generally to "business actions" on January 1, 2012. Five district courts in the state participated in the project. Initially, the project had a term of two years, but it was twice extended and concluded only in June 2015.

A. Pilot Rules. The pilot rules incorporated a number of components that will sound familiar to this group:

1. The rules expressly provided that proportionality principles would guide the interpretation and application of the rules.

2. The rules required that complaints and responsive pleadings include all material facts. General denials in responsive pleadings were deemed admissions.

3. The rules required robust initial disclosures, including all matters beneficial and harmful, to be accompanied by a privilege log. Both the disclosures and the log had to be filed with the court. In addition, disclosures took place on a staggered schedule, that is, the plaintiff was required to make disclosures before the defendant was required to answer. The court had the power to impose sanctions if either party failed to make proper disclosures.

4. The rules required defendant(s) to answer the complaint even when moving to dismiss the complaint.

5. The rules required the parties to meet and confer on the preservation of documents shortly after the defendant answers the complaint. In addition, the parties were required to promptly prepare a joint case management report which states the issues, makes a proportionality assessment, and proposes timelines and levels of discovery.

6. Again every early on, the Judge was required to hold an initial case management conference to shape the pretrial process. That process was then set forth in a Case Management Order, which could be modified only for "good cause."

7. The rules provided that the scope of discovery should be matters that "enable a party to prove or disprove a claim or defense or to impeach a witness" and, again, should be subject to the proportionality principle.

8. The rules allowed each party only one expert per issue or specialty at issue. In addition, expert discovery and testimony was limited to the expert report. No depositions of expert witnesses were allowed.

9. The general rule was that one judge would handle all pretrial matters and the trial; the judge would engage in "active" management of the case, holding prompt conferences to address any issues that arise on summary briefing.

10. The rules provided that no continuances would be granted absent "extraordinary circumstances."

B. Pilot Hypotheses. The developers of the project had the following hypotheses about the effect of the CAPP rules:

1. There would be a reduction in the length of time to resolution for cases.

2. There would be a decrease in the cost of resolution for cases.

3. The process would be fair for all parties.

4. There would be a substantial increase in judicial involvement in cases.

5. The number of judges per case would decrease.

6. There would be a decrease in motions practice.

7. There would be a decrease in motions practice associated with discovery.

8. There would be a decrease in trial time.

9. There would be an increase in the number of cases that went to trial.

10. There would be a decrease in the amount of trial time per trial.

11. There would be an improvement in all aspects of proportionality.

C. Pilot Evaluation. At the request of the pilot project developers, IAALS conducted an evaluation and issued a report about the CAPP rules in October 2014. The report reached the following conclusions:

1. The CAPP rules reduced the time to resolution of cases over both the existing regular and expedited procedures. Four of five attorneys surveyed expressed the view that the time spent on the case was proportionate to the nature of the case.

2. Three of four attorneys surveyed expressed the view that the cost of cases under the CAPP rules was proportionate to the nature of the case.

3. Both a docket study and the attorney survey indicated that the CAPP process was not tilted toward plaintiffs or defendants.

4. The docket study and surveys reported a general adherence to the timelines imposed.

5. The evaluation reports that parties did see the judge in a case at a much earlier stage and that cases were generally handled by a single judge. This was by far the "most approved" part of the CAPP rules – the early, active and ongoing judicial management of the cases. In addition, the evaluation concluded that the initial case management conference was the most useful tool in shaping the pretrial process, including ensuring proportionate discovery. E.g., the evaluation states: "Judges point to the initial case management conference as the most useful tool in shaping the pre-trial process to ensure that it was proportional."

6. The evaluation found that the CAPP rules significantly reduce motions practice, especially extension requests.

7. The evaluation found that far fewer discovery motions were filed.

8. The evaluation concluded that discovery was both proportionate and sufficient.

9. **Notable Non-Results.** The evaluators were surprised to see that the CAPP rules had little effect on the rate at which cases went to trial, the length of trials or the number of dispositive motions filed or granted.

The evaluation also identified certain "challenges" with respect to the CAPP rules which might more forthrightly be called criticisms. First, parties were generally critical of the staggered deadlines for a number of reasons. Because the timing of a defendant's responsive disclosures and pleadings were keyed to the time of a plaintiff's disclosures, there was no predictability about that deadline. In addition, plaintiffs sometimes sought to compress a defendant's timing by immediately filing disclosures with his or her complaint or shortly thereafter. Both the parties and the courts complained about the uncertainty resulting from making one deadline contingent upon a prior event, preferring rules that specify due dates. Second, there were complaints about the enforcement of the requirements of both expanded pleading and robust early disclosures. Third, both litigants and judges complained about the uncertainty of the extraordinary circumstances test for continuances and extensions. Fourth, the parties surveyed strongly advocated for the return of depositions of expert witnesses. Finally, the parties and judges found that the categorization of cases as "business" and within the pilot or not was too difficult and should be simplified.

One other interesting point: The evaluators noted that the anecdotal responses and comments in the attorney and judicial surveys were not nearly as positive as the data was. The parties in particular cited the complexity and bureaucracy of the CAPP rules, and observed that it was inherently confusing to have several different sets of civil rules operating at the same time in the same court. This may be an under-appreciated downside of pilot projects.

II. Minnesota Civil Justice Reform Task Force. Pursuant to a December 2011 report from the Civil Justice Reform Task Force, Minnesota implemented revisions to its Rules of Civil Procedure and General Rules of Practice and a pilot project. Minnesota's Rules of Civil Procedure and General Rules of Practice for District Courts were amended in February 2013. The rules amendments included:

1. Incorporating proportionality into the scope of discovery.

2. Adoption of the federal regime of automatic initial disclosures.

3. Requirement of a discovery conference of counsel and discovery plan in every case.

4. An expedited process for non-dispositive motions.

5. A new program to address Complex Cases.

No evaluation of these rule changes has yet occurred.

On May 7, 2013, the Minnesota Supreme Court also authorized the creation of a Pilot Expedited Civil Litigation Track in two districts. This track applies to cases involving "contract disputes, consumer credit, personal injury and some other types of civil cases." The project is intended to answer the question whether this package of changes will reduce the duration and cost of civil suits.

1. The track requires early automatic disclosures from both parties, as well as a summary of the contentions in support of every claim, a witness list and contact information and any statements of those witnesses.

2. The track requires both parties to produce copies of all documents and things that will be used to support all claims or defenses, a description of the damages sought, a disclosure of insurance coverage, and a summary of any expert's qualifications accompanied by a statement that sets forth any facts and opinions of that expert and their grounds.

3. The track requires an early case management conference that includes a discussion of settlement prospects and the setting of a trial date, as well as deadlines for the submission of documents that will be used in trial.

4. The track limits discovery to 90 days after issuance of the case management order. The track both limits written discovery and requires that it be served within 30 days of issuance of the case management order.

5. The track requires parties to meet and confer on all motions and then limits the parties to letter briefs of two pages on issues submitted to the judge for resolution.

6. The "intention" of the track is to secure the setting of an early trial date (within four to six months of filing) and to have that date be a "date certain."

It appears that the Court intended that an initial evaluation of the pilot should have occurred by this time, but I have been unable to locate any evaluation. The 2014 Annual Report of the Minnesota Judicial Branch stated that an evaluation of the pilot project is now expected sometime in 2015.

III. Iowa Civil Justice Reform Task Force. Iowa is implementing a report called *Reforming the Iowa Civil Justice System*, issued in March 2012. That report called for a specialty business court pilot project for three years starting in May of 2013. "Cases are eligible to be heard in the Business Court Pilot Project if compensatory damages totaling $200,000 or more are alleged or the claims seek primarily injunctive or declaratory relief." Parties participate in the pilot only if both sides agree and if the state administrator accepts the case for the project. The court has assigned three judges who manage all cases assigned to the project. In every accepted matter, the court assigns one judge for litigation while another is assigned to handle settlement negotiations.

I found an "initial evaluation" of the pilot project that was issued in August 2014. At that point, this specialized court had handled only ten cases, and only one attorney had submitted an evaluation, so that data set was quite limited.

The judges assigned to the business court made the following observations:

1. The strategy of assigning a separate business court judge to handle settlement negotiations works well.

2. The judges suggested that videoconferencing could save travel time and money for lawyers using a specialized court.

3. Additional steps would be needed to publicize and promote the business court program.

In addition, on August 29, 2014, Iowa adopted new Iowa Rule of Civil Procedures 1.281, an expedited civil action rule for cases involving $75,000 or less in damages, to become effective January 1, 2015. Parties with higher damages may stipulate to proceeding under this rule. [The court separately amended its rules to require proportional discovery and initial disclosures; I did not review these provisions as they fall into another working group's area.] The key features of the expedited civil action rule are:

1. Limits on discovery, i.e., no more than 10 interrogatories, 10 requests for production and 10 requests for admission (absent leave of court). There are also limited numbers of depositions.

2. One summary judgment motion may be filed by each party.

3. When cases on this track go to trial, the jury includes only six persons, and trial time is limited to six hours. In addition, cases on this track shall be tried within one year of filing unless otherwise ordered for good cause.

The new expedited civil action rule has not yet been evaluated. Within the first month of its effective date, however, more than 25 cases were filed to proceed on the expedited track.

IV. Massachusetts Business Litigation Session Pilot Project. This project was implemented on a voluntary basis in only a couple of county courts. It is focused on initial disclosures and discovery, which are the purview of another working group. The project began in January 2010 and ran through December 2011. The pilot incorporated several of the IAALS principles, including:

1. Limiting discovery proportionally to the magnitude of the claims at issue.

2. Staging discovery where possible.

3. Requiring all parties to produce "all reasonably available non-privileged, non-work product documents and things that may be used to support the parties' claims, counterclaims or defenses."

4. Requiring the parties to confer early and often and to make periodic reports to the court especially in complex cases.

At the conclusion of the pilot, the court conducted a survey which had a low rate of response, but follow up questions elicited more feedback. A large majority

of users of the project rules reported high satisfaction (80%). I could locate no substantive evaluation of the project.

* * * *

There are several elements of any regime of simplified rules that we should consider if we pursue a pilot project in this area. The following elements seem to receive universal acclaim: Robust early disclosures; an early case management conference and case management order with firm deadlines for discovery and trial date; accessible, active judicial management of the case, with short letter briefs and quick decisions on non-dispositive motions. One regular bone of contention appears to be selecting the right cases for slimmed-down procedures.

EX. B

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SIMPLIFIED PROCEDURES SUBCOMMITTEE --
SUMMARY OF CERTAIN JUDICIAL REFORMS

As part of the "Simplified Procedures" Pilot Project Subcommittee, this memorandum summarizes recent judicial reforms employed by New Hampshire, New York, Ohio, and Texas. The New Hampshire and Ohio reforms arose out of pilot projects implemented in various counties in those states. The New York and Texas reforms were based on recommendations by Task Forces created by their respective Supreme Courts. The general goal of these judicial reforms was to increase access, decrease expenses, and increase judicial management in civil cases.

I have reviewed the relevant pilot projects, the Task Force recommendations, the new rules, various articles about the rules, an evaluation from the National Center for State Courts, and any relevant information on the Institute for the Advancement of the American Legal System's ("IAALS") Rule One initiative project.

I. New Hampshire Pilot Project:

In 2013, the Supreme Court of New Hampshire ordered the implementation of its Superior Court Proportional Discovery/Automatic Disclosure Pilot ("PAD") Rules in all counties in the state. New Hampshire originally implemented the pilot in two counties. The PAD Pilot Rules focus on changes to the pleading requirements and discovery rules. Specifically, the PAD Pilot Rules have five aspects:

1. Pleading Standards: The pleading standard changed from notice pleading to fact pleading for both complaints and answers. The parties must state the material factual basis on which any claim or defense is based. The intent behind the rule is to expedite the civil litigation process by giving sufficient factual information for the other side to evaluate the merits.

2. Early Meet and Confer: The parties must meet and confer within twenty days of the filing of the answer and establish deadlines for discovery, ADR, dispositive motions, and a trial date. The parties submit their agreement to the court and it becomes the "case structuring order." If the parties agree on the deadlines, they do not need a conference with the court.

3. Early and Meaningful Initial Disclosures: This requirement mandates automatic disclosure of names and contact information of those individuals who have information about a party's claims or defenses and a brief summary of such information. The parties also have to disclose all documents, ESI and tangible things to support their respective claims and defenses, including a) a category of damages, and b) insurance agreements or polices under which such damages may be paid. If a party fails to make

these disclosures, a court can impose sanctions including barring the use of them at trial. This rule is intended to expedite discovery.

4. Limit on Interrogatories and Deposition Hours: The fourth aspect of the pilot project limits the number of interrogatories to no more than 25 and the number of deposition hours to 20 hours. Given the early disclosures in number 3, the PAD Pilot Project anticipated that the parties would need less discovery. The parties can waive these limitations by stipulation or the court can waive them for good cause.

5. Preservation of ESI: The fifth rule requires the parties to meet and confer to discuss the preservation of ESI and to agree on deadlines and procedures for the production of ESI. This rule includes a proportionality requirement – the ESI costs must be proportional to the significance of the issues in dispute.

The National Center for State Courts ("NCSC") evaluated the New Hampshire PAD Pilot Rules. As part of the review, the NCSC interviewed judges, attorneys, court clerks, and staff of the Administrative Office of the Courts. They also evaluated pre-implementation and post-implementation case data. The NCSC's findings are discussed below.

First, the PAD Pilot Rules have not impacted the case disposition time, although the NCSC only had a small number of cases over a short period of time to evaluate. They have, however, significantly decreased the proportion of cases that ended in a default judgment.

Second, the PAD Pilot Rules have not had any real impact on discovery disputes based on the NCSC's review of the percentage of cases both pre-implementation and post-implementation with discovery disputes. New Hampshire thought the automatic disclosure requirement in number 3 would decrease discovery disputes.

The NCSC made several recommendations based on its review:

1. Clarify the existing ambiguity in the current appearance requirement.

2. Establish a firm trial date in the case structuring order.

3. Avoid aggressive enforcement of the rules except for intentional or bad faith noncompliance.

4. Establish a uniform time standard for return of service.

II. New York Task Force

New York created a Task Force on Commercial Litigation in the 21st Century to recommend reforms to enhance litigation in its Commercial Division. The New York Task Force submitted its final report to the Chief Judge in June 2012. The report made multiple recommendations that are not relevant to our pilot project's scope including endorsing the Chief

Judge's legislative proposal to establish a new class of Court of Claims judges; increasing the monetary threshold for actions to be heard in the Commercial Division; implementing several measures to provide additional support to the Division, including additional law clerks and the creation of a panel of "Special Masters"; assigning cases to the Commercial Division earlier in the process; creating standardized forms; improving technology in the courtrooms; and appointing a statewide Advisory Council to review the recommendations and guide implementation.

In addition, the Task Force made several recommendations, some of which have resulted in the implementation of new rules. All of the recommendations apply to cases in the Commercial Division only. These areas may be appropriate for pilot projects.

1. Robust expert disclosures: The Task Force recommended the parties make more robust and timely expert disclosures, similar to the disclosure requirements in the Federal Rules. The Rule would require expert disclosures, written reports, and depositions of testifying experts to be completed no later than four months after the close of fact discovery.

2. New privilege log rules to streamline discovery: The Task Force concluded that the creation of privilege logs has become a substantial, needless expense in many complex commercial cases. In order to limit unnecessary costs and delay in the creation of such logs, the Task Force recommended limitations on privilege logs. Specifically, the Task Force recommended that parties meet and confer in advance in an effort to stipulate to limitations on privilege logs. It referenced four orders or principles as examples for limiting privilege logs:

a) The Sedona Principles: The Sedona Principles encourage parties to meet in advance and reach mutually agreed-upon procedures for the production of privileged information. The Principles encourage the acceptance of privilege logs that classify privileged documents by categories, rather than individual documents.

b) The Facciola-Redgrave Framework: Magistrate Judge John Facciola and attorney Jonathan Redgrave have proposed that parties should meet regarding privilege logs and agree to limit documents that require logging, use categories to organize privileged documents, and use detailed logs only when necessary. *See* John Facciola & Jonathan Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 The Fed. Cts. L. Rev. 19 (2009).

c) The Southern District of New York's Pilot Project Regarding Case Management Techniques for Complex Civil Cases: The SDNY addresses privilege assertions in its pilot project for complex cases. The following documents do not have to be included on a privilege log: 1) communications exclusively between a party and its trial counsel; 2) work product created by trial counsel, or an agent of trial counsel other than a party, after the commencement of

the action; 3) internal communications within a law firm, a legal assistance organization, a governmental law office, or a legal department of a corporation or of another organization; and 4) documents authored by trial counsel for an alleged infringer in a patent infringement action. The order also provides a specific procedure for a person who challenges the assertion of a privilege regarding documents, including the submission of a letter to the court with no more than five representative documents that are the subject of the request.

d) The District of Delaware's Default Standard for Discovery: The District of Delaware has a Standing Order governing default standards for discovery, including privilege logs. Under this order, parties must confer on the nature and scope of privilege logs, "including whether categories of information may be excluded from any logging requirements and whether alternatives to document-by-document logs can be exchanged." It also excludes two categories of documents from inclusion on privilege logs: 1) any information generated after the complaint was filed and 2) any activities "undertaken in compliance with the duty to preserve information from disclosure and discovery" under Rule 26(b)(3)(A) and (B). In addition, the order directs the parties to confer on a non-waiver order under Federal Rule of Evidence 502.

In response to the Task Force's recommendation, New York adopted a rule in the Commercial Division that requires parties to meet and confer at the inception of the case to discuss "the scope of privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review, including the entry of an appropriate non-waiver order."

3. E-discovery: The Task Force recommended that parties who appear at a preliminary conference before the court have an attorney appear who has sufficient knowledge of the client's computer systems "to have a meaningful discussion of e-discovery issues." The Task Force also encouraged the E-Discovery Working Group to examine how other courts are addressing e-discovery issues.

4. Deposition and Interrogatory Limits: The Task Force recommended, and the Supreme Court ultimately adopted rules, that limit depositions to ten per side for the duration of seven hours per witness. The parties can extend the number by agreement or the court can order additional depositions for good cause. In addition, New York implemented a new rule consistent with the Task Force's recommendation to limit interrogatories to 25 per side unless the court orders otherwise.

5. An accelerated adjudication procedure: The Task Force recommended an accelerated adjudication procedure for the Commercial Division. This recommendation amounts to an expedited bench trial. The Task Force suggested that this procedure involve highly truncated discovery. The Chief Judge of the New York Supreme Court

adopted an accelerated adjudication rule in response to the recommendation. Under the rule, the parties have to agree to the procedure. By agreeing to the procedure, the parties agree to waive any objections based on lack of personal jurisdiction, the right to a jury trial, and the right to punitive or exemplary damages. Under this procedure, discovery is limited to seven interrogatories, five requests to admit, and seven depositions per side. The parties also agree to certain limits on electronic discovery. As part of the accelerated adjudication procedure, the parties agree to be ready for trial within nine months from the date of the filing of a request for assignment of the case to the Commercial Division.

New York adopted the new Commercial Division rules primarily in 2014. It is too early to assess their effectiveness.

III. Ohio Pilot Project

In April 2007, the Chief Justice of the Ohio Supreme Court created the Supreme Court Task Force on Commercial Dockets to "develop, oversee, and evaluate a pilot project implementing commercial civil litigation dockets in select courts of common pleas." Four counties agreed to serve as pilot project courts and commercial dockets were created in all four counties in 2009. The Supreme Court of Ohio's Task Force on Commercial Dockets made 27 recommendations for the permanent establishment of commercial dockets in Ohio's courts of common pleas. The recommendations pertained to the permanent establishment of commercial dockets in Ohio, the selection of judges to handle the commercial dockets, the training of judges, the assignment of cases, the balancing of the workload of the judges who handle commercial dockets, and certain case management procedures. The relevant case management procedures include:

1. **The Use of Special Masters:** The Task Force recommended the use of special maters because they provided a process through which pretrial, evidentiary, and post-trial matters could be addressed timely and effectively through extra-judicial resources.
2. **Alternative Dispute Resolution:** The Task Force recommended that a commercial docket judge in one county be able to refer a commercial case to a commercial docket judge of another county.
3. **Pretrial Order:** The Task Force recommended against adopting a mandatory model case management pretrial order because most of the participating pilot project judges use their own pretrial orders and procedures.
4. **Motion Timeline:** The Task Force also recommended that commercial judges decide dispositive motions no later than 90 days from completion of briefing or oral arguments, whichever is later. It also suggested that they decide all other motions no later than 60 days from completion of briefing or oral arguments, whichever is later.

The report found that the benefits of the program included accelerating decisions, creating expertise among judges, and achieving consistency in court decisions around the state. The Supreme Court of Ohio thereafter adopted rules pertaining to commercial dockets.

IV. Texas Task Force

In May 2011, the Texas legislature passed a bill regarding procedural reforms in certain civil actions, and directed the Texas Supreme Court to adopt rules to "promote the prompt, efficient and cost-effective resolution of civil actions when the amount in controversy does not exceed $100,000." In November 2012, the Texas Supreme Court issued mandatory rules for the expedited handling of civil cases. The rules limit pre-trial discovery and trials in cases where the party seeks monetary relief of $100,000 or less. In response to the legislation, the Texas Supreme Court appointed a Task Force to address the issues and "advise the Supreme Court regarding rules to be adopted" to address the legislation. The Task Force focused on: scope of discovery, disclosure, proof of medical expenses, time limits, expedited resolution, monetary limits, and alternative dispute resolution. The Task Force submitted various recommendations to the Texas Supreme Court, but it could not agree on whether the process should be mandatory or voluntary. Based on the recommendations of the Task Force, the Supreme Court issued mandatory rules in November 2012. The goal of the new rules is to "aid in the prompt, efficient and cost effective resolution of cases, while maintaining fairness to litigants." The Texas project is not based on a pilot project, although the Task Force apparently looked at the procedures that some other States were implementing.

The new rules include the following:

1. Expedited Actions: This Rule applies to all cases that seek $100,000 or less in damages, other than cases under the Family Code, Property Code, Tax Code, or a specific section of the Civil Practice & Remedies Code. It provides for limited, expedited discovery and a trial within 90 days after the discovery period ends. A court can only continue a trial for cause twice and each continuance cannot exceed a 60 days. Each side is allowed no more than eight hours to complete its portion of the trial. The Rule also limits the court's ability to require ADR and limits challenges to expert testimony. A court may remove a case from this process for good cause.

2. Pleading Requirements Regarding Relief Sought: The Texas Supreme Court amended its pleading requirements to require a more specific statement of the relief sought. A party must state the monetary relief it seeks so a court can determine if it falls within an Expedited Action. Texas does not require fact pleading for the underlying claims.

3. Discovery Plan: For Expedited Actions, the discovery period starts when the suit is filed and continues until 180 days after the date the first request for discovery is served on a party. Parties can serve no more than 15 written interrogatories, 15 requests for production, and 15 requests for admission, and spend no more than six hours in total to

examine and cross examine all witnesses in depositions. It also provides for requests for disclosure from a party that are separate and distinct from its requests for production.

I could not find any data on the effectiveness of these new rules. The NCSC currently is evaluating the use and effectiveness of the new rules and is expected to issue its report at some point in the Fall of 2015.

CONCLUSION

Based on the evaluations that exist of these reforms and the scope of our sub-committee to focus on "simplified procedures", I recommend having further discussion on three particular reforms:

1. The New Hampshire rule requiring early and meaningful initial disclosures. A pilot project focusing on these disclosures would be fairly easy to achieve and should expedite discovery. Interestingly, the NCSC found that the PAD Pilot Rules (which include early and meaningful initial disclosures) did not have any real impact on discovery disputes. This conclusion may be based, in part, on the fact that NCSC did not have a wide range of data to work with given the initial limited implementation of the program.

2. The New York Task Force's recommendation regarding new privilege logs to streamline discovery. This recommendation focuses on the expense such logs generate in relation to the usefulness of the logs in most cases. This proposal is worth discussing further, especially given the amount of privileged information ESI generates.

3. Expedited Actions. Both Texas' and New York's Task Forces recommended expedited actions for certain types of cases. Judge Campbell has been trying to get lawyers to adopt this efficient concept for some time. It is worth discussing with Judge Campbell's insights because it would save significant time and money for the parties.

Amy J. St. Eve
September 24, 2015

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EX. C

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M E M O R A N D U M

To: Pilot Project Subcommittee

From: Dave Campbell

Date: September 25, 2015

Re: Innovations in Arizona, Utah, Oregon, and the District of Kansas

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This memo will summarize my review of materials related to civil litigation innovations adopted in Arizona, Utah, Oregon, and the Federal District Court for the District of Kansas. I have plagiarized language from various reports I have reviewed. I include a few conclusions at the end.

A. Arizona.

In 1990, the Arizona Supreme Court appointed a committee, headed by Tucson trial lawyer (and later Chief Justice) Thomas A. Zlaket, to address discovery abuse, excessive cost, and delay in civil litigation. The result was the "Zlaket Rules," a thorough revision of the state rules of civil procedure adopted by the Supreme Court effective July 1, 1992. Arizona has adopted a number of other unique procedures since then. Key provisions of the Arizona rules are described briefly.

1. Disclosures.

The rules require broad initial disclosures by all parties within 40 days after a responsive pleading is filed. Each disclosure must be under oath and signed by the party making the disclosure. The rules require disclosure of the following (in addition to disclosures required in the federal rules):

- The legal theory upon which each claim or defense is based, including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities;
- The names and addresses of all persons whom the party believes may have knowledge or information relevant to the case, and the nature of the knowledge or information;
- The names and addresses of all persons who have given statements related to the case, whether or not the statements were made under oath;

- The names and addresses of expert witnesses, including the substance of the facts and opinions to which the person is expected to testify;
- A list of the documents or ESI known by a party to exist and which the party believes may be relevant to the subject matter of the action, or reasonably calculated to lead to the discovery of admissible evidence, and the date on which the documents and ESI will be made available for inspection and copying.

2. Depositions.

Only depositions of parties, expert witnesses, and document custodians may be taken without stipulation or court permission, and depositions are limited to four hours each.

3. Experts.

Each side is presumptively entitled to only one independent expert on an issue, except on a showing of good cause.

4. Medical Malpractice Cases.

Within ten days after defendants answer, the plaintiff must serve on all defendants copies of all of plaintiff's available medical records relevant to the condition which is the subject matter of the action. All defendants must do the same within ten days thereafter.

5. Mandatory Arbitration.

Arizona rules require mandatory arbitration of all cases worth less than $50,000. At the time the complaint is filed, the plaintiff must file a certificate of compulsory arbitration stating the amount in controversy. If the defendant disagrees, the issue is determined by the court. Unless the parties stipulate otherwise, the trial court assigns the arbitrator from a list of active members of the State Bar.

The arbitrator must set a hearing within 60 to 120 days. Because the purpose of compulsory arbitration is to provide for the efficient and inexpensive handling of small claims, the arbitrator is directed to limit discovery "whenever appropriate." In general, the Arizona Rules of Evidence apply to arbitration hearings, but foundational requirements are waived for a number of documents, and sworn statements of any witness other than an expert are admissible. The arbitrator must issue a decision within 10 days of the hearing.

In the absence of an appeal to the court of the arbitrator's decision, any party may obtain judgment on the award. If an appeal is filed, a trial de novo is held in the state trial

court, and any party entitled to a jury may demand one. If the appellant fails to recover a judgment on appeal at least 23 percent more favorable than the arbitration result, the appellant is assessed not only normal taxable costs, but also the compensation paid to the arbitrator, attorneys' fees incurred by the opposing party on the appeal, and expert fees incurred during the appeal.

A 2004 study revealed that, in most counties, an arbitration award was filed in less than half the cases assigned to arbitration (suggesting the cases settled before the arbitration), and a trial de novo was sought in less than a third of all cases in which an award was filed. This suggests that most cases assigned to the program either settled or produced a result satisfactory to the parties after the arbitration hearing.

6. Complex Case Courts.

The Maricopa County Superior Court has established complex litigation courts staffed by judges experienced in complex case management. Cases are eligible for assignment to the complex litigation courts based on a number of factors, including the prospect of substantial pre-trial motion practice, the number of parties, the need for extensive discovery, the complexity of legal issues, and whether the case would benefit from permanent assignment to a judge who has acquired a substantial body of knowledge in the specific area of the law. A 2006 survey of attorneys who had used these courts found that 96% favored their continuation. Responding attorneys gave high marks both to the quality of the judges assigned and their ability to devote more attention than usual to the assigned cases.

7. Commercial Courts.

A few months ago, the Maricopa County Superior Court launched commercial courts for all business disputes that exceed $50,000, other than those that qualify for the complex case courts. Cases in these commercial courts will include an early conference on ESI, use of an ESI checklist and a standard ESI order, and an early case management conference that focuses on ADR options, sequencing of discovery, and proportionality in discovery.

8. Survey Results.

In a 2008 survey of fellows of the American College of Trial Lawyers, 78% of the Arizona respondents indicated that when they had a choice, they preferred litigating in state court to federal court. In contrast, only 43% of the national respondents to the ACTL survey preferred litigation in state court. 67% of the Arizona respondents indicated that cases were disposed of more quickly in state court. 56% believed that processing cases was less expensive in the state forum.

In 2009, the IAALS conducted a survey of the Arizona bench and bar about civil procedure in the State's superior courts. Over 70% of respondents reported litigation experience in federal district court, and they preferred litigating in state court over federal court by a two-to-one ratio. Respondents favoring the state court forum cited the applicable rules and procedures, particularly the state disclosure and discovery rules. Respondents favoring the state forum also indicated that state court is faster and less costly.

B. Utah.

On November 1, 2011, the Utah Supreme Court implemented a set of revisions to Rule 26 and Rule 26.1 of the Utah Rules of Civil Procedure designed to address concerns regarding the scope and cost of discovery in civil cases. The revisions included seven primary components:

- Proportionality is the key principle governing the scope of discovery — specifically, the cost of discovery should be proportional to what is at stake in the litigation.
- The party seeking discovery bears the burden of demonstrating that the discovery request is both relevant and proportional.
- The court has authority to order the requesting party to pay some or all of the costs of discovery if necessary to achieve proportionality.
- The parties must automatically disclose the documents and physical evidence which they may offer as evidence as well as the names of witnesses with a description of each witness's expected testimony. Failure to make timely disclosure results in the inadmissibility of the undisclosed evidence.
- Upon filing, cases are assigned to one of three discovery tiers based on the amount in controversy; each discovery tier has defined limits on the amount of discovery and the time frame in which fact and expert discovery must be completed. Cases in which no amount in controversy is pleaded (e.g., domestic cases) are assigned to Tier 2.
- Parties seeking discovery above that permitted by the assigned tier may do so by motion or stipulation, but in either case must certify to the court that the additional discovery is proportional to the stakes of the case and that clients have reviewed and approved a discovery budget.
- A party may either accept a report from the opposing party's expert witness or may depose the opposing party's expert witness, but not both. If a party accepts an expert witness report, the expert cannot testify beyond what is fairly disclosed in the report.

The three tiers and their limits are as follows:

- Tier 1 applies to cases of $50,000 or less and allows no interrogatories, 5 requests for production, 5 requests for admission, 3 total hours for depositions, and completion of discovery within 120 days.

- Tier 2 applies to cases between $50,000 and $300,000 and allows 10 interrogatories, 10 requests for production, 10 requests for admission, 15 total hours for depositions, and completion of discovery within 180 days.

- Tier 3 applies to cases of $300,000 or more and allows 20 interrogatories, 20 requests for production, 20 requests for admission, 30 total hours for depositions, and completion of discovery within 210 days.

Since these changes were adopted, some Utah courts have also adopted a procedure for expediting discovery disputes. It requires a requires a party to file a "Statement of Discovery Issues" no more than four pages in length in lieu of a motion to compel discovery or a motion for a protective order. The statement must describe the relief sought and the basis for the relief and must include a statement regarding the proportionality of the request and certification that the parties have met and conferred in an attempt to resolve or narrow the dispute without court involvement. Any party opposing the relief sought must file a "Statement in Opposition," also no more than 4 pages in length, within 5 days, after which the filing party may file a Request to Submit for Decision. After receiving the Request to Submit, the court must promptly schedule a telephonic hearing to resolve the dispute.

In April, 2015, the National Center for State Courts completed a comprehensive study of the Utah rule changes. The study produced the following findings:

- The new rules have had no impact on the number of case filings.
- Some plaintiffs may be increasing the amount in controversy in the complaint to secure a higher discovery tier assignment and more discovery.
- There have been increases of 13% to 18% in the settlement rate among the various tiers. The study associates this with the parties obtaining more information earlier in the litigation.
- Across all case types and tiers, cases filed after the implementation of the new rules tended to reach a final disposition more quickly than cases filed prior to the revisions.
- Contrary to expectations, the parties sought permission for additional discovery (called "extraordinary discovery" in the rules) in only a small minority of cases.

Stipulations for additional discovery were filed in 0.9% of cases, and contested motions were filed in just 0.4% of cases.

- Discovery disputes fell in Tier 1 non-debt collection cases and Tier 3 cases and did not exhibit a statistically significant change in Tier 2 cases. Discovery disputes in post-implementation cases tended to occur about four months earlier in the life of the case compared to pre-implementation cases. Attorney surveys and judicial focus groups also provided evidence for the rarity of discovery disputes under the revised rules.

The NCSC study included a survey of attorneys that afforded the opportunity to make open-ended comments. Although it may have been due to self-selection by those unhappy with the new rules, 74% of the comments were negative, with only 9% positive. The negative comments were equally divided between plaintiff and defense lawyers.

The NCSC also did judge focus groups. Among the results:

- A recurring theme across all of the focus group discussions was the difficulty involved in changing well-established legal practices and culture in a relatively short period of time.
- The judges expressed widespread suspicion that attorneys are routinely agreeing to discovery stipulations at the beginning of litigation, but not filing those stipulations with the court unless they are unable to complete discovery within the required time frame.
- Many judges indicated that they had experienced significant decreases in the number of motions to compel discovery and motions for protective orders since implementation of the new rules.
- In general, the judges who participated in the focus groups were fairly positive about the impact of the rule revisions thus far.
- There was general agreement that one benefit of the revisions was that they leveled the playing field between smaller and larger law firms and that larger firms could no longer bury the small firms with excessive discovery requests.

C. Oregon.

Although not on our list, I have heard for some time about innovative practices in Oregon, so I took a quick look. These are some of the practices used in the Oregon state courts:

- Oregon's rules require parties to plead ultimate facts rather than providing mere notice of a cause of action. Civil complaints must contain a "plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition." The Oregon Supreme Court has interpreted this to mean that "whatever

the theory of recovery, facts must be alleged which, if proved, will establish the right to recovery."

- Oregon's civil rules impose limitations on discovery. No more than 30 requests for admission are allowed, and interrogatories are not permitted at all.
- Discovery of experts is also significantly curtailed. The Oregon rules do not permit depositions of experts, nor do they require the production of expert reports. Indeed, the identity of expert witnesses need not even be disclosed until trial. A party may defeat summary judgment simply by filing an affidavit or a declaration of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact.
- Plaintiffs must file a return or acceptance of service on the defendant within 63 days of the filing of a complaint. If the plaintiff does not meet this requirement, the court issues a notice of pending dismissal that gives the plaintiff 28 days from the date of mailing to take action to avoid the dismissal.
- Motions for summary judgment are relatively rare compared to federal court. In an IAALS study, only 91 motions were filed in 495 cases, and more than one-third of those motions were concentrated in two cases (23 motions in one case, and 11 motions in another). Interestingly, more than half of the summary judgment motions filed in Multnomah County (where Portland is located) never received a ruling from the court. Fewer than 30% of summary judgment motions filed were granted in whole or in part.
- As in Arizona, Oregon requires that all civil cases with $50,000 or less at issue, except small claims cases, go to arbitration.
- For the years 2005 to 2008 the statewide average for civil cases closed in a calendar year by trial was 1.6% and the average for Multnomah County was 1.4%.
- The IAALS study found that when compared to Oregon federal court, the Multnomah County system is faster, less prone to motion practice, and less likely to see schedules interrupted by continuances or extensions of time.

D. District of Kansas.

In early March 2012, the U.S. District Court for the District of Kansas undertook an effort to increase the just, speedy, and inexpensive determination of every matter. Spearheaded by the court's Bench-Bar Committee, the Rule 1 Task Force divided into six working groups with corresponding recommendations: 1) overall civil case management, 2) discovery involving ESI, 3) traditional non-ESI discovery, 4) dispositive-motion practice, 5) trial scheduling and procedures, and 6) professionalism and sanctions. Nearly all of the Rule 1 Task Force's recommendations were approved by the Bench-Bar Committee, and then by the court.

As a result of the Rule 1 Task Force's recommendations, the court revised its four principal civil case management forms: 1) the Initial Order Regarding Planning and Scheduling, 2) the Rule 26(f) Report of Parties' Planning Conference, 3) the Scheduling Order, and 4) the Pre-trial Order. The court also revised its Guidelines for Cases Involving Electronically Stored Information and its Guidelines for Agreed Protective Orders, along with a corresponding pre-approved form order, and developed new guidelines for summary judgment. The court has also adopted corresponding amendments to its local rules.

I am not aware of any studies that have been completed regarding these changes, but the form orders contain many best practices and helpful suggestions. In addition to standard case management orders, the district has adopted helpful ESI guidelines and a form protective order.

E. Thoughts.

1. Arizona and Utah seem to have had success requiring greater disclosures at the outset of the case. We should consider that as part of a potential pilot program.

2. The Utah model for tiering cases, limiting the discovery in each tier, and limiting the time for discovery in each tier, is intriguing. It may be responsible for the reduced disposition time found in the NCSC survey. We have heard that assigning cases to tiers based solely on the amount in controversy could be problematic in federal court.

3. I find the Utah limit on total deposition hours very appealing. It creates the right incentive for lawyers – to conclude each deposition as efficiently as possible. I have used it in several cases and have received positive feedback. Such limits could be included in any pilot that involved tiering.

4. Mandatory arbitration of cases worth $50,000 or less seems to be working well in Utah and Oregon. The statistics in Arizona suggest that it is quite successful in removing a large number of cases from the trial court and resolving them quickly. It is not clear how many federal court cases would fall in this damages range (no diversity cases would). Could we get away with setting the number higher in a pilot – say $100,000?

5. The severe limitations placed on expert discovery in Oregon is another interesting idea, but it likely would be viewed as directly contrary to Rule 26(a)(2). I also suspect it is something unique to the Oregon culture (which the IAALS survey found quite different than other states) and would not be received well in federal court.

6. If we end up putting together a package of proposed orders or forms for pilot projects, we should look at Kansas's.

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EX. D

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MEMORANDUM

To: Judge Neil M. Gorsuch

From: Stefan Hasselblad

Date: September 24, 2015

Re: Summary of Materials Concerning Simplified Federal Procedures

This memorandum briefly summarizes three reports and two law review articles that discuss the past, present, and future of efforts to reform the federal rules to create simplified procedures for less complex cases.

* * *

I. The Federal Simplified Procedure Project: A History, Institute for the Advancement of the American Legal System, 2009.

In 1999, Judge Niemeyer proposed that the Advisory Committee on Civil Rules develop a set of simplified procedural rules applicable to simple federal cases. This proposal stemmed from a concern that the current federal rules provided too much procedure for smaller cases, which raises costs and effectively bars access to courts for many litigants.

In response, the Advisory Committee initiated the Simplified Procedure Project, which aimed at developing procedures that would shift emphasis away from discovery, and toward disclosure and pleading in an effort to ensure prompt trials. As the Committee began its work, it discussed a number of possible options and difficulties: the interaction between simplified rules and federal diversity requirements, the possibility of capping damages, the possibility of simple majority jury verdicts, and whether simplified procedures could draw litigants from state to federal courts, thereby increasing federal case loads.

The Simplified Procedure Project met nine times between 1999 and 2001. The project's discussions were guided by a set of draft rules provided by Professor Edward H. Cooper, discussed below and later published in a law review article. During the project's two years of activity, some committee members

raised significant reservations about the possibility of capping damages, interference with ADR, and unintentionally creating a "cheap and inferior set of rules" for small claims. In 2001, the Advisory Committee found that the project lacked direction because of difficulty identifying the cases appropriate for application of the simplified rules. The project was then held in abeyance. Over the next seven years the project was occasionally mentioned in Committee minutes, but no further progress was made.

Professor Cooper wrote the draft rules that guided the committee's discussions. He later published these rules in a 2002 law review article. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002). The rationale behind Professor Cooper's simplified rules is that "current reliance on notice pleading and searching discovery puts too much weight on time-consuming and expensive discovery." *Id.* at 1796. The following is an overview of these simplified rules.

- The simplified rules are to be construed and administered to secure the just, speedy, and economical determination of simplified actions. Furthermore, discovery should be limited, and the costs of litigation should be proportional to the stakes.

- The simplified rules apply to all cases where the amount in controversy is less than $50,000, and may be applied voluntarily when the amount in controversy is between $50,000 and $250,000.

- The simplified rules provide for fact pleadings no longer than 20 pages. To the extent practicable, claims and answers must state details of the time, place, participants, and events involved in the claim. Furthermore, any documents relied on must be attached to the pleadings. This approach is designed to encourage careful preparation before litigation and limit costs for small claims. The rules also make clear that fact pleading should still be construed in the same spirit of liberality as notice pleading.

- The rules provide for a demand judgment procedure for plaintiffs, in which they may submit a demand asserting a contract claim for a sum certain. The demand must include any writings or sworn statements that establish the obligations owed under the contract. Sworn responses to demands for judgment, or admission of the amount due, must be submitted in the answer. Then, the clerk of the court is required to enter judgment for any amounts admitted due.

- Federal Rule 12 applies to simplified procedure cases, but the time frame for filing motions is limited. Motions to dismiss based on 12(b)(2)-(5) and (7) may be made in the answer or in a motion filed no later than 10 days after the answer.

- The simplified rules combine Rule 12(b)(6) and Rule 56 motions into a single motion filed no later than 30 days after an answer or reply. This reduces delay while preserving the functions of both rules.

- The simplified rules favor enhanced disclosure in an effort to make the pre-trial process more efficient. Both parties must disclose 1) the names and phone numbers of any person likely to have relevant information, 2) the source of information in any pleadings, 3) a sworn statement of known facts, and 4) any documents or tangible items known to be relevant to the facts disputed. Disclosure is based on information reasonably available to the parties and is not excused because either party has not completed an investigation or because a party believes an opponent has not provided sufficient disclosure.

- While pleading and disclosure requirements are expanded under the rules, discovery is limited. An FRCP 26(f) conference is available, but no discovery requests are available until after the conference. Even then, requests for production of documents and tangible things must specifically identify the things requested. Parties are limited to three depositions of three hours each.

- Expert witnesses are discouraged. The court should evaluate the issues and stakes of the claim to determine if party experts should be allowed.

- The simplified rules provide an early and firm trial date six months from the filing date in most cases. The rules specifically preclude consideration of a party's failure to complete investigations, disclosure, or discovery as a rationale for delaying trial.

II. Reforming Our Civil Justice System: A Report on Progress and Promise, The American College of Trial Lawyers Task Force on Discovery and Civil Justice & The Institute for the Advancement of the American Legal System, 2015.

The report presents 24 principles that aim to both reform civil rules and improve legal culture in a way that leads to full, fair, and rational resolution of disputes.

There are two "fundamental principles" for civil justice reform. The first principle makes FRCP 1 applicable to lawyers (in addition to parties and judges) in an effort to encourage lawyers to "secure the just, speedy, and inexpensive determination of every action." The second principle states that the "one size fits all approach" to current state and federal rules should be abandoned in favor of a flexible approach that applies different rules to different types of cases.

The report presents nine principles relating to case management. The first two of these principles relate to case management conferences. The report urges an initial, robust case management conference that informs the court about the issues (allowing judges to better plan case management), narrows the issues, and rationally limits discovery. These early conferences should discuss such topics as limits on discovery, financial limitations of the parties, a trial date, dispositive motions, preservation of electronic information, and the importance of cooperation and collegiality.

The report recommends engagement between the court and parties early in litigation. First, the court should set an early and firm trial date to encourage parties to work more efficiently and narrow the issues. Second, counsel should be required to confer and communicate early and often. Studies have shown that this reduces discovery and client costs. Third, all issues to be tried should be identified early so as to limit discovery.

The final case management principles deal with the general process of litigation. First, courts should have discretion to order mediation or other alternative dispute resolution unless *all* parties agree otherwise. Second, the court should rule promptly on motions, and prioritize motions that will advance the case more quickly. Third, judges should be more involved throughout the litigation process, which will likely require more judicial resources. Fourth, judges should be trained on managing trials and trial practice.

The report provides a single pleading principle: "[p]leadings should

concisely set out all material facts that are known to the pleading party to establish the pleading party's claims or defenses." Parties may plead facts on "information and belief" if they cannot obtain information necessary to support a claim, but they must still submit the basis for their belief. The report argues that more specific pleadings would enable courts to make proportionality determinations and allow parties to better target discovery.

The report's eleven principles on discovery begin by stating that proportionality should be the most important principle of discovery. Currently, discovery is crippling the legal system by creating inefficiency and undue expense. The first step is for courts to supervise an agreement to proportional discovery between the parties. Second, parties must recognize that all facts are not necessarily subject to discovery. This agreement should appropriately limit parties' expectations as they enter discovery.

The principles also call for parties to produce all known and reasonably available documents and tangible things that support or contradict specifically pleaded factual allegations. This principle is broader than the federal rules because it requires *production* rather than merely description. The next principle provides that, in general, discovery should be limited to documents or information that would enable a party to prove or disprove a claim or defense or enable a party to impeach a witness. In addition, parties should be required to disclose trial witnesses early in litigation.

After initial production, only limited discovery subject to proportionality should be allowed. And, once that discovery is complete, further discovery should be barred absent a court order granted only with a showing of good cause and proportionality. This would create more active judicial supervision of the discovery process, while reducing discovery in conjunction with increased disclosure. Finally, in some cases, courts should stay discovery and disclosure until after a motion to dismiss is decided. This procedure would ensure discovery is used to prove a claim, rather than to determine whether a valid claim exists.

Early in litigation, parties should meet and agree on procedures for preservation of electronically stored information (ESI). All parties should be responsible for reasonable efforts to protect ESI that may be relevant to claims, but all parties must also understand that it is unreasonable to expect other parties to take every conceivable step to preserve all potentially relevant ESI. Furthermore, the same principle of proportionality that controls discovery generally should apply to ESI specifically. To make ESI discovery more efficient, attorneys and judges should be trained on principles of ESI technology.

Finally, there should be only one expert per issue per party. Experts should furnish a written report setting forth their opinion, the basis for that opinion, a CV, a list of cases in which they have testified, and the materials they have reviewed. This final principle will limit the "battle of the experts" and reduce the cost of expert testimony.

III. Summary of Streamlined Pathway Efforts, Conference of Chief Justices, Civil Justice Improvements Committee, Rules/Litigation Subcommittee, 2015.

The Civil Justice Improvements Committee anticipates that in making recommendations for improving the civil justice system it will address three different paths for civil cases: the streamlined pathway, the general pathway, and the highly-managed pathway. Defining different approaches for different paths recognizes the modern reality that one size does not fit all.

In the streamlined pathway are cases with a limited number of parties, simple issues relating to liability and damages, few or no pretrial motions, few witnesses, and minimal documentary evidence. Case types that could be presumptively assigned to the streamlined pathway include:

- automobile, intentional, and premises liability torts
- insurance coverage claims arising out of such torts
- cases where a buyer or seller is a plaintiff
- consumer debt
- appeals from small claims decisions

The subcommittee is undertaking a draft of procedural rules for the streamlined pathway. Key features of rules applied to the streamlined pathway may include:

- a focus on case attributes rather than dollar value
- presumptive mandatory inclusion for cases identified by streamlined-pathway attributes
- mandatory disclosures
- truncated discovery
- simplified motion practice
- an easy standard for removal from the pathway
- conventional fact finding
- no displacement of existing procedural rules consistent with streamlined pathway rules
- an early and firm trial date

IV. Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794 (2002).

The Federal Rules rightly provide for open-ended rules that call for wise discretion. However, there is reason to believe our litigation system does not sufficiently prevent inept misuse and deliberate strategic over-use of the rules. The draft rules in this article provide for more detailed pleading, enhanced disclosure obligations, restricted discovery opportunities, reduced motion practice, and an early and firm trial date. The purpose of these simplified rules is not to establish second-class procedures for second-class litigation, but rather to enable access to justice by creating more efficient and more affordable procedures without the unnecessary complexity of rules designed for high-stakes, multi-party litigation.

There are some potential problems with these rules. For one, it is unclear if they could be adopted as a local experiment because Civil Rule 83 only authorizes the adoption of national rules. Second, these simplified rules assume knowledge of the Federal Rules of Civil Procedure. This made drafting the rules easier, but it would make it more difficult for a *pro se* party to litigate. A self-contained, short, and clearly stated set of rules might be a better approach.

As for the rules themselves, Rule 102 states that the simplified rules apply in actions where the plaintiff seeks monetary relief less than $50,000, where the plaintiff seeks monetary relief between $50,000 and $250,000 and the defendants do not object, and where all parties consent. This rule is tentative and is included in part to illustrate the difficulty of defining the cases appropriate for simplified procedural rules. Other approaches are also possible. For example, consent of all parties could always be required, or the power to determine when to use simplified procedures could be left to the discretion of the district court.

Fact-based pleading is at the heart of the simplified rules. Rule 103 requires that a claim state, to the extent reasonably practicable, the details of time, place, participants, and events involved in the claim. Furthermore, pleaders must attach each document the pleader may use to support the claim. Answers require the same. And avoidances and affirmative defenses must be specifically identified in a pleading. These provisions should enhance parties' ability to litigate small claims effectively and efficiently. It is important to note, however, that fact-pleading should not be approached in a spirit of technicality. The spirit that has characterized notice pleading should animate Rule 103 fact pleading. What is expected is a clear statement in the detail that might be provided in proposed findings of fact. One question that remains to be answered is the

applicability of Rule 15's amendment procedures. Allowing amendments might lead to delay and strategic misuse, but *pro se* plaintiffs in simple cases may need to use good-faith amendments even more than typical litigants.

Rule 104 provides for a demand for judgment in which a party may attach a demand to a pleading that asserts a contract claim for a sum certain. The demand must be supported by a writing and sworn statements that evidence the obligation and the amount due. A defendant must admit the amount due or file a response. If the defendant admits an amount due, a court clerk may enter judgment. Essentially, Rule 104 creates a plaintiffs' motion for summary judgment. This rule is necessary because a substantial number of actions in federal court are brought to collect small sums due on contracts or unpaid loans.

Rule 104A limits motions practice. A motion to dismiss under the defenses of Rule 12(b)(2)-(5) and (7) may be made in an answer or within 10 days of an answer. The time periods to answer provided under Rule 12(a)(1)-(3) cannot be suspended by motion. And, a party seeking relief under Rule 56, 12(b)(6), 12(c), or 12(f) must combine that relief in a single motion filed no later than 30 days after the answer or reply. These rules are meant to prevent the strategic delays often created by protracted motion practice.

Rule 105's disclosure requirements are designed to reduce discovery. No later than 20 days after the last pleading, a plaintiff must provide 1) the name and telephone number of any person likely to have discoverable information relevant to the facts disputed in the pleadings, 2) sworn statements with any discoverable information known to the plaintiff or a person reasonably available, 3) a copy of all reasonably accessible documents and tangible things known to be relevant, and 4) damages computations and insurance information. 20 days later, other parties must make a corresponding disclosure. Such disclosures cannot be excused because a party has not fully completed an investigation, challenges another party's disclosure, or has not been provided another party's disclosure.

Of course, with heightened disclosure comes more limited discovery. Under Rule 106, a discovery request may only be made with the stipulation of all parties or in a Rule 26(f) conference. And a conference must be held only if requested in writing. Parties are limited to three depositions of three hours each, and 10 interrogatories. Finally, Rule 34 discovery requests must specifically identify the items requested.

Rule 108 provides that a court should first consider the issues, the amount in controversy, and the resources of the parties, and only then determine whether

to allow expert testimony. This rule is meant to reduce the risk that a better-resourced party will introduce expert testimony merely to increase the costs of litigating.

Finally, the draft rules provide for setting a trial date six months from the initial filing. This trial date should not be extended on the basis that discovery is incomplete or an action is too complex. There may be problems with this proposal. For example, it seems to give docket priority to cases that courts typically consider low-priority.

V. Paul V. Niemeyer, *Is Now the Time for Simplified Rules of Civil Procedure?*, 46 U. MICH. J.L. REFORM 673 (2013).

The current federal civil process is inadequate for the purpose of discharging justice speedily and inexpensively. It takes three years and hundreds of thousands of dollars to try a medium-sized commercial dispute. Meanwhile, the private bar is fleeing from courts to alternative dispute resolution systems.

Although well-intentioned, the 1938 transition from fact pleading to notice pleading is part of the problem. The reformers of 1938 sought to avoid procedural maneuvering in the pleading stage that often proved too complex for the common lawyer, effectively denying litigants access to courts. The reformers' solution was notice pleading and liberal discovery rules. This reassigned resolution of procedural battles from court-supervised pleading to attorney-controlled discovery. Then, reforms in 1946, 1963, 1966, and 1970 further liberalized pleading and discovery rules. The process grew increasingly expensive, complicated, and time-consuming.

In the late 1970s, the tides shifted and courts and reformers began to attempt to limit discovery practice. In 1993, the Civil Justice Reform Act required federal districts to conduct self-study and develop a civil case management plan to reduce costs and delays. In addition, the Act called for evaluation of these plans to identify best practices. That evaluation came to three conclusions. First, early court intervention in the management of cases reduced delay, but increased litigant costs. Second, setting a firm trial date early was the most effective tool of case management – reducing delay without producing more costs. Finally, reducing the length of discovery reduced both costs and delays without adversely affecting attorney satisfaction.

In 2000, the Rules Committee and Supreme Court made several small but

beneficial changes. First, they limited discovery to any matter related to a "claim or defense of a party," rather than any matter related to a "subject matter involved in the pending action." Under the new rules, parties could still seek broader discovery, but they would need a court order that required a showing of good cause. This amendment was designed to allow courts to better supervise discovery. Second, the Rules Committee expanded mandatory disclosure and reduced interrogatories and depositions. After these reforms, Supreme Court cases in the 2000s heightened pleading standards, requiring that a complaint allege enough factual matter to state a plausible claim for relief.

It is within this context that the Civil Rules Committee chaired by Judge Niemeyer sought to draft rules that would further reduce costs and delays. From 1999 to 2000, the Rules Committee discussed a number of reform proposals but did not begin detailed debate before Judge Niemeyer's term expired. However, the Committee's reporter, Professor Edward Cooper, drafted a set of proposed simplified rules that should be the starting point for further reforms.

Professor Cooper's proposed rules would apply to all small money-damage actions and parties could choose to apply them to larger money-damage actions. These draft rules incorporated five basic elements that address known problems of costs and delay in the federal civil process. First, the rules required more detailed pleadings, enabling an early look at the merits of a case. Second, the rules would enhance early disclosures, which would have to be made within twenty days of the filing of the last pleading. Third, the draft rules restrict discovery, authorizing only three depositions and ten interrogatories. Fourth, the draft rules would reduce the burden of motions practice, combining all motions to dismiss into a single motion that must be filed early in the proceedings. Finally, the draft requires an early and strict trial date scheduled six months from the filing.

Professor Cooper's draft rules are a good basis for further reform, but there are three other ideas worthy of consideration. First, simplified rules should be applied to a wider range of cases by making them available for all damage actions, and mandatory for a larger segment of damage actions. Second, it may be wise to include incentives to encourage plaintiffs' and defendants' attorneys to use simplified rules in damage actions, as some attorneys may initially shy away from the simplified track. Third, practice under Rule 56 may need to be trimmed down, as summary judgment is now often an expensive mini-trial within the pretrial phase, creating disproportionate costs and delays.

EX. E

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To: Rebecca Womeldorf

Cc: Simplified Procedures Pilot Project Subcommittee

From: Amelia Yowell, Supreme Court Fellow

Date: October 15, 2015

RE: CACM report on the CJRA pilot program

The Civil Justice Reform Act of 1990 (CJRA) outlined a series of case management principles, guidelines, and techniques to reduce cost and delay in civil litigation. To test these procedures, Congress established a pilot program in ten districts. Congress directed the Judicial Conference to commission an independent evaluation of the program,[1] study the results, and assess whether other districts should be required to implement the same case management principles. Report at 11. I've provided a brief summary of the Judicial Conference's May 1997 final report below,[2] with an emphasis on the topics that overlap with those discussed at the pilot project subcommittee's conference call on Friday, October 9, 2015.

The CJRA Pilot Program

The pilot program consisted of twenty district courts. Report at 14–15. To obtain representative results, the Judicial Conference did not allow districts to volunteer. *Id.* at 15. Instead, the Judicial Conference chose districts based on their "size, the complexity and size of their caseloads, the status of their dockets and their locations." *Id.* At least five districts were located in a metropolitan area. *Id.* Ten of the districts were "pilot districts,"[3] which were required to implement the following principles:

- Differentiated Case Management, where cases are sorted into expedited, standard, and complex tracks that have a specific set of procedures and time lines;

- Early and ongoing control of the pretrial process, including setting early dispositive motion and trial dates and controlling the extent of discovery;

[1] The RAND Corporation conducted the independent evaluation. Report at 15.

[2] The Judicial Conference delegated oversight responsibility to the Court Administration and Case Management Committee (CACM). Report at 12–13.

[3] The ten pilot courts were: the Southern District of California, the District of Delaware, the Northern District of Georgia, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Western District of Tennessee, the Southern District of Texas, the District of Utah, and the Eastern District of Wisconsin. Report at 15 n.5.

- "Careful and deliberate monitoring" of complex cases, including bifurcation of issues, early trial dates, a defined discovery schedule, and encouragement to settle;

- Encouraging voluntary exchange of information and the use of cooperative discovery techniques;

- Prohibiting the consideration of discovery motions, unless accompanied by a good faith certification; and

- Encouraging alternative dispute resolution programs

Id. at 15, 26–38. The Judicial Conference also asked the pilot districts to implement the following litigation management techniques:

- Requiring the submission of joint discovery plans;

- Requiring a representative with the power to bind the parties to be present at all pre-trial conferences;

- Requiring all requests for extensions of discovery deadlines or trial postponements to be signed by an attorney and the party;

- Implementing a neutral evaluation program to hold a nonbinding ADR-like conference early in the litigation; and

- Requiring a representative with the power to bind the parties to be present at all settlement conferences

Id. at 15, 39–44.

These pilot districts were compared with ten "comparison districts,"[4] which were not required to implement the above principles or techniques. *Id.* at 15. In total, the RAND Study compared over 12,000 cases in the pilot and comparison courts, as well as case cost and delay data from before and after implementation of the CJRA. *Id.* The Study also collected data from

[4] The ten comparison courts were: the District of Arizona, the Central District of California, the Northern District of Florida, the Northern District of Illinois, the Northern District of Indiana, the Eastern District of Kentucky, the Western District of Kentucky, the District of Maryland, the Eastern District of New York, and the Middle District of Pennsylvania. Report at 15 n.6.

five other districts,[5] which implemented "demonstration programs to test systems of differentiated case management and alternative dispute resolution." *Id.* at 9.

The Judicial Conference's Assessment and Recommendation

After review, the Judicial Conference cautioned against implementation of the pilot program nationwide, at least "as a total package." *Id.* at 2, 15. The Conference based its recommendation on the RAND Study's finding that the pilot project, as a whole, did not have a great impact on reducing cost and delay.[6] *Id.* at 26. Assessing these results, the Conference noted that "there is a need for individualized attention to each case that a 'one size fits all' approach cannot satisfy."[7] *Id.* at 46.

The RAND Study outlined six procedures that likely were effective in reducing cost and delay: (1) establishing early judicial case management; (2) setting the trial schedule early; (3) establishing shortened discovery cutoff; (4) reporting the status of each judge's docket; (5) conducting scheduling and discovery conferences by phone; and (6) implementing the advisory group process. *Id.* at 15–16.

Notably, the RAND Study did not address several important questions: (1) the possible differential impact of procedural reforms on small law firms, solo practitioners, and those serving under contingency fee arrangements; (2) the impact of front-loading litigation costs under accelerated case management programs; and (3) the effects of the procedural reforms on particular case disposition types. *Id*. at 45–46. In particular, the Study noted that "[r]eforms that actually increase costs for small and solo practitioners may frustrate the aims of the Act by lessening access to justice for low-income litigants or those with small claims." *Id.* at 46.

The following chart summarizes the relevant parts of the CJRA Pilot Program, the RAND Study's findings, and the Judicial Conference's resulting recommendation.

[5] The Western District of Michigan and the Northern District of Ohio experimented with systems of differentiated case management while the Northern District of California, the Western District of Missouri, and the Northern District of West Virginia experimented with various methods of reducing cost and delay, including ADR. Report at 16–17.

[6] One reason for this may be that the judiciary had already adopted many of the CJRA's case management procedures. Report at 26.

[7] The RAND Study reported that "reduction of litigation costs is largely beyond the reach of court-established procedures because: (a) most litigation costs are driven by the impact of attorney perceptions on how they manage their cases, rather than case management requirements; and (b) case management accounts for only half of the observed reductions in 'time to disposition.'" Report at 46.

Tested Procedure	Findings	Recommendation
Differentiated case management using a "track" system Report at 26–28	· The districts sorted cases into expedited, standard, and complex tracks. · The districts employed a variety of identification methods; many courts used an automatic track assignment process based on subject matter outlined in the initial pleadings. · Districts encountered significant difficulties classifying cases at the pleading stage, especially when identifying and evaluating complex cases. Because of this difficulty, most districts placed the vast majority of cases in the "standard" track. · Many districts found that a judge's ability to tailor the management of each particular case was more effective than rigid case tracks.	· Some form of differentiated case management should be used. · However, track systems "can be bureaucratic, unwieldy, and difficult to implement." · Therefore, individual districts should determine on a local basis whether the nature of the caseload calls for a more rigid track model or a judicial discretion model.
Early judicial case management Report at 19, 29–31	· Early judicial case management included "any schedule, conference, status report, joint plan, or referral to ADR that occurred within 180 days of case filing. · Early case management alone significantly reduced time to disposition (by up to two months), but significantly increased lawyer work hours. · If early judicial intervention was combined with shortened discovery (from 180 days to 120 days), then lawyer work hours (and therefore cost) decreased.	· Courts should follow Rule 16(b), which requires entry of a scheduling order within 120 days and encourages setting an early and firm trial date as well as a shorter discovery period. · The Conference was "opposed to the establishment of a uniform time-frame, such as eighteen months, within which all trials must begin," mainly because a standard time line would slow down cases that could be resolved more quickly.

Early voluntary exchange of information and use of cooperative discovery techniques Report at 33–	· All pilot and comparison courts instituted some form of voluntary or mandatory early exchange of information. · It was difficult to analyze the effects of voluntary disclosure versus mandatory discovery. · Discovery deadlines were a major factor in decreasing the cost and length of litigation.	· The Judicial Conference did not find enough information in the RAND Study to make a specific recommendation about voluntary versus mandatory initial disclosures · The Committee on Rules of Practice and Procedure should re-examine the need for national uniformity in applying Rule 26(a).

Based on these results and recommendations, the Judicial Conference proposed the following alternative cost and delay procedures:

- Continued and increased use of district court advisory groups, composed of attorneys and other litigant representatives;
- Public reporting of court dockets;
- Setting early, firm trial dates and shorter discovery periods in complex cases;
- Effective use of magistrate judges;
- Increased use of chief judges in case management;
- Increased use of visiting judges to help with backlogged dockets;
- Educating judges and lawyers about case management, especially considering the RAND Study's finding that one of the primary drivers of litigation costs is attorney perception of case complexity; and
- Increased use of technology

Id. at 18–26.

The Judicial Conference also made several recommendations that required the action of Congress or the Executive branch. For example, the Conference pointed out that "a high number of judicial vacancies, and the delay in filling these vacancies, contribute substantially to cost and

delay." Report at 22. The Conference also noted that a court's ability to try cases in a timely manner depended on available courtrooms and facilities. *Id.* at 25.

EX. F

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Report on Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action

Emery G. Lee III & Jason A. Cantone
Federal Judicial Center
October 2015

Executive Summary

In November 2011, a task force of plaintiff and defendant attorneys, working in cooperation with the Institute for the Advancement of the American Legal System ("IAALS"), released a pattern discovery protocol for adverse action employment cases. The task force intended for this protocol to serve as the foundation for a pilot project examining whether it reduced costs or delays in this subset of cases. About 75 federal judges nationwide have adopted the protocols; in some districts, multiple judges have been using them.

The Judicial Conference Advisory Committee on Civil Rules asked the Federal Judicial Center ("FJC") to report on the pilot. FJC researchers identified almost 500 terminated cases that had been included in the pilot since late 2011 ("pilot cases"). For purposes of comparison, the researchers created a random sample of terminated employment discrimination cases from approximately the same filing cohorts ("control cases"). Information was collected on case processing times, case outcomes, and motions activity in the pilot and control cases. The key findings summarized in this report:

- There was no statistically significant difference in case processing times for pilot cases compared to control cases.
- There was generally less motions activity in pilot cases than in the control cases.
- The average number of discovery motions filed in pilot cases was about half the average number filed in control cases.
- Both motions to dismiss and motions for summary judgment were less likely to be filed in pilot cases.
- Although the nature of private settlements makes it difficult to determine conclusively, it appears that pilot cases were more likely to settle than control cases. On average, however, the pilot cases did not settle faster than the control cases.

Background

In May 2010, the Judicial Conference Advisory Committee on Civil Rules ("Committee") sponsored a major Civil Litigation Review Conference at Duke University School of Law ("the Duke conference"). The Duke conference was motivated by the perception that cost and delay in civil litigation required a reevaluation of the Federal Rules of Civil Procedure. One idea to arise from the conference was that pattern discovery in certain types of civil cases could streamline the discovery process and reduce delays and costs.

A committee of plaintiff and defendant attorneys highly experienced in employment matters began meeting to debate and finalize the details of what became the Pilot Project Regarding Initial Discovery Protocols for Employment Cases Alleging Adverse Action ("protocols"). Joseph Garrison chaired the plaintiffs' subcommittee and Chris Kitchel chaired the defendants' subcommittee. District Judge John G. Koeltl (Southern District of New York) and the Institute for the Advancement of the American Legal System ("IAALS") and its director, Rebecca Love Kourlis, facilitated these meetings. At the time, Judge Koeltl chaired the civil rules subcommittee charged with following up on proposals made at the Duke conference. The protocols were formalized in November 2011 and posted, along with a standing order and model protective order, to the FJC public website (www.fjc.gov). Judges were encouraged to adopt the protocols for use in a subset of adverse action employment discrimination cases. As of this writing, about 75 judges nationwide have participated in the pilot project. In some districts, including the District of Connecticut, several judges participate.

The introduction to the protocols identifies the pilot's purposes in the following way:

> The Protocols create a new category of information exchange, replacing initial disclosures with initial discovery specific to employment cases alleging adverse action. This discovery is provided automatically by both sides within 30 days of the defendant's responsive pleading or motion. While the parties' subsequent right to discovery under the F.R.C.P. is not affected, the amount and type of information initially exchanged ought to focus the disputed issues, streamline the discovery process, and minimize opportunities for gamesmanship. The Protocols are accompanied by a standing order for their implementation by individual judges in the pilot project, as well as a model protective order that the attorneys and the judge can use a basis for discussion.

In spring 2015, FJC researchers searched court electronic records to identify cases that participating judges had included in the pilot. This search used key words likely to be found on

the dockets of pilot cases, with the language largely drawn from the standing order made available as part of the protocols.

The searches resulted in a sample of 477 pilot cases, which was determined to be adequate for analysis. Pilot cases were identified in 10 districts (Arizona, California Northern, Connecticut, Illinois Northern, New York Eastern, New York Southern, Ohio Northern, Pennsylvania Eastern, and Texas Southern). Not all districts are represented evenly in the terminated pilot cases. More than half (55%) were in Connecticut, and almost another quarter were in New York Southern (22%). The finding that more than three-quarters of pilot cases came from only two of the districts could reflect differing docketing practices, the number of judges employing the protocols, and/or the number of eligible cases in the various districts.

A nationwide random sample of terminated employment discrimination cases (nature of suit = 442), filed in 2011 or later, was drawn for a control sample. The control sample included 672 terminated cases alleging employment discrimination.

Findings

Disposition Times. The mean disposition time for pilot cases (N=477) was 312 days, with a median of 275 days. The mean disposition time for control cases (N=672) was 328 days, with a median of 286 days. These miniscule differences in disposition times, although in the expected direction, are not statistically significant (p = .241).

Case Outcomes. The most common case outcome for pilot cases (N=477) was settlement, observed in 51% of cases. The second-most common outcome for pilot cases was voluntary dismissal, observed in 27% of cases. Many, if not most, voluntary (stipulated, in most cases) dismissals are probably settlements, but for this project a case was only coded as settled if there was some positive indication on the docket or in the stipulation that a settlement had been reached. If every voluntary dismissal is presumed to be a settlement, adding that number to the number of settlements provides a maximum estimate of 78% cases settling.

Pilot cases were dismissed on a Rule 12 motion 7% of the time, and resolved by summary judgment 7% of the time. Three pilot cases (< 1%) were resolved by trial. Seven percent of the pilot cases were resolved some other way (including dismissals for want of prosecution and for failure to exhaust administrative remedies).

The most common case outcome for control cases (N=672) was voluntary dismissal, observed in 35% of the cases. Settlement was the second-most common outcome, at 30%. The maximum, combined estimate for the settlement rate in the control cases is around 65%. The lower settlement rate for control cases corresponds with these cases being much more likely to be dismissed on a Rule 12 motion (13%) or resolved through summary judgment (12%). These two outcomes account for fully a quarter of dispositions in control cases, but only about an eighth of dispositions in pilot cases. Ten control cases (2%) were resolved by trial. Eight percent of the control cases were resolved in some other way.

Comparing the pilot cases and control cases that were either settled or voluntarily dismissed, the pilot cases did not reach settlement earlier. The pilot and control cases have essentially the same mean disposition time (just under 300 days).

Motions Practice. Fewer discovery motions were filed in the pilot cases than in the control cases. This analysis is limited to motions for protective orders and motions to compel discovery, including motions to compel initial disclosures required under the pilot. One or more discovery motions were filed in 21% of the control cases, compared to only 12% of pilot cases. The difference of means for the number of discovery motions filed between pilot and control cases is statistically significant ($p < .001$).

Cases with more than two discovery motions were quite rare. Three or more discovery motions were observed in about 1% of pilot cases and 2% of control cases.

Motions to dismiss were filed in 24% of the pilot cases and in 31% of the control cases. Motions for summary judgment were filed in 11% of pilot cases and in 24% of control cases. The court decided 71% of the motions to dismiss in the pilot cases and 87% of the motions to dismiss in the control cases.

Discussion

Some of the findings summarized above are consistent with the hypothesis that the pattern discovery required under the pilot was effective in reducing discovery disputes and perhaps reducing costs—assuming, that is, that less motions practice is associated with lower costs overall. Costs are difficult to measure directly. The findings are also consistent with the hypothesis that the pilot cases were more likely to result in settlement, although not necessarily

an earlier settlement. Indeed, the findings indicate that case processing times were very similar for the pilot and control cases overall and for settlement cases. The pilot does not, in short, appear to have an appreciable effect on reducing delay.

Two caveats are in order, however. First, while the initial disclosures required by the pilot were docketed in some cases, this does not appear to be standard practice. Thus, it is impossible to determine how often the parties in the pilot cases actually complied with the discovery protocols and exchanged the required initial disclosures. In fact, in some cases, it was relatively clear that the parties delayed the exchange while engaging in settlement efforts. Second, this report makes no claim that the *only* factor differing between the pilot and control cases was the pattern discovery in the former. Cases were not randomly assigned to be pilot or control cases. Individual judges' practices vary and judges inclined to adopt new discovery procedures may vary in some systematic fashion from judges who decline to do so. Individual districts' local rules and procedures also vary. Some districts in the study appear to commit more resources to mediating employment disputes than others, which may explain some of the variation in settlement rates. Thus, some caution is warranted before concluding that the pilot program caused the above described differences between the pilot and control cases.

Appendix 1: Control cases

This section summarizes the results of a study of a random, nationwide sample of terminated employment discrimination cases (Nature of suit 442) filed after January 1, 2011 (N=672). Because of the focus on terminated cases, cases filed in 2011-2013 comprise the bulk of the sample; only about 11% of the sample cases were filed in 2014 or 2015.

Disposition times by case outcomes. The median time to disposition for all control cases was 286 days (9.4 months). The mean time to disposition was 328 days (10.8 months). Leaving aside "other" outcomes, voluntary dismissals had the shortest median disposition time, 239 days (7.9 months), followed by dismissal on motion, 247 days (8.1 months), and settlement, 290 days (9.5 months). Not surprisingly, cases decided by summary judgment take much longer to resolve, median time to disposition, 504 days (16.6 months), and the small number of cases decided by trial had the longest disposition time of all, median 526 days (17.3 months).

Times to important case events. The median time from filing to the first scheduling order was 109 days (3.6 months). The median time from the first scheduling order to the discovery cut-off was 186 days (6.1 months). The median time from filing to the first discovery cut-off (in the first scheduling order, if any) was 299 days (9.8 months). The median time from filing to the filing of a motion to dismiss, if any, was 69 days (2.3 months). The median time from filing to the filing of a motion for summary judgment, if any, was 368 days (12.1 months).

Motions activity. About one in three cases had a motion to dismiss, and about one in four had a motion for summary judgment. Motions to dismiss were filed in 31% of the sampled cases, and motions for summary judgment were filed in 24%. More than one motion for summary judgment was filed in about 5% of the sample cases. Motions to compel were filed in 10% of the sampled cases, and motions for protective orders were filed in 18%. The latter figure includes stipulated protective orders.

Appendix 2: Pilot cases

This section summarizes more detailed findings of the identified pilot cases (N=477).

Disposition times by case outcomes. The median time to disposition for all pilot cases was 275 days (9.1 months). Leaving aside "other" outcomes, dismissal on motion had the shortest median time to disposition, 236 days (7.8 months), followed by voluntary dismissals, 237 days (7.8 months), and settlement, 280 days (9.2 months). Again, cases decided by summary judgment take much longer to resolve, median time to disposition, 623 days (20.5 months), but the small number of cases decided by trial was shorter, median 459 days (15.1 months).

Times to important case events. The median time from filing to the first scheduling order was 109 days (3.6 months). The median time from the first scheduling order to the discovery cut-off was 168 days (5.5 months). The median time from filing to the first discovery cut-off (in the first scheduling order, if any) was 329 days (10.8 months). The median time from filing to the filing of a motion to dismiss, if any, was 75 days (2.5 months). The median time from filing to the filing of a motion for summary judgment, if any, was 368 days (12.1 months).

Motions activity. About one in four cases had a motion to dismiss, and about one in ten had a motion for summary judgment. Motions to dismiss were filed in 23% of the sampled cases, and motions for summary judgment were filed in 11%. More than one motion for summary judgment was filed in about 1% of the sample cases. Motions to compel were filed in 5% of the sampled cases, and motions for protective orders were filed in 9%. The latter figure includes stipulated protective orders.

EX. G

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tions. The 1984 amendment to Rule 11 adequately accomplishes the purposes of Federal Rule 26(g).

The rejection of Federal Rule 26(g), and the concomitant loss of its language expressly requiring certification that the discovery request, response or objection is not unreasonable or unduly burdensome or expensive, is not intended to diminish the protection provided by Rule 26(c).

Rule 26(g). Discovery motions

No discovery motion will be considered or scheduled unless a separate statement of moving counsel is attached thereto certifying that, after personal consultation and good faith efforts to do so, counsel have been unable to satisfactorily resolve the matter.

Added and effective June 27, 2001.

Rule 26(h). Deleted. Effective Nov. 1, 1970

Rule 26.1. Prompt disclosure of information

(a) **Duty to Disclose, Scope.** Within the times set forth in subdivision (b), each party shall disclose in writing to every other party:

(1) The factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense.

(2) The legal theory upon which each claim or defense is based including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities.

(3) The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call at trial with a fair description of the substance of each witness' expected testimony.

(4) The names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action, and the nature of the knowledge or information each such individual is believed to possess.

(5) The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6) The name and address of each person whom the disclosing party expects to call as an expert witness at trial, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness and the name and address of the custodian of copies of any reports prepared by the expert.

(7) A computation and the measure of damage alleged by the disclosing party and the documents or testimony on which such computation and measure are based and the names, addresses, and telephone numbers of all damage witnesses.

(8) The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the disclosing party plans to use at trial and relevant insurance agreements.

(9) A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by a party to exist whether or not in the party's possession, custody or control and which that party believes may be relevant to the subject matter of the action, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection, copying, testing or sampling. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the documents and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

Court Comment to 1991 Amendment

In March, 1990 the Supreme Court, in conjunction with the State Bar of Arizona, appointed the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged with the task of studying problems pertaining to abuse and delay in civil litigation and the cost of civil litigation.

Following extensive study, the Committee concluded that the American system of civil litigation was employing methods which were causing undue expense and delay and threatening to make the courts inaccessible to the average citizen. The Committee further concluded that certain adjustments in the system and the Arizona Rules of Civil Procedure were necessary to reduce expense, delay and abuse while preserving

the traditional jury trial system as a means of resolution of civil disputes.

In September, 1990 the Committee proposed a comprehensive set of rule revisions, designed to make the judicial system in Arizona more efficient, more expeditious, less expensive, and more accessible to the people. It was the goal of the Committee to provide a framework which would allow sufficient discovery of facts and information to avoid "litigation by ambush." At the same time, the Committee wished to promote greater professionalism among counsel, with the ultimate goal of increasing voluntary cooperation and exchange of information. The intent of the amendments was to limit the adversarial nature of proceedings to those areas where there is a true and legitimate dispute between the parties, and to preclude hostile, unprofessional, and unnecessarily adversarial conduct on the part of counsel. It was also the intent of the rules that the trial courts deal in a strong and forthright fashion with discovery abuse and discovery abusers.

After a period of public comment and experimental implementation in four divisions of the Superior Court in Maricopa County, the rule changes proposed by the Committee were promulgated by the Court on December 18, 1991, effective July 1, 1992.

Committee Comment to 1991 Amendment

This addition to the rules is intended to require cooperation between counsel in the handling of civil litigation. The Committee has endeavored to set forth those items of information and evidence which should be promptly disclosed early in the course of litigation in order to avoid unnecessary and protracted discovery as well as to encourage early evaluation, assessment and possible disposition of the litigation between the parties.

It is the intent of the Committee that there be a reasonable and fair disclosure of the items set forth in Rule 26.1 and that the disclosure of that information be reasonably prompt. The intent of the Committee is to have newly discovered information exchanged with reasonable promptness and to preclude those attorneys and parties who intentionally withhold such information from offering it later in the course of litigation.

The Committee originally considered including in Rule 26.1(a)(5) a requirement for disclosure of all cases in which an expert had testified within the prior five (5) years. The Committee recognized in its deliberations that information as to such cases might be important in certain types of litigation and not in others. On balance, it was decided that it would be burdensome to require this information in all cases.

Committee Comment to 1996 Amendment

Rule 26.1(a)(3). With regard to the degree of specificity required for disclosing witness testimony, it is the intent of the rule that parties must disclose the substance of the witness' expected testimony. The disclosure must fairly apprise the parties of the information and opinion known by that person. It is not sufficient to simply describe the subject matter upon which the witness will testify.

Rule 26.1(a)(5) was not intended to require automatic production of statements. Production of statements remains subject to the provisions of Rule 26(b)(3).

Rule 26.1(a)(6). A specially retained expert as described in Rule 26(b)(4)(B) is not required to be disclosed under Rule 26.1.

(b) Time for Disclosure; a Continuing Duty.

(1) The parties shall make the initial disclosure required by subdivision (a) as fully as then possible within forty (40) days after the filing of a responsive pleading to the Complaint, Counterclaim, Crossclaim or Third Party Complaint unless the parties otherwise agree, or the Court shortens or extends the time for good cause. If feasible, counsel shall meet to exchange disclosures; otherwise, the disclosures shall be served as provided by Rule 5. In domestic relations cases involving children whose custody is at issue, the parties shall make disclosure regarding custody issues no later than 30 days after mediation of the custody dispute by the conciliation court or a third party results in written notice acknowledging that mediation has failed to settle the issues, or at some other time set by court order.

(2) The duty prescribed in subdivision (a) shall be a continuing duty, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party. A party seeking to use information which that party first disclosed later than sixty (60) days before trial shall seek leave of court to extend the time for disclosure as provided in Rule 37(c)(2) or (c)(3).

(3) All disclosures shall include information and data in the possession, custody and control of the parties as well as that which can be ascertained, learned or acquired by reasonable inquiry and investigation.

Committee Comment to 1991 Amendment

The Committee does not intend to affect in any way, any party's right to amend or move to amend or supplement pleadings as provided in Rule 15.

EX. H

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INITIAL DISCLOSURE - DISCOVERY PILOT PROJECT RULE

Proposed Rule Sketch

The sketch set out below is proposed as a starting point in working toward a rule that might be tested to expand on the initial disclosure provisions in present Rule 26(a)(1). It is derived from Arizona Rule 26.1, but simplified in several ways. The reasons for this proposal follow.

(a) [*Version 1*: Within the times set forth in subdivision (b),[1] each party must disclose in writing to every other party:[2]] [*Version 2*: Before seeking discovery from any source, except in a proceeding listed in Rule 26(a)(1)(B), each party must answer these Rule 33 interrogatories {and Rule 34 requests to produce or permit entry and inspection}, providing:]

(1) (A) the factual basis of its claims or defenses;

(B) the legal theory upon which each claim or defense is based;

(C) a computation of each category of damages claimed by the disclosing party — who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of the injuries suffered;

(D) for inspection and copying as under Rule 34 any insurance [or other] agreement under which an insurance business [or other person] may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment;[3] and

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[1] The times established in present Rule 26(a)(1)(C) and (D) may need to be reconsidered in light of the increased disclosures required by this rule. See footnote 2.

[2] Version 2 makes this exchange of information a first wave of discovery. Adopting the full incidents of those rules will set times to respond, and address many other issues that may arise.

[3] This is present Rule 26(a)(1)(A)(iv) as a placekeeper. Are there reasons to broaden the disclosures it requires? Indemnification agreements, for example, are not covered. It has been observed that these questions do arise. The

(2) whether or not the disclosing party intends to use them in presenting its claims or defenses:

(A) the names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action;

(B) the names and addresses of all persons known to have given statements, and — if known — the custodian of any copies of those statements; and

(C) a list of the categories of documents, electronically stored information, nondocumentary tangible things or land or other property, known by a party to exist whether or not in the party's possession, custody or control and which that party reasonably believes may be relevant to any party's claims or defenses, including — if known — the custodian of the documents or electronically stored information not in the party's possession, custody, or control.

Discussion

RULE DESIGN

Designing the rule to be tested in a pilot project is not entirely separate from designing the project's structure. But the first task is to determine the elements of the rule that is to be tested.

Many real-world models could be used as a point of departure, perhaps combining elements from different models, adding new elements, or subtracting elements from a truly demanding model. This proposal was framed by reducing the scope of Arizona Rule 26.1. This foundation provides solid reassurance that the elements of the proposal have been tested in practice, and in combination with each other.

Arizona Rule 26.1 is the broadest disclosure rule we know of. Over the course of twenty years it seems to have built toward substantial success. It would be difficult to implement a more

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bracketed language is used to contrast with the otherwise unchanged language of the present rule; if disclosure is to reach further, integrated language may prove more attractive. Whatever may be done on that score, the Committee decided recently that the time has not yet come to consider disclosure of litigation finance arrangements.

demanding model. And to the extent that it may be possible to structure a pilot project in ways that make it possible to evaluate different components of the model, separating those that work from those that do not work, aiming high has real advantages.

Caution, however, suggests adoption of a model that is robust but not aggressive. The project will fail at the outset if the model is so demanding that no court can be found to test it. As described in more detail below, there may be independent reasons to question whether the Arizona rule can work on a nationwide basis, across courts with different mixes of cases and different local cultures. The proposal aims at a less demanding but still robust regime.

The first question to be addressed in working from the Arizona model is whether to frame the model as initial disclosure or as first-wave discovery. The original version of Rule 26(a)(1) was adopted in 1993 in an effort to streamline the exchange of information that inevitably would be sought in the first wave of discovery. Although more demanding than the version adopted in 2000, it was focused on a sufficiently narrow target to make it work as disclosure. The disclosure approach is illustrated by Version 1 in the model.

An alternative is to frame the model as mandatory initial discovery. This approach has at least two potential advantages. First, by incorporating Rules 33 [and 34], it incorporates the provisions of those rules that set times to respond and obligations in responding. (It might be helpful to complicate the rule text by prohibiting objections, but the complication seems unnecessary.) The second advantage is to avoid claims that the model is inconsistent with present Rule 26(a)(1). Everything in the model is well within the court’s authority to control discovery and disclosures, particularly through Rule 16(b)(3) and (c)(2)(F). These advantages may well lead to adopting this alternative.

The next questions go to the details: What elements of the Arizona rule might be reduced? Some of the changes are simple matters of drafting. For example, it suffices to say "the factual basis of its claims or defenses," instead of "the factual basis of the claim or defense. In the event of multiple claims or defenses, the factual basis for each claim or defense." Other changes are more substantive.

Model (a)(1)(B) is limited to "the legal theory on which each claim or defense is based." It omits "including, where necessary for a reasonable understanding of the claim or defense, citations of pertinent legal or case authorities." Requiring these added details will often lead to unnecessary information and provides a rich occasion for disputes about the adequacy of

the disclosures.

Arizona Rule 26.1(a)(3) calls for initial disclosure of expected trial witnesses, including a fair description of the substance of the expected testimony. It is omitted entirely, in the belief that present Rule 26(a)(3) pretrial disclosures do the job adequately, and at a more suitable time. Arizona Rule 26.1(a)(8) calls for initial disclosure of documents, electronically stored information, and tangible evidence the party plans to use at trial. It is omitted for similar reasons; the part that calls for disclosure of "relevant insurance agreements" is reflected in Model Rule (1)(D).

Model Rule subparagraphs (1)(C) and (D) are drawn verbatim from present Rule 26(a)(1)(A)(iii) and (iv). These rules seem to work well. They displace Arizona Rule 26.1(a)(7) on computation of damages and the part of (8) that calls for identification of "relevant insurance agreements."

Paragraph (2) of the model begins by requiring disclosure of additional matters "whether or not the disclosing party intends to use them in presenting its claims or defenses." Although this obligation is implicit in the initial direction to disclose, it seems wise to emphasize that this model goes beyond the "may use" limit in present Rule 26(a)(1)(A)(i) and (ii).

Subparagraph (2)(A), requiring disclosure of persons believed to have knowledge of the events in suit, is taken verbatim from the first part of Arizona Rule 26.1(a)(4), but omits "and the nature of the knowledge or information each such individual is believed to possess." There may be sufficient uncertainty or outright mistake, and sufficient difficulty in describing these matters, to urge caution in going so far.

Subparagraph (2)(B) departs from Arizona Rule 26.1(a)(5) in two ways. It omits the description of witness statements "whether written or recorded, signed or unsigned." Those words seem ambiguous as to oral "statements" not reduced to writing or recording. And it adds "if known" to the requirement to disclose the custodian of copies of the statement. This provision may need further work to decide whether to include oral statements, or to exclude them explicitly.

Subparagraph (2)(C) substantially shortens Arizona Rule 26.1(a)(9). First, the Arizona rule initially requires a list of all documents or electronically stored information, allowing a list by categories only "in the case of voluminous" information. The Model Rule is content with a list by categories for all cases. That is enough to pave the way and direction for later Rule 34 requests. Second, the Arizona rule invokes a term omitted from Federal Rule 26(b)(1) by the proposed amendments now pending in Congress: "relevant to the subject matter of the action." The

Model Rule substitutes "relevant to any party's claims or defenses." Third, the Model Rule eliminates the direction to list documents "reasonably calculated to lead to the discovery of admissible evidence." Whatever might be made of that familiar phrase in defining the outer scope of discovery, it overreaches for initial disclosure. Finally, and most importantly, the Model Rule eliminates the direction to serve a copy of the documents or electronically stored information with the disclosure "[u]nless good cause is stated for not doing so." The related provisions for identifying the custodian if production is not made, and for the mode of producing, are also omitted. Full production at this early stage is likely to encompass more — often far more — than would actually be demanded after the categories of documents and ESI are described. Too much production does no favors, either for the producing party or for the receiving party. The Arizona alternative of stating good cause for not producing everything that is listed might work if all parties behave sensibly, but it also could add another opportunity for pointless disputes.

Pilot Project Design

Designing the project itself will take a great deal of work, much of it by the experts at the Federal Judicial Center. It is imperative that the structure provide a firm basis for evaluating the model chosen for testing. But a few preliminary and often tentative thoughts may be offered.

The initial recommendation is to structure the pilot to mandate participation. The choice between mandatory or voluntary participation is one of the first questions common to all pilot projects. A choice could be introduced in various ways — as opt-in or opt-out, either at the behest of one party or on agreement of all parties. Resistance to a pilot is likely to decline as the degree of voluntariness expands. But there is a great danger that self-selection will defeat the purposes of the test. To be sure, it would be useful to learn that more and more parties opt to stay in the model as experience with it grows. But in many circumstances it would be difficult to draw meaningful lessons from comparison of cases that stay in the model to cases that opt out.

The second recommendation is that the pilot should include all cases, subject to the possibility of excluding the categories of cases now exempted by Rule 26(a)(1)(B) from initial disclosure. Those cases were selected as cases that seldom have any discovery, and they occupy a substantial portion of the federal docket. Nothing important is likely to be lost by excluding them, and much unnecessary work is likely to be spared. Beyond those cases, arguments can be made for excluding others. One of the concerns about the original version of Rule 26(a)(1) was that it would require useless duplicating work in the many cases in which the parties, not trusting the initial disclosures,

would conduct discovery exactly as it would have been without any disclosures. That might well be for complex, high-stakes, or otherwise contentious cases. But the more expanded disclosures required by the model provide some reassurance that this danger will be avoided. The model, particularly when seen as an efficient form of focused first-wave discovery, is designed in the hope that it really will reduce the cost and delay of discovery in many cases, including — perhaps particularly including — complex cases.

A quite different concern arises from cases with at least one pro se party. It may be wondered whether these initial requirements will prove overwhelming. But pro se litigants are subject to discovery now. And here too, it may be hoped that simple rule directions will provide better guidance than the complex language of lawyer-formulated Rule 33 [and Rule 34] discovery demands.

One particularly valuable consequence of including all cases is that information will be provided on how well the model actually works across the full range of litigation. There may be surprises, but that is the point of having a pilot. Any national rule that is eventually adopted would be crafted on the basis of this experience. If, for example, broad initial disclosures prove useless or even pernicious in antitrust cases, a way can be found to accommodate them. (It seems likely that the rule would recognize judicial discretion to excuse or modify the disclosure requirements, but that choice will await evaluation of the pilot's lessons.)

Selection of pilot courts is also important. Potentially conflicting considerations must be weighed. There are obvious advantages in selecting courts in states that have some form of initial disclosure more extensive than the present federal rule. Lawyers will be familiar with the state practice, and can adapt to the federal model with some ease, at least if they can check reflexes ingrained by habitual state practice. The same may hold, although to a lesser extent, for the judges. From this perspective, the District of Arizona might be a natural choice. Another might be the District of Connecticut, where the judges have widespread experience with the protocols for initial discovery in individual employment cases. Courts in Colorado, New Hampshire, Texas, and Utah also might be considered: each state has experience with initial disclosure systems more extensive than the current federal model. A particular advantage of selecting such courts may be that because they are already primed, they will achieve better results than would be achieved in other courts. That could mean that other courts will be encouraged to adopt the practice, or the national rules to embrace it, even though success will take somewhat longer to achieve in other courts.

Reliance on courts already familiar with expanded disclosure, however, might undermine confidence in whatever favorable findings might be supported by the pilot court. That a rule works with courts and lawyers who have favorable attitudes is not a sure sign that it will work with lawyers who remain hostile. And there may be a further problem. A means must be found to compare cases managed under the model with other cases. Comparison of pilot cases with cases in the same court in earlier years runs the risk that the earlier cases were shaped by habits developed under the already familiar disclosure regime. Comparison of pilot cases with cases in other courts might encounter similar difficulties.

In the most attractive world, it might prove possible to engage a number of courts with different characteristics in the pilot program. But if the project is to be tested in only one court, or even two, it will be necessary to decide whether to look to a court that already has some experience, whether it is by vicarious connection to local practice or by direct experience.

The proper duration of a pilot project may vary by subject. A model that departs substantially from present practice in discovery and disclosure is likely to require a rather extensive period of adjustment. It takes time for lawyers and judges to learn how to make the most of a new model, and to learn how to defeat efforts to subvert it. Surely anything less than three years would be too short, and five years seems a more realistic duration.

There is a point of structure peculiar to disclosure. Comparison of results depends on sure knowledge whether the model was actually used. The pilot should include a requirement that the parties file a certificate of compliance that will lead researchers to the proper starting point.

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EX. I

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MEMORANDUM

To: Judge Jeffrey S. Sutton
From: Derek Webb
Subject: Rule 26(a) Disclosure Reform History: A Canvas of the Criticisms in the 1990s.
Date: December 7, 2015

In the 1990s, the Civil Rules Committee attempted to reform Civil Rule 26 disclosures. The goal was to require disclosures of helpful *and* hurtful information held by each party. The rule gave district courts the choice of opting out and most of them did. Ultimately, the "hurtful" part was abandoned because too many lawyers thought it was not their job to help the other side. In response to your request, I have done a quick survey of the precise criticisms of this reform and the individuals who made them.

Let me start first with the Supreme Court's reaction. On April 22, 1993, Justices Scalia, Thomas, and Souter officially dissented from the proposed Rule 26(a) requiring the duty to disclose helpful and harmful information held by each party. Before this dissent, Supreme Court Justices had only objected twice to the substance of a proposed rule since the early 1960's. Scalia objected to the proposed rule change, which he called "potentially disastrous," for the following reasons:

> 1) It would actually add another layer of discovery, requiring litigants to determine and fight over what information was "relevant" to "disputed facts" and whether either side had adequately disclosed the required information.
>
> 2) It would undermine the adversarial nature of the litigation process and infringe upon lawyers' ethical duties to represent their clients and not to assist the opposing side.
>
> 3) It had not been tested locally in three-year "pilot project" experiments prior to the implementation of a nation-wide rule change.
>
> 4) It had been widely opposed by the bench, bar, and ivory tower.

I am appending Justice Scalia's dissent to this memo.

The response from lawyers appears to have been overwhelmingly negative. Of the 264 written comments submitted to the Federal Judicial Center, 251 opposed the rule change.

Many politicians opposed the rule change. The House of Representatives actually passed a bill, co-sponsored by William Hughes of New Jersey and Carlos Moorehead of California, to block its passage. Perhaps distracted by NAFTA, health care reform, and other pressing matters, and rushed by the eleventh-hour nature of the debate, the Senate, despite the support of Senator Howell Heflin, did not pass its own bill and thereby allowed the rule change to go into effect on December 1, 1993.

A host of academics and other lawyer-commentators chimed in with other criticisms. Some who weighed in critically included Michael J. Wagner, Randall Samborn, Carl Tobias, Carol Campbell Cure, John Koski, Thomas Mengler, Griffin Bell, Chilton Varner, and Hugh Gottschalk. Among their additional criticisms included these concerns:

1) It would lead litigants on both sides to bury the other side in voluminous and often irrelevant documents, thereby frontloading the costs of litigation to its early stages and impeding settlement because both sides would have already invested too much in the case and would want to go to trial.

2) It would make complex litigation, which is often highly technical and document-intensive, more difficult and expensive under the new rules.

3) It would be particularly onerous for defendants, especially large corporations, who have less time than plaintiffs to consider the case and determine what documents are relevant. For large corporations, it might incline them to settle more rather than go to trial.

4) It would ironically add extra responsibilities to district court judges who would have to preside over satellite litigation and mini-trials on which documents were relevant.

5) It would chill attorney-client communications, with both sides reluctant to discuss pending cases lest their content eventually need to be disclosed.

6) The ability of district courts to opt out of the rule would undermine national uniformity and make practice all that more difficult.

This is just a quick survey of the relevant terrain. Please let me know if you would like me to layer this with further research (e.g., more arguments, names, details).

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 146 F.R.D. 401, 507

[April 22, 1993]

Justice Scalia, with whom Justice Thomas joins, and with whom Justice Souter joins as to Part II, filed a dissenting statement.

I dissent from the Court's adoption of the amendments to Federal Rules of Civil Procedure 11 (relating to sanctions for frivolous litigation), and 26, 30, 31, 33, and 37 (relating to discovery). In my view, the sanctions proposal will eliminate a significant and necessary deterrent to frivolous litigation; and the discovery proposal will increase litigation costs, burden the district courts, and, perhaps worst of all, introduce into the trial process an element that is contrary to the nature of our adversary system.

…

II
Discovery Rules

The proposed radical reforms to the discovery process are potentially disastrous and certainly premature—particularly the imposition on litigants of a continuing duty to disclose to opposing counsel, without awaiting any request, various information "relevant to disputed facts alleged with particularity." See Proposed Rule 26(a)(1)(A), (a)(1)(B), (e)(1). This proposal is promoted as a means of reducing the unnecessary expense and delay that occur in the present discovery regime. But the duty-to-disclose regime does not replace the current, much-criticized discovery process; rather, it *adds a further layer of discovery*. It will likely *increase* the discovery burdens on district judges, as parties litigate about what is "relevant" to "disputed facts," whether those facts have been alleged with sufficient particularity, whether the opposing side has adequately disclosed the required information, and whether it has fulfilled its continuing obligation to supplement the initial disclosure. Documents will be produced that turn out to be irrelevant to the litigation, because of the early inception of the duty to disclose and the severe penalties on a party who fails to disgorge in a manner consistent with the duty. See Proposed Rule 37(c) (prohibiting, ****511*** in some circumstances, use of witnesses or information not voluntarily disclosed pursuant to the disclosure duty, and authorizing divulgement to the jury of the failure to disclose).

The proposed new regime does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker. By placing upon lawyers the obligation to disclose information damaging to their clients—on their own

initiative, and in a context where the lines between what must be disclosed and what need not be disclosed are not clear but require the exercise of considerable judgment—the new Rule would place intolerable strain upon lawyers' ethical duty to represent their clients and not to assist the opposing side. Requiring a lawyer to make a judgment as to what information is "relevant to disputed facts" plainly requires him to use his professional skills in the service of the adversary. See Advisory Committee Notes to Proposed Rule 26, p. 96.

It seems to me most imprudent to embrace such a radical alteration that has not, as the advisory committee notes, see *id.*, at 94, been subjected to any significant testing on a local level. Two early proponents of the duty-to-disclose regime (both of whom had substantial roles in the development of the proposed rule—one as Director of the Federal Judicial Center and one as a member of the advisory committee) at one time noted the need for such study prior to adoption of a national rule. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. Pitt. L. Rev. 703, 723 (1989); Brazil, The Adversary Character of Civil Discovery: A Critique and Proposals for Change, 31 Vand. L. Rev. 1295, 1361 (1978). More importantly, Congress itself reached the same conclusion that local experiments to reduce discovery costs and abuse are essential *before* major revision, and in the Civil Justice Reform Act of 1990, Pub. L. 101-650, §§ 104, 105, 104 Stat. 5097-5098, mandated an extensive pilot program for district courts. See also 28 U. S. C. §§471, 473(a)(2)(C). Under that legislation, short-term experiments ***512** relating to discovery and case management are to last at least three years, and the Judicial Conference is to report the results of these experiments to Congress, along with recommendations, by the end of 1995. Pub. L. 101-650, § 105, 104 Stat. 5097-5098. Apparently, the advisory committee considered this timetable schedule too prolonged, see Advisory Committee Notes to Proposed Rule 26, p. 95, preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress, especially since courts already have substantial discretion to control discovery.[2] See Fed. Rule Civ. Proc. 26.
I am also concerned that this revision has been recommended in the face of nearly universal criticism from every conceivable sector of our judicial system, including judges, practitioners, litigants, academics, public interest groups, and national, state and local bar and professional associations. See generally Bell, Varner, & Gottschalk, Automatic Disclosure in Discovery—The Rush to Reform, 27 Ga. L. Rev. 1, 28-32, and nn. 107-121 (1992). Indeed, after the proposed rule in essentially its present form was published to comply with the notice-and-comment requirement of 28 U. S. C. §2071(b), public criticism was so severe that the advisory committee announced abandonment of its duty-to-disclose regime (in favor of limited pilot experiments), but then, without further public comment or explanation, decided six weeks later to recommend the rule. 27 Ga. L. Rev., at 35.

*** * ***

Constant reform of the federal rules to correct emerging ***513*** problems is essential. Justice White observes that Justice Douglas, who in earlier years on the Court had been wont to note his disagreements with proposed changes, generally abstained from doing so later on, acknowledging that his expertise had grown stale. *Ante*, at 5. Never having specialized in trial practice, I began at the level of expertise (and of acquiescence in others' proposals) with which Justice Douglas ended. Both categories of revision on which I remark today, however, seem to me not matters of expert detail, but rise to the level of principle and purpose that even Justice Douglas in his later years continued to address. It takes no expert to know that a measure which eliminates rather than strengthens a deterrent to frivolous litigation is not what the times demand; and that a breathtakingly novel revision of discovery practice should not be adopted nationwide without a trial run.

In the respects described, I dissent from the Court's order.

Footnote:

2. For the same reason, the proposed presumptive limits on depositions and interrogatories, see Proposed Rules 30, 31, and 33, should not be implemented.

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 5, 2015

The Civil Rules Advisory Committee met at S.J. Quinney College of the Law at the University of Utah on November 5, 2015. (The meeting was scheduled to carry over to November 6, but all business was concluded by the end of the day on November 5.) Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan M. Ericksen; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Judge Brian Morris; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq. (by telephone); and Judge Craig B. Shaffer. Former Committee Chair Judge David G. Campbell and former member Judge Paul W. Grimm also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison, Judge Amy J. St. Eve (by telephone), and (also by telephone) Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt, Esq.. Rebecca A. Womeldorf, Esq., Amelia Yowell, Esq., and Derek Webb, Esq. represented the Administrative Office. Emery G. Lee attended for the Federal Judicial Center. Observers included Jerome Scanlan, Esq. (EEOC); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Brittany Kaufman, Esq. (IAALS); Alex Dahl, Esq. and Mary Massaron, Esq. (Lawyers for Civil Justice); John K. Rabiej, Esq.; John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); and Ariana Tadler, Esq..

Judge Bates opened the meeting by greeting new members, Judge Ericksen and Judge Morris.

Judge Bates also noted the presence of former Committee member Judge Grimm and former Committee Chair Judge Campbell. They, and Judge Diamond who rotated off the Committee at the same time, contributed in many and invaluable ways to the Committee's work. Looking to the package of rules amendments that are pending in Congress now, Judge Grimm chaired the Discovery Subcommittee and was a member of the Subcommittee chaired by Judge Koeltl that worked through proposals generated by the Committee's 2010 Conference on reforming the rules. Judge Campbell has devoted a decade to Committee work, and continues with the work on pilot projects and on educating bench and bar in what we hope will, on December 1, become the 2015 amendments. The Reporters also described the many lessons in drafting, practice, and wisdom they had learned in working closely with Judge Campbell as chair of the Discovery Subcommittee and then Committee Chair.

Judge Bates concluded these remarks by observing that the new members would soon witness the Committee's determination to work toward consensus in its deliberations. The package of amendments now pending in Congress emerged from a remarkable level of agreement even on the details. Judge Campbell's strong and tireless leadership was demonstrated at every turn. Professor Coquillette "seconded" all of this high praise.

Judge Campbell expressed appreciation for the "overly kind comments." He noted that special praise is due to Judge Grimm for contributions "as substantial as anyone," especially in chairing the Discovery Subcommittee. He emphasized that the Committee is indeed a collaborative group. It is the profession's best example of collective thinking, good-faith effort, and agenda-less work. Every member who moves into alumnus standing has expressed this view. The Reporters provide excellent support. Judge Bates and Judge Sutton will carry the work forward in outstanding fashion.

Judge Campbell also noted that in 1850 his great-great grandparents came to the valley where the Committee is meeting as Mormon pioneers. Robert Lang Campbell became the first Commissioner of Public Education and was a regent of the University of Deseret, a progenitor of the University of Utah. "The University is home to me and my family."

Dean Robert W. Adler welcomed the Committee to the Law School and its new building. The new building is designed both to improve the learning experience and to advance the Law School's involvement with the community. He noted that as a professor of civil procedure he always demands that his students read the Committee Notes as they study each rule. "You can see the lights going off in their heads" as they read the Notes and come to understand that there is more in the rule texts than may appear on first reading.

April 2015 Minutes

The draft minutes of the April 2015 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Standing Committee and Judicial Conference

Judge Campbell reported on the May meeting of the Standing Committee and the September meeting of the Judicial Conference.

The Standing Committee meeting went well. There was a good discussion of pilot projects.

At the Judicial Conference, the Chief Justice invited Judge Sutton and Judge Campbell to present a summary of the amendments now pending in Congress. They urged the Chief Judges to offer programs to explain to judges and lawyers the nature and importance of these amendments in the hoped-for event that they emerge from

Congress.

The Judicial Conference approved and sent to the Supreme Court amendments to Rule 4(m) dealing with service on corporations and other entities outside the United States; Rule 6(d), clarifying that the "3-added-days" provision applies to time periods measured after "being served," and eliminating from the 3-added days service by electronic means; and Rule 82, synchronizing it with recent amendments of the venue statutes as they affect admiralty and maritime cases.

Legislative Report

Rebecca Womeldorf provided the legislative report for the Administrative Office. Two familiar sets of bills have been introduced in this Congress.

The Lawsuit Abuse Reduction Act of 2015 (LARA) has passed in the House. It would amend Rule 11 by reinstating the essential aspects of the Rule as it was before the 1993 amendments. Sanctions would be mandatory. The safe harbor would be removed. This bill has been introduced regularly over the years. In 2013 Judge Sutton and Judge Campbell submitted a letter urging respect for the Rules Enabling Act process, rather than undertake to amend a Civil Rule directly. The prospects for enactment remain uncertain.

H.R. 9, the Innovation Act, embodies patent reform measures like those in the bill that passed in the House last year. There are many provisions that affect the Civil Rules. Parallel bills have been introduced in the Senate, or are likely to be introduced. The earlier strong support for some form of action seems to have diminished for the moment.

A proposed Fairness in Class Action Litigation Act would directly amend Rule 23. A central feature is a requirement that each proposed class member suffer an injury of the same type and scope as every other class member. The ABA opposes this bill.

Publicizing the Anticipated 2015 Amendments

Judge Grimm described the work of the Subcommittee that is seeking to support programs that will educate members of the bench and bar in the package of rules that will become law on December 1 unless Congress acts to modify, suspend, or reject them.

The 2010 Conference emphasized themes that have persisted through the ensuing work to craft these amendments. Substantial reductions in cost and delay can be achieved by proportionality in discovery and all procedure, cooperation of counsel and parties, and early and active case management. These concepts have been reflected in the rules since 1983. They have been the animating

spirit of succeeding sets of rules amendments. The need for yet another round of amendments has suggested that amending the rules is not always enough to get the job done. So it was decided that the amendments should be advanced by promoting efforts to bring them home to members of the bench and bar by focused education programs. Work on the programs is progressing.

Five videotapes are being prepared. They will be structured in segments, facilitating a choice between a single viewing and viewing at intervals. Judge Fogel and the FJC have been a wonderful resource. Tapes by Judge Koeltl and Judge Grimm have been done. The remaining tapes will be done on November 6.

Letters from Judge Sutton and Judge Bates will alert district judges to the new rules. A powerpoint presentation is being prepared.

Bar organizations have been encouraged to prepare programs. The ABA has done one, and will do more; John Barkett is participating. The American College of Trial Lawyers has planned a program. The Fifth Circuit and Eighth Circuit will have programs; it is hoped that other circuits will as well.

Many articles are being written. Judge Campbell has prepared one for Judicature. Professor Gensler, a former Committee member, has prepared a very good pamphlet.

One indication of the value of educational efforts is provided by a poll Judge Grimm undertook. He asked 110 judges — 68 Magistrate Judges and 42 District Judges — whether they actively manage discovery from the beginning of an action or, instead, wait for the parties to bring disputes to them. More than 80% replied that they wait for disputes to emerge. "We hope to educate them that early management reduces their work."

One caution was noted. The Duke Center for Judicial Studies has convened a group of 30 lawyers, evenly divided between 15 who regularly represent plaintiffs and 15 who regularly represent defendants, to prepare a set of Guidelines on proportionality. Some present and former Committee members reviewed drafts. These guidelines will be used in 13 conferences planned by the ABA and the Duke Center that aim to advance the practice of proportionality. The first conference will be held next week, a few weeks before we can know that the proposed amendments will in fact take hold. Professor Suja Thomas has expressed concern that these guidelines will be used to "train" judges, and to be presented in a way that casts an aura of official endorsement. In response to this concern, Judges Sutton, Bates, and Campbell have sent out a letter to federal judges making it clear that the guidelines are not endorsed by the rules committees. The letter also notes that these conferences are not being used to "train" judges.

Judge Sutton noted that December 1 has not yet arrived. "We must be very careful to show that we are not presuming Congress will approve the amendments." It is appropriate to anticipate the expected birth of the amendments by preparing to encourage implementation from and after December 1. And it is appropriate to participate in programs that are presented before December 1 if it is made clear that the amendments remain pending in Congress and will become law only if Congress does not intervene by December 1. It is proper for Committee members and former Committee members to participate in these educational programs, but it is important to continue the tradition that no favoritism should be shown among the outside groups that organize the programs. An invitation should be accepted only if the same invitation would be accepted had it been extended by a different organization. And, as always, it is important to emphasize both in opening and in closing that no member speaks for the Committee.

Judge Campbell noted that the Duke Center has invested great effort in promoting the new rules. "We should be grateful." It is unfortunate that Professor Thomas has become concerned that the Center is too closely connected to the Committee. It continues to be important that all branches of the profession, teaching, practicing, and judging, understand that the Committee is in fact independent of all outside groups. The letter to federal judges is designed to provide reassurance.

Judge Bates echoed this appreciation of the Duke Center’s efforts.

John Rabiej noted that the Duke Center says, explicitly and repeatedly, that the Guidelines are not binding. They are only suggestions. And they emerged from a working group evenly divided between plaintiff interests and defense interests.

A Committee member noted that she observed e-mail traffic, including messages focused on the Duke Center’s involvement, that reflects a widespread perception that the rules result from an adversary process in which "someone wins and someone loses." That wrong impression is unfortunate. "The rules are for everyone." As a private person, she tells people that the best course is to read the rules and Committee Notes. Practicing lawyers may be forgiven for misperceiving the process because they are largely unaware of it. But it is difficult to forgive similar ignorance when it is shown by academics — within the last few weeks she had occasion to ask a civil procedure teacher what he thought of the pending amendments and he asked "what amendments"?

Another Committee member observed that it is a good process. The 2010 Conference contributed a lot. But it remains important to stress, without overdoing it, that the Duke guidelines are not ours.

Another Committee member underscored the importance of making it clear that members do not speak for the Committee. "I always do it." But it also is important to emphasize that the Committee is seeking to achieve the effective administration of justice.

Yet another member noted that at least some judges are uncertain whether it is appropriate to attend the ABA-Duke Center presentations. Reassurances would be helpful.

Rule 23

Judge Bates introduced the Rule 23 proposals by noting that the Class-action Subcommittee has been working with extraordinary intensity. Over the course of the summer he participated in 10 Subcommittee conference calls working on the substance of the proposals, and there was much other traffic by messages and calls on incidental matters. Judge Dow and Professor Marcus deserve much credit for pushing things along.

For today, the goal is to form a good idea of which proposals should move forward. It may be possible to work on some specifics, but "this is not the final round." The Committee will report to the Standing Committee in January. By this Committee's meeting next April we may be in a position to make formal recommendations for publication in 2016. For today, we can view the package as a whole. Much of it deals with settlements.

Judge Dow introduced the Subcommittee report by noting that it presents 11 items for discussion, generally with illustrative rule text and committee notes.

Six topics are recommended for continuing work: "frontloading" the initial presentation of a proposed settlement; adding a provision to Rule 23(f) to ensure that appeal by permission is not available from an order approving notice of a proposed settlement; amending Rule 23(c)(1) to make it clear that the notice of a proposed settlement triggers the opt-out and objection process, even though the class has not yet been certified; emphasizing opportunities for flexible choice among the means of notice; establishing a requirement that a court approve any payment to be made in connection with withdrawing an objection to a settlement or withdrawing an appeal from denial of an objection, along with provisions coordinating the roles of district courts and circuit courts of appeals when dismissal of an appeal is involved; and expanding the rule text criteria for approving a proposed settlement.

One topic, adoption of a separate provision for certifying a settlement class, is presented for discussion, although the Subcommittee is not inclined to move toward adopting such a provision.

Two other topics are on hold. Each awaits further development in the courts. One is "ascertainability," a set of questions that are percolating in the circuits. The other is the use of Rule 68 offers of judgment or other settlement offers as a means of attempting to moot a class action by "picking off" all class representatives; this question has been argued in the Supreme Court, and any further consideration should await the decision.

Finally, the Subcommittee recommends that two other topics be removed from present work. One is "cy pres" awards in settlements. The other is any attempt to address the role of "issue" classes. The reasons for setting these topics aside will be developed in the later discussion.

Frontloading: Draft Rule 23(e)(1) tells the court to direct notice of a proposed class settlement if the parties have provided sufficient information to support a determination that giving notice is justified by the prospect of class certification and approval of the settlement. The basic idea was developed in response to discussion at the George Washington conference described in the Minutes for the April meeting, and with help from an article by Judge Bucklo about the things judges need to know about a proposed class settlement but often do not know. The information will enable the judge to determine whether notice to the class is justified. If the class has not already been certified, the notice will be in the form required by Rule 23(c)(2) — for a (b)(3) class, it will trigger the opportunity to request exclusion, and for all classes it will provide a basis for appearing and for objecting to the proposed settlement. These purposes are best served by detailed notice of the terms of settlement. Many courts follow essentially this practice now, but express rule text will advance the best practice for all cases.

This proposal begins by adding language to the initial part of Rule 23(e)(1), making it clear that court approval is required to settle the claims not only of a certified class but also of a class that is proposed for certification at the same time as the settlement is approved.

The frontloading concept was presented to the September miniconference in the form of rule text that listed 14 kinds of information the parties should provide. This "laundry list" approach met a lot of resistance. There is constant fear that an official list of factors will be diluted in practice to become a simple check-list that routinely checks off each factor without distinguishing those that are important to the specific case from those that are not. The present draft channels all these factors into an open-ended behest that the parties provide "relevant" or "sufficient" information. Perhaps some other descriptive word should be found to emphasize the purpose to provide as much as possible of the information that will be presented on the motion

for final approval. This approach, leaving it to the court and parties to identify and focus on the considerations that bear on a particular proposed settlement, seemed to win support at the miniconference. The Committee Note can go a long way toward calling attention to the multiple factors that appeared in the "laundry list" draft.

Judge Dow noted that the sophisticated lawyers who bring class actions in his court commonly provide the kinds of information required by the proposal. But not all lawyers do it. "The less sophisticated practitioners need" more guidance in the rule.

Judge Dow further noted that the proposed rule text does not address the question of what to do with the residue of a class defendant's agreed relief when not all class members make claims. It would be possible to say something on this score, and to support the rule text with a Committee Note that identifies the factors included in the original laundry list rule draft. Professor Marcus added that the Note attempts "to identify, advocate, convey." It does not say that all 14 factors need be checked off every time.

A Committee member said that the draft rule reflects what has become "procedural common law." Judges created this procedure. The Manual for Complex Litigation adopts it. When the parties present a proposed settlement for approval in an action that has not already been certified as a class, the practice calls for "preliminary approval" of certification and settlement, notice to the class with opportunity to opt out or object, and final approval. Many experienced lawyers and judges believe that Rule 23 says this. "The proposal is to have the rule say what many think it says now." But too often, in the hands of those who are not familiar with Rule 23 practice, the important information comes out too late. But the draft is ambiguous in calling for relevant information about the proposed settlement — is this information about the quality of the settlement, or does it include information about the reasons for certifying any class and about proper class definition? The response was to point to the statement in the draft Committee Note that "[o]ne key element is class certification." But perhaps more could be said in the rule text.

A drafting question was raised: would it be better to begin in this form: "The court must direct notice," etc., if the parties have provided the required information and if the court determines that giving notice is justified, etc.? And is either of the alternative words used the best that can be found to describe the quantity and quality of information that must be provided? "'Relevant' calls to mind the scope-of-discovery provision in rule 26(b)(1)." The answer was recognition that work will continue on the drafting. The earlier draft that set out 14 factors was troubling because in many cases several of the 14 "do not matter." But drafting a more open-ended approach is a work in progress.

This answer prompted the reflection that "the information relevant is quite different from one type of action to another." A complex antitrust action may call for quite different types of information than will be called for in an action involving a single form of consumer deception.

A similar style suggestion was offered: "I like better rules that tell the parties to do things," rather than "rules that tell the court to do things." The purpose of this rule is to tell the parties to provide more information. Such was the approach taken in the 14-factor draft, set out at p. 189 in the agenda materials: when seeking approval, "the settling parties must present to the court" all of the various described items of information.

A finer-grained drafting comment also was made. The draft simply grafts a reference to a proposed settlement class into the present text of subdivision (e)(1):

> The claims, issues, or defenses of a certified class, or a class proposed to be certified as part of a settlement, may be settled, voluntarily dismissed, or compromised only with the court's approval. * * *

There is a miscue — the proposal described in the new operative text is only to settle, not to voluntarily dismiss or compromise the action. The broader sweep that includes voluntary dismissal or compromise fits better with the class that has already been certified. It would be better to separate this into separate parts: "The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval; the claims, issues, or defenses of a class proposed to be certified as part of a settlement may be settled only with the court's approval. The following procedures apply in seeking approval: * * *.

Judge Dow concluded the discussion by observing that the Committee agrees that the frontloading proposal should be pursued further, with work to refine the drafting. The rule will speak to the parties' duty to provide information, and other improvements will be made.

Rule 23(f): This proposal would add a new sentence to the Rule 23(f) provision for appeal by permission "from an order granting or denying class-action certification": "An order under Rule 23(e)(1) may not be appealed under Rule 23(f)." The concern arises from the common practice that refers to "preliminary certification" of a class when the court approves notice to the class. An appeal was attempted at this stage in the NFL concussion litigation; the Third Circuit decided not to accept the appeal. But the possibility remains that appeals will be sought in other cases. And the sense is that there should be only one opportunity for appeal, at least

as to a single grant of certification.

This introduction generated no further discussion. It was noted later, however, that the Department of Justice continues to study a proposal to expand the time available to ask permission to appeal under Rule 23(f) when the request is made in actions involving the United States or its officers or employees. The Department expects to have a concrete proposal ready fairly soon.

Rule 23(c)(2)(B): This proposal is intended to solidify the practice of sending out notice to the class before actual certification when a proposed settlement seems likely to be approved:

> For any class certified under Rule 23(b)(3), or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified [for settlement] under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances * * *.

Judge Dow noted that sending out notice before certification and approval of the settlement is intended to accomplish the purposes of notice in a (b)(3) class, including establishing the deadline to request exclusion and affording the opportunities to enter an appearance and to object. This is consistent with present practice. And it is mutually reinforcing with the frontloading proposal: frontloading will support notice that provides more comprehensive information, enabling better-informed decisions whether to opt out or to object. The opt-out rate and objections in turn will advance further evaluation of the proposed settlement at the final-approval stage. An important further benefit will be to reduce the risk that initial notice made defective by providing inadequate information to the court will, by objections that show the need for better notice or that demonstrate the inadequacy of the proposed settlement, require a second round of notice.

Professor Marcus added that this proposal is useful to respond to an argument forcefully advanced by at least one participant in the miniconference. The common practice, carried forward in this package of proposals, is that actual certification of the class is made only at the same time as approval of the settlement. As Rule 23(c)(2)(B) stands now, its text literally directs that notice satisfying all the requirements of (B) be sent out then, never mind that the notice of proposed settlement sent out under (e)(1) has already triggered an opt-out period and so on. It is better to make it clear that class members can be required to decide whether to opt out, to appear, or to object before the class is formally certified.

A committee member observed that courts believe now that the notice of a proposed settlement discharges the function of

(c)(2)(B). Characterizing the court's initial action as preliminary certification and approval brings it within the rule language. But, in turn, that triggers the prospect that a Rule 23(f) appeal can be taken at that stage, a disruptive prospect that is so unlikely to prove justified by a grossly defective proposal that it should never be available. This revision of (c)(2)(B) helps in all these dimensions.

General Notice Provisions. Discussion turned to the draft that would introduce added flexibility to the description of notice in Rule 23(c)(2)(B):

> For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice [by the most appropriate means, including first-class mail, electronic, or other means] {by first-class mail, electronic mail, or other appropriate means} to all members who can be identified through reasonable effort * * *.

Judge Dow noted that this proposal would "bring notice into the 21st Century." First-class mail may not be the best means of informing class members of their rights, but it seems to be settled into general practice. The proposal is designed to establish the flexibility required to provide notice by the most effective means. The objective is the same as before — to provide the best notice possible to the greatest number of class members. The alternative presented in the first bracketed alternative, focusing on "the most appropriate means," emphasizes the importance of the choice. Whatever choice is made for rule text, it is important to have text that supports the examples that may be useful in the Committee Note.

The first suggestion, made and seconded, was that it might be better to simplify the rule text by referring only to "the most appropriate means." Amplification could be left to the Committee Note. The response was that it may be important to add examples to rule text to make it clear that the choice of means is technology-neutral. The ingrained reliance on first-class mail may make it important to make it clear that other means may be as good or better. This response was elaborated by suggesting the advantages of the first alternative, calling for the most appropriate means and referring to "electronic means" rather than "electronic mail." It may be, particularly in the not-so-distant future, that appropriate means of electronic communication will evolve that cannot be fairly described as part of the familiar "e-mail" practices we know today.

Further discussion suggested that limiting the rule text to "the most appropriate means" would avoid an implication that first-

class mail or e-mail are always appropriate.

A separate question was addressed to the parts of the draft Note that discuss the format and content of class notice: is it appropriate to address these topics when the amended rule text does not directly bear on them? The only response was that any amendment addressing effective means of notice will support discussion of the importance of making sure that the notice conveyed by appropriate means is itself appropriately informative. Merely reaching class members does little good if the notice itself is inadequate.

Objectors: Judge Dow began by observing that the Subcommittee has repeatedly been reminded that there are both "good" and "bad" objectors. Class-member objections play an important role in class-action settlements. As a matter of theory, the opportunity to object is a necessary check on adequate representation. As a practical matter, objectors have shown the need to modify or reject settlements that should not be approved as initially proposed. But there are also objectors who seek to enrich themselves — that is, commonly to enrich counsel — rather than to improve the settlement for the class. The advice received at several of the meetings the Subcommittee has attended, and at the miniconference, is that bad-faith objections can be dealt with successfully in the trial court. The problem that persists is appeals or threats to appeal a judgment based on an approved settlement. An appeal can delay implementation of the judgment by a year or more. That means that class members cannot secure relief, in some cases relief that is important to their ongoing lives. The objector offers not to appeal, or to dismiss the appeal, in return for a payment that goes only to the objector's counsel, or perhaps in part to the objector as well. Too often, class counsel are unwilling to submit the class to the delay of an appeal and agree to buy off the objector.

Starting in 2010, the Appellate Rules Committee has been considering rules to regulate dismissal of objector appeals. The Subcommittee has been working in coordination with them.

The first step in addressing objectors is a draft that requires some measure of detail in making an objection. This draft responds to suggestions that some "professional objectors" simply file routine, boilerplate objections in every case, do nothing to explain or support them, fail to appear at a hearing on objections, and then seek to appeal the judgment approving the settlement. The draft adds detail to the present provision that authorizes objections:

> (A) Any class member may object to the proposal if it requires court approval under this subdivision (e)~~:~~. The objection must [state whether the objection applies only to the objector or to the entire class, and] state [with specificity] the grounds for the objection. [Failure to

state the grounds for the objection is a ground for rejecting the objection.]

The first comment was that "this is the most oft-repeated topic at all the conferences." The materials submitted for discussion at the miniconference included a lengthy list of information an objector must provide in making an objection. "It seemed too much."

Later discussion provided a reminder that the Subcommittee will continue to consider whether to retain the bracketed words stating that failure to state the grounds for the objection is a ground for rejecting the objection.

The draft in the agenda materials addresses the question of payment by adding to present Rule 23(e)(5) a new subparagraph:

(B) T~~t~~he objection, or an appeal from an order denying an objection, may be withdrawn only with the court's approval. If [a proposed payment in relation to] a motion to withdraw an appeal was referred to the court under Rule 42(c) of the Federal Rules of Appellate Procedure, the court must inform the court of appeals of its action.

This draft is supplemented by alternative versions of a new subparagraph (C) that require court approval of any payment for withdrawing an objection or an appeal from denial of an objection. The overall structure is built on the premise that payment to an objector may be appropriate in some circumstances. Rather than prohibit payment, approval is required. It may be that the district court finds it appropriate to compensate the costs of making an objection that, although it did not result in any changes in the settlement, played an important role in assuring the court that the settlement had been well tested and does merit approval. That prospect, however, is not likely to extend to payment for withdrawing an appeal.

Recognizing that the Appellate Rules Committee has primary responsibility for shaping a corresponding Appellate Rule, a sketch of a possible Appellate Rule is included. The Appellate Rules Committee met a week before this meeting. Their deliberations have suggested some revisions in the package.

One question is how the court of appeals will know the problem exists. A new sketch of a possible Appellate Rule 42(c) would direct that a motion to dismiss an appeal from an order denying an objection to a class-action settlement must disclose whether any payment to the objector or objector's counsel is contemplated in connection with the proposed dismissal. Then a possible Rule 42(d) would provide that if payment is contemplated, the court of appeals may refer the question of approval to the district court. The court

of appeals would retain jurisdiction of the appeal, pending final action after the district court reports its ruling to the court of appeals. The court of appeals can instead choose to rule on the payment without seeking a report from the district court. Finally, a new Civil Rule 23(e)(5)(D) would direct the district court to inform the court of appeals of the district court's action if the motion to withdraw was referred to the district court.

One initial question is whether there should be any provision regulating withdrawal of an objector's appeal when there is no payment. As a matter of theory, it may be wondered whether other objectors may have relied on this appeal to forgo taking their own appeals. But that theory may bear little relation to reality. It was not developed further in the discussion.

The focus of the new structure is to provide the court of appeals a clear procedure for getting advice from the district court. The district court is familiar with the case and often will be in a better position to know whether payment is appropriate. The Appellate Rules Committee is anxious to retain jurisdiction in the court of appeals. That can be done whether the action by the district court is simply a recommended ruling or is a ruling by the district court subject to review by the ordinary standards that govern the elements of fact and the elements of discretion.

The first question was what happens when the district court refuses to approve a payment and the objector wants to appeal. The response was that the draft retains jurisdiction in the court of appeals. The objector can address his grievance to the court of appeals, whether the question be one of independent decision by the court of appeals as informed by the district court's recommendation, or be one of reviewing a ruling by the district court.

An analogy was offered: Appellate Rule 24(a) directs that a party who desires to appeal in forma pauperis must file a motion in the district court. If the district court denies the motion, the party can file a motion in the court of appeals, in effect renewing the motion. Here, the motion to dismiss the appeal is made in the court of appeals, disclosing whether any payment is contemplated. But what happens if the court of appeals simply dismisses the appeal without deciding whether to approve the payment? The draft prohibits payment without court approval, so the objector would have to seek approval from the district court. The district court's action would itself be a final judgment, subject to appeal.

Another analogy also is available. There are many circumstances in which a court of appeals finds it useful to retain jurisdiction of an appeal, while asking the district court to take specific action or to offer advice on a specific question. The court of appeals can manage its own proceedings as it wishes, but

is most likely to defer further proceedings until the district court reports what it has done in response to the appellate court's request. There is a further analogy in the "indicative rulings" provisions of Civil Rule 62.1 and Appellate Rule 12.1 — one of the paths open under those rules is for the court of appeals to remand to the district court for the purpose of ruling on a motion that the district court otherwise could not consider because of a pending appeal. The court of appeals retains jurisdiction unless it expressly dismisses the appeal.

Further discussion suggested that at least one participant thought it better to think of this process as a "remand," because a "referral" does not seem to contemplate factfinding in the district court.

A member expressed a skeptical view about the value of this process. The hope is for an in terrorem effect that will deter payments by the threat of exposure and the prospect that courts will never approve a payment that is not supported by a compelling reason. But the problem is delay in implementing the judgment; the more elaborate the process for withdrawing an appeal, the greater the delay.

This view was countered. "The use of delay as leverage for a payoff is the problem. If we say no payoff without court approval, we do a lot. The bad-faith objector wants delay not for its own sake, but for leverage." A legitimate objector will not be affected by the need for approval of any payment.

A different doubt was expressed: the incentive is to get rid of objectors, but will this process simply encourage objectors to pad their bills? The response was that the objector's lawyer does not get paid unless there is a benefit to the class. But the doubt was renewed: that can be met by a stipulation of the objector and counsel that there was a benefit to the class. The response in turn was that this procedure will eliminate the incentive for delay. Bad-faith objectors self-identify before taking an appeal, or after filing the notice of appeal. They do not appear at the hearing on approval, they often do no more than file form objections. And the good-faith objectors articulate their objections in the district court. They appeal for the purpose of defeating what they view as an inadequate settlement, not for the purpose of delay or coercing payment for abandoning their objections.

This view was supported by noting that a good-faith objector who participated in the miniconference reported that the business model of bad-faith objectors does not support actual work on an appeal. But why not let the district court be the one that decides whether to approve payment? The court of appeals can grant the motion to dismiss the appeal, and remand to the district court to decide on payment. The district-court ruling can be appealed. This

view was supported by noting that once the district court has ruled, "there is something to review."

General support for the proposed approach was offered by noting that "rulemaking cannot resolve every problem." But we can accomplish the modest goal of insisting on sunlight, and creating a mechanism for courts to address the issues as promptly as possible.

A wish for simplicity was expressed by suggesting that it may be enough to provide in Rule 23(e)(5)(B) that court approval is required to withdraw an objection or an appeal from denial of an objection, and to limit new provisions in Appellate Rule 42 to a direction that any payment for dismissing the appeal be disclosed to the court of appeals. The court of appeals then "does what it does." It may choose to decide the appeal. Or it can simply dismiss the appeal; the case is over. But an objector who wants payment must apply to the district court. The key is disclosure to the court of appeals. Appellate Rule 12.1 and Civil Rule 62.1 already provide the opportunity to seek an indicative ruling if a motion to approve payment is made in the district court while the appeal remains pending. The full set of draft provisions is "too much process."

A different vision of simplicity was suggested: the rules should leave it open to the court of appeals to choose between acting itself, referring to the district court, making a limited remand, or adopting whatever approach seems to work best for a particular case.

The next question was whether it might be possible to provide some guidance in rule text on the circumstances that justify payment for withdrawing an objection or appeal? Apart from that, should we be concerned that there may be means of compensation that are not obviously "payment"? One possibility may be to accord some form of benefit in collateral litigation — the objector may represent clients who are not in the class, or it might be agreed to acquiesce in an objection made in a different class action.

These questions were addressed by the observation that the only familiar demands are for payments to lawyers, or to clients who want more than the judgment gives them. But it is possible to imagine a threat of objections in all future cases, or a promise to withdraw objections in other cases. So the sketch of a possible Appellate Rule 42(c) on p. 102 of the agenda materials refers to "payment or consideration."

The discussion concluded by noting the paths to be tested by further drafting. It will be good to achieve as much simplicity as possible. Full disclosure should be required of any payments (or consideration) for withdrawing an objection or appeal from denial

of an objection. The district court should be the place for determining whether to approve any payment. Beyond that, this structure can be effective if lawyers for the plaintiff class do their part in resisting requests for payment.

Settlement Approval: Judge Dow introduced the draft criteria for approving a class-action settlement by noting that the draft is inspired in part by the approach taken in the ALI Principles of Aggregate Litigation. The ALI approach was shaped by the same concerns that the Subcommittee has encountered. There are as many dialects as there are circuits; each circuit has its own differently articulated list of factors to be applied in determining whether a settlement is "fair, reasonable, and adequate." The draft is an effort to capture the most important procedural and substantive elements that should guide the review and approval process. In its present form, it seeks to capture the most important elements in four provisions that might be viewed as "factors," or instead as the core concerns. The first question is whether this focus will support meaningful improvement in current practices.

Professor Marcus supplemented this introduction by identifying two basic questions: Will the draft, or something like it, prove helpful to judges and lawyers? The purpose begins with helping the parties to shape the information they submit in seeking approval. Every circuit now has a list of multiple factors. The draft presented to the Committee last April included a catch-all "whatever else" provision. Discussion then suggested that the provision was not helpful. It was dropped during later drafting efforts, but has found renewed support and is included in the agenda drafts for further discussion. It takes different forms in the two alternative structures. In alternative 1, the court "may disapprove * * * on any ground the court deems pertinent, * * * considering whether." That is less restrictive than alternative 2, which directs that the court "may approve" "only * * * on finding" the four core criteria are met and also that "approval is warranted in light of any other matter that the court deems pertinent." The choice here is whether to suggest the relevance of considerations in addition to the four core showings that are explicitly described, and whether to be more or less restrictive.

The second question is related: what prominence should be given to the present rule formula, which was drawn from well-developed case law, looking to whether the settlement is "fair, reasonable, and adequate"? These words support consideration of every factor that has been identified by any circuit. Should the process remain that open?

The first comment was that both alternatives are open-ended. A "ground" or "matter" that "the court deems pertinent" is not a legal standard.

The next comment was that the second alternative displaces the present "fair, reasonable, and adequate" standard from its present primacy, demoting it to a role as part of the factor that asks whether the relief awarded to the class is fair, reasonable, and adequate, taking into account the costs, risks, probability of success, and delays of trial and appeal. The fair, reasonable, and adequate standard is the over-arching concern. Another member agreed — this is an argument for alternative 1, which allows approval "[only] on finding it is fair, reasonable, and adequate." The brackets would be removed, allowing approval only on making this finding.

Alternative 2 is "more focused." It allows approval only on finding that all four factors are satisfied, compared to Alternative 1 that allows a finding that the settlement is fair, reasonable, and adequate, after simply "considering" the four. Alternative 1 is less rigorous.

Turning to one of the four core elements, it was asked how a court is to determine whether a settlement "was negotiated at arm's length and was not the product of collusion." Why is that not implicit in finding the settlement is fair, reasonable, and adequate?

This question was addressed by observing that a number of circuits distinguish between procedural and substantive fairness. The parties must show that the process was free of collusion. This showing is made by describing the process, or by having a special master or mediator participate and report. Account is taken of how long the negotiations endured, and whether there was actual negotiation.

The open-endedness of "considering whether" in Alternative 1 provoked the suggestion that, taken literally, it overrides a lot of circuit law. It would allow a court to find a settlement is fair, reasonable, and adequate, even though it was not negotiated at arm's-length and was the product of collusion. But then perhaps the intention is to overrule the various laundry lists of factors found across the circuits?

A Subcommittee member responded that the purpose is not to overrule existing circuit factors. In all but two circuits, these factors were developed in the 1970s and 1980s. Any of these factors may, at some time with respect to some proposed settlement, prove relevant. But the purpose of identifying the core concerns is to encourage the court to look closely at the settlement rather than move unthinkingly down a check list of factors, none of them clearly developed by the parties and many of them not relevant to the particular settlement. Part of the purpose is to respond to the increasing cynicism found in public views of class actions. Many people view settlements in consumer-class actions as devices that

provide no meaningful value to consumers and provide undeserved awards to class counsel.

In a similar vein, it was observed that the purpose of focusing on four core concerns seems to be to simplify and codify the purposes and best elements of present practice. But we should consider whether the "considering whether" formula in alternative 1 might be seen as overruling the circuit factors. "Would any circuit think we're changing what it can do"?

A response was that the ALI concern was that the lengthy lists of factors distract attention from the central elements. A related concern was that there is a tendency to view the various "factors" as things to be weighed in a balancing process, albeit without any direction as to how any one is to be weighed. It is better to adopt the approach of Alternative 2: the court may approve "only on finding." This will redirect attention to the essential elements of approval.

But it was noted that the four subparagraphs attached to both alternative 1 and alternative 2 are conjunctive: the court must consider, or find, all of them. The rule is written not for the experts, who understand this now. It focuses everyone on the key factors in a way that is not always understood.

The fifth element, "any other matter" or "any ground" the court deems pertinent, was questioned: what does it add? What is there that could not be read into the four central elements identified in the first four subparagraphs? The response was that "there still will be X factors." The four factors focus on what is important, and focus the parties on what to present to the court, and on what to present in the notice to the class. But the rejoinder asked again: what else is relevant if all four are satisfied — there is adequate representation, not tainted by collusion, adequate relief, and equitable treatment of class members relative to each other? Should it be made clear that the burden is on the objector to show reasons to reject a settlement when all of these elements are present?

It was noted that the alternative 2 formulation, "may approve only * * * on finding" the four elements leaves discretion to refuse approval even if all four are found. And it implies that the standard of review should be abuse of discretion. So the court can draw on any factor that has been identified in any circuit that seems relevant to evaluating the settlement. "There are any number of things that cannot be captured in factors." As one example: the settlement is negotiated while the defendant is teetering on the brink of insolvency. By the time of the hearing on objections, the defendant has been restored to a financial position that would support more adequate relief. How do you write a specific factor for that? Still, it was suggested that alternative 1, "considering

whether," provides a more emphatic statement of discretion.

A more particular question was asked: what happens if a lawyer who initially supported a proposed settlement changes position to challenge the proposal? No answer was attempted.

The summary of this discussion began by observing that the really good lawyers the Subcommittee has been meeting in its travels do all these good things now. But not all lawyers do. "These four factors are aimed at the lowest common denominator" of lawyers who bring class actions without much experience or background learning. They are not intended to displace the factors identified in the many appellate opinions that have been written over nearly a half-century of review. The intent instead is to focus attention on the important core. The plan is to displace the process in which parties and court are distracted by routine, uninformative submissions that simply run through the local check-list of factors, some important to the particular case, some not important, and some irrelevant.

All of this pointed toward a synthesis of alternative 1 and alternative 2. "fair, reasonable, and adequate" will be retained as the entry point. The court may approve a settlement only on making the four core findings. And "fair, reasonable, and adequate" will be removed from the third core:

> If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate because: * * *
>
> (C) the relief awarded to the class * * * is ~~fair, reasonable, and~~ adequate, given the costs, risks * * *.

Settlement Classes: Judge Dow introduced this topic by asking whether it would be useful, or perhaps necessary, to adopt a separate provision for settlement classes. The underlying question arises from uncertainty in applying the "predominance" requirement of Rule 23(b)(3) to settlements. The Subcommittee has reached a tentative view that it should table this question, but is not prepared to recommend that course without guidance from the Committee.

The dilemma can be framed by asking what might be gained by adopting an express settlement-class provision, and what are the "unnerving things that might happen" if one were adopted.

The first question was whether settlements have failed because a class could or would not be certified? The answer was that this in fact has happened. And there is a concern that people are deterred from even attempting settlements by the obscurity of the

predominance requirement as applied to settlement.

The most common illustration of the value of subordinating predominance is choice-of-law concerns. A class that spans several states may present thorny choice-of-law questions, and present the prospect that different laws will be chosen for different groups within the class, forestalling predominance in litigation. These problems can be readily resolved, however, by settlement. At least the Second and Third Circuits have approved settlements despite choice-of-law predominance concerns. Beyond that, a number of lawyers believe that courts are pretty much ignoring the statements in the Amchem opinion that predominance is required in certifying a class for settlement.

This comment was amplified by the observation that the role of predominance in settlement classes has generated many objections by "those who take Amchem literally." But courts have developed a gloss on Amchem that takes the fact and value of settlement into account in finding that (b)(3) criteria have been satisfied. Still, the objections come in — often from "serial objectors." Adopting a settlement-class rule would clarify the law, restating where it is in practice today, helping to identify how account should be taken of settlement in determining whether to certify a class. But as for the empirical question, "I do not know how many settlements are disapproved, or not attempted," for want of a clear rule.

But, it was asked, why not require predominance? An immediate response was that Amchem would require the laws of 50 states to apply at trial; on settlement, there is no need to worry about that — "everyone gets the same." But it was objected that giving everyone "the same" may not be right if different sets of laws would prescribe differences in the awards. The rejoinder was that choice-of-law questions can be resolved in settlement, perhaps choosing different laws and relief for different subclasses. And if the case comes to be tried, the court may chose a single state's law to govern, or may choose the law of a few states to govern, grouping subclasses around the similarities in the chosen separate laws. So long as the class is given notice of a proposed settlement — everyone gets to see what is proposed and can object — why force it to trial?

A further response was that predominance addresses the efficiencies of trial on class claims. It does not address the fairness of settlement. The Court in Amchem recognized that manageability is not a concern on settlement, despite the inclusion of difficulties in managing a class action among the matters pertinent to finding predominance and superiority. The same can be true of predominance.

In the same vein, it was noted that in 1993 the Third Circuit said that a class action cannot be certified for settlement unless

the same class could be certified for trial. Amchem has superseded that. Amchem led the Committee to stop work on its pre-Amchem proposal to add a settlement-class provision as a new Rule 23(b)(4). The current draft (b)(4), however, is different from the 1996 version.

A Subcommittee member said he was impressed by how little reaction was provoked by the draft of a settlement-class rule. People did not even seem to be worried about the prospect that representations made in promoting a proposed settlement might be used against them if the settlement falls through and a request is then made to certify a class for trial.

A different perspective was suggested by the observation that settlement generally is in the interests of the immediate parties. But that does not ensure fairness to absent class members. Settlement does avoid the risks of class adjudication, and that may justify some dilution of the predominance requirement. But does it justify abandoning any shadow of predominance?

It was suggested that the evolution that has followed Amchem shows a reduced emphasis on predominance in reviewing proposed class settlements.

Beyond that, an alternative approach that incorporates settlement classes into Rule 23(b)(3) itself is also sketched in the agenda materials from p. 130 to p. 132. This approach would allow certification on finding "that the questions of law or fact common to class members, or interests in settlement, predominate * * *." (The parallel structure could be tightened further by looking to "common interests in settlement.")

Still another approach was suggested. The role of predominance could be diminished by a rule provision that the court can consider whether settlement obviates problems that would arise at trial.

But it also was recognized that the defense bar is concerned that reducing the role of predominance in settlement classes will unleash still more class actions. And on the other side, there is concern that the bargaining position of class representatives will be eroded if they cannot make a plausible threat of certification for trial.

It was noted again that the interest in doing anything to add a separate provision for settlement classes diminished steadily as the Subcommittee made the rounds of many outside groups. There was substantial enthusiasm for doing something several years ago, prompting the ALI to address the question in the Principles of Aggregate Litigation. But that has faded.

The conclusion was to not go further with the settlement-class

proposal.

Ascertainability: The question of criteria for the "ascertainability" of class membership has come to the fore recently. The most demanding approach is reflected in a series of Third Circuit decisions, many of them in consumer actions. The Seventh Circuit has expressly rejected the Third Circuit approach. Other circuits come close to one side or the other. This is an important topic, and it continues to be developed in the lower courts. There is some prospect that the Supreme Court may address it soon. And it is difficult to be confident about drafting rule language that would give effective guidance. The Subcommittee has put this topic on "hold," keeping it in the current cycle but without anticipating a recommendation for publication over the next several months. The Committee approved this approach.

Rule 68: Pick-off Offers: Judge Dow explained that the Subcommittee looked at the use of Rule 68 offers of judgment in an attempt to moot class actions because of the Seventh Circuit decision in the Damasco case. Under that approach, an offer of complete relief to the representative plaintiffs before class certification moots their individual claims and defeats certification. Plaintiffs commonly worked around this rule by moving for certification when they filed, but also by requesting that consideration of the motion be deferred until the case had progressed to a point that would support a well-informed certification ruling. The Seventh Circuit recently overruled this approach. Most circuits now refuse to allow a defendant to defeat class certification by offers that attempt to moot the individual claims of any representative plaintiffs who may appear. More importantly, this question has been argued in the Supreme Court. The Subcommittee has deferred further work pending the Court’s decision. The Committee agreed this course is wise.

Separately, it was noted that the Committee is committed to further study of Rule 68 in response to regularly repeated suggestions for revision. The timing will depend on the allocation of available resources between this and other projects that may seem more pressing.

Cy pres: For some time, the Subcommittee carried forward a proposal to address cy pres awards. The proposal was based, at least for purposes of illustration, on the model adopted by the ALI. This model attempts to achieve the maximum feasible distribution of settlement funds to class members. Only when it is not feasible to make further distributions could the court approve distribution of remaining settlement funds — and even then, the first effort must be to identify a beneficiary that would use the funds in ways that would benefit the class.

It seems to be generally agreed that many classes are defined in terms that make it impracticable to identify every class member

and achieve complete distribution to class members. Some undistributed residue will remain. The ALI proposal would confine cy pres awards to those circumstances. That set of issues seems to fall comfortably within the scope of the Rules Enabling Act. But these are not the only circumstances that characterize cy pres awards in present practice. More creative awards are structured, often in cases involving small injuries to large numbers of consumers, most of whom cannot be easily identified. Attempting to address cy pres awards of this sort would present tricky questions about affecting substantive rights.

Cy pres awards have evolved in practice and have been accepted in many judgments. Some states have statutes addressing them. Given the difficulty of knowing how to craft a good rule, the Subcommittee recommended that further work on these questions be suspended. The Committee accepted this recommendation.

Issue Classes: Judge Dow introduced the question of issue classes by noting that the subject was taken up because of a perceived split between the Fifth Circuit and other circuits on the extent to which the predominance requirement of Rule 23(b)(3) limits the use of an issue class to circumstances in which the issue certified for class treatment predominates over all other issues in the litigation. More recent Fifth Circuit decisions, however, seem to belie the initial impression. "Dissonance in the courts has subsided." There seems little need to undertake work to clarify the law. And any attempt might well create new complications.

A Subcommittee member said that the Subcommittee has learned that courts address issue-class questions in case-specific ways. Difficult questions of appealability would be raised by any distinctive changes in the issue-class provisions in Rule 23(c)(4) so as to focus on final decision of a discrete issue without undertaking to resolve all remaining questions within the framework of the same action. The problems could be similar to those that arise after separate-issue trials under Rule 42.

The Committee agreed with the Subcommittee recommendation that further work on these questions be suspended.

Judge Bates concluded the class-action discussion by stating that the Committee had done good work. Thanks are due to both the Subcommittee and the Committee.

Requester Pays for Discovery

For some time the Committee and the Discovery Subcommittee have deliberated the questions raised by periodic suggestions that the discovery rules should be revised to transfer to the requesting party more of the costs incurred in responding to discovery requests. Many different approaches could be taken. Many

suggestions cluster around a middle ground that would leave the costs of responding where they lie as to some "core" discovery, but require the requesting party to pay — or perhaps to justify not paying — for the costs of responding to requests outside the core. Those suggestions present obvious challenges in the task of defining core discovery in terms that apply across different subjects of litigation.

Beyond these questions, the assumption that the responding party bears the costs of responding is well-entrenched. Hundreds of comments addressed to the package of discovery amendments that is pending in Congress emphasize the role of discovery in supporting enforcement of public policies that provide important protection beyond the disposition of the particular action. Great difficulty would be encountered in attempting to devise a wise rebalancing of the competing interests.

Additional reasons for diffidence about requester-pays proposals arise from the pending discovery amendments. They are designed in many ways to reduce the costs of discovery. The renewed emphasis on proportionality, coupled with the strong encouragement of early and active case management, and perhaps supported by the encouragement of party cooperation, may achieve substantial reductions in the cost and delay that occasionally result from searching discovery. Beyond that, if the amendments take effect the Rule 26(c) protective-order provisions will be modified to recognize expressly the court's authority to allocate the costs of responding in a particular case. This provision is not designed to inaugurate any general practice of shifting response costs, but it can be used to address specific needs in particular cases.

In all, it was agreed that further work on requester-pays proposals would be premature. One or another aspect of discovery is usually on, or close to, the active agenda. Requester-pays issues will remain in the background, to be taken up again when it may seem appropriate.

Rule 62: Stays of Execution

Rule 62 came on for study in response to separate suggestions made to the Civil Rules Committee and to the Appellate Rules Committee. The work has been pursued through a joint subcommittee chaired by Judge Matheson. The materials in the agenda book were also on the agenda of the Appellate Rules Committee, which considered them last week.

Judge Matheson opened the Subcommittee Report by reminding the Committee that these questions were discussed in a preliminary way last April. The Appellate Rules Committee also took up the topic then, and both Committees agreed that it makes sense to carry the work forward. At the same time, no one identified any actual

difficulties that have emerged in practice under the current rule, apart from the specific questions that prompted the project from the beginning. The Subcommittee worked through the summer and fall to simplify and improve the draft revision. The current version appears in the agenda materials at p. 342.

The draft reorganizes the allocation of subjects among present subdivisions (a) through (d), and changes the provisions for judgments that do not involve an injunction, an accounting in an action for patent infringement, or a receivership.

Draft Rule 62(a) addresses three kinds of stays: (1) the automatic stay; (2) a stay obtained by posting a bond; and (3) a stay ordered by the court. These provisions address all forms of judgment, whether the relief be an award of money or some other form of relief such as foreclosing a lien or a decree quieting title.

Several changes are made over the current rule.

The automatic stay is extended from 14 days to 30 days. This eliminates the "gap" in present Rule 62(b), which recognizes the court's authority to order a stay "pending disposition" of post-judgment motions that may be made up to 28 days after entry of judgment. This revision addresses one of the two questions that prompted the Committees to take up Rule 62. The draft also expressly recognizes the court's authority to "order otherwise," denying or terminating an automatic stay. (In response to a later question, it was explained that the stay was extended to 30 days to allow an orderly opportunity to begin to prepare for a further stay when expiration of the 28-day period shows there will be no post-judgment motion and while a brief period remains before expiration of the 30-day appeal time that governs most civil actions.)

The draft revises the supersedeas bond provisions of present Rule 62(d) in various respects. It allows the bond to be posted at any time after judgment is entered, rather than "upon or after filing the notice of appeal." It allows "other security," not only a bond. These provisions address the questions that prompted the Appellate Rules Committee to study Rule 62 by enabling a party to post a single bond or other security that runs from entry of judgment through completion of any appeal. It also expressly recognizes the opportunity to rely on security other than a bond — one example might be a letter of credit, or establishment of an escrow fund.

Draft Rule 62(a)(3) allows the court to order a stay at any time. This authority could, for example, be used to substitute a stay with security for the automatic stay.

Draft Rule 62(b) authorizes a court, for good cause, to refuse

a stay sought by posting security under draft 62(a)(2), or to dissolve or modify a stay. This is new.

Draft Rule 62(c), also new, authorizes the court to set appropriate terms for security, or to deny security, both on entering a stay and on refusing or dissolving a stay. One example could be an order denying a stay only on condition that the judgment creditor post security to protect the judgment debtor against the injury caused by execution in case the judgment is reversed on appeal.

Proposed Rule 62(d) does little more than consolidate the provisions in present subdivisions (a) and (c) for injunctions, receiverships, and accountings in actions for patent infringement. It does bring into rule text the complete array of actions that support appeal from an interlocutory order with respect to an injunction.

Some attention was paid to the possibility of revising present subdivisions (e) and (f), but it was decided that no changes are needed. Subdivisions (g) and (h) were addressed in extensive memoranda prepared by Professor Struve as Reporter for the Appellate Rules Committee, but no action has been recommended as to them.

The discussion by the Appellate Rules Committee led to agreement on extending the automatic stay to 30 days, closing the gap; to supporting the opportunity to post a single bond; and to recognizing alternative forms of security.

The practitioner members of the Appellate Rules Committee, however, expressed concern about the features of the draft that would authorize the court to deny a stay even when the judgment debtor offers adequate security in the form of a bond or another form. They believe that the present rule recognizes a nearly absolute right to a stay on posting adequate security, and that allowing a court to deny a stay, even for "good cause," would be a dangerous departure. This question must be taken seriously.

This introduction was followed by a reminder that there seems to be general agreement on the answers to the questions that launched this work. The automatic stay should be extended to 30 days, closing the potential gap between its expiration on the 14th day and the time when the court is authorized to order a stay pending disposition of a motion that may not be made until 28 days after judgment is entered. A judgment debtor should be able to post security in a form other than a bond, and should be allowed to post a single security that covers both post-judgment proceedings in the district court and all proceedings on appeal.

The questions that go beyond the initial concerns arose in a

familiar way. Studying Rule 62 suggested ways in which it might be made more flexible, for the most part by provisions that would expressly recognize steps a court might well be prompted to take to protect the judgment or the parties even without explicit rule provisions. This approach often leads to the common dilemma: many ideas look good in the abstract. But there may be unforeseen problems that show both abstract and practical defects, and further difficulties may arise from the attempt to translate even good ideas into specific rule language. The wisdom of restraining ambition is underscored by the responses in the Standing Committee and both advisory committees that there have been no general complaints about Rule 62 in practice.

Turning more pointedly to the concerns raised in the Appellate Rules Committee, the Subcommittee discussed repeatedly, and in depth, the question whether there should be a nearly absolute right to a stay on posting adequate security. There does seem to be a general belief in this right. And it might be seen as an integral part of the system that assures one appeal as a matter of right from a final judgment. The purpose of appeal is to provide an opportunity for reversal, even if the standards of review narrow the opportunity with respect to matters of fact or discretion.

Counter considerations persuaded the Subcommittee to recognize authority to deny a stay. There may be cases in which the district court can accurately predict that there is little prospect of reversal, while also recognizing the risk of injuries that cannot be compensated even by assurance that the amount of a money judgment can be collected after affirmance. The judgment creditor may have immediate needs for money that cannot be addressed by collection of money after the delay of an appeal. For example, it may be possible to revive a damaged business by immediate action, while it may fail irretrievably pending appeal. A judgment for some other form of relief may pose comparable problems. A decree quieting title, for example, may open an opportunity for an immediate transaction that will be lost by delay. The "good cause" standard was thought to be sufficient protection of the judgment debtor’s interests, particularly when coupled with the court’s further authority to require security for the judgment debtor as a condition of denying a stay.

Discussion began in two directions. One question was whether there truly is a right to a stay on posting security. The other went in the other direction: why should the rule allow the court to order a stay without any security, as the draft clearly contemplates? Is the judgment itself not assurance enough of the judgment creditor’s probable right to require that the judgment be protected against defeat by delay — with the potential for concealing or dissipating assets — by requiring security?

The question of absolute right turned into discussion of

present Rule 62(d). It says that an appellant "may obtain a stay by supersedeas bond." Does "may obtain" imply discretion, so that the court may refuse the stay even though the bond is otherwise satisfactory in its amount, terms, and guarantor? That possible reading may be thwarted by the reading of parallel language in Rule 23(b), which begins: "A class action may be maintained if Rule 23(a) is satisfied and if" the requirements of paragraphs (1),(2), or (3) are satisfied. In Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co., 130 S.Ct. 1431, 1437, 1438 (2010), the Court read "may be maintained" to entitle the plaintiff to maintain a class action on satisfying Rule 23(a) and one paragraph of Rule 23(b). Rule 23 says not that the court may permit a class action, but that the class action may be maintained. "The Federal Rules regularly use 'may' to confer categorical permission." "The discretion suggested by Rule 23's 'may' is discretion residing in the plaintiff: He may bring his claim in a class action if he wishes." Parallel interpretation of present Rule 62(d) would read it to mean that all discretion resides in the judgment debtor, who has categorical permission to obtain a stay on posting suitable security.

It was noted that Appellate Rule 8(a)(1) directs that a party must ordinarily move first in the district court for a stay pending appeal or approval of a supersedeas bond. But Rule 8(a)(2) authorizes a motion in the court of appeals if it is impracticable to move first in the district court, or if the district court denied the motion or failed to afford the relief requested. Rule 8(a)(2)(E) says blandly that the court of appeals "may condition relief on a party's filing a bond or other appropriate security." This locution clearly recognizes appellate discretion to deny any stay — as seems almost inevitable if application has been made to the district court and denied — and to grant a stay without security.

It was suggested that district courts have authority now to order a stay without any security, but that it may be unwise to emphasize that authority by explicit rule text.

A tentative solution was suggested: the draft should be shortened by deleting subdivisions (b) and (c). Subdivision (b) reads: "The court may, for good cause, refuse a stay under Rule 62(a)(2) or dissolve a stay or modify its terms." Subdivision (c) reads: "The court may, on entering a stay or on refusing or dissolving a stay, require and set appropriate terms for security or deny security." The final words of (c) would be transferred to paragraph (a)(3): "The court may at any time order a stay that remains in effect until a time designated by the court[, which may be as late as issuance of the mandate on appeal,] and set appropriate terms for security or deny security.

A separate issue was raised. The draft rule does not describe

the appeal bond as a "supersedeas" bond. It was agreed that it would be better to move away from that antique-sounding word. But "supersedeas" appears in Appellate Rule 8(a)(1)(B), most likely because it directs that application for a stay be made first to the district court. (Appellate Rule 8(a)(2)(E) is simpler — it refers only to conditioning a stay on "a bond or other appropriate security.") The Bankruptcy Rules also refer to a supersedeas bond. It would be good to strike the word from each set of rules.

Discussion concluded with the suggestion that the proposed rule should be simplified along the lines indicated above. The practicing lawyers on the Appellate Rules Committee believe there is a nearly absolute right to a stay on posting an adequate bond or other security. No one is pressing for revision. If the rule is amended to authorize the court to deny a stay by posting bond, even if the court must find good cause to deny the stay, there will be an increase in arguments seeking immediate execution. And it will be difficult to implement the good-cause concept. Imagine one simple argument: The judgment creditor is 85 years old and wants the chance to enjoy the fruits of judgment in this life time.

Judge Matheson agreed that the Subcommittee will reconsider these problems in light of the discussion here and in the Appellate Rules Committee.

e-Rules

The Committee was reminded of the recent history of work on the rules for electronic filing, electronic service, and use of the Notice of Electronic Filing as a certificate of service. Last April, this Committee voted to recommend publication of a set of rules amendments addressing these topics. The Criminal Rules Committee, however, decided at the same time that the time has come to write independent provisions for these topics into Criminal Rule 49. Rule 49 currently incorporates the practice of the civil rules for filing and service. Their project is designed to avoid cumbersome cross-references between different sets of rules, and also to determine whether differences in the circumstances of criminal prosecutions justify differences in the filing and service provisions. Brief discussions led to modifications in the Civil Rules provisions that were presented to the Standing Committee for discussion. The revised provisions are included in the agenda materials for this meeting. This Committee did not recommend publication at the May Standing Committee meeting. The Criminal Rules Committee continues to work on its new Rule 49. A conference call of the Criminal Rules Subcommittee will be held on November 13; representatives of this Committee will participate.

The goal of this work is to work toward common proposals on all topics that merit uniform treatment across the different sets of rules. That goal leaves the way open to different treatment of

topics that warrant different treatment in light of differences in the circumstances that confront the different sets of rules. The parallel proposals for the Appellate Rules already include some variations that integrate these subjects with the structure of the Appellate Rules. So it may be that the Criminal Rules Committee will find that criminal prosecutions deserve different treatment of some aspects of electronic filing and service.

One of the topics that has been discussed is access to electronic filing and service by pro se litigants. The Civil Rules proposals reflect a belief that a pro se litigant, the court, and all other parties may benefit from allowing electronic filing and service by a pro se litigant. The question is how to manage this practice. It may be that uniform provisions are suitable for all sets of rules. It may be that different approaches are desirable. These questions will be addressed as all committees work toward final proposals for publication. One committee member noted that her court has had difficulty with local rules that track each other for pro se litigants in criminal and civil proceedings — the problems really are different.

Once decisions are reached as to the appropriate level of substantive uniformity, style questions will remain. It will be important to work out style questions with the help of the style consultants so as to avoid any occasion for asking the Standing Committee to resolve any differences.

Pilot Projects

Judge Bates opened the discussion of pilot projects by asking Judge Campbell, who has chaired the pilot projects committee, to report on the committee's work.

Judge Campbell began by noting that many people have worked in the effort to advance consideration of pilot project proposals.

The interest in pilot projects was stimulated by experience in attempting to translate the lessons offered at the 2010 Conference into specific rules proposals. There are limits to what can be accomplished by rules. If a page of history is worth a volume of logic, the purpose of pilot projects may be to create pages of history by actual experience in testing new approaches. One result may be rules amendments. But pilot projects may provide valuable lessons that are implemented in other ways. The Committee on Court Administration and Case Management may find valuable practices that it can foster through its work. The Judicial Conference may gain similar benefits. It may be that approaches that have been tested and found valuable will be adopted by emulation without the need for formal action by any committee.

For the rules committees, the immediate plan is to prepare

concrete proposals for possible pilot projects that can be discussed with the Committee on Court Administration and Case Management and with the Standing Committee this coming spring. The goal will be to identify one or more projects that could be implemented late in 2016.

One informal pilot project, the protocols for initial discovery in individual employment actions, is already being studied. Emery Lee at the FJC has been tracking experience.

Emery Lee reported that the first thing he learned was that the employment protocols are being used by more judges than he had thought. He has identified 70 judges that are using them. Drawing on cases that have concluded since 2011, he identified some 500 terminated cases. He drew a random sample of cases that did not use the protocols during the same period. Overall, he studied data on 1,150 cases.

The positive lesson is that there are fewer discovery motions in protocol cases: motions were made in 12% of these cases, as compared to 21% of the comparison cases. The average number of motions made was half as many in the protocol cases. "That is a big number." The number suggests that the protocols made an important difference. But it is not possible to draw firm conclusions because the judges who choose to adopt the protocols may be judges who are actively engaged in managing discovery in any event.

The negative lesson is that the time to disposition appears to be essentially identical in protocol cases as in non-protocol cases. The essential identity held true for the time taken to reach disposition by different methods — by motion to dismiss or by summary judgment. The time to settlement, however, appears to be different. The identity of times to disposition is puzzling.

The first comment was made by a judge who requires a request for a conference before a motion can be made. That may be happening in the employment cases — the same number of discovery disputes arise, but many of them are resolved at the pre-motion conference, reducing the number of motions.

A second comment was that the times to disposition may track closely if courts set the same discovery cut-off time in protocol cases as in non-protocol cases. The timing of dispositive motions tends to feed off the discovery cut-off.

Another judge offered a guess that protocol judges are likely to be "more progressive — to require a conference before a discovery motion can be made." But he uses the protocols, and thinks he is seeing fewer discovery disputes. "They don’t fight over things they used to fight over because of automatic disclosures." As one example: confronted with a request to identify

the person who made the decision to terminate a plaintiff, defendants used to argue that the information was protected by work product. It is not protected, but the argument had to be resolved. Now the information is automatically disclosed and there is no dispute.

Yet another judge said that lawyers use the protocols and "play nicely together." The similarity in times to disposition is probably because the case schedules are not changed.

Discussion turned to pilot projects in general. Various pilot projects aimed at reducing cost and delay have been identified in eleven states. Before that, the Civil Justice Reform Act stimulated a massive set of local experiments. The Conference of Chief Justices is working on a Civil Justice Improvement Project. The Institute for the Advancement of the American Legal System has studied several pilot projects, and recommended principles to improve civil litigation. The National Center for State Courts has evaluated some projects. Projects are upcoming in Texas and Minnesota. New York State is developing a program that is aimed at trading early trial dates for curtailed pretrial procedure.

One possible pilot project that has drawn attention is the one that would involve some form of expanded initial discovery, perhaps moving beyond the form embodied by Civil Rule 26(a)(1) between 1993 and 2000 to a model drawn from the Arizona rule.

Other possibilities focus on assigning cases to different tracks that embody different levels of pretrial procedure, as many of the CJRA plans attempted. One problem that has confronted these programs has been identification of criteria for assigning cases to the different tracks. When dollar limits are set, lawyers tend to plead around them. Other criteria become difficult to manage.

A quite different approach would forgo formal experiments with new procedures to focus on training. The RAND study of the CJRA experiments confirmed that time to disposition can be reduced by a combination that includes early judicial case management, shorter discovery cut-offs, and early setting of a firm trial date. This learning could be demonstrated by a quasi-pilot project that trains judges in a district, gathers statistics, measures the progress of judges in reducing times to disposition, and seeks to persuade other judges of the value of these practices. Emery Lee noted that gathering information on individual judge performance can be sensitive. But the RAND study shows that there is real value. We know it is there.

A Committee member noted that he does a lot of arbitrations as an arbitrator, usually as a neutral member. "There is a convergence of what happens in arbitration with civil litigation." In arbitration, you get only the discovery the arbitrator orders. So

a lawyer may request 10 depositions; the order is to come back after talking with the client about the cost. The next request is for one deposition. "People sign up for this." "At the Rule 16 conference you quickly learn what the case is about." The idea of training judges is terrific. But we have to be able to distinguish cases for tracking purposes — small cases have to be dealt with differently. And they must be identified early. Tracking can work. Arbitration hearing dates tend to be quite firm because they must coordinate the schedules of 8, 9, 10 different people — a missed date may push the next hearing back by half a year.

A judge noted that before he became a judge he was a member of the CJRA committee for his district. "We're still doing tracking." But "I can't say whether it's good or bad." Lawyers are required to address tracking in their Rule 26(f) conference. Then they discuss it with the judge. There are five tracks: expedited, standard, complex, mass tort, and administrative.

Another judge reported that "tracking works." For example, he reduces the time for discovery in FDCA cases and reduces the number of discovery events.

The same judge then asked how does the Arizona initial disclosure of legal theories relate to practice on motions to dismiss for failure to state a claim? Judge Campbell suggested that it does not seem to have made a significant change.

A broader perspective was suggested. The RAND study of CJRA experience was expensive. We should focus on what we can try to do, and on what resources are available. Comparing pilot projects in some districts with others can be interesting, but "we do not have a lot of resources for data-driven projects." Pilot projects, however, "can be about norm changing." None of the suggested projects embodies an idea that is strong enough to be adopted without testing in a national rule that binds all 94 districts. Instead, we can find 5 or 10 districts to implement known good ideas. The hope will be that they will like the experience, carry on with it, and perhaps encourage other districts to emulate their experience. A similar comment suggested that it may be more effective to develop ideas, label them as best practices or innovations, and then draw attention to successful adoptions. But another judge expressed doubt whether "it catches on that way among judges." A different judge, however, thought that judges will be willing to adopt a practice when they become convinced that it will help move cases effectively. The question "is how to get people off the mark." A more specific suggestion was that "we can convince people to have a pre-motion telephone conference."

Federal Judicial Center training of all judges may be another means of fostering ideas that have proved out in one or a few districts.

A judge suggested that the idea of pilots is to test ideas, such as initial disclosure. Initial disclosure can be tested to see how it affects the number of motions, the time to disposition, and other variables. The Committee on Court Administration and Case Management will meet to discuss these same pilot-project ideas in December. They support work on this. It was agreed that involving "CACM" is essential. If they identify districts that have long times to disposition, they can help to focus enhanced training there. And it may be possible to measure the results.

A suggestion from an absent member was relayed: "Why are we thinking of small cases"? We need fact pleading, short discovery, and firm trial dates in all cases. "Do we need two rounds of pleading in every case"? Unlimited discovery? State courts working along these lines are achieving cheaper, faster resolutions. "We should be driving toward pretty radical rule change."

Another judge noted that it is difficult to measure achievement of the "just" aspiration expressed in Rule 1. But it is possible to measure satisfaction of the parties, and that may be a good thing to study.

The initial disclosure proposal came on for more detailed discussion. This model aims at "robust, but not aggressive" disclosure. It works from the Arizona model, but reduces the level of required disclosures in several dimensions.

The first question asked why the model requires only identification of categories of relevant documents, rather than actual production. The Arizona rule requires actual production unless the documents are voluminous. Arizona lawyers report that the rule operates as a presumption for production of particular documents. The response was that the model reflects concern that too much burden will be imposed by requiring actual production at the outset of an action, particularly if that were added to the obligation to identify witnesses, the fact basis for claims and defenses, and legal theory. To be sure, not much is accomplished by disclosing that relevant information can be found in such categories as "personnel files," "R & D files," or the like. But the parties can figure out where to start discovery by other means. Still, this question is open to further consideration if this model moves toward testing in a pilot project.

Initial disclosure was viewed from an expanded perspective. The bar was not ready for the 1993 rule that required disclosure of information unfavorable to the disclosing party. "The Arizona experience may not convince" federal judges in 49 other states. It would be difficult to move directly to adopting a rule that embodies the Arizona practice. But if it works in 5 or 10 pilot districts, there could be support for adopting a national practice.

A member reported work on a CJRA committee that adopted an initial disclosure rule. "It failed. Lawyers weren't ready." But the "pilot project" label may not be effective in selling a program. We want to test ideas to see whether they work. We need something that facilitates culture change. Seeing that something actually works can do a lot.

A truly pointed question was asked: (a)(2) and (a)(2)(A) of the model require disclosuring:

> (2) whether or not the disclosing party intends to use them in presenting its claims or defenses:
>
> (A) the names and addresses of all persons whom the party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to the action * * *.

Just what is intended? The purpose is to require disclosure of information unfavorable to the disclosing party — it is enough that the information is relevant to the events, etc.

The alternative of judge training programs came back for expanded discussion with the question whether it is a fool's errand. A judge responded that there are some judges who will resist training. But overall, training can do more than can be done by rules. Still, it would be a mistake to adopt a pilot that forces all judges into training. Another judge said that newer judges are particularly likely to want to take training in subjects they do not know well. But forcing it will not work. Still another judge agreed that new judges are more amenable to this sort of training.

"Baby judges school" also was noted, but it was suggested that new judges are still so new at this point that it cannot do the job of more focused and advanced programs. And in any event, "I'm not sure the problem is newer judges." However that may be, the training has to be meaningful. It will not work just to tell us judges that early case management is important. "Tell me how to make it happen."

A similar perspective was offered. "The important thing is to move from the abstract to the concrete." "Here's what actually works." A phone call on a 3-page statement of a motion to dismiss leads to an amended complaint. If the motion is renewed, whatever is dismissed is with prejudice. The ideas must be packaged in a way that makes it easier for the judge to do it.

So it was noted that "we learn more in gatherings of judges where we talk together." Mid-career judges help newer judges in informal exchanges that often are more useful than formal training programs. So one promising approach may be to go to the districts

to get the local judges talking among themselves about topics they would not "fly to D.C. to learn about."

Other questions were raised about pilot projects. "We know a lot about what works." A pilot project will take 3 or 4 years in practice. Then it will have to be evaluated. And the result may be a simple message that it works better with more judge involvement.

One note of frustration was expressed. In many districts the district judges refer all pretrial matters to magistrate judges, but do not set trial dates. The magistrate judge can move cases, but the district judge has to be involved.

It was noted that sometimes a pilot project will not be able to enlist every judge in a district. It may be necessary to look for judges. The Administrative Office can tell a district whether it is moving faster or slower than the national average. "It's a question of putting the resources in the right place."

A final suggestion was that it could be useful to get on the agenda of the Chief District Judges conference.

New Docket Items

15-CV-C

This suggestion protests the overuse of "objection as to form" during oral depositions. The proposed remedy is to create a Committee Note "indicating that it is improper to merely object to 'form' without providing more precise information as to how the question asked is 'defective as to form' (e.g., compound, leading, assumes facts not in evidence, etc.)."

It is well established that a Committee Note can be written only as part of the process of adopting or amending a rule. Rule 30(c)(2) could be amended to say something like this: "An objection must be stated in a nonargumentative and nonsuggestive manner <u>that reasonably explains the basis of the objection</u>." But the Committee concluded that any revisions of the rule text are unlikely to change behavior for the better, and might easily create more problems than would be solved.

This suggestion was removed from the docket.

15-CV-E

This suggestion addresses the time to file a responsive pleading when a Rule 12(b)(6) motion to dismiss addresses only part of a complaint or when the motion is converted to a motion for summary judgment. The concern is that some courts rule that the time to respond is suspended by Rule 12(a)(4) only as to the parts

of the complaint challenged by the motion; an answer must be filed as to the remainder of the complaint. The same problem can persist if the motion to dismiss is converted to a motion for summary judgment.

It is urged that it is better to suspend the time to respond as to the entire complaint. This practice avoids duplicative pleadings and confusion over the proper scope of discovery. Many cases support it.

Discussion revealed that even though many cases support the suggested approach, not all judges follow it. One Committee member reported that some judges in his home district require a response to the parts of a pleading not addressed by the motion, even though the time to respond is suspended as to the parts addressed by the motion. There is some reason for concern.

Despite these possible concerns, the Committee concluded that there is not yet evidence of a problem so general as to warrant amending the rules. This suggestion will be removed from the docket, although without any purpose to suggest that it should not be considered further if a general problem is shown.

15-CV-X

This suggestion raises two or three issues.

One suggestion is that Rule 45 should be revised to extend the reach of trial subpoenas so as "to force a representative of a non-resident corporate defendant to appear at trial in the court that has jurisdiction over the parties and the case." This question was thoroughly explored in working through the recent amendments of Rule 45. A proposal similar to this one was published for comment, albeit without any recommendation that it be adopted. No sufficient reasons are offered to justify reexamination now.

A second suggestion would adopt the procedure of Rule 30(b)(6) for trial subpoenas. A trial subpoena could name an entity as witness and direct the entity to produce one or more real persons to testify for the entity. Discussion noted that Rule 30(b)(6) itself has been examined twice in the recent past. Each time the Committee found problems in practice, but concluded that the problems were not sufficiently pervasive to justify amending the rule. It was concluded that however well Rule 30(b)(6) works for discovery, extending it to trial would generate additional problems that could become serious.

The suggestion also might be read to urge that a nonparty entity be required to produce witnesses to testify at a deposition in the district where an action is pending.

The Committee concluded that this set of suggestions should be removed from the docket.

15-CV-EE

This submission offers four discrete suggestions, all of which touch on other sets of rules in addition to the Civil Rules.

The first suggestion is to amend Rule 5.2(a)(1). The rule now permits disclosure in a filing of the last four digits of the social-security number and taxpayer-identification number. The suggestion is that no part of these numbers be disclosed. The reason is that the method of generating social security numbers relies on a well-known formula that, together with additional information about a person that is often readily available, can be used to reconstruct the full number. This phenomenon was considered by the joint subcommittee that drafted Rule 5.2 and the parallel Appellate, Bankruptcy, and Criminal Rules. The decision to allow filing the last four digits was made because this information was thought important for the Bankruptcy Rules. A preliminary inquiry suggests that this information may remain important for bankruptcy purposes. This suggestion will be carried forward for consultation with the other advisory committees.

The second suggestion is that any affidavit made to support a motion to proceed in forma pauperis under 28 U.S.C. § 1915 be filed under seal and reviewed ex parte. The court could order disclosure to another party for good cause and under a protective order, or permit unsealing in appropriately redacted form. The concern seems to be to protect privacy interests. Again, the other advisory committees are involved. Brief discussion suggested that filing under seal is not a general practice now. One judge says that he does not order sealing because it imposes costly burdens on the court. Another participant suggested that i.f.p. disclosures generally invade privacy only to the extent of disclosing a lack of financial resources, a state that could be inferred from a grant of in forma pauperis permission in any event. This suggestion too will be carried forward for consultation with other advisory committees.

The third suggestion is for a new Rule 7.2. It is modeled on a local rule for the Eastern and Southern Districts of New York. It would address citation by counsel of cases or other authorities "that are unpublished or reported exclusively on computerized data bases." Counsel who cites such authority would be required to provide copies to a pro se litigant. In addition, on request, counsel would be required to provide copies of such cases or authorities that are cited by the court if they were not previously cited by counsel. Discussion began by asking whether other courts have local rules similar to the E.D. & S.D.N.Y. rule; no one had information to respond. A judge noted that he makes copies available when he cites unpublished authority. A lawyer suggested

that Assistant United States Attorneys seem to do this in some districts. It was suggested that some way might be found to encourage this as a best practice. A note of this suggestion will be sent to the head of the FJC. But it was concluded that this practice involves a detail of practice that need not be enshrined in the Civil Rules.

The final suggestion is that pro se litigants should be permitted, but not required, to file by paper, and should be permitted to qualify for e-filing and service to avoid burdens that other parties do not have to bear. These questions are being actively considered by several advisory committees, as noted during earlier parts of this meeting. They will continue to be considered.

Pre-Motion Conference: Rule 56

Judge Jack Zouhary, a member of the Standing Committee, has offered an informal suggestion that this Committee consider the practice of requiring a party to request a conference with the court before making a motion for summary judgment. He follows that practice, and finds that it has many benefits.

The benefits that may be realized by pre-motion conference include these possibilities: The movant may decide not to make the motion, or may focus it better by omitting issues that are genuinely disputed. The nonmovant may realize that some issues are not genuinely disputed or are not material. Discussion in the conference may lead the parties to a better understanding of the facts, the law, or both. A conference with the court may work better than a conference of the parties alone. The court may not use the conference to deny permission to make the motion — Rule 56 establishes a right to move. But the court can suggest and advise.

Similar advantages can be gained by holding a conference with the court before other motions are made. These advantages were discussed in developing the package of case-management amendments now pending in Congress. The result of those deliberations is to add a new Rule 16(b)(3)(B)(v), which provides that a scheduling order may "direct that before moving for an order relating to discovery, the movant must request a conference with the court." This provision was limited to discovery motions in a spirit of conservatism in adding details to the rules. It was recognized that many courts require pre-motion conferences for motions other than discovery motions, including summary-judgment motions. But it also was recognized that some judges do not. One step was to reject any general requirement — the new Rule 16(b) provision serves simply as a reminder and perhaps as an encouragement.

It would be easy enough to expand pending Rule 16(b)(3)(B)(v) to encompass summary-judgment motions. It would authorize a scheduling-order provision that "direct[s] that before moving for

an order relating to discovery or for summary judgment, the movant must request a conference with the court." Or Rule 56(b) could be amended to mandate this procedure: "a party may, after requesting a conference with the court, file a motion for summary judgment at any time until 30 days after the close of all discovery."

Discussion began with a judge who requires a pre-motion conference for "all sorts of motions." This practice has many benefits. Recognizing that some judges would oppose a mandate, why not expand Rule 16(b) to encompass not only discovery but any "substantive" motion?

Another judge thought the underlying idea is good. "But we have just been through one round of amendments. We did it carefully." We can find a way to recommend pre-motion conferences as a best practice, but should wait before suggesting another rule amendment. And then we will need to think about how broadly the rule should apply. For example, is there a sufficiently clear concept of what is a "substantive motion" to support use of that term in rule text?

A lawyer noted that the AAA rules used to provide for summary disposition in general terms. The rules were amended to require permission of the arbitrator before making the motion. As an arbitrator, he has denied permission when the motion seemed inappropriate. That is not to suggest that a judge be authorized to deny leave to make a summary-judgment motion, but requiring a conference would give the judge an opportunity to observe that a motion would not have much chance of succeeding.

The discussion concluded by determining to hold this suggestion open, without moving forward now.

Rules 81, 58

Two additional items were included in the agenda materials. One addresses the provisions of Rule 81(c) that govern demands for jury trial in an action that has been removed from state court. The other addresses the Rule 58 requirement that a judgment be entered in a "separate document." These items will be carried forward on the agenda.

Respectfully submitted,

Edward H. Cooper
Reporter