ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, D.C.
April 10-11, 2000

AGENDA
Advisory Committee on Civil Rules
April 10-11, 2000

I. Opening Remarks of Chairman

   A. Report on Actions taken by the Supreme Court on Proposed Rule Amendments
   B. Attorney Conduct Rules
   C. Legislative Report

II. Approval of Minutes October 14-15, 1999 meeting

III. Approval of August 1999 Published Amendments to Rules 5(b), 6(e), 65, 77(d), 81(a), and Copyright Rule Abrogation

IV. Report of Discovery Subcommittee

V. Report of Class Action Subcommittee

VI. Report of Subcommittee on "Simplified" Procedure Rules

VII. Report of Subcommittee on Rule 53-Special Master

VIII. Report of Agenda Subcommittee

IX. Proposed Amendments to Rules 54 and 58 — Finality of Judgment

X. Proposed New Rule 7.1 Concerning Financial Disclosure Statements

XI. Proposed Amendments to Rule 51: Jury Instructions Requests Before Trial

XII. Proposed Amendment of Rule 81 Concerning Habeas Corpus

XIII. Next Meeting in Arizona, October 12-13, 2000

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I-A

ORAL PRESENTATION

I-B

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JOHN K. RABIEJ
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March 28, 2000

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Attorney Conduct*

For your information, I am attaching the most recent version of the Federal Rules of Attorney Conduct.

Mark D. Shapiro

Attachment

FRAC Models: Introduction

The years of work and discussion on the proposal to create a uniform Federal Rule of Attorney Conduct have progressed through the February 2000 invitational meeting. Two basic alternatives have come to the fore through this process. One is to do nothing. The other is to adopt, for the moment, a single Federal Rule of Attorney Conduct. Several variations of this FRAC 1 are set out below. The theme common to all of these variations is that all district courts and courts of appeals should look to state law for rules of professional responsibility. At the same time, these federal courts must retain control over their own practice and procedure, and similarly must retain the control that 28 U.S.C. § 1654 recognizes over the right to appear as an attorney. These principles are expressed in more or less detail in the several drafts.

The reasons for considering adoption of a national rule have become familiar. Federal courts now regulate professional responsibility in two different ways. The more visible regulation stems from local rules. The local-rule pattern in the district courts is more random noise than pattern. Almost every conceivable approach has been adopted somewhere. Some districts simply incorporate the local state rules of professional responsibility. Some districts adopt the ABA Model Rules of Professional Responsibility, or the ABA Model Code of Professional Responsibility, or — in one district — the ABA Canons of Ethics. The version adopted by the federal court may or may not coincide in written text with the version adopted by the local state, and interpretations of even the same written text may differ. Some districts have adopted their own stand-alone systems, different not only from the local state rules but different also from any other system anywhere. In multidistrict states, different districts may take different approaches. The result often is not only a complete lack of national uniformity but also disuniformity, and — often far more disruptive — uncertainty.

Beyond the local rules, federal courts also address matters of professional responsibility through their decisions. The common-law process that generates these decisions does seem to be working toward uniformity among federal courts on the issues that arise most frequently. The decisional uniformity, however, is reached by treating decisions based on one set of local rules as precedent in courts that have quite different local rules, and often by ignoring all of the local rules.

Confronting all of this mess, the Local Rules Project for many years concentrated its attention on other local rules problems. It is now able to return to the local rules aspect of professional responsibility, in part because resolution of many of the other problems releases energy for the task. In addition, the mess or local rules appears to be the source of increasing concern both for present practice and for the future. More and more lawyers and law firms are engaging in multiforum practice, and feel threatened by the frequent inscrutability of local federal rules and the prospect that conflicts will emerge between the federal rules and state rules. Some observers have suggested that these fears have been stirred in part by the very fact that the Local Rules Project has brought attention to the problem. Even if the Project has played some role, the problems are now recognized. Doing nothing will not, of itself, erase awakened consciousness.

Some support remains for the "do nothing" approach. The central argument is that none of the theoretical problems are real. Federal courts do not in fact undertake to impose professional discipline apart from sanctions designed to regulate practice in federal court — even if the sanction

calls for payment to the court, censure, or suspension or revocation of the right to practice in federal court, there is no direct effect on the attorney's state license to practice or standing in the state bar. State authorities do not in fact undertake to impose professional discipline for actions undertaken under the authority of federal procedure or under order of a federal court. Although the Department of Justice believes that it encounters serious problems with the eccentric interpretations that a few states place on local rules of professional responsibility, most of the Department's problems relate to investigative behavior that in any event is not a proper subject for regulation under the Rules Enabling Act. We are getting along perfectly well as matters stand now, and there is no reason to adopt remedies that may have undesirable consequences.

The alternatives to doing nothing have been explored in depth. There is no support for adopting a complete and nationally uniform set of rules of professional responsibility for the federal courts, even if the rules were to be taken directly from the rules adopted and occasionally revised by the American Bar Association. There has been little more enthusiasm for relying generally on local state rules, while carving out for uniform federal treatment a discrete set of rules addressed to the problems that have most frequently appeared in federal decisions. Those alternatives have been put aside, at least for the foreseeable future. All that remains of them is the prospect that if FRAC 1 is adopted, it may some day prove useful to adopt another Rule for bankruptcy practice, which has distinctive problems and already is regulated in part by the Bankruptcy Code, and perhaps another Rule to address specific needs of the Department of Justice.

The surviving alternative to doing nothing is to adopt some form of "dynamic conformity" to state practice. The starting point is simple: each federal court conforms to the professional responsibility rules that would be applied by the local state. This conformity is dynamic in the sense that it continually adapts to state rules as the text may be changed from time to time and as the meaning of the text is fleshed out by authoritative state interpretations.

The models built out of this starting point can be more or less elaborate. The most elaborate approach spells out the need to rely on local state choice-of-law rules, expressly defers professional responsibility enforcement proceedings to state authorities, spells out the primacy of federal procedure in federal courts and the right of federal courts to control the right to practice in federal court, and expressly forbids imposition of state sanctions for conduct that conforms to the requirements or opportunities of federal procedure. This approach is set out first in the models that follow because it identifies the issues that should be addressed. Successive models simplify the expression. The first relies for attorney protection on specific federal court order, not an abstract statement of the primacy of federal procedure. This model might be changed to allow retroactive protection by federal court order after state disciplinary proceedings are launched; a sketch is provided for that approach. Still simpler models pare off the statement of federal protection, relying on development by decision and on the common sense of state disciplinary authorities. The choice-of-law problem that confronts the courts of appeals also can be simplified, or perhaps put aside entirely. All that remains at the end is a very simple rule that, by mandating dynamic conformity to local state rules, preempts local federal rules and does nothing more. This rule is presented with an alternative that excludes the courts of appeals. Professor Coquillette's research shows that there is no problem in the courts of appeals; it may be better to leave Appellate Rule 46 as it stands.

FEDERAL RULES OF ATTORNEY CONDUCT

Rule 1. Applicable Rules.

(a) Rules of Professional Responsibility.

(1) District Court. ~~Except as provided in these rules, t~~The professional responsibility of an attorney for conduct in connection with any action or proceeding in a United States District Court is governed by the rules [that apply to an attorney admitted to practice in the state where the district court sits]{that would be applied by the courts of the state in which the district court sits}.

(2) Court of Appeals. ~~Except as provided in these rules, t~~The professional responsibility of an attorney for conduct in connection with any appeal or proceeding in a United States Court of Appeals is governed:

(A) With respect to any appeal from a district court, and any other proceeding directed to a district court, by the rules that apply [to an attorney admitted to practice in the state where the district court sits]{in the district court under Rule 1(a)(1)}.

[**(B)** With respect to any other action or proceeding:

(i) if the attorney is admitted to practice only in one state, by the rules of that state, or

(ii) if the attorney is admitted to practice in more than one state, by the rules of the state in which the attorney principally practices, but the rules of another state in which the attorney is licensed to practice govern conduct that has its predominant effect in that state.]

{**(B)** With respect to any other action or proceeding, by the law of the state where the court of appeals has its administrative headquarters.}

(b) Enforcing Professional Responsibility. The rules of professional responsibility that govern under Rule 1(a) are enforced by the proper state authority. A United States District Court or Court of Appeals may initiate an investigation of an alleged infraction of a rule of

professional responsibility, and — with or without an investigation — may refer any question of professional responsibility to the proper state authority.

(c) Procedure. Federal law governs all matters of procedure in the United States District Courts and Courts of Appeals[, whether addressed by the Federal Rules of *Attorney Conduct*, Appellate Procedure, Bankruptcy Procedure, Civil Procedure, Criminal Procedure, or Evidence; by judicially developed rules; by local court rules; or by the court in its inherent power]. The court may, after notice and opportunity to be heard, enforce the procedural rules and its orders by all appropriate sanctions, including forfeiture of fees, reprimand, censure, or suspension or revocation of the privilege to appear before the court.

(d) Practice in United States Court. A court of the United States may establish and enforce rules governing the right to appear as counsel in that court.

(e) State Sanctions Preempted. No state authority may impose any sanction, civil liability, or other consequence on an attorney for conduct in connection with an action or proceeding in a United States District Court or Court of Appeals if the conduct is authorized by order of the United States court or by the federal law of procedure that applies under Rule 1(c).

Committee Note

The purpose of these rules is to separate issues of professional responsibility from control of the procedure in the United States District Courts and Courts of Appeals. Matters of professional responsibility are allocated to state law. Matters of procedure are controlled by federal law.

Attorneys are licensed by state authorities, not by the United States nor by United States courts. By continuing tradition, rules of professional responsibility have been a matter of state responsibility, not federal responsibility. This tradition has become threatened, however, by the adoption of hundreds of local rules in the district courts and courts of appeals. These rules provide a crazy-quilt pattern that defeats any possibility of national uniformity and that often defeats uniformity within a state. See the extensive studies by the Reporter of the Standing Committee and the Federal Judicial Center published as: *The Working Papers of the Committee on Rules of Practice & Procedure: Special Studies of Federal Rules Governing Attorney Conduct*, September, 1997. [Hereafter *"Working Papers."*] Some local rules are drafted in opaque terms that defy understanding and — if enforcement is attempted — threaten to deny due-process principles of fair notice. See *Working Papers* 3-121. When the time comes for enforcement, moreover, some courts invoke authority outside their local rules and on occasion simply ignore the local rules. See *Working Papers* 3-44, 99-121, 187-193, 235-244. This rule preempts all of these local rules by occupying the field of professional responsibility in the district courts and courts of appeals.

Subdivision (a). The rules that apply with respect to a district court are the rules that would be applied by the state in which it sits. This approach means that ordinarily all attorneys involved in any proceeding are governed by the same rules; there is no risk that an attorney for one party may win an advantage over an attorney for another party by exploiting differences in the rules of the different states by which the attorneys are licensed. Different rules will apply only if local state choice-of-law rules would, because of different circumstances affecting the attorneys' conduct and client relationships, apply different rules to the different attorneys.

This rule does not address all choice-of-law questions. An attorney's involvement with the issues that eventually appear in litigation commonly begins before litigation. This rule does not choose the law that governs before an action comes to the federal court. Local state rules apply from the moment an action or proceeding comes before the district court. The local rules include local choice-of-law rules. If the local state would choose the rules of a different state to govern a particular situation, those are the rules that govern. Removal from a state court presents no difficulty — the same rules as would be applied by the state court carry over. If a case is transferred to a district court from another federal court, the rules that would be applied by the receiving court's state apply after the transfer becomes effective. If actions are consolidated in a single district for pretrial purposes under 28 U.S.C. § 1407, the rules of the multidistrict court's state apply to all proceedings in the multidistrict court. Other situations must be addressed as they arise.

The rules that apply with respect to a court of appeals depend on the nature of the proceeding in the court of appeals. If the proceeding is an appeal or is otherwise directed to a district court, as on petition for an extraordinary writ, the rules are those that apply in the district court. This approach prevents the confusions that might arise when there is a change of counsel or when the parties choose attorneys from different states. Some proceedings in a court of appeals, however, are not directed to a district court. Review of an administrative agency is the most common example, but there are other examples such as contempt proceedings arising from an order entered by the court of appeals. [A three-part test applies to these proceedings. If the attorney is admitted to practice in only one state, that state's rules apply. If the attorney is admitted to practice in more than one state, the rules that apply are those of the state where the attorney principally practices, unless the attorney's conduct has its principal effect in another state where the attorney is also licensed.]{In order to ensure that a single body of law applies to all attorneys in a single proceeding, the rules of professional responsibility for these situations are taken from the state where the court of appeals has its administrative headquarters.}

Subdivision (b). Enforcement of state rules of professional responsibility remains with the proper state authority. Ordinarily the state will be the state whose rules apply under subdivision (a). Only that state can provide an expert and authentic interpretation and application of the controlling rules. If the attorney is licensed in that state, other states should defer to its enforcement decisions to the same extent as they would defer if the attorney's conduct had been undertaken in connection with a court of that state. If another state initiates disciplinary proceedings because the attorney is not admitted to practice in the state of the district court, or does so even though the attorney is admitted to practice in the district court's state, the enforcing state is bound by the choice-of-law rule in subdivision (a).

In considering whether to investigate or refer a professional responsibility question, a district court must be sensitive to the consequences that flow even from an investigation or referral. The court should make its investigation as discreet as possible, and should seize every opportunity for confidentiality in state referral procedures.

Subdivision (c). Subdivision (c) recognizes the fundamental imperative that the federal government must be able to control the procedure in federal courts. A state may not regulate federal procedure through the guise of state rules of professional responsibility. The distinction between matters of procedure and matters of professional responsibility is as clear at the core, and as uncertain at the edges, as the familiar distinctions that draw lines between procedure and substance. The distinction between procedure and substance reflects different policies, and may yield different results, in such separate contexts as state-state choice of law, federal-state choice of law, and determining the retroactivity of legislation. The policies that separate federal control of federal procedure from state regulation of professional responsibility also are different, although quite similar to the policies that distinguish "substance" from "procedure" under the doctrine of *Erie R.R. v. Tompkins*, 1938, 304 U.S. 64.

Although a federal court is free to regulate its procedure in ways that require departure from the state rules of professional responsibility that govern under subdivision (a), the state rules should be considered in making procedural rulings. Needless affront to state principles should be avoided.

A federal court may enforce procedural requirements by all appropriate sanctions. The sanctions may be those expressly provided in a rule of procedure, such as Appellate Rule 38, or Civil Rules 11, 26(g), and 37. The sanctions also may be contempt sanctions or other sanctions supported by inherent power. These sanctions may include those that often are invoked for professional-responsibility violations, including disqualification, fee forfeiture, reprimand, censure, or suspension or revocation of the privilege to appear before the federal court. These sanctions are appropriate remedies for procedural violations, necessary to deter such violations and to protect the court against recidivism by attorneys whose conduct has threatened to disrupt or subvert proper procedure.

Requirements of notice and opportunity to be heard apply to the imposition of procedural sanctions. Such requirements are already familiar through the developed procedures used to adjudicate contempt issues or to impose procedural sanctions.

Subdivision (d). 28 U.S.C. § 1654 establishes the right of parties in the courts of the United States to plead and conduct their cases "by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." Subdivision (d) recognizes that the power to establish these rules includes the power to provide for enforcement. Enforcement may include such measures as limitation, suspension, or revocation of the right to appear as counsel in the court, or before a particular judge of the court. Enforcement by suspension or revocation may be based on acts that do not relate directly to the attorney's conduct in the proceedings. Examples include disbarment by state authorities or criminal prosecution or conviction. Such steps are designed to protect the court's interest in regulating the right to practice before the court, not to impose professional discipline as such.

Subdivision (e). The principle that federal law must control federal procedure must not be defeated by imposition of state standards for attorney conduct authorized or required by federal procedure. This preemption of state sanctions includes conduct undertaken to comply with a specific federal court order.

The need to preempt state sanctions can be illustrated by one example. Thirty months into a complex litigation, a motion is made to disqualify opposing counsel for violations of professional responsibility rules relating to confidential client information and conflicts of interest. The federal court determines that there is no violation, or that a violation does not warrant disqualification in light of the costs that disqualification would entail. The federal court's interest in regulating its own proceedings supersedes the interest of any state in imposing sanctions for the conduct approved by the federal court.

The law governing lawyers may impose civil liability for conduct that also violates the disciplinary rules of professional conduct. The federal interest in enforcing federal procedure requires that a lawyer who complies with federal procedure in federal-court proceedings be protected against civil liability as well as against disciplinary sanctions.

Alternative (c), (e) Court-order Provisions

(c) Exemption. A United States District Court or Court of Appeals may, on motion or on its own, enter an order that exempts an attorney from an otherwise applicable rule of professional responsibility with respect to conduct in connection with an action or proceeding in that court. In determining whether to enter the order the court should consider whether the conduct violates any rule of professional responsibility and should weigh any violation against the procedural interests served by the conduct.

* * *

(e) State Sanctions Preempted. No state authority may invoke any standard of professional responsibility to impose any sanction, civil liability, or other consequence on an attorney for conduct in connection with an action or proceeding in a United States District Court or Court of Appeals that was protected by an exemption ordered under Rule 1(c).

Committee Note

Subdivision (c). Subdivision (c) recognizes the fundamental imperative that the federal government must be able to control the procedure in federal courts. The sources of federal procedure include court rules, both national and local; judicially developed doctrines; and inherent power. Federal procedure drawn from these sources serves not only the interests of the federal courts but also the substantive principles of federal law that account for much federal judicial business. A state may not control federal procedure under the guise of state rules of professional responsibility. At the same time, it is appropriate to accommodate the interests of federal procedure to the interests that underlie state regulation of attorney responsibility.

Accommodation of these competing interests might be left to a general provision that exempts from state responsibility rules any conduct undertaken in compliance with federal procedure. This general approach would encounter at least two major difficulties. The first difficulty is that there are many broad areas in which the same conduct involves both judicial procedure and professional responsibility. When procedure interests collide with responsibility interests, each interest may be important, trivial, or significant. One interest may be trivial while the other is important. It is important to achieve a case-specific accommodation of the competing interests in a way that would not be served by a broad principle that federal procedural interests always supersede state responsibility interests. The accommodation is too sensitive and too difficult to be left to the unguided judgment of individual attorneys. Explicit judicial review and disposition is required.

The second difficulty with a mere general principle is that enforcement ordinarily would occur in state professional discipline proceedings. State-created institutions would be required to make determinations of federal procedure divorced from the underlying federal proceeding,

commonly after the proceeding has concluded, and almost always after the challenged conduct has been completed. There would be few opportunities for review of the state determination by any federal court.

Together, these difficulties justify the burdensome requirement that an exemption order be sought by an attorney who recognizes a potential conflict between the interests of federal procedure and state professional responsibility rules. In some circumstances it may be possible to seek an advisory ruling from a state agency before acting. Often, however, only the federal court will be in a position to act in time to support continued efficient development of the federal proceeding.

The variety of potential conflicts between procedure and professional responsibility is too great to support any explicit standard for weighing the competing interests. Violation of a rule of responsibility may lie at the extended margin of application that involves little if any significant interest, or may lie at the core of a vitally important state policy. A slight change in procedural course might avoid any conflict in some circumstances, while other circumstances may pit a vital procedural need against the requirements of professional responsibility. All that can be said is that the federal court should be sympathetically sensitive to the interests embodied in the state rules of professional responsibility, and should take care to be sure that federal interests weigh so heavily as to overcome the state interests involved in the specific conflict.

A determination that proposed conduct does not violate the rules of professional responsibility should not always preclude consideration of the federal procedural interests involved. The question of professional responsibility may be close and may involve interests that are significantly more important than the potential federal procedure interest. A court may decline to enter an exemption order in such circumstances.

* * *

Subdivision (e). Subdivision (e) is the necessary complement of subdivision (c). The subdivision (c) power to serve the needs of federal procedure by exempting attorney conduct from state rules of professional responsibility requires that state tribunals recognize the exemption. The exemption includes an absolute immunity against civil liability for the exempted conduct.

The absence or even explicit refusal of a Rule 1(c) exemption order does not prevent a state disciplinary authority from considering federal procedural interests in determining whether there has been a violation of professional responsibility requirements or in deciding on a sanction after finding a violation.

Reporter's Note

This draft avoids at least one important question: when may the federal court enter an exemption order? Only before the relevant conduct? Also after, but before any state disciplinary inquiry is launched? After a state disciplinary inquiry is launched, but before final disposition? The answer may be complicated by the residual ambiguities of the concept that addresses conduct in connection with a federal action or proceeding. It may be difficult to insist that an exemption order be obtained before prefiling conduct is undertaken.

Alternative: Retroactive Federal Protection By Order

This version would discard the subdivision (e) preemption provision entirely, and replace subdivision (c) by the following provision:

(c) Protective Order.

(1) A United States District Court or Court of Appeals may enter an order that protects an attorney from any sanction, civil liability, or other consequence under a state rule of professional responsibility for conduct in connection with any action or proceeding in that court.

(2) An application for a protective order under Rule 1(c)(1) may be made only after a standard of professional responsibility is invoked against the applicant in state proceedings.

(3) In determining whether to grant a protective order under Rule 1(c)(1), the court should consider:

(A) whether the attorney's conduct violated any applicable rule of professional responsibility, and the nature and severity of any possible violation;

(B) whether the attorney's conduct was required or authorized by order of the federal court, by federal procedure, or by other federal interests derived from federal substantive law; and

(C) whether the federal interests served by the attorney's conduct outweigh the interests served by completion of the state proceedings in which the rule of professional responsibility is invoked.

Committee Note

Subdivision (c) recognizes the conflicts that may arise between federal interests and state rules of professional responsibility. If a federal court orders an attorney to engage in specified conduct, the interests both of the court and of the attorney forbid imposition of sanctions or liability under inconsistent state rules. Federal courts also must be able to develop and apply their own procedure free from indirect control by state rules of professional responsibility. An attorney who complies with federal procedural requirements, or who seizes opportunities made available by

federal procedure, must be protected against state-imposed sanctions unless the attorney could have achieved the same procedural ends by other means consistent with federal procedure and also consistent with important state rules of professional conduct. Overriding federal interests also may derive from substantive federal principles.

These abstract principles are difficult to translate into practice. It is particularly difficult to ask state disciplinary bodies and state courts to interpret and vicariously apply the federal rules of procedure and the interests that may derive from federal substantive law. It is better that the balancing of federal interests against state interests be made by the federal court connected to the attorney conduct that has been called into question in state proceedings. A protective order issued by the federal court provides the means to effectuate this balancing. At the same time, there is little point in submitting federal courts to a continuing barrage of anticipatory applications by attorneys who fear that their conduct may some day be called into question in state proceedings. State authorities in fact have shown no general inclination to pursue professional responsibility sanctions for conduct in connection with federal proceedings that arguably serves federal interests. The need to protect federal interests is best served by allowing an application for a protective order only after a state rule of professional responsibility is actually invoked in state proceedings.

The federal court's decision whether to issue a protective order is a matter of discretion that requires balancing federal interests against state interests. The strength of the federal interest is direct and overwhelming when the attorney's conduct was directed or authorized by order of a federal court. If at the time of making the order the federal court was aware of the facts that give rise to the issue of professional responsibility, it is difficult to imagine the extraordinary circumstances that should allow imposition of state sanctions for conduct that complies with the order. Absent a directly applicable order, the nature of the federal interest will, standing alone, be important in some circumstances and less important in others. One very important dimension of the federal interest is interdependent with the potentially prohibiting rule of professional responsibility. There is, for example, little federal interest in protecting against a rule of professional responsibility if at the time of the attorney's conduct there was good reason to fear violation of the rule, the professional responsibility interest is important, and the federal purposes could be well served by alternative conduct that would not violate the rule.

In balancing federal and state interests, the federal court need not reach its own final conclusion whether the attorney's conduct violated a state rule of professional responsibility. If there is reasonable doubt on this question, it is enough to take account of the probability — high or low — that there was a violation.

A protective order, once issued, commands the res judicata effects of any federal judgment. State tribunals are obliged to honor the effect of the order according to its terms.

Reporter's Note

This approach emerged for the first time during discussions at the February 2000 invitational conference. It attracted substantial support during the open discussion. At least some participants have had second thoughts. Two particular doubts have been expressed. The first is that this ex-post opportunity for protection will do little or nothing to reassure attorneys who see a potential conflict

between federal procedural opportunities and state professional responsibility rules, and who do not know how to resolve the conflict. Many are likely to seek protection by seeking an order authorizing the desired conduct, so as to enhance the identifiable federal interest and to dissuade state authorities from pursuing possible discipline. Otherwise the opportunity for intervention by a federal court may assure a more sympathetic and better-informed understanding of federal law, but provides scant protection. The whole purpose of this approach is to avoid this kind of anticipatory request to the federal court; the purpose may in practice be difficult to achieve. The second doubt is whether state authorities really would find this approach more congenial. This approach forces a direct confrontation between the federal court and state authorities in every case — although the federal court is considering a "protective order" rather than an "injunction," the effect on state proceedings is the same as an injunction.

Simplified Rule: No Conflict-of-Law, No Federal Interests

This version would adopt a rule of dynamic conformity, confirm the § 1654 power of a federal court to control admission to practice before it, and provide a few details about the distinction between sanctions imposed by state authorities for professional responsibility violations and sanctions imposed by federal courts to protect their own needs. It would not expressly state the primacy of federal procedure interests, nor would it provide any vehicle for federal-court protection against state disregard of federal interests. This approach rests on a combination of concerns. In part, it reflects the belief that there are no real problems. State authorities do not seek to impose professional responsibility sanctions for conduct pursued in reliance on federal procedure or in service of federal substantive interests. There is no need to state a principle that is honored in practice. And in part, this approach reflects the concern that open statement of the principles of federal primacy has generated substantial opposition, even though the principles are followed in practice. Some of these questions might be addressed in the Committee Note.

FRAC 1 in this form would be:

(a) Admission to Practice. A court of the United States may establish and enforce rules governing the right to appear as counsel in and practice before that court.

(b) Professional Responsibility. The professional responsibility of an attorney for conduct in connection with any action or proceeding in a United States court is governed by the rules that apply to an attorney admitted to practice in the state where the court sits. A United States court may conduct an investigation of an infraction of a rule of professional responsibility and — with or without an investigation — may refer any question of professional responsibility to the proper state authority. Whether or not an infraction is so referred, the court may independently impose appropriate sanctions, including forfeiture of fees, reprimand, censure, or revocation of the privilege to appear before the court.

Committee Note

Most federal courts have undertaken to regulate matters of professional responsibility by adopting local rules. These local rules have not been successful. There are wide variations of approach among federal courts, even among different federal districts within a single state. Many of the local rules adopt models that are inconsistent with local state rules; even if local state rules appear to be adopted, the federal court may assert the right to interpret the same text at odds with the state interpretation. There seems to be a growing tendency in some federal courts to disregard even their own local rules, looking toward development of a federal common law of attorney conduct that is cut free from any authoritative text. This tendency toward decisional principles is fed by the context in which federal courts face issues of attorney conduct — almost invariably, the question is not one of professional discipline, but instead is a procedural question affecting conduct of the

federal court's own proceedings. The result has been that an attorney appearing in federal court often cannot know what rules of professional responsibility apply to conduct in connection with the federal proceeding. The problem is exacerbated in some federal courts by the opacity of the local federal rules. The problem is further exacerbated for the growing number of attorneys who appear in federal courts away from their home states.

The time has come to replace the confusing welter of local federal rules with a uniform national rule. This rule adopts the rules that apply to an attorney admitted to practice in the state where the federal court sits. For a federal court of appeals, this state is the state where the court has its administrative headquarters. *[Reporter's Query: What do we do about the Federal Circuit? It refers many matters of procedure and substance to regional circuit law. How about this one? Everything according to D.C. rules?]* For all courts, the rules that apply to an attorney admitted to practice in the state mean the rules that would be applied by the courts of that state. If the local state would undertake to apply the professional responsibility rules of a different state — most likely the state in which an out-of-state attorney is licensed — the federal court makes the same choice. Adoption of the state rules means more than mere adoption of the current printed text of the state rules. It means also adoption of the interpretation placed on the state rules by state courts, adhering to the general rules that govern a federal court when it seeks to ascertain the content of state law.

Adoption for federal courts of local rules of professional responsibility leads to an inevitable interplay between federal interests and enforcement of the local rules. Federal courts never have undertaken to impose professional discipline in a form that affects an attorney's license to practice in state courts or standing in a state bar. But federal courts regularly consider issues of professional responsibility in ruling on matters that come before them in the course of litigation, and will continue to do so. In choosing procedural alternatives, for example, the federal court may be influenced by the prospect that one alternative is nearly as satisfactory as another for procedural purposes and should be preferred because it avoids significant issues of professional responsibility. And federal courts also consider matters of professional discipline for their own purposes. 28 U.S.C. § 1654 establishes the authority of a federal court to adopt rules that permit an attorney "to manage and conduct causes therein." By statute, court rule, and inherent power, federal courts can impose sanctions for procedural violations and the unreasonable and vexatious multiplication of proceedings. Considerations of professional responsibility may inform the exercise of these powers. Federal courts also share the interest of the entire legal profession in ensuring proper professional behavior by all attorneys. A federal court that learns of conduct connected to its own proceedings that may violate the applicable rules of professional responsibility is interested — and at times has the responsibility — to refer the question to state authorities. Under Attorney Conduct Rule 1, the federal court may make such a reference after conducting its own investigation or without conducting an investigation. A confidential federal investigation may protect an innocent attorney against the burdens that go with a formal referral, but often the federal court will prefer that responsible state authorities undertake any appropriate investigation.

Simple Dynamic Conformity

This model avoids all of the complications:

The professional responsibility of an attorney for conduct in connection with an action or proceeding in a United States District Court or Court of Appeals is governed by the rules that apply to an attorney admitted to practice in the state where the court sits.

Committee Note

(The Committee Note would include at least the first two paragraphs of the Note for the preceding rule. It might venture to adopt the whole of that Note, addressing some of the issues that are omitted from the text of the rule. The rule might add a subdivision recognizing the authority to "establish and enforce rules governing the right to appear as counsel.")

Simple Dynamic Conformity Without the Courts of Appeals

The professional responsibility of an attorney for conduct in connection with an action or proceeding in a United States District Court is governed by the rules that apply to an attorney admitted to practice in the state where the court sits.

Committee Note

(The Committee Note would be similar to the Note for the Simple Dynamic Conformity Rule, but would point out that the courts of appeals are governed by Appellate Rule 46. It might include a suggestion that a court of appeals should recognize the importance of continuity between district court proceedings and appellate proceedings, particularly with respect to the question whether a possible conflict of interest that was permissible in the district court should disqualify an attorney from participating in the appeal.)

Draft Minutes

Standing Committee Attorney Conduct Rules Subcommittee

The Attorney Conduct Rules Subcommittee of the Standing Committee on Rules of Practice and Procedure held an invitational conference at the Administrative Office of the United States Courts in Washington, D.C., on February 4, 2000. Judge Anthony J. Scirica presided as chair of the Standing Committee, assisted by Professor Daniel R. Coquillette as Standing Committee Reporter. Invited Guests who attended included Leo V. Boyle, Esq.; Professor Stephen B. Burbank; J. Scott Davis, Esq.; Claudia Flynn, Esq.; Lawrence J. Fox, Esq.; Professor Bruce A. Green; Robert M.A. Johnson, Esq.; Greg P. Joseph, Esq.; Professor Andrew L. Kaufman; George Kuhlman, Esq.; Professor Margaret C. Love; Hon. John W. Lungstrum (as liaison from the Judicial Conference Committee on Court Administration and Case Management); Michael E. Mone, Esq.; Alan B. Morrison, Esq.; Hon. Marvin H. Morse; Professor Linda S. Mullenix; Robert S. Peck, Esq.; Hon Thomas J. Perrelli; Gerald K. Smith, Esq.; Guy Miller Struve, Esq.; Hon. Ewing Werlein, Jr.; and Hon. Michael D. Zimmerman. Members of the rules committees who constitute the Attorney Conduct Rules Subcommittee who attended included Professor Daniel J. Capra; Darryl W. Jackson, Esq.; Hon. Douglas Letter; Professor Myles V. Lynk; Professor Jeffrey W. Morris; Hon. Paul V. Niemeyer; Hon. David W. Ogden; Hon. Lee H. Rosenthal; Hon. Jerry E. Smith; and Hon. John Charles Thomas. Two other members of the Subcommittee, Professor Geoffrey C. Hazard, Jr., and Hon. John M. Roll, attended by telephone. Edward H. Cooper was present as Civil Rules Advisory Committee Reporter. Administrative Office staff who attended included Patricia S. Ketchum; Karen M. Kremer; Peter G. McCabe; Mark S. Miskovsky; and John K. Rabiej. Marie Leary attended for the Federal Judicial Center. Others in attendance included Juliet Eurich, Esq., and Lynn Rzonca, Esq.

Introduction

Judge Scirica welcomed the participants, stating that the conference is not a public hearing but a dialogue of differing views, reflecting perspectives that may in part draw from the experiences of different constituencies. This conference is not the end of the subcommittee process, and is not the occasion for subcommittee decisionmaking. The time for decision will stretch out at least for several months, unless Congress acts in a way that requires an accelerated response.

Professor Coquillette, aided by many of those who have joined in this conference, has done a great deal of work on the question whether the time has come to adopt one or more federal rules of attorney conduct. Veterans of the process will help to advance this work still further. Newcomers will both have the chance to learn of the work that has been done and provide the benefits of fresh views. Following introductions of those in attendance and an opening summary, the first part of the

agenda will consist of individual statements by each invited guest reflecting on the value of the "FRAC" enterprise.

Judge Scirica continued by noting that many years ago Congress expressed concern about the proliferation of local rules. Congress remains concerned about local rules, in part because local rules are not reviewed by Congress in the way the federal rules are reviewed. Lawyers also are concerned about local rules. The American Bar Litigation Section will soon move for adoption of a resolution urging restraint in the local rules process. One of the reforms adopted by Congress requires circuit council review of local rules.

Phase 1 of the Local Rules Project resulted in the elimination of many local rules. Many districts, obedient to the command of amended Civil Rule 83(a)(1), have renumbered their local rules.

One of the discoveries of the Local Rules Project was that there is a wide variety of inconsistent local rules on professional responsibility. The inconsistencies exist in every direction. Local federal rules often are inconsistent with the rules of the forum state, and commonly are inconsistent with the local rules of other districts. Even when a local rule purports to adopt the text of the local state rule, the federal court may interpret the text in ways that depart from the state interpretation.

It is recognized that a federal court must be able to control the conduct or proceedings before it, and likewise must be able to control admission to practice before it. But at the same time, it is recognized that the states are primarily responsible for professional discipline. The difficulty is that practice and professional responsibility overlap, in ways that may be complementary but also may be competitive.

The major problems experienced by lawyers in the midst of this confusion relate to conflicts of interest, confidentiality and privilege, and the duty of candor to the tribunal. Government lawyers have particular problems with rules governing contact with represented persons. The McDade Amendment, 28 U.S.C.A. § 530B, now provides direction on the source of law for professional responsibility. The Tenth Circuit has concluded that a state rule governing the practice of subpoenaing an attorney to testify before a grand jury is a matter of professional responsibility for purposes of § 530B, and thus controls in federal court.

Negotiations on Model Rule 4.2 revisions continue among the two ABA committees — Ethics 2000 and the standing committee, the Conference of Chief Justices, and the Department of Justice. There seems to be some interest in the Senate in reconsidering § 530B.

It is important to know whether conflicts between federal procedure and state professional responsibility rules pose real problems for private lawyers. Whether or not real problems are frequently encountered now, as a matter of principle it is important to decide whether a lawyer who

complies with federal procedure or a federal court order is protected against state discipline. It also is important to consider conduct undertaken before litigation actually commences, and to determine whether federal interests may be meaningfully affected in this setting.

Significant federalism interests are at stake. Justice Veasey, who could not attend today's meeting, wants to remind us of the primary state interests in professional responsibility. But there also are federal interests.

It also is important that the subcommittee and Standing Committee continue to be prepared to respond if Congress asks the Judicial Conference to consider these issues.

Professor Coquillette provided a supplemental introduction, designed to provide an overview of progress over the last several years and to capture the spirit of the Rules Enabling Act process.

The Enabling Act process works well because of the opportunities it provides for hearing from many voices. This conference is one valuable part of that process. A particular strength of the Enabling Act is that it expressly involves the legislative and judicial branches, and in fact involves the executive branch as well. The executive branch is represented through the Department of Justice on the advisory committees and the Standing Committee, and has been a very important participant in the process. A further strength is that people from many backgrounds and interests work together, both as members of the committees and as witnesses and writers of comments.

The attorney conduct inquiry has its roots in 1986. Congress became concerned with local rules. Local rules continue to be a problem. They circumvent the Enabling Act process; they often are hard to find — 30% of the districts still have failed to honor the renumbering command of Civil Rule 83(a)(1); they often restate the federal rules, but incompletely or confusedly; and they sometimes are invalid because inconsistent with statute or federal rule.

On matters of attorney conduct, some districts have local rules that adopt forms of the Model Rules or Model Code that are inconsistent with the rules in effect in their own states. One district continues to adhere to the original Canons of Professional Ethics. Some districts have adopted their own unique rules, unlike any national model or any actual state system. The District of Colorado provides a recent example of a system that adopts the state rules by local rule, but then sets out exceptions by an administrative order that is difficult to find. The project book of studies, including FJC studies, documents these findings in detail.

The Standing Committee is responsible to promote consistency of federal rules and otherwise to advance the administration of justice. At present, regulation of professional responsibility by local federal court rules has no consistency. The problems are so great that in 1988 it was decided to exclude them from the first phase of the Local Rules Project. In 1995, however, the Standing Committee concluded that the topic should be taken up. In 1997, seven studies had been completed — two by the Federal Judicial Center, and five by Professor Coquillette.

The McDade amendment creates a problem for the Department of Justice because its command that federal lawyers comply with both state and local federal rules ignores the frequent inconsistencies between state and local federal rules.

It has become clear that bankruptcy is different from other areas of federal practice. The Bankruptcy Code establishes different standards for conflicts of interest. There is no parallel to these standards in state professional responsibility rules.

The first two invitational conferences focused on four options. One option is to do nothing to change the present situation. This course is favored by those who believe that there are not real problems, not even for the Department of Justice. It also is favored by those who believe that federal courts are solving the problems by ignoring their own local rules and developing a body of federal common law. Recent research shows that frequently there is no citation of local rules in federal opinions on attorney conduct, and often other federal court decisions are cited — the very model of common law.

A second option is to adopt a simple rule that adopts local state professional responsibility rules for each district, without any qualification. This would be "dynamic conformity," in which a federal court adheres to every change in the formal state rules and to state interpretations of the state rules. There would be a choice-of-law rule for the courts of appeals. Supporters of this option do not like the present local rules situation, and also are wary of the evolution of a federal common law of attorney responsibility. They believe that these are state issues, and that the Enabling Act process should be used to return authority to the states, or more accurately to confirm paramount state authority. The objective is to decrease, not increase the role of the states.

A third option adopts dynamic conformity to state rules as the default rule, but also would establish specific federal rules for the issues that have arisen most frequently in federal courts. The federal rules likely would be modeled on the ABA Model Rules, seeking the version of each rule that most resembles the mode of state adoptions. This model was prepared for discussion purposes, consisting of a general dynamic conformity rule supplemented by nine additional rules. There is not much support for this approach at the moment. A Note in the Harvard Law Review expressed dissatisfaction. Many other important observers have expressed similar reservations.

The fourth option explored in the prior conferences would be adoption of a comprehensive federal code of professional responsibility, most likely based on the most current ABA model, holding open the possibility of adopting special rules for bankruptcy. There has never been much support for this approach.

Since the first two conferences, a fifth model has emerged. This model adopts local state rules, including choice-of-law rules, to govern all matters of professional responsibility, both in general and with respect to matters connected to proceedings in federal court. But it also expressly

recognizes federal power to regulate federal procedure, and protects acts dictated by federal procedure or court order against sanctions based on state professional responsibility rules. At present, only this "FRAC 1" has been drafted, and the draft is only for discussion purposes. It is possible that there will be a FRAC 2, dealing with bankruptcy, and a FRAC 3 dealing with federal government attorneys. While still additional rules might be adopted, no subject for additional rules has yet been suggested. It also is possible that only FRAC 1 will be pursued.

Discussion of all five models leaves substantial support for doing nothing. But § 530B has aggravated the problems faced by federal government attorneys. Support of dynamic state conformity is mingled by some with support for permitting independent federal interpretation of the text of local state rules.

Bills in the Senate reflect different approaches. One would override § 530B. Another would invite the Judicial Conference to advise Congress on the problems faced by government attorneys. The Washington Post has opined this very day that these bills are among the important bills calling for action during this session.

Finally, Professor Coquillette expressed great thanks to the Administrative Office staff for helping both with the series of invitational conferences and with the work of the subcommittee.

Individual Statements

The conference then turned to brief opening statements made by each of the invited guests, primarily in the order of seating around the conference table.

Andrew Kaufman began by asking whether there is a problem. There was a problem all these years, but no one knew about it until Professors Burbank and Coquillette pointed it out. Once the problem is pointed out, lawyers see an opportunity for conflict and confusion that <u>will</u> generate conflict and confusion. Academics tend to like uniform rules as a solution to such problems. Uniform rules can respond to an internal logic. They also are easier to teach. But work with state rules shows the difficulty of achieving uniformity. The Massachusetts Supreme Judicial Court has just revised its rules of professional conduct. The advisory committee operated under the "Coquillette Rule," adhering to member Coquillette's advice that the prima facie choice should be adherence to the ABA Model Rules, departing only for good reason. Notwithstanding this approach, many changes were made in the ABA rules. The reason is that the ABA rules, although developed with great effort and great good will, are the product of a committee of lawyers. The time has come for the judges of this country to become more actively involved; rulemaking should not be run by the private bar. In Massachusetts, it was a great mistake not to involve the federal judges in the process; involvement of the federal judges would have helped to resolve many of the tensions that have emerged between the new state rules and the federal courts. Rule 4.2 would be a good place to start bringing judges into the process, beginning with more active participation by the Conference

of Chief Justices. Finally, the distinction between federal procedure and state professional responsibility rules reflected in draft FRAC 1 is right. But all of the illustrations are wrong in result.

Michael Zimmerman began by observing that it is nice to think of involving the Conference of Chief Justices more actively, but that three years of trying to broker Rule 4.2 between the ABA and the Department of Justice have shown how difficult this is. Rule 4.2 is shaping up to be a 30-year war, perhaps a 100-year war. There is no forum with enough power to force a resolution, unless it is Congress. And professional ethics problems are not well suited to resolution in the political process. But if the Rule 4.2 problem can be solved, it will be proper to do nothing else. The present situation of local rules is horrid on paper, but has not proved to be a problem in practice. The states have 50 different professional responsibility cultures. An ABA rule, whatever it is, will not be easily accepted in all states. If Congress tells the Standing Committee to do something, something will be done. But perhaps the solution will be worse than the problem.

Stephen Burbank noted that in the early 1990s it seemed that the problem was primarily one of paper inconsistencies. The inconsistencies of rules on paper have persisted, and perhaps have grown worse. But we would need a study to tell us whether there is a real problem. So, absent a study, it is important to decide where the burden lies. The Standing Committee's responsibility for achieving uniformity in federal practice suggests that perhaps the burden should be on those who champion inconsistency. But that leaves it to decide what is the real burden of inconsistency — one example is provided by the Seventh Circuit ruling on the question whether a lawyer can advance the costs of a federal class action despite a prohibition in local rules of professional responsibility. There is no apparent need for consistency among federal courts; a uniform federal borrowing rule that adopts local state rules for each federal court makes sense. Borrowing, however, borrows also the "transremedial" approach that is often found no matter what the source of professional responsibility rules. The transremedial approach takes a professional responsibility rule and translates it to other purposes such as disqualification or civil liability. The ALI Restatement Third of the Law Governing Lawyers is an illustration of the transremedial fallacy. We need to identify this phenomenon before we can clearly identify the areas where federal interests are paramount. It is intolerable to have a system in which federal law allows a prosecutor to contact a witness but state law can discipline the same conduct. But it may be tolerable to allow a state to impose discipline for a conflict of interests even though the federal court refuses to disqualify the attorney for the same asserted conflict. Finally, we should be careful to distinguish evidentiary privilege from confidentiality.

Guy Miller Struve noted that the Association of the Bar of the City of New York was galvanized to action on these questions by the "FRAC 10" draft. They thought the principle of adopting several detailed federal rules of attorney conduct to be a very bad thing. Disuniformity between federal court rules and local state rules is a serious problem. There is an element of unfair surprise in unnecessary differences. The Association study did not directly focus on the current draft that proposes dynamic conformity to state practice but contemplates the possibility of some

departures. In the recent overhaul of the local rules of SDNY and EDNY, the approach to professional responsibility was to adopt the text of New York rules as interpreted by the federal courts. This approach was taken because of Second Circuit precedent that chose the path of independent interpretation. Judge Weinstein suggested that a distinctive federal interest should be required to justify departure from the state interpretation of the state text, but the cases seem to show that federal judges disagree whenever they feel strongly that the state has it wrong without regard to any distinctive federal interest. Federal judges are not likely to want state control.

Gerald Smith reminded the conference that bankruptcy is unique. There is national law, but applicable professional rules come into play as well. Generally application of state conflict-of-interest standards presents no problem. But there is a federal "adverse interest" standard for professionals who represent a fiduciary such as a trustee or debtor-in-possession. This standard applies to a variety of professions, such as accountants, as well as lawyers. These other professions have their own ethical norms. The rulemaking process affords an opportunity to give meaning to the adverse interest standard, which is not defined in the statute and is given different ad hoc interpretations by bankruptcy judges. It would be an achievement to develop a definition of adverse interest. Adverse interest informs disclosure, and that is important. But drawing the adverse interest line will be controversial. In approaching these questions, we must remember that bankruptcy is part administration, part negotiation, and part litigation. Bilateral litigation rules do not fit — strict application would make it very difficult to initiate a bankruptcy. But of course a bankruptcy proceeding can become adversarial at some point. Can an attorney, for example, propose a plan that would adversely affect a participant in the bankruptcy proceeding when the participant is the attorney's client for an unrelated matter? Giving at least some parameters to the adverse interest rule, and in particular narrowing the extent of firm-wide disqualification, would be a good achievement.

Claudia Flynn stated that disuniformity is a substantial and significant problem for the Department of Justice. The Professional Responsibility Advisory Office has fielded 500 or 600 inquiries since it was opened last April. The questions go beyond Rule 4.2 to include such matters as unauthorized practice, conflicts of interests, and public statements about pending matters. The Department has encountered conflicts between local federal court rules and state rules. It also has found conflicts between state rules and federal court interpretations of the state rules. Department attorneys are clamoring for uniformity. They are concerned about their ability to do their work, and are concerned also about liability and their professional licenses. Core law-enforcement interests are a special concern. Some state interpretations of rules on contact with represented persons create difficulties, as do some state applications of fraud and deceit concepts to undercover operations. Some states seem bent on using rules of professional responsibility to regulate federal procedure. The Tenth Circuit has recently ruled that for purposes of § 530B a state rule regulating grand-jury subpoenas addressed to lawyers is indeed a rule of professional responsibility, binding on federal

courts, rather than a rule of procedure. Section 530B subjects Department attorneys to both state and federal rules. Any help in addressing the problems caused by § 530B will be welcome. There also is a case pending in the Fourth Circuit that raises the question whether a local pro hac vice rule can supersede the federal statute that allows the Department to send its attorneys anywhere in the country.

Thomas Perrelli began with the reminder that the Attorney General is very interested in trying to find solutions to these problems. Department of Justice concerns focus on the confusion that arises from present rules, and on the ways in which state rules impede law enforcement. The confusion could be reduced substantially by adoption of uniform federal rules through the Enabling Act process. Even then, however, legislation also is likely to prove necessary — § 530B is open to too many different interpretations. A number of ethics rules affect law enforcement. But Rule 4.2 is 95% of the problem. It would meet the Department's problems in large part to solve the Rule 4.2 problem and add a bit of "wiggleroom" in other areas where attorneys supervise law enforcement. The Department really believes that matters are not far from the point where reasonable compromise is possible.

George Kuhlman suggested that the remarks about vast numbers of howling United States Attorneys reflects the wisdom of Professor Kaufman's remarks: if we say there is a problem, responsible attorneys will seek advice. The fact that questions are being asked is not as important as the answers that are being given. Is it possible to find an answer? Are the answers pretty much uniform? Do the answers cause trouble across the board? Justice Zimmerman's remark about 50 different legal cultures strikes a chord. It is a failure of the ABA that there are such differences. The ABA sought to achieve uniform adoption of the Model Rules, but failed. The present balkanization of professional responsibility rules, however, has not led to great harm. The changes in interjurisdictional practice may augment the problems. For there are different cultures on ethics problems in different states. We are going to have to live with this. The best answer may be the simple one: discipline should not be sought when there is a good faith effort to find the applicable rules and comply with them.

Alan Morrison reminded the conference of a comment made by Attorney General Bell on a proposal — it looks awful on paper, but it will work well in practice. That may describe the current local rules situation. Section 530B, however, is bad. Federal courts should make the law, whether we view these problems as those of procedure, professional responsibility, or something else. Such matters as bankruptcy conflicts of interest, disqualification of counsel, and the conduct of class actions should not be governed by state law. Still, it is not clear that there is a practical problem. If and when there is a need for a federal answer, local rules and standing orders are not the proper means to develop the answer. In a way, questions like contact with represented persons are substantive: they affect outcomes. These questions should not be controlled by the Department of Justice or by judges alone. If these topics are to be taken up, it would be good to do something about

the local rules that limit appearances by out-of-local counsel. Some local federal rules impose undesirable restrictions, requiring that local counsel be involved more extensively than makes sense, or limiting pro hac vice appearance to once every two years, or exacting re-registration fees.

Margaret Love finds that these problems grow more complex, and less tractable, as the discussion expands. Rules may not be possible. So the Model Rules themselves should be made simpler, not more complex. The Ethics 2000 undertaking is providing a forum for this conversation; perhaps we can talk our way back down the limb we have crawled out on. This is an open process, not controlled by the private bar. Whatever the next steps may be, however, we should remember that in practice the sky is not falling.

Michael Mone believes that the "do nothing" option grows more attractive as the discussion of alternatives develops. Experience in litigating professional responsibility cases, and on the Massachusetts Board of Bar Overseers, shows that in practice the problem is not great. There may be a few hard cases around the country, but they seem not to have made bad law.

Linda Mullenix is not surprised that these problems have proved complex. Rule 4.2 problems have been well discussed. Professor Kaufman is right in observing that we did not know there was a problem until these recent processes started talking about it. The Georgine asbestos settlement provides an intriguing launching pad for inquiry. In addressing the ethical challenges made to the settlement, Judge Reed stated that Pennsylvania rules applied. What, in fact, do federal courts do with respect to state law? What they do varies from district to district. Every court does it differently. Perhaps more important, every attorney asked in a random survey did not know what rules apply in federal court. There is no empirical evidence that this random behavior and general ignorance is a problem. But the lack of a present problem is not the point. The point is that for an attorney with a national practice there is a potential problem. The problem will grow over time. The problem is not simply that the present situation is not tidy. There is a real problem of notice, of the inability of an attorney in federal court to know what rules apply. It is good to be forward-looking, to solve the problem before it becomes real "on the street." An effort should be made to deal with the problems we can see coming before they mature. So it is not satisfying to support the "do nothing" alternative by pointing to the gradual development of a federal common law free from the local rules; this development simply shows the reality of the notice problem, of an attorney's inability to know what the rules are until the court or other agency has decided a professional responsibility problem. But there are troubling Enabling Act problems with what is going on here. Some district courts treat professional responsibility as an Erie problem, and by referring to state law implicitly view professional responsibility as a matter of substance. If they are right, how can an Enabling Act rule properly address the problem? And there is a need for conflict-of-law thinking. Should a federal court, adhering to a dynamic conformity to state law, include the state choice-of-law rules? Finally, both Professors Burbank and Kaufman are right in asserting that the divide between procedure and professional responsibility is not clear.

Marvin Morse, drawing on forty years of experience in federal litigation and administrative law judging, believes there should be a uniform national answer, not a series of fragmented answers. The Federal Bar Association, however, is likely to prove schizoid on this topic. It is a grass-roots organization, and has a tradition that local chapters work closely with the local federal judiciary. If local rules are to remain, the organization is likely to support them. For all of that, uniformity is better. The lack of rigorous empirical evidence of problems "on the ground" is not a reason for doing nothing.

Leo Boyle limited the scope of his comments by noting that ATLA does not represent the criminal defense bar or prosecutors, and does not focus much attention on bankruptcy. ATLA members mostly try civil cases for plaintiffs. This constituency has not asked that ATLA address the problems being discussed here. The practicing-in-the-trenches plaintiff trial lawyer does not seem to be worried about these things. But it is a bit surprising to discover that Congress may be worried about conduct in court; Congress should not play a major role with these problems.

Lawrence Fox thinks that these discussions resemble the ABA discussions of multidisciplinary practice. We would not be talking about these things if it were not for the Department of Justice obsession with Rule 4.2. If we could get that problem off the table, we would conclude that there is nothing that has to be done. States regulate lawyers. Only states admit to the practice of law. Incorporation of local state rules for the federal courts seems the best approach. The idea of two sets of rules, especially at a time when a lawyer does not know whether a representation lead to any court proceeding, much less what court may be involved, is bad. But then federalism often is confusing. It is surprising, indeed, that the Department of Justice reports only 500 or 600 inquiries since April; Fox, in his own firm, has had that many inquiries in that period. Most of the questions he gets are Rule 4.2 questions — all lawyers want to talk to others without deposing them. These questions often have to be addressed for multiple states in a single case; it is the lawyer's job to deal with such complexity and confusion, and to come up with the right answer. So dynamic conformity alone is enough; there is no pressing federal interest that requires explicit articulation of an exception for federal procedural interests or like interests, as draft FRAC 1 would do. And it should be noted that the minutes of the May and September subcommittee meetings seem to accept the Department of Justice concerns with Rule 4.2; these concerns should not be accepted at face value. It must be remembered that the rules are adopted to protect not only attorneys but also clients and, at times, courts. There are differences of view on when, and how far, to protect clients. But that is the main purpose. We should bear the interests and needs of clients in mind as we pursue these discussions.

Another guest spoke from the perspective of prosecuting professional responsibility cases. At least in his own sparsely populated state, "it ain't broke." State disciplinary authorities are satisfied with the present state of affairs, and the chief federal district judge is perfectly happy. The federal court has adopted the state code. Federal judges file complaints with the state disciplinary

officials. The perhaps myopic view of bar discipline counsel, dealing with what is happening in the pits, is that there is little that raises problems, apart from Rule 4.2. But the question of notice of the applicable rules is close to the top of the list of topics that might be addressed: it is important to know what rules apply. Comity is another concern when federal courts disagree with state rules. The line between procedure and professional responsibility may not work. An illustration is provided by a personal experience when a federal judge, acting in a fraud prosecution against a lawyer, signed a subpoena for all state disciplinary complaint files involving the lawyer. Under state law these preliminary investigation files are confidential. Bar counsel sued the United States Attorney in state court for a declaratory judgment. The state judge ordered that one of the 12 files be revealed. One file was released; the federal judge accepted the state order and respected the state confidentiality rule. This problem seems to involve procedure. But remember that, apart from Rule 4.2, this is not a real problem. Judge Scirica agreed that comity is an important part of the mix, but wondered whether the issues become more complex in the states where the federal courts have not adopted state professional responsibility rules. The response was that probably there still is no problem — so long as the federal court orders exemption from the state rule, discipline is not likely to be pursued. A lawyer who complies in good faith with a reasonable interpretation of federal requirements need have no fear. An illustration is provided by the inadvertent receipt of privileged material — the misaddressed facsimile transmission. Our federal court says that the privilege is waived. The state rule is the opposite, recognizing continuing privilege. Neither state nor federal court talks about the rules of professional responsibility. To muddy the waters further, there is an advisory state ethics opinion that rejects the ABA approach, and concludes that although there is an obligation to notify the sender of the receipt, the misdirected material can be freely used by the unintended recipient. In this situation, it would be difficult for bar counsel to advise an inquiring lawyer as to the proper approach.

Greg Joseph found this example a good bridge to draft FRAC 1, which provides protection to the lawyer in these circumstances if the federal court applies its waiver rule. There is a problem. Suppose, for example, two related class actions, one pending in federal court and one in state court. There may be three sets of rules to consult; the practical result is that the lowest common denominator controls. We should not abandon the "FRAC 10" model; it would help. So, for another example, New York allows an attorney to resign when a client commits perjury; most states require that the perjury be revealed to the tribunal. What should a federal court in New York do? In another state, when the representation is centered in New York? These are serious issues. As class actions proliferate, we will have greater problems.

Robert Johnson began by observing that state prosecutors do get into federal court. Uniformity is desirable. A set of core federal rules would not be a problem. Those who practice in federal court should be protected from state ethics authority. Thirty years of practice have provided far too many examples of situations in which change is called for, but change is defeated by inability

to agree fully on all details of the change. It is better to act, and then — if needed — to clean up the reformed rules in light of further experience. These problems will continue to evolve; it is important to assert control now.

Bruce Green said ruefully that his record in advising on useful approaches to these problems should be remembered in evaluating his remarks. Four years ago he argued that a court is responsible for the lawyers before it — federal courts should control the rules that apply to lawyers in federal proceedings. Then he wrote that conflict issues are the most common, and that the standard for discipline should be different from the standard for disqualification — and the ALI has rejected that approach. Now his view is that § 530B is deeply flawed in every way we can think of; and it persists. So we should ask whether federal decisions on attorney conduct should be governed by federal law. Most will be governed by federal law through rules of procedure. Rule 11, contempt, and like federal rules obviously control. There is a small overlapping area covered by the rules of professional responsibility, such as conflicts of interest and investigation outside of discovery (Rule 4.2). Most of the rules of professional responsibility cover matters that will not come before the federal court, such as commingling funds. And all the law of every state is pretty much similar at the core. The differences are at the margin: and there are a lot of issues, like the misdelivered facsimile transmission, that are not dealt with by any rule. If you refer to state law, do you refer also to state interpretations? To the uncodified "understandings"? A federal court has to predict what a state court would say; the best approach is to ask what makes sense. There are federal interests in play here. An illustration is provided by proceedings that arose out of a New Jersey injunction against selling "stamps" with the image of The Beetles. A lawyer went out to buy stamps to show that the injunction was being violated. The question was whether this was deceit; the federal court, acting as a matter of federal common law, said this practice was proper. The issue came up a year later in a federal court in New York; it said that the New York state rule seems to bar this practice, but state authorities have not really dealt with the precise question, so it sought guidance by following the federal court in New Jersey. This approach is better when there is no clear state rule; it is not profitable to try to guess what the state court would do in an uncertain situation. It would be desirable to adopt the ABA rules by federal rule. That course would promote uniformity in several ways. Federal courts would have a uniform set of rules. The rules often would agree with existing state rules. And the federal example would encourage the states to reduce or eliminate departures from the ABA model, thereby generating greater uniformity among the states themselves.

Robert Peck believes that uniformity is not possible. Balkanization is the rule in legal ethics, even in a single state court. There may not be a rule. Interpretations of a single rule text may differ between advisory groups and the courts. The substantive law of an action may control what a lawyer has to do.

Geoffrey Hazard urged that the end result should be dynamic conformity. Professor Kaufman is right — there is a great diversity of outlook across the country. But there are strong

practical pressures to reduce major discrepancies in the rules. Fortunately, there are not many major discrepancies. Most of the tough problems are highly fact-specific and complex. There is not much that can be done to reduce this complexity. There are problems in relating the regulatory law of professional responsibility to decisions on disqualification in a judicial proceeding, fee forfeiture, or the like; but these are the problems of uncertainty that affect all persons in dealing with the law, not only lawyers. It is very difficult to know whether Rule 4.2 should allow government lawyers more leeway in dealing with represented persons than government lawyers think they have or than in fact they have. There is profound disagreement in Congress between the Senate and the House; if Congress cannot internally decide this question, as a political-policy question, it is not an area where the Standing Committee should tread.

Discussion of Draft FRAC 1

Professor Cooper presented a summary introduction to draft FRAC 1. The basic purpose of the draft is to accomplish two things: to establish dynamic conformity to state rules of professional responsibility, and to ensure that federal control of federal procedure is not jeopardized by state regulation of professional responsibility. State control of professional responsibility is recognized by applying state rules to conduct in connection with a federal action or proceeding as well as to all other attorney conduct. There is no need to grapple with the distinctive problems that would arise if federal rules of professional responsibility were to attach at some indefinite point at which a professional representation ceases to be general and comes to be sufficiently directed at a federal judicial proceeding to come within the federal rules. State control of professional responsibility is just that — application of the state rules is to be made by state authorities if the question is one of professional responsibility sanctions, not one of procedural sanction. A federal court can control the right to practice before it, but cannot affect the right to practice in state courts and cannot reprimand or censure in a way designed to affect state license practices. When a federal court has occasion to consider state rules for purposes other than professional discipline, moreover, conformity means that the federal court should ask what is the meaning of state rules to state enforcement authorities, not what meaning would the federal court independently attribute to the official text of a state rule. Federal control of federal procedure, however, is stated in Rule 1(c), as a predicate for the Rule 1(e) provision that protects a lawyer who complies with the requirements and opportunities of federal procedure or a federal court order against consequences under state professional responsibility rules.

In considering this draft and the broader questions, it is important to do our best to determine whether there are real problems, now or in the future, that can be made better by adopting federal rules. Even if the problems are of our own making — if no one would have worried about them, proceeding in blithe and protected ignorance — attention has been called to them, and that makes them real to lawyers. Lawyers are concerned about the relationship between state professional responsibility rules and federal law — federal law of procedure, federal law of professional responsibility as embodied in local court rules and common law, and at times federal substantive

law. These concerns are likely to grow. Problems of notice become increasingly severe as people make conscious efforts to determine what law applies and to conform to its requirements. If it is possible to do something effective, it may be useful to act to head off problems that may become more intractable if they are allowed to develop unchecked.

The constant reminders that it is difficult to distinguish between procedure and professional responsibility are well taken. That is, of course, the source of the problem. There is not a clear divide, not even a vague and uncertain divide. Instead, a great many aspects of lawyer conduct involve both procedure and professional responsibility. That is what makes the problems of federalism so severe. Federal courts must respect state regulation of professional responsibility, but must preserve their own authority over federal procedure. More particularly, federal courts cannot be made subject to the occasional temptation to adopt state rules of professional responsibility to win control of federal procedure for purposes that are rejected in the rulemaking and other processes of regulating federal procedure.

A more particular point is that draft FRAC 1 is intended to adopt state choice-of-law rules. It does not incorporate the law of the local state, but rather the law that would be applied by the local state. If, for example, Illinois would choose Michigan law to govern the relations between a Michigan client and a Michigan lawyer admitted pro hac vice in Illinois, a federal court in Illinois — and also disciplinary authorities in Michigan — should do the same.

The question of Enabling Act authority is affected by the particular area of professional responsibility in issue. The questions are not always easy, and become more difficult as the distance increases between the regulated attorney conduct and actual federal court proceedings. But the question whether a particular issue involves a matter of "practice and procedure" for Enabling Act purposes is not the same as the Erie question. It is clear, to the contrary, that a question can be "substantive" for Erie purposes when there is no applicable Enabling Act rule, but at the same time can be "procedural" in the sense that it can be addressed by a valid Enabling Act rule. The new rule then supersedes the former reliance on state law.

Since the last meeting of the attorney conduct rules subcommittee, an alternative has been added to draft FRAC 1. This alternative protects an attorney against state discipline only when there is a specific federal court order that exempts the attorney from the state rules. This draft reflects discussion in the Federal-State Jurisdiction Committee. The Federal-State Jurisdiction Committee was concerned that application of the open-ended draft that protects compliance with federal procedure must be made by state disciplinary authorities. The question whether particular attorney conduct is authorized by federal procedure, and the question whether the same procedural goals could be reached by means that do not thwart state professional responsibility interests, is always difficult. It is much more difficult for a tribunal that is removed from the actual federal court proceeding, that is not especially familiar with federal procedure, and that is acting after the fact.

There will be virtually no opportunity for federal review; the Supreme Court cannot provide review in any meaningful fraction of the cases that must be handled by state authorities, Rooker-Feldman doctrine and more elemental concepts of res judicata prohibit review of state decisions in lower federal courts, and federal courts should not be able to enjoin the state disciplinary proceedings. All of these difficulties can be reduced if a lawyer who is in doubt about a perceived conflict between federal procedure and state disciplinary rules asks the federal court to review the conflict, weigh the competing interests, and determine whether there is a pressing procedural need that in a particular case justifies exemption from an applicable, or arguably applicable, state discipline rule.

Professor Coquillette reminded the conference that Congress has shown an interest in these problems, and that some bills would ask the Judicial Conference to make recommendations. The timetables set up in these bills are shorter than the regular Enabling Act process, but inevitably the Judicial Conference will need to rely on the Standing Committee and — to the extent feasible — the advisory committees.

The first comment suggested several drafting changes. (1) The adoption of state choice-of-law rules is so important that it should be made explicit in the rule language. Something like "including choice-of-law rules" should be added to the reference to state law. (2) Subdivision (c) is troubling. The first long sentence that states the primacy of federal procedure in federal court should be eliminated. The second sentence can be retained, but the reference to notice and opportunity for hearing should be stricken as unnecessary and moderately insulting; federal courts know they must provide notice and opportunity for hearing in enforcing their own procedural rules. (3) Subdivision (e) should be deleted; it should be replaced by a provision [illustrated by a draft provided later in the discussion] that allows for an ex post federal order if a professional responsibility standard is invoked in state proceedings. The federal court can determine whether to confer protection against state sanctions. The ex post proceeding is better because it will greatly reduce the burdens on federal courts — there are very few if any instances now in which state sanctions are sought for conduct that complies with federal procedure, and there will be few if any in the future. Ex post determination is also better for all of the reasons that make it undesirable to engage in premature anticipation of abstract problems that may never arise, or that may arise in forms different from those foreseen at the time of an anticipatory ruling. It also will be easier, in this context, to distinguish between what federal procedure permits and what state law may properly forbid.

This proposal was supported by the argument that the "preemption" tag affixed to draft Rule 1(e) is a red flag that creates automatic rather than thoughtful opposition. Preemption of state authority is opposed reflexively not only by state officials but also by many in Congress. There is, moreover, little need for preemption. If in fact a lawyer acts from a desire to comply with a federal rule, there is no more than a minuscule prospect that state disciplinary proceedings will even be undertaken. There is still less prospect that either disciplinary sanctions or civil liability will actually

be imposed by state authorities. An ex-post opportunity for seeking exemption from federal court should give all needed reassurance and protection. After striking Rule 1(e), the Committee Note should be amended to reflect how unlikely it is that state sanctions will be sought or imposed.

In parallel vein, it was noted that in Massachusetts there is ongoing litigation between the United States Attorney and the State Board of Bar Overseers on Rules 3.8 and 4.2. This form of proceeding provides an alternative means of seeking clarification without incurring the hazards of professional discipline.

It was suggested that an express preemption of state authority, as by draft Rule 1(e), gives added protection, but that the first priority of the Department of Justice is to get desirable rules of professional responsibility.

A request was made for examples of the overlap between procedure and professional responsibility. Tentative examples were offered, with the recognition that there is room to debate the outcome of any of them. One involves a large set of problems that were noted by several of the introductory comments: many issues in the conduct of a federal class action, from the initial quest for representative parties to responsibility for court costs to dealings with nonrepresentative class members and relationships between class counsel and individual clients, pose issues of professional responsibility that have not really been contemplated in the formation of state rules of professional responsibility. Or a federal court may address a conflict-of-interests question and conclude either that there is no conflict or that a conflict that might better have been avoided has no such real importance as to justify the disruption of disqualifying counsel in the middle of a complex proceeding. Or, to take a more abstruse illustration, a federal court might wish to approve an agreement for book or movie rights between counsel and a criminal defendant as an important vehicle for securing representation by an attorney preferred by the defendant. In response to these examples, it was suggested that the primacy of federal procedure proposed by Rule 1(c) would swallow up the primacy of state professional responsibility rules and state enforcement ostensibly established by Rules 1(a) and 1(b). Every state rule could be undermined by an argument for a federal procedural interest We need a principled, narrow, cabined, "slick" explanation of the narrow area in which federal interests might prevail.

It was suggested again that these problems are fact-specific, and that this characteristic is an important reason to prefer the ex-post exemption proposal that invites a federal court to address a potential conflict when, and only when, a state proceeding actually is initiated. That is when it is possible to develop a meaningful, focused body of federal law. The proponent of the ex-post exemption approach added that it is not meant to authorize a federal court to disagree with state rules of professional responsibility simply as a matter of differing views of professional responsibility. The proposal is meant to require that the federal court point to an exogenous source of federal interests, such as Civil Rule 23 on class actions.

The substitution of "exemption" for "preemption" as the locution of federal primacy was questioned on the ground that the softer word does not disguise the fact of federal control. But it was asked who would be on the other side of the application for a federal court order, whether ex ante or ex post? Will the opposing party in the underlying federal proceeding appear to champion the state interest, particularly if it is an ex-post proceeding that will not affect the outcome of the federal proceeding? Should state disciplinary authorities be invited to participate in the federal exemption proceeding — or the state court or opposing parties if there is a state proceeding to impose civil liability? Most lawyers will be willing to take their chances if a federal judge says that something is proper, relying on the actual present practice of tacit accommodation between state authorities and federal courts. The exemption process may not be worth the effort in either ex-ante or ex-post forms. The effect of an ex-post order, for that matter, is the effect of an injunction. It is surprising to suggest that state authorities would prefer the direct confrontation of an injunction-like order to a more general principle to be administered by the state authorities themselves.

Another suggestion was that the ex-post procedure does not solve all problems. Many issues arise in the course of federal proceedings and will need to be addressed. It is uneasy, however, to rely on the "procedural" characterization; this may not help us to cabin anything. And the idea of looking for an exogenous source of federal interest does not explain much. What generally happens in fact is that federal courts simply weigh the interests differently than state rules or authorities do. There should be a presumption against departing from the state rule.

This suggestion was met with the elaboration that the federal rule could protect against state-law consequences where federal statute, federal rule, or federal order otherwise requires or provides, drawing from the language of the Rules of Decision Act. An order refusing to disqualify counsel would be an example.

And this elaboration was met in turn with the question whether a focus on an explicit order in a particular case simply gives federal courts carte blanche to do what they wish. The reply was that it is an order for the conduct of the case. Then when — if — state discipline is sought, the federal judge exempts if there is an irreconcilable inconsistency between federal interests and state rules, but not otherwise. And the rejoinder was that the issue will be joined when the first application is made for a federal court order. The party opposing the order will oppose on all grounds, including arguable interference with state professional responsibility interests, and the federal court will be forced to confront the issue head-on from the outset.

The discussion returned to the procedure-responsibility divide with the suggestion that there is a value in distinguishing between procedure and responsibility. There are many procedural sanctions — most notoriously Civil Rule 11 — that do not draw from rules of professional responsibility. But it was asked why FRAC 1(c) is needed at all? We know procedure when see see it. Federal courts have authority to regulate their own procedure. That is not a problem. FRAC 1(a),

coupled perhaps with FRAC 1(b), is all we need. The statement of dynamic conformity to state rules of professional responsibility must inevitably be implemented by recognizing the primacy of federal procedure when it applies. This is self-evident. Federal courts can protect their own interests.

This suggestion was seconded by observing that the weight of draft FRAC 1(c) can be carried by statement in the Committee Note without the need for express rule provision. The Note could say that there are many circumstances governed by federal procedure or federal substantive law. The Note would reverse the history reflected in the May and September minutes. Two examples were offered to test these propositions. In the first, on motion to disqualify a federal judge determines that there is indeed an egregious violation of conflict-of-interest principles, expresses the hope that the appropriate authorities will impose discipline, but further concludes that all the harm has been done and that it is better to deny disqualification and continue the representation through the conclusion of the federal proceeding. State disciplinary authorities should not be precluded from acting. In the second example, a disgruntled client revealed to a lawyer a plan to burn down an apartment house. The lawyer went to the police, who prevented the fire. In the subsequent prosecution of the client, the court ruled that attorney-client privilege barred testimony by the lawyer, but also observed that the attorney had acted properly in going to the police.

These comments were extended by suggesting that the ex-post exemption proposal is moving in the right direction, although there may be problems with a lawyer's need for advance assurance. The ex-post exemption draft that has been provided during this conference, however, does not suggest the basis for ordering an exemption. As the draft stands, a lawyer might be able to win an exemption by confessing that a mistake was made and pleading for an exemption on grounds that should be resolved by state authorities rather than the federal court — for example, that the mistake was made while acting under great personal pressure or emotional distress.

Discussion turned to the draft FRAC 1 language that refers to acts "in connection with" federal proceedings. This is elastic language. Is a Rule 11 investigation before filing in connection with a federal proceeding? Can an attorney contact a potential class member before filing as part of the Rule 11 investigation? How about disclosure as a waiver of confidentiality, and how does this tie to Evidence Rule 501 on privilege? Draft FRAC 1(c) and (e) talk about orders that need not have anything to do with procedure. Most importantly, it must be determined whether a federal exemption is to be binding in state proceedings, having the same effect as an injunction. The proponent of the ex-post exemption approach agreed that there is a problem in this dimension.

A chorus of law professors agreed that draft Rule 1(c) should go. But a practicing lawyer said that the principle of federal procedure primacy should not be relegated to a Committee Note. We need the principle in the text of the rule. It might be sufficient to move the expression to draft Rule 1(a), expressing it as an exception to the general invocation of state rules of professional responsibility. The draft might be drawn from § 1652 — "except where the Constitution or treaties

of the United States or Acts of Congress [or rules adopted under 28 U.S.C. § 2072] otherwise require or provide." This would grant the needed protection and assurance to lawyers.

It was urged again that the distinction between professional responsibility and procedure remains important. The states use ethics rules to affect procedure. The Colorado rule on subpoenaing an attorney is an example. Federal courts do have an interest in this.

Turning to choice-of-law issues, it was suggested that many states do not have explicit choice-of-law provisions as part of their rules of professional responsibility. Model Rule 8.5 has been adopted in only a few states. This presents a real problem for Department of Justice attorneys, particularly when a team of two or more attorneys has members who are admitted to practice in different states and are governed by different rules of professional responsibility. It is difficult to manage a team when one lawyer is prohibited from doing or learning something that another lawyer on the team can properly do or learn. An after-the-fact exemption is not sufficient protection. The 500 or 600 inquiries that come to the Department in Washington are only the tip of the iceberg, the top of the professional-responsibility pyramid. There are many, many more problems addressed on a daily basis by the many attorneys and attorney offices of the Department. If we can only tell people that perhaps a court will approve their conduct after they get in trouble with state disciplinary authorities, and perhaps a court will not approve, there is no comfort. These remarks were extended by noting that after-the-fact consideration of an exemption in response to an initiated state inquiry may seem to be more, not less, invasive of state concerns. At the same time, it must be noted that without express authorization, some situations may not yield to ex-ante court consideration. The Department of Justice had a "court order" provision in the regulations governing contact with represented persons, but found that some federal judges believed there was no Article III case or controversy to support an investigation-stage inquiry by a court.

The proponent of the ex-post exemption approach agreed that if state disciplinary authorities should refuse to heed the federal court order, there would be problems with the rules governing federal injunctions of state proceedings and with notions of comity, particularly "Younger" abstention theories.

The view was expressed again that lawyers "just want to know when we act."

Returning to the suggestion that an express exception for federal procedure should be incorporated in a dynamic incorporation rule, it was suggested that while the exception may seem obvious to members of this conference, it should be in the rule as a means of reminding those who do not frequently consider these matters.

Renewed support was voiced for the ex-post approach on the ground that it will spare federal judges the burden of many anticipatory requests that start at the shadows of improbable state proceedings.

Choice-of-law problems returned to the discussion. It was suggested that while many states may not have developed approaches for the specific problems of professional responsibility, all states do have choice-of-law systems. It is important to address the incorporation of state choice-of-law in the text of a dynamic incorporation rule. And it should be noted that the draft Committee Note is inconsistent with the general rules that apply to a § 1404 transfer in federal court. The general rule is that a transfer brings with the action the choice-of-law rules of the transferring forum state. The draft Note invokes the choice rules of the receiving state.

Attention turned to the choice rules framed by draft FRAC 1(a)(2) for proceedings in the courts of appeals. The principle that the law of a district court's state should apply to proceedings on appeal from a district court, or addressed to a district court, was generally approved. The provisions drawn from Model Rule 8.5 for other situations met greater resistance. The effect of the provisions is that in administrative review proceeding involving lawyers from three states, for example, each participating lawyer might be governed by a different body of professional responsibility rules. This result was thought undesirable. There are, to be sure, problems with simply referring all professional responsibility questions to the law of the state where the court of appeals sits, even if the reference is to the law of the single state where the court has its "domicile," rather than the law of the state where an appeal actually is heard. But it may be better to rely on the geographic location of the tribunal being reviewed. For proceedings that begin in the court of appeals, it may be possible to find a connection to a district court that supports application of the general principles of draft FRAC 1(a)(1) — an application for leave to initiate a second or successive habeas corpus petition would be an example. If all else fails, reference to the court of appeals headquarters may be the best solution. At the same time, some support was offered for referring to the attorney's state of licensure, along the lines of Model Rule 8.5 as adopted in the draft FRAC 1(a)(2). It also was noted that the Ethics 2000 inquiry extends to Model Rule 8.5; it is recognized that the rule is not good, and an effort will be made to mark out a new approach. The new approach will be important to any federal rule that may emerge, particularly against the background purpose to conform any federal rules of attorney conduct as near as may be to the mode of state practice.

The discussion returned to draft FRAC 1(c) and the express statement of federal procedural primacy. It was urged that this is desirable even if it does "swallow up" the dynamic conformity principle. What, for example, of the situation in which, in the middle of the joint representation of the employer and an employee as defendants in an employment discrimination action, a conflict emerges between employer and employee: the attorney seeks to withdraw from representing the employee, the employee seeks disqualification of the attorney from representing the employer, and the court concludes that the attorney should be permitted to continue to represent the employer. Or, to make it even more poignant, the court denies the attorney's motion to resign from representing the employer as well as the employee. Is this a matter of practice or professional responsibility? Or what about inadvertent privilege waiver?

These questions were used to juxtapose an earlier illustration. In the earlier example, the court concluded that there had been a reprehensible conflict of interests, but that the effects had been spent and that the representation should continue for the efficient completion of the federal proceeding. In this setting, it was urged, the answer should be twofold: state authorities should have the power to impose discipline for any violation of professional responsibility rules up to the time of the federal order, while they should be barred for imposing sanctions for continuing the representation after the order. For that matter, state authorities should be free to impose sanctions for conduct up to the time of the federal order even if the federal court expressed no view on the question. So in the more recent example: there was nothing blameworthy up to the time the conflict emerged, the lawyer responded to the conflict by seeking to withdraw, and the court explicitly approved or ordered the course of conduct that ensued. The federal order should protect the lawyer.

Turning to the confidentiality problem, a clear example would emerge if, in an action on a federal claim, a federal court applied federal privilege concepts under Evidence Rule 501 to rule that a particular privilege had been waived, as in the misaddressed facsimile example so often discussed. The attorney then objects that state confidentiality rules nonetheless prohibit testifying. Some states apparently do not include an express "court order" exception in their confidentiality rules, but are thought to rely on an implicit exception. If there is a conflict between the state confidentiality rule and the federal privilege-waiver ruling, a lawyer who is ordered to testify by the federal court should be protected against state professional-responsibility sanctions.

It was suggested that unauthorized practice issues provide a further complication.

The unauthorized practice problem led to discussion of the provision in draft FRAC 1(b) that bypasses the problem of identifying the "proper" state disciplinary body to apply the state rules of professional responsibility incorporated in subdivision (a). Generally a bar undertakes to impose discipline on attorneys admitted to practice before it. A Michigan lawyer representing an Ohio client in a federal court in Illinois, for example, is clearly subject to disciplinary proceedings in Michigan. If the lawyer is not also admitted in Ohio, the only interest Ohio may assert is one in regulating the unauthorized practice of law in Ohio. If Illinois courts would apply Michigan law to measure the relationships between the Michigan lawyer and the client, it is easy for the Michigan authorities to act. But what if Illinois would apply Illinois rules: how easy is it for Michigan authorities to apply them also? What if, left to their own devices, Michigan authorities would apply Michigan law? How far can Illinois authorities impose meaningful professional responsibility sanctions on a Michigan attorney, apart from precluding any further pro hac vice appearances in Illinois?

Future Directions

The question of the purposes of this Conference was put to frame the concluding discussion. We have learned, or reaffirmed, several things. Bankruptcy problems are special, and need to be carved out. Federal government attorneys seem to have special, even unique, problems that differ

from private lawyers' problems. Straight civil litigation does not seem to present much of a real problem. Notice of the rules that apply, concern with the deterrent effects of uncertainty as to what rules apply, and anxiety among lawyers seem to be present nonetheless.

Facing these and other parts of the discussion, there is no purpose to attempt to forge a consensus at this meeting. The problems remain difficult. The attorney rules subcommittee will reflect on this discussion, and will work through the problems yet again. It may be able to generate new drafts that can be circulated for further comment by the participants in this conference. The discussion has focused the issues.

It remains possible that Congress will act in a way that will accelerate the natural pace of deliberations. It is wise to be as well prepared as possible against this eventuality.

The Rule 4.2 issue is different. Until the principal players sit down to work out their differences, the attorney conduct rules subcommittee should hold the problem in abeyance.

It was suggested that the further deliberations should consider the assertion that the principle of dynamic conformity reflected in draft FRAC 1 is flawed. Federal rules are better. States in fact do not undertake to regulate unauthorized practice in federal courts. To the contrary, all the cases that have been found seek to regulate only practice in state courts, recognizing the power of a federal court to permit practice, if it wishes, by an attorney who is not authorized to practice in state courts. It was responded that pro hac vice appearance in a federal court is a distinctive problem. But it was rejoined that this is not what the state cases are about — Maryland, for example, has recognized the right of an attorney who cannot practice in Maryland to appear before a federal court in Maryland, and indeed to maintain an office in Maryland to serve the needs of clients in connection with federal court proceedings in Maryland. The surrejoinder was that this is simply a generalized illustration of pro hac vice appearance.

Discussion turned to the question whether the right to control admission to practice in a federal court eviscerates the dynamic conformity approach seemingly recognized in draft FRAC 1. It was responded that draft FRAC 1(d) simply confirms the power established by 28 U.S.C. § 1654. Federal judges have expressed the desire to have this power confirmed in any federal rule, lest negative implications be drawn.

And the group was reminded that the present situation is one in which 94 different local district rules regulate professional responsibility in federal courts. The regulation abounds in inconsistencies, both among federal courts and with state law. Anything proposed by the draft FRAC 1 in fact enhances, or at least clarifies, the primacy of state law.

It was stated again that state disciplinary counsel do not seek to interfere with procedural rulings by federal courts that have "ethical overtones." It is common to refuse to respond to requests from federal judges for advice on what should be done in a particular case. But the question of

timing remains important. Many bar counsel would not approve the ex-post exemption order approach. They prefer that a federal court be able to act only ex ante, while ruling on its own concerns, and not be directed to intervene directly with state proceedings that have actually been launched.

It was urged that the draft Rule 1(d) recognition of the power of federal courts to regulate admission to practice in federal court is important to make the rule self-contained and clear. It would be better to expand the draft to state explicitly that this power includes the power to suspend or revoke the privilege of practicing in federal court, lest a negative implication be drawn from the draft Rule 1(b) reference of enforcement to the proper state disciplinary body.

As to choice-of-law, clarity and predictability are very important. Looking to the state where the district court sits is right. For the courts of appeals, perhaps the reference should be to the state where the court of appeals sits, if only for the values of clarity and achieving a single rule that applies to all counsel in a proceeding. At the same time, incorporating state choice rules may defeat clarity. Perhaps the default rule for a court of appeals should be the geographic location of the tribunal being reviewed. As to administrative agency review, that often will be to the law of the District of Columbia; so be it.

The group also was reminded that a clear choice-of-law rule will not always, or even often, yield a clear rule of law. The underlying rules of professional responsibility often are unclear. Such standards as conduct unbecoming to the profession or prejudicial to the administration of justice are often used. These standards themselves may be subject to constitutional challenges for vagueness, unless given more specific content by local rules or common-law development. Appellate Rule 46 is an example of this problem; it has been upheld only because it is given specificity by local circuit rules.

If the choice is made to do nothing, the result will be more, and eventually more uniform, federal common law of professional responsibility. Or the result may be that Congress acts, either directly or by first asking for the views of the Judicial Conference. In one way or another, the approach reflected in the draft of ten Federal Rules of Attorney Conduct may again return to the fore. But it is important to continue to think about the choice between doing nothing and adopting an approach that resembles the draft FRAC 1.

The final observation was from a lawyer who manages many lawyers on a daily basis, and who believes that the value of any federal rule will depend on the sense of security it engenders. If it means taking your chances before state disciplinary authorities later on, the rule will not be much help.

By common acquiescence, it was agreed that these problems are important and complex. They should not be put aside, but deserve continued work to determine whether effective solutions

can be found.

Respectfully submitted,

Edward H. Cooper

Appendix

(This draft was prepared and circulated by Professor Burbank during the conference to illustrate the rough dimensions of the "ex post" exemption approach. It would replace the draft FRAC 1(e) and the alternative draft 1(e).)

In the event that a standard of professional responsibility is invoked in state proceedings to impose a sanction, civil liability, or other consequence on an attorney for conduct in connection with an action or proceeding in a United States district court or court of appeals, the attorney may apply to the federal court for an exemption from such imposition.

In determining whether to enter an order granting an exemption, the court should consider whether the conduct violates a rule of professional responsibility and whether there is an irreconcilable conflict between such rule and the federal interests served by or implicated in the conduct.

I-C

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

March 24, 2000

MEMORANDUM TO CIVIL RULES COMMITTEE

SUBJECT: *Asbestos Legislation*

On March 16, 2000, the House Judiciary Committee favorably reported the Asbestos Compensation Act of 2000 (H.R. 1283) for the consideration of the full House of Representatives. In a press release filed by chairman Henry J. Hyde, the bill is summarized as followed:

> H.R. 1283 would establish a national claims facility that would resolve asbestos injury claims. The non-judicial administrative process proposed in the legislation would be funded entirely by the defendant companies — no taxpayer dollars would be required. A claimant would be entitled to compensation only if he or she can demonstrate physical impairment as a result of their exposure to asbestos. Impairment would be determined on the basis of the *Georgine* medical criteria. Further, defendant companies would not be able to assert the statute of limitations as a defense with respect to claims that were not already barred as of the date of enactment. Similarly, claimants could recover for nonmalignant disease such as asbestosis without losing their right to future compensation for cancer, just as under the *Georgine* settlement. Punitive damages and mass consolidations would be prohibited, so as to ensure that funds would be available to compensate people who may in the future become impaired by asbestos-related diseases. Finally, the legislation would help control excessive transaction costs by capping attorneys' fees expenses at 25% of the recovery.

The Committee on Federal/State Jurisdiction is monitoring and reviewing the legislation on behalf of the federal judiciary. For those asbestos cases that are not resolved under the administrative process, a claimant can file a lawsuit. Section 205(a) of the bill would significantly curtail consolidation of these cases, however, allowing consolidation of asbestos cases in a state or federal court only with the consent of all parties. The provision was later amended to permit consolidation, if the "court, pursuant to an exercise of judicial authority to promote the just and efficient conduct of asbestos civil actions, orders such (aggregation)

procedures, including the transfer for consolidation, to determine multiple asbestos claims on a collective basis."

Section 205(b) governs class action filings of asbestos cases. Despite efforts to revise it, the provision remains obscure and says: "In any civil action asserting an asbestos claim, a class action may be allowed without the consent of all parties if the requirements of Rule 23, Federal Rules of Civil Procedure are satisfied."

A companion bill, Fairness in Asbestos Compensation Act of 1999 (S. 758), was introduced in the Senate on March 25, 1999, but no action on it has been taken.

John K. Rabiej

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WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

March 22, 2000
Via Fax

MEMORANDUM TO JUDGE PAUL V. NIEMEYER

SUBJECT: *Rule 4 Amendments*

For your information, I have attached amendments proposed by the Marshals Service to Rule 4. The proposal is intended to relieve the Service of some of its current responsibilities. It responds to a Congressional request to study alternatives for service, which was initiated by the Marshals Service.

The Congressional Conference report on the Consolidated Appropriations Act of 2000 directed the Marshals Service to study ways to reduce the costs of service. The Congressional report said the following:

> The conference agreement does not include a provision proposed in the Senate bill requiring a judge to submit a written request to the Attorney General for approval prior to the service of process by a Marshals Service employee. The conferees are aware of concerns regarding the impact that service of process duties is having on the Marshals service. Therefore, the conferees direct the Attorney General and the Marshals Service to work with the Administrative Office of the United States Courts to study alternatives for service of process in certain cases in which no law enforcement presence is required, and to report back to the Committees on Appropriations no later than February 1, 2000, on the impact of such alternatives on the Marshals Service and the Federal Courts.

The deadline has passed. The Marshals Service will be discussing the attached proposals at a meeting this Friday. A financial representative of the AO will attend. I understand that the Department of Justice was unaware of the Marshals Service legislative efforts and have serious misgivings about the project. A DOJ representative is expected to attend the Friday meeting, although I understand that she was a former Marshals Service employee. The AO representative can relay our concerns at the meeting.

This morning I sent a copy of the Marshals Service proposal to Professor Cooper, and we briefly discussed some of the potential issues with the proposal. In the first place, we will point

out that any change of the rules should go through the rulemaking process. We probably could make some preliminary comments on the substance. For example, we probably will have reservations about the provisions that require: (1) the clerk of court to serve parties on behalf of a party filing in forma pauperis, (2) force a seaman or a party filing in forma pauperis to use the waiver of service provisions (which is intended to be completed by an attorney), and (3) permit local authorities to execute service. Other provisions seem aimed at the Department of Justice. I am not sure whether David Ogden is aware of all this. We may wish to consider alerting him.

John K. Rabiej

Attachment

cc: Honorable Anthony J. Scirica (with attach.)
Professor Edward H. Cooper (without attach.)
Professor Daniel R. Coquillette (with attach.)
Peter G. McCabe, Secretary (with attach.)

LEGISLATION AFFECTING
THE FEDERAL RULES OF PRACTICE AND PROCEDURE
106th Congress

SENATE BILLS

S. 32 *No title*
- Introduced by: Thurmond
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules
  - **Criminal Rule 31(a)** is amended by striking "unanimous" and inserting "by five-sixths of the jury."

S. 96 Y2K Act (See H.R. 775) Pub. L. No 106-37.
- Introduced by: McCain
- Date Introduced: January 19, 1999
- Status: Referred to Committee on Commerce; Hearings held on February 9, 1999; Committee reported bill favorably on March 3, 1999; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999; Cloture vote not obtained 5/18/99; Text inserted in H. R. 775 as passed Senate (CR S6998) on 6/15/99
- Provisions affecting rules: federalizing Y2K class actions and heightened pleading requirements

S. 248 Judicial Improvement Act of 1999
- Introduced by: Hatch (5 co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/24/99 Referred to Subcommittee on Oversight and Courts
- Provisions affecting rules
  - Sec. 4. Would amend Section 1292(b) of title 28, and allow for interlocutory appeals of court orders relating to class actions;
  - Sec. 5. Creates original federal jurisdiction based upon minimal diversity in certain single accident cases; and
  - Sec. 10. Clarifies sunset of civil justice expense and delay reduction plans.

S. 250 Federal Prosecutor Ethics Act
- Introduced by: Hatch (3 co-sponsors)
- Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary
- Provisions affecting rules
  - Sec. 2 authorizes Attorney General to establish special ethical standards governing federal prosecutors in certain situations. Those standards would override state standards.

S.353 Class Action Fairness Act of 1999

- Introduced by: Grassley (6 co-sponsors)
- Date Introduced: February 3, 1999
- Status: Referred to the Committee on Judiciary 5/4/99 Subcommittee on Oversight and Courts; hearings held on May 4, 1999;
- Provisions affecting rules:
  - Sec. 2. Provides for notification of the Attorney General & state attorney generals;
  - Sec. 2. Limits on attorney fees
  - Sec. 3. Minimal diversity requirements;
  - Sec. 4. Allows for removal of class actions to federal court; and
  - Sec. 5. Removes judicial discretion from **Civil Rule 11(c)** in all cases.

S.461 Year 2000 Fairness and Responsibility Act (See S. 96 and H.R. 775) (Pub. L. No. 106-37)

- Introduced by: Hatch (2 co-sponsors)
- Date Introduced: February 24, 1999
- Status: Referred to Committee on the Judiciary; hearings held on March 3, 1999; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999; Judiciary Committee reported favorably on March 25, 1999
  - Sec. 103 establishes special ("fraud-like") pleading requirements
  - Sec. 404 established minimal diversity for Y2K class actions

S. 625 *Bankruptcy Reform Act of 1999* (See also H.R. 833)

- Introduced by: Grassley (5 co-sponsors)
- Date Introduced: March 16, 1999
- Status: Referred to the Committee on Judiciary; Letter sent by Director to Hatch 3/23/99; Ordered to be reported with amendments favorably Apr 27, 1999; Committee on Judiciary reported to Senate with amendments. (Report No. 106-49 May 11, 1999.) Placed on Senate Legislative Calendar; 11/19/99 Unanimous consent agreement in Senate to vote on cloture motion on Jan. 25 (CR S15061); 2/2/2000 Senate passed companion measure H.R. 833 in lieu of this measure by Yea-Nay Vote. 83 - 14. Letter to be sent from Director to Conferees when appointed;
- Provisions affecting rules:
  - ~~Section 702 requires clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.~~ Deleted from the passed version
  - Sections 102, 221, 319, 421, 433, and 425 would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

S. 721 No title (See *H.R. 1281*)

- Introduced by: Grassley (6 co-sponsors)
- Date Introduced: March 25, 1999
- Status:
- Provisions affecting rules:
  - Section 1 states that the presiding judge of any appellate court or district court may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides; safeguards are provided to obscure the identity of nonparty witnesses; the Judicial Conference is authorized to promulgate advisory guidelines
  - Section 3 provides a 3-year sunset of section 1.

S. 755 No title

- Introduced by: Hatch (14 co-sponsors)
- Date Introduced: March 25, 1999
- Status: April 12 read the second time, placed on the calendar
- Provisions affecting rules: Delays effective date of the "McDade" provision on Rule 4.2 contacts with represented parties

S. 758 Fairness in Asbestos Compensation Act of 1999

- Introduced by: Ashcroft (29 co-sponsors)
- Date Introduced: March 25, 1999
- Status: Referred to the Committee on Judiciary; 10/5/99 hearing held by sub. Administration Oversight and the Courts.
- Provisions affecting rules:
  - Section 208 gives exclusive jurisdiction, regardless of the amount in controversy or citizenship of parties, to federal courts;
  - Section 301 requires the board of the Asbestos Resolution Corporation to establish procedures for ADR;
  - Section 307(j) creates an penalty for an inadequate offer; and
  - Section 402 bars class actions in asbestos cases without the consent of each defendant, and governs removal.

S. 855 Professional Standards for Government Attorneys Act of 1999

- Introduced by: Leahy (0 co-sponsors)
- Date Introduced: April 21, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Requires the Judicial Conference to submit to the Chief Justice a report that includes recommendations with respect to amending the Federal Rules of Civil and Criminal Procedure to provide for such a uniform national rules governing conduct of government attorneys. Directs the Judicial Conference, in developing recommendations, to consider: (1) the needs and circumstances of multi-forum and multi-jurisdictional litigation; (2) the special needs and interests of the United

States in investigating and prosecuting violations of Federal criminal and civil law; and (3) practices that are approved under Federal statutory or case law or that are otherwise consistent with traditional Federal law enforcement techniques.

S. 899 21st Century Justice Act of 1999

- Introduced by: Hatch (8 co-sponsors)
- Date Introduced: April 28, 1999
- Status: Referred to the Committee on Judiciary. May 18, 1999 partially incorporated into S. 254
- Provisions affecting rules:
  - Sections 5103-08 provide victims of crime with allocution rights; **Criminal Rule 11** is amended
  - Section 5224 amends **Evidence Rule 404** to permit consideration of evidence showing disposition of defendant
  - Section 6515 amends **Criminal Rule 43(c)** to permit videoconferencing of several types of proceedings n criminal cases, including sentencing
  - Section 6703 amends **Criminal Rule 46** governing criterion for forfeiture of a bail bond
  - Section 7101 amends **Criminal Rule 24** to equalize the number of peremptory challenges
  - Section 7102 amends **Criminal Rule 23** to permit a jury of 6 in a criminal case
  - Section 7105 amends the **Rules Enabling Act** and would restructure the composition of the rules committees to include more prosecution-oriented members
  - Section 7321 sets up ethical standards governing attorney conduct
  - Section 7477 permits disclosure of grand jury information to government attorneys not involved in the original prosecution

S. 934 Crime Victims Assistance Act

- Introduced by: Leahy (7 co-sponsors)
- Date Introduced: April 30, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 121 would amend **Criminal Rule 11** to require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any hearing on entering a plea of guilty or nolo contendere, and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard on the plea.
  - Section 122 would amend **Criminal Rule 32** detailing the contents of the Victim Impact Statement; give the victim an opportunity to submit a written or oral statement, or an audio or videotaped statement; require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of any sentencing hearing and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard.
  - Section 123 would amend **Criminal Rule 32.1** require the Government to make a reasonable effort to notify the victim of a crime of violence of the time and date of

any hearing to revoke or modify sentence and the victim's right to attend that hearing. If the victim attends the proceeding, the court shall afford the victim an opportunity to be heard.

- Section 131 would amend **Evidence Rule 615** to allow the victim of a crime of violence to be present unless the court finds the testimony of that person will be material affected by hearing the testimony of other witnesses or there are too many victims. [Note: It appears the amendments are based on the old version of Evidence Rule 615 (i.e do not account for the 2/98 amendment)]

S. 957 Sunshine in Litigation Act of 1999

- Introduced by: Kohl (No co-sponsors)
- Date Introduced: May 4, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - section 1 would amend chapter 111 of title 28, U.S.C. to require a court to make particularized findings of fact prior to entering a protective order; the proponent of the protective order has the burden of proof; stipulated protective orders would be unenforceable

S. 1360 Secret Service Protection Privilege Act of 1999

- Introduced by: Leahy (0 co-sponsors)
- Date Introduced: July 13, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 3 amends title 18 to establish a secret service privilege (EV501)

S. 1437 Thomas Jefferson Researcher's Privilege Act of 1999

- Introduced by: Moynihan (0 co-sponsors)
- Date Introduced: July 26, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 3 would amend CV45 to allow a court to quash a subpoena requiring disclosure of information relating to study or research of academic, commercial, scientific, or technical issues
  - Section 4 adds EV502 which would create a privilege for information relating to study or research of academic, commercial, scientific, or technical issues

S. 1700 "Hunt for the Truth Act" (H.R.3233 Identical bill; and S. 2073)

- Introduced by: Durbin (0 co-sponsors)
- Date Introduced: October 6, 1999
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 2 would add new criminal Rule 33.1 allowing a judge upon motion of the defendant to order post-conviction forensic DNA testing if the technology for that type of testing was not available when the defendant was convicted.

S. 2073 Innocence Protection Act of 2000 **(see H.R 3233 and S. 1700)**

- Introduced by: Leahy (4 co-sponsors)
- Date Introduced: February 10, 2000
- Status: Referred to the Committee on Judiciary.
- Provisions affecting rules:
  - Section 202 would amend habeas provisions in 2254
  - Possible Criminal Rule 33 implications

HOUSE BILLS

H.R . 461 Prisoners Frivolous Lawsuit Prevention Act of 1999

- Introduced by: Gallegly (27 co-sponsors)
- Date Introduced: February 2, 1999
- Status: Referred to the Committee on Judiciary; 2/25/ 99 Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
  - Sec. 2 would amend **Civil Rule 11** creating special sanction rules for prisoner litigation.

H.R . 522 Parent-Child Privilege Act of 1999

- Introduced by: Andrews (No co-sponsors)
- Date Introduced: February 3, 1999
- Status: Referred to the Committee on Judiciary; 2/25/99 Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
  - Sec. 2 would create new **Evidence Rule 502** providing for a parent/child privilege.

H.R. 771 No title

- Introduced by: Coble (16 co-sponsors)
- Date Introduced: February 23, 1999
- Status: Referred to the Committee on Judiciary; 3/11/99 Forwarded by Subcommittee to Full Committee; Letter from Judge Niemeyer to Hyde 3/22/99
- Provisions affecting rules:
  - Amends **Civil Rule 30** to require that depositions be recorded by stenographic or stenomask means unless the court upon motion orders, or the parties stipulate in writing, to the contrary.

H.R. 775 Year 2000 Readiness and Responsibility Act; Small Business Year 2000 Readiness Act (See S. 96 and S. 461) Public Law: 106-37 (07/20/99)

- Introduced by: Honorable W. Eugene Davis (62 co-sponsors)
- Date Introduced: February 23, 1999; ordered report 5/4/99
- Status: Referred to the Committee on Judiciary; Letter from Director opposing class action and special pleading requirements sent on March 24, 1999; hearing 4/13; Passed by House of Representatives on May 12, 1999; Signed by President on 7/20/99

- Provisions affecting rules:
  - Section 103 establishes special ("fraud-like") pleading requirements
  - Section 404 establishes federal jurisdiction of Y2K class actions over $1 million

H.R. 833 Bankruptcy Reform Act of 1999 (See S. 625)

- Introduced by: Gekas (105 co-sponsors)
- Date Introduced: February 24, 1999
- Status: Referred to the Committee on Judiciary; Forwarded by Subcommittee to Full Committee in the Nature of a Substitute by the Yeas and Nays: 5 - 3; letter sent by Director to Hyde on 3/23/99; Passed(313 - 108) 05/05/99; Read twice in the Senate 5/12/99; letter to conferees prepared 3/15/00)
- Provisions affecting rules:
  - Section 802 requires clerks of court to maintain a register of all governmental units to ensure that the appropriate government office receives adequate notice of bankruptcy filings.
  - Sections 102, 403, 607, and 816(e) would authorize or mandate the initiation of the rulemaking process with respect to separate proposals for rule changes.

H.R. 967 Multiparty, Multiforum Jurisdiction Act of 1999 (See H.R. 2112)

- Introduced by: Sensenbrenner (1 co-sponsor)
- Date Introduced: March 3,1999
- Status: Referred to the Committee on Judiciary; Mar 16, 1999: Referred to the Subcommittee on Courts and Intellectual Property.
- Provisions affecting rules:
  - Minimal diversity for class actions arising from single-event mass tort

H.R. 1281 No title (See S. 721)

- Introduced by: Grassley (43 co-sponsors)
- Date Introduced: March 25, 1999
- Status: 3/25/98 Referred to the House Committee on the Judiciary; referred to the Subcommittee on Courts and Intellectual Property 4/7/99; Judicial Conference opposes this proposal
- Provisions affecting rules:
  - Section 1 states the presiding judge of any appellate court or district court may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides; safe guards are provided to obscure the identity of nonparty witnesses; the Judicial Conference is authorized to promulgate advisory guidelines
  - Section 3 provides a 3-year sunset of section 1.

H.R. 1283 Fairness in Asbestos Compensation Act of 1999 (See S. 758)

- Introduced by: Hyde (76 co-sponsors)
- Date Introduced: March 25, 1999
- Status: 3/25/99 Referred to the House Committee on the Judiciary; 3/9/00 Mark-up held; 3/16/00 ordered reported

- Provisions affecting rules:
  - Section 205 eliminates consolidation of cases, including class action filings

H.R. 1658 Civil Asset Forfeiture Reform Act
- Introduced by: Hyde (59 co-sponsors)
- Date Introduced: May 4, 1999
- Status: 5/4/99 Referred to the House Committee on the Judiciary; Measure passed House on June 24, 1999, received in the Senate June 28, 1999

H.R. 1752 Federal Courts Improvement Act of 1999
- Introduced by: Coble (1 co-sponsors)
- Date Introduced: May, 11, 1999
- Status:09/09/99 Reported to House from the Committee on the Judiciary with amendment
- Provisions affecting rules
  - Sec. 208 Provides for the sunset of provisions requiring a civil justice expense and delay reduction plan.
  - Sec. 210 would allow the presiding judge of any appellate court or district court may, in his or her discretion, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides; safe guards are provided to obscure the identity of nonparty witnesses; the Judicial Conference is authorized to promulgate advisory guidelines

H.R. 1852 Multidistrict Trial Jurisdiction Act of 1999 (See H.R. 2112)
- Introduced by: Sensenbrenner (2 co-sponsors)
- Date Introduced: May 18, 1999
- Status: 5/19/99 Referred to the Subcommittee on Courts and Intellectual Property. 5/20/99 Subcommittee Consideration and Mark-up Session Held; 5/20/99 Forwarded by Subcommittee to Full Committee by Voice Vote; .
  - Addresses Lexecon issue.
-

H.R. 1875 Interstate Class Action Jurisdiction Act of 1999
- Introduced by: Goodlatte (37 co-sponsor)
- Date Introduced: May 19, 1999
- Status: Referred to the Committee on Judiciary; Hearings Held on July 21, 1999, Mark-up held July 27, 1999 and August 3, 1999; Ordered to be Reported (Amended) by the Yeas and Nays: 15 - 12.; letter from Executive Committee generally stating Judiciary's opposition more detailed letter to follow; 09/23/99 Measure passed House, amended, (222-207) . 11/19/99 Referred to Senate Committee on the Judiciary
- Provisions affecting rules: None directly; general class action considerations; extends minimal diversity to all class actions

H.R. 2112 Multidistrict; Multiparty, Multiforum Trial Jurisdiction Act of 1999 (See H.R. 1852)
- Introduced by: Sensenbrenner (2 co-sponsors)
- Date Introduced: June 9, 1999

- Status: 9/13/99 Measure passed House; 9/14/99 referred to the Senate Committee on Judiciary; 10/27/99 Measure passed and modified by Senate to exclude "single-event" mass tort choice of law provisions; 11/16/99 Conference scheduled in House
- Provisions affecting rules
    - Addresses Lexecon issue and choice of law issues for single-event mass torts.

JOINT RESOLUTIONS

S. J. RES. 3; *A joint resolution proposing an amendment to the Constitution of the United States to protect the rights of crime victims.* (See also H.J. Res 64)

- Introduced by: Kyl (33 Co-sponsors) Date Introduced: 1/19/99
- Status: Referred to the Committee on Judiciary; 3/23/99 Referred to Subcommittee on Constitution, Federalism, Property; 3/24/99 Committee on Judiciary, Hearings held; 9/30/99 passed House; 10/4/99 placed on Senate Legislative Calendar; 2/10/00 Judge Sullivan testified before the House Subcommittee on the Constitution urging a statutory approach
- Provisions affecting rules
    - Calls for a Constitutional amendment enumerating victim's rights.

II

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 14 and 15, 1999

The Civil Rules Advisory Committee met on October 14 and 15, 1999, at Kennebunkport, Maine. The meeting was attended by Judge Paul V. Niemeyer, Chair; Sheila Birnbaum, Esq.; Judge John L. Carroll; Justice Christine M. Durham; Mark O. Kasanin, Esq.; Judge David F. Levi; Myles V. Lynk, Esq.; Judge John R. Padova; Acting Assistant Attorney General David W. Ogden; Judge Lee H. Rosenthal; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Chief Judge C. Roger Vinson and Professor Thomas D. Rowe, Jr., attended this meeting as the first meeting following conclusion of their two terms as Committee members. Professor Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee; Professor Edward H. Cooper attended by telephone as Reporter. Judge Anthony J. Scirica attended as Chair of the Standing Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Standing Committee Reporter. Judge Adrian G. Duplantier attended as liaison member from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej represented the Administrative Office of the United States Courts. Thomas Willging, Judith McKenna, and Carol Krafka represented the Federal Judicial Center; Kenneth Withers also attended for the Judicial Center. Observers included Scott J. Atlas (American Bar Association Litigation Section); Alfred W. Cortese, Jr.; and Fred Souk.

Judge Niemeyer introduced Judge Padova as one of the two new members of the committee. Professor John C. Jeffries, Jr., the other new member, was unable to attend because of commitments made before appointment to the committee.

Judge Niemeyer expressed the thanks of the committee to Chief Judge Vinson and Professor Rowe for six years of valuable contributions to committee deliberations. Each responded that the privilege of working with the committee had provided great professional and personal rewards.

Introduction

Judge Niemeyer began the meeting by summarizing the discovery proposals that emerged from the committee's April meeting and describing the progress of those proposals through the next steps of the Enabling Act process. The April debates in this committee were at the highest level. Committee members were arguing ideas. If the ideas are inevitably influenced by personal experience, the discussion was enriched by the experiential foundation. It is difficult to imagine a better culmination of the painstaking process that led up to the April meeting. During those debates the disclosure amendments were shaped to win acceptance despite the strong resistance from many district judges who did not want to have local practices disrupted by national rules. The decision to reallocate the present scope of discovery between lawyer-managed discovery and court-directed discovery met the question whether the result would be to increase abuses by hiding information and would lead to increased motion practice. The committee concluded that any initial increase of motion practice would be likely to subside quickly, and that the result would be the same level of useful information exchange. The committee also decided to recommend an explicit cost-bearing provision, notwithstanding the belief that this power exists already. The opposing motion made by

committee member Lynk proved prophetic, as his arguments proved persuasive to the Judicial Conference. The seven-hour deposition limit also provoked much discussion, and significant additions to the Committee Note, before it was approved.

The responsibility of presenting the multi-tiered advisory committee debates and recommendations to the Standing Committee was heavy. The Standing Committee, however, provided a full opportunity to explore all the issues. The carefulness of the advisory committee inquiry, the deep study, and the broad knowledge brought to bear persuaded the Standing Committee to approve the recommendations by wide margins.

The Standing Committee recommendations then were carried to the Judicial Conference, where the central discovery proposals were moved to the discussion calendar. Because all members of the Judicial Conference are judges, there were no practicing lawyer members to reflect the concerns of the bar with issues like national uniformity of procedural requirements and the desire to win greater involvement of judges in policing discovery practices. Some of the district judge members were presented resolutions of district judges in their circuits, and felt bound to adopt the positions urged by the resolutions. Practicing lawyers sent letters. The Attorney General wrote a letter expressing the opposition of the Department of Justice to the discovery scope provisions of Rule 26(b)(1).

With this level of interest and opposition, the margin of resolution seemed likely to be close. Judge Scirica and Judge Niemeyer were allowed considerably more time for their initial presentations than called for by the schedule, and then sufficient time for each individual proposal.

Discussion of the disclosure proposals began with a motion to vote on two separate issues — elimination of the right to opt out of the national rule by local rule, and elimination of the requirement to find and disclose unfavorable information that the disclosing party would not itself seek out or present at trial. The proposal to restore national uniformity was approved by a divided vote. Approval likewise was given to the proposal to scale back initial disclosure to witnesses and documents a party may use to support its claims or defenses.

The proposal to divide the present scope of discovery between attorney-managed discovery and court-directed discovery was discussed before the lunch break, while the vote came after the break. This vote too was divided, but the proposal was approved. The discussion mirrored, in compressed form, the debates in the advisory committee. Professor Rowe's motion to defeat the proposal was familiar to the Conference members, who explored the concern that the proposal might lead to suppression of important information.

The presentation of the cost-bearing proposal was not long. It was noted that the advisory committee believes courts already have the power to allow marginal discovery only on condition that the demanding party bear the cost of responding. Although the purpose is only to make explicit a power that now exists, several Conference members feared that public perceptions would be different. Again, the views expressed in advisory committee debates on Myles Lynks's motion to reject cost-bearing were reviewed by the Conference. The Conference rejected the proposal.

The presumptive seven-hour limit on depositions met a much easier reception; it was quickly approved.

The next step for the discovery amendments lies with the Supreme Court. There may well be some presentations by members of the public to the Court. If the Court approves, the proposals should be sent to Congress by the end of April, to take effect — barring negative action by Congress — on December 1, 2000.

In the end, the discovery proposals were accepted not only because the content seems balanced and modest, but also because of the extraordinarily careful and thorough process that generated the amendments. The Discovery Subcommittee's work was a model. It is to be hoped that a detailed account of this work will be prepared for a broader audience, as an inspiration for important future Enabling Act efforts.

Judge Scirica underscored the observations that the debate on the discovery proposals was very close. The debate, with the help of Judge Niemeyer's excellent presentation, mirrored the discussions in the advisory committee. Conference members know a lot about these issues. They came prepared; some had called either Judge Scirica or Judge Niemeyer before the meeting to ask for additional background information. All of the arguments were put forth; nothing was overlooked.

Assistant Attorney General Ogden noted that the Department of Justice appreciated the efforts that were made to explain the advisory committee proposals to Department leaders. Although official Department support was not won on all issues, the Department supports ninety percent of the proposals. The Department, moreover, recognizes that its views were given full consideration. For that matter, there are differences of view within the Department itself. Opposition to the proposed changes in the scope-of-discovery provision, however, was strongly held by some in the enforcement divisions. From this point on, it is important that the Enabling Act process work through to its own conclusion.

Judge Niemeyer responded that it is important that the advisory committee maintain a full dialogue with the Department of Justice. The Department works with the interests of the whole system in mind.

Judge Duplantier reported that he had observed the Standing Committee debate. The written materials submitted by the advisory committee were read by district judges, and they recognized that the advisory committee had worked hard on close issues. This recognition played an important role in winning approval of the proposals.

Judge Niemeyer observed that the questions that arise from local affection for local rules will continue to face the advisory committee.

Scott Atlas expressed appreciation for the efforts of the advisory committee to keep the ABA Litigation Section informed of committee work. The Section will continue to support the discovery proposals.

It also was noted that the Judicial Conference considered on its consent calendar the packages of proposals to amend Civil Rules 4 and 12, and to amend Admiralty Rules B, C, and E with a conforming change to Civil Rule 14. These proposals were approved and sent on to the Supreme Court.

In June, the Standing Committee approved for publication a proposal to amend Rule 5(b) to provide for electronic service of papers other than the initial summons and like process, along with alternatives that would — or would not — amend Rule 6(e) to allow an additional 3 days to respond following service of a paper by any means that requires consent of the person served. A modest change in Rule 77(d) would be made to parallel the Rule 5(b) change. Publication occurred in August, in tandem with the proposal to repeal the Copyright Rules of Practice, and make parallel changes in Rule 65 and 81; these proposals were approved by the Standing Committee last January.

Judge Niemeyer noted that the admiralty rules proposals grew from an enormous behind-the-scenes effort by Mark Kasanin, the Maritime Law Association, the Department of Justice, and the Admiralty Rules Subcommittee. The package was so well done and presented that it has not drawn any adverse reaction.

Appointment of Subcommittees

Judge Niemeyer announced that changes in advisory committee membership and new projects require revisions in the subcommittee assignments and creation of a new subcommittee.

The Admiralty Rules Subcommittee will continue to be chaired by Mark Kasanin. The two new members are Judge Padova and Myles Lynk, replacing Chief Judge Vinson and Professor Rowe.

The Agenda Subcommittee will continue to be chaired by Justice Durham. The new members are Judges Carroll and Kyle, and Professor Jeffries.

The Discovery Subcommittee will continue without change.

The delegates to the Mass Torts Working Group were Judge Rosenthal and Sheila Birnbaum. The Working Group delivered its Report to the Chief Justice exactly on time, last February 15. The Chief Justice directed that the Report be printed and distributed to the public, but has not acted either way on the Working Group recommendation to create a new Judicial Conference Mass Torts Committee. A new committee, drawing from several established Judicial Conference committees, could build on the work begun by the advisory committee's extensive study of class actions, and at the same time draw from the knowledge of the other committees in a project considering legislative as well as rulemaking solutions. A project of this kind, on the other hand, would interject the judiciary into a very controversial area. The risk of becoming entangled with highly politicized matters may, in the end, seem to outweigh the opportunities for constructive contributions. Rather than postpone further advisory committee action indefinitely, it is desirable to begin to revisit the questions whether Rule 23 can be revised. Rule 23 revisions might aim at mass torts, but also might aim at other questions — the entire Rule 23 project was put on hold pending completion of the Mass Torts Working Group project. The delegates to the Working Group will be reconstituted as part of a new Rule 23 Subcommittee, chaired by Judge Rosenthal and including also Sheila Birnbaum and Assistant Attorney General Ogden.

The work of the class-action subcommittee will be considerable. The four volumes of working papers provide a solid, if rather formidable, foundation. The work of the advisory committee that built on that foundation will help to provide some focus. But there are many key class-action issues that remain to be explored further and brought to a conclusion. Settlement classes have never been brought to rest, and the Supreme Court has emphasized that its two recent decisions in settlement-class cases have rested on present Rule 23 rather than any final view whether Rule 23 should be revised to provide new answers. Settlement classes inject the courts deep into social ordering. And the advisory committee has never fully resolved the question whether to establish a new "opt-in" class procedure. The advantage of an opt-in class is that it provides a strong reassurance of genuine consent by class members in a way that an opt-out class cannot match.

The most imminent class-action event is the November mass-torts symposium at the University of Pennsylvania Law School. This symposium has been designated as an official advisory committee activity. Although the symposium has been designed in part as a ground for exploring issues peculiar to mass torts, aiming either at any new committee that may be created or at Congress, it also will provide much food for thought about Rule 23. The fact that legislative proposals will be addressed does not detract from the value of the rules proposals that also will be advanced. The mass tort landscape changes so rapidly, moreover, that it is important to renew our acquaintance. The lessons learned even one or two years ago are now partly out-of-date.

The Rule 23 Subcommittee should work toward presenting materials for deliberation and debate at the next advisory committee meeting.

The Rule 53 Special Masters Subcommittee will have a new chair, Judge Scheindlin, to replace Chief Judge Vinson. A first draft of a thoroughly revised Rule 53 was prepared for the committee a few years ago. The Federal Judicial Center has launched a study to explore the premises that underlie the draft; an interim progress report will be provided at this meeting, and it is expected that the project will be completed in time for a subcommittee report at the next advisory committee meeting.

The Technology Subcommittee will have one new member, Professor Jeffries, to replace Professor Rowe. The subcommittee has worked on electronic filing, and particularly the Rule 5 amendments and Rule 6(e) alternatives that were published for comment last August. Other issues are certain to arise. Many courts are now making docket sheets available electronically, generating privacy issues that were not, in any realistic way, the same when access to docket documents required a personal visit to the courthouse. The Court Administration and Case Management Committee has appointed a special committee to study these issues, chaired by Chief Judge Hornby. They have invited a number of experts to help them explore the policy issues that arise from posting court documents on the internet. By fortunate coincidence, Professor Jeffries will be one of their experts. Judge Carroll observed that the Subcommittee is not yet seeking to take the lead on these issues.

In an accurate forecast of the advisory committee's later decision to pursue the question whether it is possible to adopt simplified rules of procedure for some cases, a Simplified Procedures Subcommittee was appointed. Sheila Birnbaum will chair the Subcommittee. Its members

tentatively will include Judge Levi, Assistant Attorney General Ogden, Judge Padova, and Professor Jeffries. Professor Marcus was asked to work with the Subcommittee in his capacity as Special Reporter.

The advisory committee delegates to the ad hoc subcommittee on Federal Rules of Attorney Conduct will continue to be Judge Rosenthal and Myles Lynk. They also will be charged with helping to formulate the advisory committee's advice to the Standing Committee on development of a uniform rule for financial disclosure.

Legislation Report

John Rabiej made the Administrative Office report on legislative activity on matters of interest to the advisory committee.

Legislation was introduced earlier this year that would federalize all class actions asserting a "Y2K" claim. The Administrative Office's Director wrote on behalf of the Judicial Conference to the chairs of the Congressional Committees opposing the bill. The letter had been coordinated with Judges Niemeyer and Scirica and reflected their concern that the judiciary's opposition should not be interpreted to reject all future efforts to extend federal jurisdiction over peculiarly national class actions or mass torts under suitable conditions. Despite the judiciary's opposition, the legislation was enacted into law. The House later passed a separate bill that would federalize state class actions with the exception of a small number of essentially intra-state actions. Judge Niemeyer expressed his hope to the Judicial Conference's Executive Committee that the judiciary might defer opposing the bill at this time and maintain a flexible negotiating position. He noted that the bill was unlikely to proceed much further in Congress this year.

In responding to the bills that would essentially federalize most state-court class actions, the Judicial Conference Executive Committee was importuned by the Federal-State Jurisdiction Committee to take a position flatly opposed to any transfer of class-action jurisdiction from state courts to federal courts. Based on experience growing out of the advisory committee's class-action conferences, studies, and hearings, and particularly on the conferences held by the Mass Torts Working Group, representatives of this committee sought to persuade the Executive Committee to adopt a more nuanced view. Since 1995, and perhaps earlier, the Judicial Conference has been on record in support of some role for federal courts in class actions that sweep across many states or the entire country. The advisory committee and Working Group heard much concern with the opportunity to frame national class actions in any state that seems most hospitable to the party choosing the forum, and particular concern with the prospect that a collusive class-action settlement may be shopped from one state to another until an agreeable court is found. With the able assistance of Administrative Office staff, the Judicial Conference response to the pending bills was framed in terms that leave the way open to support mass-tort legislation if it proves desirable to develop federal subject-matter jurisdiction in this area. It will be most important to continue to work with the Federal-State Jurisdiction Committee in this area, whether through a new Mass Torts Committee or through other means of cooperation. The future of the class-action bill that passed the House is uncertain in the Senate, and President Clinton has threatened a veto. The prospect that there will be more activity in this area remains open. There are strong and competing federal and state interests

in these areas, and all involved must be sensitive to the competition and cautious in developing solutions.

S.353, the Class-Action Fairness Act of 1999, includes a provision that would eliminate judicial discretion from Civil Rule 11(c), restoring the 1983 provision that made sanctions mandatory. Similar provisions have appeared in other bills since the 1993 Rule 11 amendments. The opposition of the judiciary to this incursion on the rulemaking process has been communicated to Congress.

Minutes Approved

The draft minutes for the April 1999 meeting were approved as circulated.

Federal Rules of Attorney Conduct

Judge Niemeyer introduced the background of the Federal Rules of Attorney Conduct. States comprehensively regulate matters of professional responsibility. But problems arise when, for example, a Pennsylvania attorney with a Virginia client appears in proceedings in the United States District Court for the District of Columbia. Choosing the applicable law is not easy — and different enforcing bodies may make different choices. Professor Coquillette, as Reporter for the Standing Committee, created a 10-Rule model for consideration of an approach that would adopt state law for most issues but establish specific Federal Rules of Attorney Conduct for the issues that most frequently arise in federal courts. At about the same time that the Standing Committee launched its project, the Department of Justice began to encounter difficulties with expansive interpretations of professional responsibility rules in some states, most notably Model Rule 4.2 or its analogues dealing with contacts with represented persons. A three-way dialogue has emerged between the Department of Justice, the American Bar Association, and the Conference of Chief Justices. The role of the advisory committee is to act as one of the several advisory committees offering advice to the Standing Committee. The report presented by Professor Coquillette today is one that calls only for discussion.

Professor Coquillette began by expressing appreciation for the many warm gestures of support extended by advisory committee members after the automobile accident that prevented him from attending the May 4 meeting of the Attorney Conduct Rules Subcommittee.

The history of the Federal Rules of Attorney Conduct project has been surrounded with controversy. Much of the controversy arises from misinformation about the origins and purposes of the project. A great many bodies outside the Judicial Conference structure are involved with these topics, and it is essential that everyone involved have a clear understanding of the project.

The major concern of the Standing Committee, cutting across all of the advisory committees, is to promote consistency in the rules process and to advance justice. Ordinarily the Standing Committee discharges its responsibilities by relying on the advisory committees as the initiating agencies for rule activities within their respective competencies. But it is not feasible to rely on the advisory committee structure to originate proposals that cut across the several different areas of practice allocated to those committees. The Standing Committee at times is forced to take the lead. Issues of technology are a continuing example. Questions of attorney conduct are another example.

In 1988 Congress asked that the proliferation of local district court rules be slowed down. The Local Rules Project was established. The Project in fact made a lot of progress in trimming the number of local rules. And in the process, the Project identified local rules that seemed worthy of emulation. Many of the Federal Rules of Appellate Procedure and other national rules derive from local rules that the Project submitted to the advisory committees for consideration.

Attorney conduct matters are governed by many different local rules. The local rules often are inconsistent with the district's home state rules. Some of the local rules are unique — they are not consistent with the rules of any state or with any national model set of rules. The Federal Judicial Center has helped the Standing Committee catalogue the many district rules. It is important to remember that this project did not originate with the concerns the Department of Justice is now expressing. To the contrary, it began with the Local Rules Project. The Project initially identified the attorney conduct rules problem, but concluded that the problem was too big to be fit in with its other work. Attorney conduct local rules were put aside for separate consideration after the initial work of the Project could be concluded in other areas. Now the topic has come back.

The most important point to emphasize is that the Standing Committee is not trying to increase federal regulation of attorneys. Its purpose is quite the opposite. Today we have extensive federal regulation of attorney conduct through local rules. Many of the local rules purport to address topics that lie at the core of state interests and that involve little or no independent federal interest. The purpose of the present effort is to rein in this extensive federal control, limiting any federal control to matters that implicate important federal interests.

The Standing Committee has concluded that despite the questions that might be raised at the margins of Enabling Act authority, there surely must be centralized authority to deal with the situation created by the proliferation of local rules. If local rulemaking cannot properly deal with any of these issues, then the challenge is to find a way to set aside all the invalid local rules. But if indeed there are important federal interests, derived from the need to ensure federal control of federal procedure, then the challenge is to find a way to cede back to the states the areas of primary state interest while retaining a core of federal control over the issues that matter most to the federal courts.

In preparing to address these issues, the Standing Committee arranged two conferences constituted of representatives from all the different groups interested in these questions. Four options emerged from the work of these conferences.

One option is to do nothing. The present situation would continue. As described in more detail below, the present situation is even more confused than would appear from a mere survey of the local rules.

A second option would be to adopt a complete and independent set of attorney conduct rules for the federal courts. Implementation of this approach most likely would involve adoption of the most current version of the ABA Model Rules.

A third option would be to adopt one national rule that mandates dynamic conformity to state law, together with a choice-of-law rule for the appellate courts. This model would leave no room for federal law. There is substantial controversy about this approach. Some have urged that

although the federal rules should incorporate the text of the local state rules, federal courts should remain free to interpret the text in ways at variance with local state interpretations. The result would be a semblance of conformity, but substantial federal independence in fact. Others urge that there is no point in a mere pretense of conformity, and substantial damage when lawyers innocently but mistakenly believe that conformity to state law provides clear answers that can be relied upon in resolving dilemmas of professional responsibility.

The fourth option would begin with dynamic conformity to state law, but add a core of express federal rules addressing matters of particular interest to federal courts. This approach was illustrated by the "ten-rules" model drafted for the Standing Committee. Although there were nine independent rules for federal courts, this model achieved substantial conformity to much state practice because it was based on the ABA Model Rules, relying on the variations of the Model Rules that are adopted more frequently than any others.

The invitational conferences offered no support for the "do nothing" approach. The conferees believed that the local rules present a substantial problem; the problem is reduced in the districts that seem to routinely ignore their own local rules, but there are costs even in the appearance of federal rules that in fact have no meaning. Neither was there any support for adopting a complete and independent body of federal rules.

These consensus views left two choices open — dynamic conformity to state law as to all matters, or dynamic conformity coupled with a limited number of independent federal rules addressing matters of special federal interest. Because these issues cut across the interests of all the advisory committees, an ad hoc subcommittee was appointed. The subcommittee includes representatives from each of the advisory committees, and has advisers from other Judicial Conference committees. The subcommittee met in May and in September. Its work has shifted attention to a fifth option, embodied in the draft Federal Rule of Attorney Conduct 1 submitted with the agenda materials for the fall advisory committee meetings.

This fifth approach is styled as a Federal Rule of Attorney Conduct for two reasons. First, it cuts across all federal courts and the interests of each advisory committee and each separate body of present Federal Rules. Second, it is anticipated that there well may be additional FRAC — a likely FRAC 2, for example, would be designed to deal separately with the unique issues that confront bankruptcy practice. The Bankruptcy Code has its own definition of conflicts of interest, and adjustments also may prove appropriate for other issues.

The FRAC 1 draft combines the dynamic state conformity approach with continued federal independence in matters of federal procedure. The dynamic state conformity is clearly designed to incorporate the interpretation of local state rules by state bodies that have authority to establish definitive state law. Although federal courts retain power to control the right to appear in federal court by admitting, suspending, and revoking federal practice privileges, disciplinary enforcement as such would remain with state authorities. No one is eager to establish a federal disciplinary bureaucracy, nor to establish general federal disciplinary authority. Continued federal independence in matters of procedure, on the other hand, is based on recognition that many issues of attorney conduct involve both compelling procedural interests of the courts and important matters of

professional responsibility. The FRAC 1 draft seeks to ensure federal control over federal procedure by protecting attorneys against state discipline or civil liability for acts done in compliance with federal procedure or a federal court order.

State enforcers recognize that this draft confirms state authority in many areas in which state authority has seemed to be challenged by local federal court rules. They remain apprehensive, however, about the continuing role of federal procedure as a protection against state authority. It will be important to ensure that the provision for federal regulation of federal procedure be drafted as clearly as may be to reduce the unavoidable ambiguities that arise from the broad overlap between procedure and professional responsibility. The broad overlap, however, will make it impossible to avoid all ambiguity. Residual ambiguity need not defeat the enterprise. Similar ambiguities occur regularly in making adjustments between procedure and substance. Common sense and sensitivity in application generally work well. The present structure is one that supports many imaginary situations of horrible conflict, but for the most part these situations remain imaginary. Federal courts do not in fact undertake to usurp state licensing and discipline functions, and state disciplinary bodies do not in fact seek to interfere with the procedural interests of federal courts. The difficulties arise because careful lawyers sensibly seek authoritative assurance about proper courses of conduct and are unable to find assurance in the crazy maze of local federal rules.

The Department of Justice has specific concerns about specific issues that confront its national practice. It is engaged as a national law firm; it has investigatory and enforcement roles that are quite different from anything done by other national law firms; and it frequently is involved in work that may come to affect any of a great many different states. One of the most pressing sets of problems arises from the "Model Rule 4.2" question of contacts with represented persons. The Department initially took the position, through the "Thornburgh" Memorandum, that its attorneys were exempt from state regulation. The Eighth Circuit found that the Department lacked authority to establish its own independence. The "McDade Amendment," 28 U.S.C. § 530B, has now confirmed that Department attorneys are subject both to state regulation and also to local federal court rules. Bills have been introduced in Congress to undo the McDade Amendment. Senator Leahy has introduced S. 855, which would essentially remit the Department's issues to the Judicial Conference for proposals within one year on the Rule 4.2 issue, and within two years on other matters of special concern to government lawyers. If the bill were enacted and Judicial Conference recommendations were made, it is not clear whether the next step would be promulgation of the recommendations through the regular Enabling Act process or instead would be direct consideration and adoption by Congress. One outcome might be a FRAC 3, dealing with federal government attorneys.

The subcommittee voted to send the draft FRAC 1 forward to the advisory committees for discussion at the fall meetings. Only the Department of Justice representative voted against sending the draft forward, acting on the view that the draft does not sufficiently protect the needs of government attorneys. The draft is presented for discussion only. A workable federal answer will emerge only if it takes a form that proves acceptable to the American Bar Association (which is involved both through its "Ethics 2000" Committee and its standing committee), the Conference of Chief Justices, and the Department of Justice. The issues and pressures are intricate and important.

Discussion began with the observation that this is a complicated area with two points to be remembered. First, the clarity of the FRAC 1 draft points to the Standing Committee as the appropriate place to focus the issues — the issues are defined as arising from reconciliation of the federal interest in federal procedure with state interests. Federal procedure is peculiarly a matter within the province of the Standing Committee. Second, the arguments for and against the draft focus on the need to draw lines between procedure and responsibility, and on the need to cabin local federal rules. Professor Coquillette observed that the Local Rules Project will continue in any event, as it has been newly reinstituted, no matter what comes of the FRAC initiative. And the advisory committee was reminded that the Standing Committee has been asked to consider alternative draft revisions of Civil Rule 83 that seek to regularize the local rulemaking process.

The District of Colorado was offered as a good illustration of the problems that can arise from local federal rules on professional responsibility. D.Colo. Local Rule 83.6 adopts the Colorado Rules of Professional Responsibility. But after the Colorado Supreme Court revised three of the professional responsibility rules — including Rule 4.2 — and its own Rule 11, the federal court adopted an "administrative order" that excepted these four matters from its adoption of state practice. The administrative order is not as easily available to lawyers as the local rule. The result is an opportunity for serious confusion. Draft FRAC 1 would supersede such local rule contretemps. Enforcement likely would be straightforward — the Local Rules Project experience has been that when a local rule is plainly inconsistent with a national rule, the districts are willing to rescind the local rule. The Project undertakes to compile all local rules. Simple persuasion is effective in most cases of inconsistency. The circuit councils provide enforcement authority when needed. But the process will not always be easy. It was noted that in the Northern District of California, there was no particular concern to repeal local rules inconsistent with the national rules until the Ninth Circuit Judicial Council got interested in the subject for all courts in the Circuit.

Another committee member stated that the FRAC effort is very useful. The draft FRAC 1 approach would give attorneys clear notice of governing law and would get the district courts out of the process of enforcing local rules. The federal courts have found ways to stay out of disciplinary enforcement as it is; their efforts focus on regulating their own procedure and the right to practice in federal court. There is no apparent federal court interest in conduct that occurs outside federal court, unless it be connected to the right to practice in federal court. When federal courts do undertake to address matters of professional responsibility, moreover, they tend to be more strict than state authorities because there is so little federal experience with the realities of evolving practice. There is a tendency to adhere to more traditional views that states are less likely to hold. The draft should go forward for further development.

The Department of Justice interest was expressed in strong terms. Department lawyers engage almost exclusively in federal proceedings. The governing rules are very important to them. Concern does not much focus on the issues that arise in typical civil litigation. The rules that apply to Department lawyers in civil litigation are the rules that apply to other lawyers with other clients, and do not present many problems. But criminal litigation involves a different process. The Department's role is different from the roles played by private lawyers, and also different from the roles played by state attorneys. State regulation of some aspects of the federal enforcement system

can defeat the system. Rule 4.2 is not the only problem, but it is an easily understood illustration. There are many different interpretations of Rule 4.2 among the several states. Most of the interpretations do not cause problems. But the stricter interpretations do cause problems. One response is that Department investigators who are not lawyers make contacts without consulting Department lawyers; this is a perverse consequence, because the rights of the persons contacted will be better protected if any contact is authorized and regulated by a Department lawyer.

In the Department's view, the draft FRAC 1 makes a start by recognizing the importance of federal procedure. But it is not clear that reservation of matters of "procedure" for federal regulation goes far enough to protect behavior before filing a proceeding in federal court. It will be important to the Department to develop a "FRAC 3" to give clear guidance on the issues that are central to the Department's operations.

Another committee member expressed an initial reaction that these problems are not as complicated as the discussion made them appear. Motions to disqualify attorneys, for example, arise regularly; regularly the federal court applies state rules of conduct. When a question of contact with a represented person arises, the United States Attorney can ask the court to order a hearing, a process that will protect all important rights. If federal rules are to be adopted, moreover, it may be better to adopt separate rules for district courts (both criminal and civil), for bankruptcy courts, and for appellate courts. These rules could be adopted as parts of the Civil Rules, Criminal Rules, and so on. Attorneys would not pay as much attention to a separate set of rules.

Discussion turned to the part of draft FRAC 1(b) that would authorize a federal court to refer a question of attorney conduct to state authorities without investigation, or instead to undertake an investigation before making a referral. It was asked whether there is any need that justifies even thinking about a federal investigation — why not just refer the question directly? Is it because of a recognition that referral itself carries significant consequences for an attorney, and a hope that a discreet federal investigation that leads to no referral will reduce the risk of untoward consequences? Could this need be served as well by providing that referral to state authorities may be made only for good cause, leaving open the procedure by which a federal court determines whether there is good cause to refer? It was noted that state-court judges experience similar problems. Commonly a state judge is obliged to refer an attorney to disciplinary authorities if there is an appearance of a professional responsibility problem. Federal judges will be in a similar position under draft FRAC 1 if they believe it appropriate to explore discipline that goes beyond determination of the right to practice in federal court.

The procedure of the District Court for the District of Columbia was described as one that enables a judge who observes possible violations to refer the question to a committee. The committee investigates and reports back to the judge. In response to a question whether this procedure was advisable, it was responded that it works well, in part because there is a strong relationship between the federal court committee and the bar counsel.

The Committee on Grievances of the Southern District of New York launches an investigation only if it believes there is a federal interest. When an investigation is pursued, the Committee decides whether to impose discipline at the federal level, and also decides whether to

refer the matter to state disciplinary authorities. It is important that the federal court retain control of the decision whether to investigate.

This discussion led to a defense of draft FRAC 1(b) by a committee member who observed that now there is no specific way to get from federal court to state procedures. As a federal judge, this member observed flagrant misconduct and took the matter to state disciplinary authorities. He was told that the only way the state disciplinary authorities could act would be on a complaint filed by the judge. Filing the complaint brought the judge into an adversary state grievance process, including deposition, defensive efforts to impugn the judge, and a personal involvement that was not at all desirable. An explicit procedure that averts these consequences is all to the good.

It was noted that federal courts also have undertaken their own disciplinary proceedings after state authorities have refused to act on a referral from the federal court.

The federal courts in California have found the state disciplinary procedures unsatisfactory in the best of times. The state has a great many disciplinary complaints, and the process takes a long time. Recently the state simply closed down its grievance process for lack of state bar funding. So federal courts have had to create their own systems.

The draft FRAC 1 approach will lead to difficult questions. What is intended by federal regulation of "procedure"? Does this mean case management? Specific court orders? Anything embraced in the Federal Rules — Appellate, Bankruptcy, Civil, Criminal, and Evidence? And it is not clear that there are practical problems that justify encountering these questions. States rarely attempt to impose discipline for obeying a federal court order. If there is a practical problem, it is the situation confronting the Department of Justice. The criminal defense bar in California is using disciplinary charges as a defense strategy, complaining about things done in criminal prosecutions. This is a serious problem. There also are serious problems in the investigation stage. United States Attorneys spend most of their time directing investigations. Often enough it is not clear at the investigation stage what federal court will be most appropriate for prosecution, and thus it is not clear what state rules may come to apply. But § 530B creates a difficult issue of Enabling Act authority — since this statute expressly invokes state law as well as local federal court rules, it is uncertain whether an Enabling Act rule can supersede either state law or local federal rules with respect to government attorneys.

Professor Coquillette stated that there is a practical problem. The problem, however, is not entirely as it may seem on the surface. Federal courts often create flexibility by ignoring their own local rules, enabling an individual judge to act wisely in an individual case. A federal court may interpret its local rule in unforeseeable ways by looking to what is done by other federal courts, without regard to the local rules that may have inspired the rulings of other federal courts. The result is that a body of federal law, independent of local rules, is gradually emerging on the most frequently encountered questions that invoke federal procedural interests. If federal courts could always be counted on to decide without regard to local rules, it might seem that the local rules are no more than a quaint set of anachronisms that present no more than an aesthetic or theoretical problem. But there are practical problems. The Department of Justice has been driven by the McDade Amendment to set up a special unit on professional responsibility; one consequence has been that the Department

cannot make the most appropriate assignment of attorneys to particular tasks, but must reshuffle assignments to avoid the professional responsibility rules that attach to some attorneys. Big law firms, with increasingly multidistrict practices, are having problems. And, as witnessed by a forthcoming report from the ABA Litigation Section, the proliferation of local rules is a general problem. Attorneys cannot afford to ignore the local federal rules, no matter how often they might be reassured that the rules do not really do what they seem to do, nor mean what they seem to mean.

It was asked why Rule 4.2 problems are not experienced at the level of state prosecutions, leading to correction of the eccentric views espoused in some states. The Department of Justice response is that much depends on the particular state. In many states, the criminal investigation process is essentially exempted from Rule 4.2; in these states, neither state prosecutors nor local United States Attorneys encounter problems. But in other states, in a development that has emerged only in the last 10 years or so, new interpretations are emerging. Still, state prosecutors even in these states do not have the same problems that the Department encounters because state investigations are less likely to be directed by attorneys. The Department prefers to involve attorneys in investigations for the greater protection of the citizenry. In addition, the Department frequently becomes involved in investigations that are more complex than most state investigations and that reach across a number of states.

Judge Scirica stated that the Standing Committee hopes that work on federal attorney-conduct rules will continue in the advisory committees along the lines followed in this discussion. All the advisory committees are being consulted this fall. The problems are important, and deserve continuing debate. There is an overlap between federal procedural interests and state interests in regulating professional responsibility; just what allocation of authority will work best remains to be determined. Attorneys in general are very concerned — they do not want state authorities to impose sanctions for acts that are proper in federal court. And corporate counsel are especially concerned. This concern extends to the counterpart of the Department of Justice concerns. Corporate counsel believe that government investigators are approaching mid-level managers to gather information that the corporation does not want to reveal and that can properly be kept confidential by the corporation.

Judge Niemeyer summarized the discussion by noting that the Rule 4.2 question involves several issues: are investigative activities so much a matter of "procedure" connected to eventual federal court proceedings as to be within the Enabling Act process? The question of investigation by a federal court of possible responsibility violations before referring matters to state authorities is another problem. The advisory committee delegates to the Attorney Conduct Subcommittee have been informed by the current discussion, and can carry these questions into continuing Subcommittee deliberations. It is clear that this advisory committee believes that the Subcommittee process should continue. We will do our best to continue to help.

Discovery

Judge Levi introduced the report of the Discovery Subcommittee, noting that it would divide into two basic parts. The first part focuses on a report by Professor Marcus on three issues that have been carried forward, including one set of issues raised by the Standing Committee in response to the pending proposal to amend Civil Rule 5(d). The second part, with help from the Federal Judicial

Center, focuses on the emerging issues of discovery in the era of digital information processing. The "computer discovery" issues will be a long-range project that may, like the discovery proposals just advanced to the Supreme Court, be focused by a preliminary meeting to gather information and perhaps lead to another conference.

Professor Marcus led discussion through his Report to the Discovery Subcommittee, as set out in the Agenda materials.

Part I of the report deals with issues referred to the advisory committee after the June Standing Committee discussion of the proposal to amend Rule 5(d) to bar filing of discovery materials until used in the proceeding. The first of these issues asked whether nonfiling affects the privilege under defamation law to report on discovery information. The privilege questions in fact involve two distinct privileges. The first privilege deals with litigation conduct as such — the privilege to make assertions in pleadings, to respond to discovery demands, to advance arguments, and so on. This immunity does not depend on filing.

The second privilege deals with public reports of matters occurring in litigation. It is difficult to track down this privilege, either with respect to filed materials or with respect to materials not filed. In federal courts, most discovery materials have not been filed in recent years because of local rules or practices that forgo filing. There has not been any sign of any problem with respect to defamation privilege arising from this widespread nonfiling practice. The issues have been treated as those of state-law defamation privilege; there has not been any indication of a move to generate a federal common-law privilege for reporting on federal litigation. The only clear way to affect state-law privilege would be to abandon the proposal to amend Rule 5(d), and to substitute a uniform national rule that requires that all discovery materials be filed.

After brief discussion, the advisory committee concluded that the report to the Standing Committee should be that these privilege questions do not warrant any further action at present.

A second range of issues presented by the nonfiling amendment of Rule 5(d) arises from public access to unfiled discovery materials. A few local rules providing for nonfiling have added provisions regulating means of inquiry and access by nonparties to unfiled discovery materials. Many of the local nonfiling rules do not address the question. There is no indication that there have been any real problems under any variation of these rules. These questions are related to a number of contentious issues that the advisory committee has explored in recent years. The protective order question was considered at length, and eventually abandoned on the ground that there is no showing of need to improve on general present practices. The central question is whether discovery, and derivatively the filing of discovery materials, is designed to be part of the process of resolving particular disputes, or also is intended to make possible public access to private information that could not be forced into the public domain without the happenstance of private litigation.

Discussion of these observations began with reflection on the recent exploration of protective orders. The advisory committee concluded then that there is no present need to enter this area. The fact that the Committee Note to the Rule 5(d) amendments does not address these issues does not reflect a lack of attention. To the contrary, the advisory committee's initial proposal was a rule that provided only that discovery materials "need not" be filed. This approach was influenced by the

great concern with public access that surrounded debates about the earlier amendment of Rule 5(d) to authorize specific nonfiling orders in particular cases. The change to "must not" be filed originated in the Standing Committee; the advisory committee considered the change in relation to the question of public access and concluded that the Standing Committee was right. Any attempt to address these issues further would lead straight back to the extensive debates on protective orders — the greater the routine opportunities for public access, the greater the importance of protective-order practice.

The committee concluded that there is no need to act further on the nonfiling amendment to Rule 5(d) now pending in the Supreme Court.

Part II of the Discovery Subcommittee Report addresses the problem of privilege waiver by inadvertent disclosures in the discovery process. The committee has considered these questions as part of its ongoing discovery inquiry. The question now is whether to continue to pursue these questions. The Subcommittee wants to keep the issues alive, particularly as it approaches the problems that arise from discovery of computer information. The practical needs of "computer discovery" may introduce new dimensions to the risks of inadvertent disclosure and waiver. These issues will prove difficult. Although there are continuing questions whether any rule on this subject might need specific congressional approval under § 2074(b), those questions do not seem to present insuperable obstacles. At the most, a proposed rule would require approval by Congress.

The underlying problem is the perception that great energy is now devoted to avoiding inadvertent waiver of privilege by accidental production of privileged documents in discovery. The problem is acute because of the "subject-matter waiver" principle. Accidental production of a single document that is not obviously privileged on its face may lead to waiver of privilege with respect to all communications on the same subject, even though there are many clearly privileged and vitally important communications that have carefully and properly been withheld from production.

The technical question arises from the fact that many of the privileges involved with the waiver problem are state-law privileges. Federal discovery rules, on the other hand, clearly involve matters of federal procedure. The waiver question before the committee is how far to regulate the consequences of disclosures that are required by federal procedure. It is important to consider these consequences both for the "big document" discovery cases in which inadvertent disclosure is a particular practical problem and also for the emerging era of discovering computer-accessed information.

A related question is whether federal rules — either of Evidence or of Civil Procedure — should undertake to address other inadvertent waiver issues. Page 25 of the memorandum describes three basic approaches that have been taken by federal courts, including a complicated approach that seeks to balance several factors. It is clear that these issues need not be addressed. It is possible to craft a rule that addresses only the specific consequences of production in response to federal discovery requests. Two first-draft models for document discovery under Rule 34 are included on page 23 of the memorandum.

It was suggested that part of the link to electronic data base discovery arises from the question whether it is possible to authorize a preliminary look to see what is in the data base without

forcing a privilege waiver if anything privileged is scanned during the preliminary look.

A practical question was raised: suppose, under one of the drafts, a preliminary look is allowed without waiving privilege. The look uncovers privileged information. Will there be a "fruit-of-the-poisonous-tree" doctrine to prevent use of information derived from the preliminary look? How could such a doctrine be enforced? It was responded that there are intimations of such an approach in the California state courts. Return of the materials is a clear response — remembering that the "preliminary look" drafts do not involve actual production of documents for copying, return would be of any memorial made of the information seen but not directly copied. Both of the alternative drafts in the materials are designed for discovery that involves very large numbers of documents. The hope is that a preliminary view can narrow down the focus to materials that the inquiring party actually wants to explore in depth. But even in the "big documents" cases, the probability that hard-core privileged communications will be revealed is low. The problem is the documents that connect to privileged communications but that are not obviously privileged on facial inspection.

Another response to the practical question was that the draft rules are based on common present practice. Parties to big-documents cases often agree to produce documents on terms that preserve privilege against inadvertent waiver. These agreements do not forestall careful privilege review before the preliminary inspection is permitted. The purpose is to protect against subject-matter waiver by production of materials that connect to privileged communications in ways that are not always apparent. The shortcoming of present practice is that, even assuming that courts will enforce these agreed orders between the parties, it is not at all clear that an agreed order can prevent waiver as against nonparties. An explicit national rule could reduce or, ideally, eliminate the uncertainty that surrounds present practice. It is worth studying the problem to see whether still greater protection can be provided than these drafts seem to promise.

The committee was reminded that during the Boston College discovery conference several participants agreed that the burden of fully protective screening before production is enormous. And even the most careful screening may allow something to slip through.

The problem that many of the governing privileges are created by state law makes it particularly difficult to rely on any agreed order practice that may be followed now. Yet parties in big-discovery cases feel compelled to rely on these agreements by the practical needs of responding, recognizing the danger that a state court may not honor the protection intended by the federal court. There are indeed situations in which screening costs can be reduced by these orders; much depends on what the discovery is about, and what the documents are.

The problem of state reluctance to recognize a federal nonwaiver order or rule may diminish over time. If a nonwaiver procedure is adopted in the federal rules, many state rules will be amended to conform to the federal rule. The number of "rough edges" will be reduced.

A judge asked whether these problems occur with any frequency, noting that he has asked the magistrate judges in his district to look for cases where the nonwaiver preliminary look approach might be used. A response offered an example of a case in which nine million documents were reviewed for privilege.

It was asked whether the rule drafts are too modest by limiting the procedure to cases in which the parties agree. Should the court to empowered to direct preliminary inspection on motion of one party alone? Professor Marcus noted that the parties are likely to be uneasy about relying on an order entered without agreement. The court might order the preliminary inspection procedure as part of a program to expedite discovery, directing immediate access for preliminary inspection on terms that do not afford an opportunity to screen even for obviously privileged materials. Mere agreement of the parties without court order, on the other hand, is not binding on any court. The consequences of the agreement remain to be determined — and to be determined by the views of the court in which the question arises.

It was urged that if a federal rule is limited to the effects of compelled revelation in federal discovery, without addressing more general questions of inadvertent privilege waiver, state courts are likely to respect the effects of the federal rule. Still, it will be possible for litigants to question the effect of the federal order in subsequent state proceedings.

It was asked whether the concern was that a state court might attempt to enjoin a federal privilege order. The problem is not that, but rather that a state court might conclude that federal activities had waived the privilege no matter what the federal court intended. There is no direct impact on the federal proceeding, but the attempt to ease the burdens imposed by federal discovery is thwarted by the inconsistent state ruling.

The Subcommittee has found the inadvertent waiver issues to be difficult. The hope is that a protective procedure to avoid waiver could save time and money for the parties. The real question is whether effective protection can be provided by federal rule. There are strong grounds to believe that a rule can be adopted through the Enabling Act process without need for direct approval by Congress under § 2074(b); that question of course would be identified as part of any process working toward adoption of a federal rule. All that is intended is to create a federal procedure that protects against the consequences of disclosures forced by federal procedure, in an attempt to expedite federal proceedings and reduce the financial burdens on the parties while providing better assured protection of both federal and state-created privileges.

The advisory committee concluded that these questions are important, and that the Discovery Subcommittee should continue to study them.

Part III of the memorandum addresses a proposal advanced by Alfred Cortese to establish a presumptive retrospective time limit on the backward reach of document discovery. There would be a bright line requiring a court order, based on good cause, to discover documents created or dated more than seven years before the date of the transaction or occurrence giving rise to the claims in the action. The Subcommittee seeks direction whether to pursue this suggestion. If the suggestion is to be pursued, it could be formulated in a variety of ways. The question at this stage is whether to develop the concept, not whether to adopt specific rule language. Several perspectives were suggested.

First, the underlying problem seems to be one of proportionality. The basic argument is that the effort required to identify, produce, and study ancient documents is not justified by the probability of finding useful information. The present discovery rules, however, provide many

means to obtain relief from disproportionate discovery demands.

Second, the discovery amendments now being transmitted to the Supreme Court should reduce the possible problems still further. If these amendments are adopted without change, courts will become more involved in regulating the scope of discovery under Rule 26(b)(1). Discovery conferences will be required in all federal courts by elimination of the opportunity to opt out by local rule.

Third, new problems may arise from any attempt to introduce a formally rigid cut-off. The illustration in the materials involves an automobile designed in 1982, built in 1986, and involved in an accident in 1999. The 1982 design efforts built on modification of designs first developed in 1970. Which year is the base line for the transaction or occurrence giving rise to the claims? 1970? 1982? 1986? 1999? If the draft allows presumptive discovery of documents going back to 1963, it offers little practical protection and indeed may invite more extensive inquiry than otherwise would seem appropriate.

It also was noted that the institutional litigants who are likely to favor this sort of time cut-off for document discovery are not likely to support a similar cut-off for other forms of discovery. The victim of the 1999 automobile accident, for accident, might fairly be asked about the consequences of injuries incurred in 1990, more than seven years before the transaction giving rise to the claim.

Discussion began with the suggestion that there are many ways to deal with this problem. Adoption of a 7-year cut-off would simply encourage some lawyers to go back further in time than they would without this prompting in the rule. The proposal should be abandoned.

Alfred Cortese spoke in defense of the proposal, urging that it would provide a helpful guideline. The point is that in practice, this would give some guidance to control production in response to overbroad requests, in an area of great expense. There are plenty of illustrations of court orders directing discovery that goes beyond any sensible time limit.

A committee member suggested that it is not fair to compare medical discovery to document discovery. Medical discovery is carefully focused on issues obviously relevant to the dispute, and likely to produce useful information. Document discovery requires examination of mountains of obviously useless information; careful thought about the possibility of developing some practical means of protection is warranted.

Another committee member suggested that the current proposal to divide the scope of discovery in Rule 26(b)(1), requiring court approval for some part of the discovery that now is available as a matter of course, is a major change. We should allow time for experience to develop with this proposal before undertaking further limitations. Still another member agreed. The current discovery proposals should be given time to develop before pursuing this idea.

A motion to table this proposal was adopted with one abstention.

Discussion turned to discovery of electronic data. By way of introduction, it was observed that email has transformed our methods of communicating. Many conversations that formerly were conducted in person or by telephone are now conducted by electronic exchange. Communications

that never were preserved in tangible form now can be resurrected. There are replacements for the old methods of relying on individual memory as disclosed on depositions and as supplemented by telephone logs. In addition, all sorts of information is stored, including privileged information, in media that with easily stored back-up means threaten to endure forever. A great deal of information, moreover, is "downloaded" to many dispersed systems — what once was maintained in a single central location and then purged is now replicated in many local networks or individual computers and retained, one place or another, for indefinite periods. The volume is staggering, and the search costs incredible. The question is how do we provide real discovery? And who does the search? Although the physical act of electronic retrieval may not be great, the cost of designing the search often reaches startling levels. And if the computer produces a million documents in response to the search, who bears the cost of sorting through the documents? And the magic of electronic storage creates new questions. Many computer users delete documents, intending to destroy them. Back-up systems and the operation of delete programs, however, often make it possible to retrieve deleted information. Must often expensive reconstruction efforts be undertaken, even though in earlier days there would be no possibility of retrieving physically destroyed documents? Many efforts are being undertaken to explore these problems. And the Federal Judicial Center is undertaking its own study.

It is very difficult to know how to develop discovery practice to sort through mountains of information to produce manageable discovery. Perhaps present rules are adequate to the task. If these problems are to be approached, the Discovery Subcommittee will need to design means to become better informed about the problems that have been encountered already and about the ways in which the problems have been met. The approach may follow the model used in developing the discovery proposals that have been transmitted to the Supreme Court this fall.

Judith McKenna described the Federal Judicial Center project to examine discovery of electronic information. The Center has been considering these problems for some time. Its attention was first drawn to these questions by requests addressed by judges to the Center's judicial education arm. Judges were asking for help, noting that attorneys also needed help with these issues. Educational programs were developed, including several that featured Kenneth Withers. The educational effort is continuing, but a research effort is being developed as well. A study is now being put together. The Center needs to know what the Advisory Committee needs as information. Computerization extends to everyone, not just large corporations. Small businesses and individuals are increasingly relying on computer information systems. The situation is very fluid, and a number of issues are under consideration.

Depositions generate the largest discovery costs in most cases, but there are some cases in which document discovery entails still greater costs. Rumors are increasing about the occasionally great costs of discovering electronically stored materials. Continuing legal education courses are coming to deal with these issues, and in turn are spurring increased efforts to undertake electronic discovery. One initial research effort might be to attempt to find out how frequently electronic discovery is undertaken now. But if it were found that there is not much electronic discovery today, that information would not provide much reassurance about the potential for expansion, and perhaps very rapid expansion, in the future.

There is no basis yet for knowing whether there are issues that are unique to discovery of computerized information. It has been relatively easy to find cases that have generated problems with this sort of discovery. It is not as easy to find cases in which there are no problems, but that may be because people do not bother to comment about the non-problems.

At this point, the project seems likely to involve several components: (1) A short piece to identify the problems, perhaps looking at the cost-benefit analysis that might be used. This piece is likely to be produced soon. (2) A larger descriptive study of where the problems and successes have been, perhaps based on some sort of empirical survey or other research. (3) Additional judicial education materials. We would like to develop a typology of how these issues come before judges. It will be necessary to separate out issues that usually are lumped together in the literature.

Kenneth Withers then offered illustrations of the issues that might be studied, based on several hypothetical problems.

One set of issues arises from information that is stored in large, undifferentiated files. This often happens with email searches. The requesting party demands all email relating to a specific topic. The responding party says there is no ready way to search the information, which exists only in a back-up medium that is not arranged in any way. Judges have to be educated about the technical issues in order to be able to make informed rulings.

Other issues arise from poor electronic records management. Electronic record management documentation — file lists — may not be producible. Deposition of the electronic records manager may show that there is no system in place to retrieve the information that has been stored. This is a very difficult situation. Information services departments often save and store all corporate records, but in a form without roadmap and without any individual person who knows how to search.

Data proliferation is another problem. Documents and data are regularly copied. This multiplies the documents, media, and locations subject to discovery. A request for all nonidentical copies of each document can require very extensive searching.

So a request is made for documents created years ago. The response is that they may exist — but they are stored on hardware and media, regulated by software, that all are obsolete. Technology changes rapidly. Much of the historic material may be very difficult to retrieve. A number of cases have had to deal with these issues, beginning with disputes among the experts whether it is possible to overcome the difficulties of obsolete technology.

Email requests often seek information stored in hundreds of thousands of "pages." The responding party objects that searching the information is costly and any printout will not include system data that identify the sender, recipient, or like information. And problems arise from third-party proprietary interests in the software.

There also are problems with nonproduction. The responding party says the remaining documents were automatically destroyed. Often the process involves first a deliberate instruction to delete material, and then gradual (and unpredictable) replacement of the information, still preserved, by overwriting. The requesting party argues that the responding party negligently or even purposefully destroyed them. It is in fact likely that documents will be destroyed before discovery

by operation of standard programs. Forensic experts will assert that they can be retrieved nonetheless. And the response again is in part one of burden, and in part that reconstruction will also reveal privileged or confidential information not subject to discovery. It is objected that on-site inspection is not proper. Framing an effective protective order is very difficult.

Often a party requesting information will seek the right to send its own experts to work with the computer systems that have access to the information, arguing that the design of the search is vitally important to the outcome. The questions of access to privileged and other protected information are formidable, and are not easily resolved by protective orders.

There are still other problems. One big help will be found in judicial education. But much imagination is required in anticipating future evolution of these problems. There may be room for improvement through court rules. And larger societal ideas about privacy, production, and related issues may change the perspective from which the discovery issues are approached.

A committee member observed that the most difficult issues do not arise in the "big" case that is heavily litigated with experts on all sides. Instead, the problems arise in normal litigation. Suppose in a sex harassment case a demand is made for all email. The employer says the email is all gone. In large part this is not a problem of developing new rules. Instead, it is a problem of proportionality of the sort addressed by Rule 26(b)(2): how much expense and effort are required and appropriate in relation to the stakes in the litigation, the probability of finding useful information, and other values? The first solution may well lie not in rules changes but in judicial education about technology issues.

Kenneth Withers responded that this is what judges are saying all around the country. They want training in what information retrieval is feasible, and what effective protections are possible. We need to collect the forms and protective orders, the standard interrogatories, the law review literature. In response to the suggestion of a committee member that lawyers groups are becoming interested in these questions, he agreed and noted that the FJC is finding the people working in this area. Continuing legal education programs are beginning to investigate the problems. We must anticipate the prospect that "paper may become a rare event."

In response to another question, Kenneth Withers noted that we do not yet know enough to say what search costs are, nor what arrangements are being worked out to pay the costs. There are examples. Cost data are likely to be available, in sanitized form, from the independent contractors who design the searches. And people talk about these things. The question remains: what does the advisory committee need to know?

The problem, of course, is that what the advisory committee needs to know involves a base line of comparison. The costs and problems of electronic discovery must be compared to the benefits achieved and to the costs encountered by other modes of discovery. It might help to have a study of ten or a dozen cases with substantial electronic discovery. The study would at least provide examples of how much discovery was pursued, how much information was discovered, how much of the information was useful, and what the costs were. It could find out the parties' evaluations of the usefulness of the discovery and of the problems. The nature of the problems encountered in practice will be important in deciding whether the problems can profitably be

addressed by rulemaking. And it will help simply to listen to plaintiff and defendant attorneys talk about the problems. We do find people who say this is important. Raw data alone may not be enough to help us tell.

Professor Marcus asked whether there is a way to compare electronic discovery to paper discovery.

It was suggested that research design questions are better answered by the Discovery Subcommittee working with the FJC. The full advisory committee can help to raise the issues, but it is not possible for so many people to participate directly in the research design.

Professor Marcus urged that any committee member who finds a problem should send it on to the Subcommittee. It is important to know during the design stage what questions should be asked.

Judge Niemeyer noted that we have had a tradition of full disclosure of every document that relates to the claims and defenses in an action. It is not clear what is going on with respect to electronic discovery. Anecdotal review — a little meeting with experienced practitioners — may help to focus the issues. There is an emerging group of knowledgeable people whose learning can be tapped with profit.

Assistant Attorney General Ogden noted that there are people at the Department of Justice who are expert in these issues, and who would be glad to help the committee.

Judge Niemeyer suggested that the discussion had been helpful, in part in a discouraging way by illustrating the scope of the problems, the changing nature of the problems, and the vast areas of information that remain to be searched. We should leave it to the Discovery Subcommittee to organize a preliminary inquiry of the sort that launched their last major project.

It was suggested that the first challenge is to articulate the issues that are peculiar to electronic information and that are outside the scope of the present rules. We need to learn whether this is a rules question at all.

Some issues were suggested for illustration. Electronic mail takes the place of communications that often were oral in earlier days. If there is a tangible record, it seems to be a record. But the volume of these records may be immense: do we need a new definition of what is a "document" for discovery practice? Or do we need to define some other limiting principle that applies peculiarly to electronic records? The operative meaning of Rule 34 has expanded greatly, both in potential invasiveness and potential burdens, and we need to decide whether this reality requires new measures of containment.

Agreement was expressed with these observations, subject to the reservation that it is not clear what issues are peculiar to electronic discovery in ways that might justify rules amendments. One distinctive issue may arise with respect to the attempts to have experts for the inquiring party work directly with the computer system of the party whose information is demanded in discovery — there has not been any analogous practice of having agents of the inquiring party search the paper record files of the party whose information is demanded. And the issues of volume may be so

magnified as to become different in kind, not merely amount.

This discussion concluded by agreeing that the immediate work must be left to be organized by the Discovery Subcommittee. The project likely will begin by gathering anecdotal information to help develop more pointed further inquiries.

Corporate Disclosure

Judge Niemeyer introduced the question of corporate disclosure by observing that from time to time popular media reports have focused attention on cases in which failures of the disclosure systems have led federal judges to act in cases in which they should have recused themselves. These questions should be addressed by some part of the Judicial Conference process. Congress seems to prefer that the Third Branch address these issues directly, without interference from Congress. That leaves the questions of what should be done, and whether part of the answer should be found in rules adopted under the Enabling Act.

Professor Coquillette began the discussion by asking what is it that the Standing Committee expects the Civil Rules Advisory Committee to do. There are several immediate pressures to consider these problems. Recent newspaper accounts highlighting failures of disclosure systems have stimulated interest in means of improving the systems. The Committee on Codes of Conduct would like to see a uniform rule on disclosure that applies to bankruptcy courts, district courts, and courts of appeals, with only such variations as may be required by differences in the natures of those courts. And the Appellate Rules Committee has already secured approval in 1998 of an amended Rule 26.1 that reduces still further the information required in corporate disclosures.

There has been a real effort to find a way to get the several advisory committee reporters to work through toward a joint solution for the several committees. But the Appellate Rules Committee believes that they have found the right answer for the appellate courts in their recent work, and is little inclined to reopen the question so soon. At the same time, the Standing Committee believes that uniformity across the Appellate, Bankruptcy, Civil, and Criminal Rules would be good for the bar, and good for the consistent development of interpretations of disclosure practices. More courts working on the same basic rule would develop a better working body of law, and do so faster.

The most likely alternatives are: (1) Adopt Appellate Rule 26.1 for all federal courts. This would please the Committee on Codes of Conduct. But this course would not alone answer the need for prompt rulemaking. With all ordinary speed, new national rules could not take effect before December 1, 2002. The gap could be filled in the interim by promulgating a Model Local Rule based on Rule 26.1 and urging all courts to adopt it. (2) Answers could be found entirely outside the Enabling Act process. The alternatives might be simply to suggest a Model Local Rule, or to encourage adoption and promotion of a uniform disclosure form by the Administrative Office. This course would not engender any conflict among the national rules — Appellate Rule 26.1 would stand alone as the only national rule. (3) The advisory committees concerned with the district courts and bankruptcy courts could adopt their own disclosure rules, different from Appellate Rule 26.1. This approach would require an answer to the question whether the different courts face different needs that justify different disclosure requirements. If there is no apparent reason for different requirements, the question would be raised whether Appellate Rule 26.1 should be changed again

— there are indeed many people who believe that Rule 26.1 is too narrow.

Professor Cooper provided a supplemental introduction, aimed specifically at the questions facing the Civil Rules Advisory Committee. The starting point must be recognition that no one has urged adoption of a disclosure rule for any court that would require disclosure of all the information that might bear on a recusal decision. The burden on the parties of providing such information in all cases, and the difficulty of processing the information in the court system, would be too great. So the task is the inevitably unsatisfying task of finding the most workable compromise, knowing that occasionally something will slip through the system.

A second starting point must be recognition that it will not be possible for the other advisory committees to act by next spring to recommend to the June Standing Committee publication of rules that depart substantially from Appellate Rule 26.1. Even cursory examination of the many different disclosure systems adopted by local circuit rules and local district rules shows that a great many choices would have to be made as to who must make disclosure, what information must be disclosed, and when the disclosure must be made. The options for prompt action, apart from doing nothing, come down to two choices. Appellate Rule 26.1 could be adapted for district court application, changing the provisions on timing and number of copies to fit district court circumstances. Or a rule could be drafted that delegates to the Judicial Conference responsibility for creating a uniform disclosure form for use in all courts.

Choice among these alternatives will be affected by the importance of uniformity in two different dimensions. Professor Coquillette has already described the presumption that it is important to achieve uniformity as between bankruptcy courts, district courts, and courts of appeals. Uniformity also seems important as among all district courts, all bankruptcy courts, and all courts of appeals. The situation today is that there is no uniformity.

The lack of uniformity is most graphically illustrated by the situation in the courts of appeals. Appellate Rule 26.1 was adopted in 1989. The 1989 Committee Note observed that the rule required only minimal disclosure, and suggested that the circuits might wish to require greater disclosure by local rules. The result has been that eleven of the thirteen circuits have adopted local rules. Some of the local rules do not much expand the requirements of Rule 26.1. Other local rules go far beyond Rule 26.1. Rule 26.1 invites this response not only because of the express Committee Note suggestion but also because of its designedly minimalist nature. The 1998 revision of Rule 26.1 has reduced disclosure requirements still further, deleting as unnecessary the former requirement that a corporate party disclose its subsidiaries and affiliates. There is little reason to suppose that it would be satisfactory to adapt Appellate Rule 26.1 to district court practice without also adopting the permission to adopt local district rules that require additional disclosure. The result would be not only to continue the variety of local rule and related practices disclosed by the Federal Judicial Center study prepared for the Standing Committee, but also to encourage a further proliferation of district-court practices.

The question of timing is one that clearly distinguishes the district courts from appellate courts. Appellate Rule 26.1 reflects the pace of appellate review. In many cases, filing with a party's principal brief is all that is required. In the district courts, it is essential that filing be made

at the earliest possible moment. Several of the judges reviewed by the Kansas City Star made rulings, without adequate recusal information, that involved ministerial actions. Less than a minute of judge attention often was required. Some of the orders were as simple as appointing a "legal courier." An individual docket system makes it possible to establish early screening, and accordingly makes it imperative that the information be provided at the very outset. If only it were possible, it would be desirable to require the plaintiff to provide complete disclosure as to all parties at the time of filing. That is not possible. But the closer, the better.

The difficulty of drafting a more detailed national disclosure rule is not only a matter of time. The District of Kansas recently adopted a new broad disclosure rule. Within three months the rule was repealed because it had generated great confusion and difficulty in application. The difficulties will only grow with time. It is important to remain in constant contact with actual experience under a disclosure system, to see whether it is generating the information needed to avoid embarrassing oversights. It also is important to remain in constant contact with the technological capabilities of the district courts to match disclosure information with recusal information for individual judges. Disclosures that cannot profitably be used today may become profitable tomorrow.

All of these difficulties suggest that it may be important to explore the alternative of Judicial Conference forms. The Judicial Conference could be informed about the needs for disclosure by the Committee on Codes of Conduct. The Committee on Codes of Conduct responds to hundreds of inquiries each year, and is the judicial system's repository of wisdom about judicial conduct. The Administrative Office works continually with the technological capacities of the district clerks' offices, and can devise forms that facilitate optimal use of the information that is gathered. Perhaps most important, forms can be changed much more easily through this process than national rules can be changed.

Carol Krafka then presented a summary of the FJC study on district court disclosure rules that is included in the Agenda materials. There is a parallel study of circuit disclosure rules. It confirms the observation that the minimal nature of Appellate Rule 26.1 has stimulated broader disclosure requirements in most of the circuits. There are explicit local rules in at least 19 districts. Other districts have something else in place, often by standing order. These rules adopt quite variable approaches to the central questions of who is required to file a disclosure statement, what information is required, and when the information is required. There also are different sanctions for failure to file. The most drastic sanction, and no doubt an effective one, is that the case is stopped in its tracks until the required filings are made.

Judge Scirica asked what sort of information the FJC should be asked to look for? Should they be asked to survey district judges for suggestions? Carol Krafka responded that this suggestion has not been made. Perhaps people have not asked what district judges would like by way of disclosure because they do not often face these issues.

It was observed that federal judges have financial information on file with the Administrative Office. The Administrative Office has followed the practice of informing a judge whenever a request is made for that judge's information. But much, and perhaps all, of the information has now been put on the Internet. It will no longer be possible to know when the information is sought out.

One practical problem with increasing the scope of disclosure requirements is that federal judges are busy. They, and their staffs, tend to review disclosure forms quickly. It is possible to miss things. If the forms become increasingly complicated, we may face the embarrassment of overlooking more of the available information.

It was suggested that it would be better not to attempt a rule change. The typical problem is that, by one means or another, a judge buys stock and then genuinely forgets about it. No amount of disclosure will cure that problem, particularly when routine orders are made at the outset of an action when no one has focused on who the parties are. The Bankruptcy Rules Committee believes that Appellate Rule 26.1 disclosure is satisfactory — you do not need to know, for example, what other subsidiaries are owned by the parent of a party to the action. It is important that all committees do something soon. Meanwhile, the draft national rule should be promulgated as a Model Local Rule.

It was responded that there is an approach that does not involve local rules. We want the Administrative Office to give us a reliable administrative system that will enable a district judge to recuse immediately, at the very beginning of an action or proceeding. Software has been developed by the Administrative Office, and has been improved. We should be able to rely on getting information from the parties that matches the software. In federal court in Houston, an order goes out from the court clerk in each case as soon as it is filed. It asks for "26.1 type" information. This is not a local rule, but a case-specific order entered in every case.

Discussion returned to the question of seeking to achieve a consensus draft by work among the reporters for the several advisory committees. The Appellate Rules Committee has recently revised Appellate Rule 26.1 and believes that it has achieved a sound rule that meets the needs of the courts of appeals, as supplemented by local circuit rules. The Bankruptcy, Civil, and Criminal reporters can meet at the January Standing Committee meeting and work toward a joint draft. Agreement among the advisory committees would be the best result, avoiding the need for the Standing Committee to arbitrate among them. The Committee on Codes of Conduct does want the Standing Committee to begin the process of developing national rules, and would be pleased to have the rules for bankruptcy courts and district courts parallel Appellate Rule 26.1.

Professor Coquillette added the advice that if the Civil Rules Advisory Committee could reach agreement on a Civil Rule parallel to Appellate Rule 26.1, it seemed likely that the Criminal and Bankruptcy Rules Advisory Committees would agree. That would resolve the question neatly. If the Civil Rules Committee concludes that there should not be any national Civil Rule, the Standing Committee could begin work on alternatives. But there will be difficult questions of uniformity and coordination if work is undertaken to develop a Civil Rule that departs from Appellate Rule 26.1.

A motion was made to adopt a Civil Rule parallel to Appellate Rule 26.1. This motion was later withdrawn.

It was asked whether adoption of the Rule 26.1 model for the district courts would be intended to displace local district rules requiring greater disclosure. This question will remain open as the process continues. And it was recalled that the district court rule would, in any event, require different provisions for the time of filing a disclosure statement and for the number of copies. It also

was suggested that because Rule 26.1 requires filing only by corporate parties, district courts might want to expand disclosure to reach other forms of commercial enterprise with public investors.

Judge Niemeyer observed that if a Rule 26.1 model were adopted, a Civil Rule tailored for the circumstances of district courts could be prepared for consideration with this committee's report to the January Standing Committee meeting. Or more drafts might be prepared, illustrating alternative approaches; that process could not be completed by January, and might not yield a draft that could be recommended for publication in 2000.

It was observed that Appellate Rule 26.1 disclosure is "so minimal that it may not serve the function." The disclosures required by several of the local district rules recounted in the FJC report are much more extensive. Adherence to the Rule 26.1 approach invites local rules. It would be better to adopt a system that relies on Administrative Office and Judicial Conference resources to develop and modify disclosure forms.

The virtues of forms were seen in another light. Three years will be required to get any national rule into effect. A form could be developed for use in the interim. The Codes of Conduct Committee and the Administrative Office could help develop the form. The Codes of Conduct Committee is considering these problems, although it must be remembered that its present position is that it would be good to adopt the Rule 26.1 approach for all federal courts.

It was suggested that perhaps disclosure is an area in which bench and bar are in agreement. The task, however, will be to discover just how much information judges want, how much of that information can be managed efficiently within the court system, and how great would be the burdens of extracting that information from the parties.

It was asked whether disclosure is a procedural problem at all. The Committee on Codes of Conduct may be the body best equipped to think about these problems. Disclosure may be desirable "way beyond" the Rule 26.1 level. The question is how to implement the Codes of Conduct. There is little reason to believe that the rules committees are especially knowledgeable in this area, or that the deliberately protracted process for adopting rules of procedure is well suited to the disclosure problem.

These questions suggest that perhaps the better approach is to adopt a national rule that requires filing a form developed by the Judicial Conference.

Further discussion found interest in two models: one would adapt Appellate Rule 26.1 to the circumstances of the bankruptcy courts and district courts, while the other would delegate to the Judicial Conference the task of developing forms that must be filed.

It was urged that the Rule 26.1 approach would invite local rules, and that the result would be a lack of any national uniformity. There is no apparent reason to believe that there are local differences in the appropriate levels of disclosure. But it also was urged that the Rule 26.1 approach should be kept alive for discussions with the Bankruptcy and Criminal Rules Advisory Committees. A draft should be prepared for that purpose.

The committee was reminded that there is a short-term question that should be kept separate from the long-term solution. For the short run, the advisory committees could work with the Administrative Office to provide leadership to the district courts on a uniform disclosure form. That approach is not inconsistent with a long-term project to develop a national rule. We should work in that direction. We are not yet able to draft a rule more comprehensive than Rule 26.1, but we are likely to want more detailed disclosure than Rule 26.1 provides. It may be that the end result will be a rule that both specifies some level of detailed disclosure and also leaves the way open to require still greater detail by a process that does not require repeated amendment of the national rules. This approach would make it easier to preempt local disclosure rules.

Professor Coquillette agreed that attention must be paid to both the short- and long-term processes. Rule 26.1 does set a low threshold that invites local rulemaking. Judges find that these questions are terribly important; they want to be sure to have as much information as possible so as to avoid unknowing failures to recuse. The Codes of Conduct Committee wants a uniform minimum rule. An attempt to take away from individual judges the power to require the information they want will be very controversial. Local discretion is prized. Yet we could achieve a lot of uniformity by any of several approaches. A low-disclosure national rule could be supplemented by a Model Local Rule or model form that go beyond the rule requirements.

It was observed again that the administrative process can move more rapidly than the Enabling Act process. If a Model Local Rule and administrative forms can be used to fill the short-term need, there seems little reason to move with undue haste to shape a rule that could take effect in 2002.

It seemed to be agreed that it would not make sense to act in haste to adopt a national rule that is intended to be only an interim measure. A form could be prepared with relative speed. A national rule might be adopted to require use of the form, looking ahead to the day when experience with the form — as it might be modified in response to actual implementation — might justify a more detailed national rule. Appellate Rule 26.1 could be used as a starting point. And it must always be remembered that whatever rule may be adopted, the rule will be addressed only to the litigants. The administrative responsibility of the courts will continue to be to make effective use of the information provided by the litigants.

The discussion concluded by committee directions that both approaches should be followed for now. Two drafts should be prepared by the Reporter, working with the committee's delegates to the attorney conduct subcommittee. One draft will adapt Rule 26.1 for use in the trial courts. The other draft will require filing of a form approved by the Judicial Conference. These drafts can be discussed with reporters for the other advisory committees, and perhaps considered by the Standing Committee in January. If no clear choice emerges on consideration of these drafts, and perhaps others, it may prove desirable to publish alternative models for comment.

Special appreciation was expressed to Carol Krafka for the great help provided by her excellent FJC report.

Agenda Subcommittee

Justice Durham gave the report of the Agenda Subcommittee. The Subcommittee circulated a list of docket items as a consent calendar in August. The docket materials supporting each item were circulated with the Subcommittee recommendations for disposition. No advisory committee member asked that any of these items be moved to the discussion calendar. The Subcommittee report comes to the advisory committee as a motion for approval.

Brief discussion focused on the continuing desirability of working with the Maritime Law Association on suggestions for changes in the Admiralty Rules. Several agenda items are involved in this process now, and it is expected that this cooperative approach will be continued. It also was noted that it is important to ensure that advisory committee members have adequate time to consider consent calendar items before the time designated to request treatment on the discussion calendar. With this protection, this early experience with the consent-calendar approach has seemed good.

The consent calendar recommendations were approved.

Rule 53 Subcommittee

Chief Judge Vinson summarized the work of the Rule 53 Special Masters Subcommittee. Interest in Rule 53 and the use of special masters has been simmering in the advisory committee for several years. Rule 53 does not directly authorize many practices in the use of special masters that in fact are being utilized with some frequency. A draft revision of Rule 53 has been prepared to speak to many of the practices that seem to have emerged. The first step of the inquiry whether to develop the draft further has been to find out what is actually being done, and why it is done. To that end, the Federal Judicial Center has agreed to undertake a study. A preliminary report on the first phase of that study is included in the agenda materials.

Thomas Willging summarized the results of the first phase of the FJC study. He began with a brief review of the methods used to gather information. The initial goal was to identify more than 100 cases with some special master activity. To that end, an electronic docket search was made of nearly 450,000 cases that had closed in 1997 and 1998. Searching for specific terms in the entries, the study found more than 1,230 cases that involved special master activity. The terms searched included all of the terms used in Rule 53, plus a few more such as "appraiser," "trustee," and "court-appointed expert." A sample of nearly one-ninth of these cases, a total of 136 cases, was selected for more detailed investigation. All of the documents in these 136 cases were examined and summarized in a data base.

The first finding is that use of special masters is relatively rare, occurring in something like three-tenths of one percent of all federal cases. Even in the types of cases that show the most frequent use, such as environmental, patent, and air-crash personal injury cases, use ran at just less than three percent; it can be said with statistical confidence that special masters are used in no more than five or six percent of even these types of cases. Court-appointed experts were much more rare, occurring about once in every ten thousand cases. Although special masters thus appear to be used infrequently in relation to the total caseload in federal courts, it also can be said that an event that occurs six hundred times a year is not a rare or inconsequential event. The topic need not be written

off the advisory committee agenda because it just never arises. Nor, for that matter, can it be known whether special masters would be used more often, or differently, if Rule 53 provided greater guidance.

The question of appointing a master is raised by the judge in the plurality of cases; plaintiffs raise the question almost as often. Defendants seldom initiate consideration of an appointment. Opposition was not frequently expressed; when there is opposition, it is generally from the defendant. Absent settlement or dismissal, the judge usually accepted a party's suggestion that a master be appointed.

More than half the orders appointing special masters did not refer to any Rule or other authority for the appointment. Authority seems to be assumed.

In selecting the person to be master, judges commonly received nominations from the parties, but appointments also were made by other means. Ordinarily the master is an attorney, but not always. A non-attorney master is likely to be either a court-appointed expert, or to be appointed to address a specific issue.

Costs commonly are shared by the parties.

The responsibilities assigned to special masters cover a wide range of activities from pretrial through trial and on to post-trial work. This range of activity suggests there is at least room to expand Rule 53, which focuses only on trial uses.

Generally the court accepted the report and recommendations of the master. Modification is relatively rare, and rejection is quite rare.

As a subjective assessment, it seems that generally the master has at least some impact on the outcome. It is rare that the master's recommendations are either determinative or have no impact.

Judges were more likely to take the initiative in appointing special masters for pretrial use. Curiously, appointments for pretrial work were more likely than other appointments to rely expressly on Rule 53, even though Rule 53 does not refer to this use. Pretrial appointments were most likely to aim at settlement. When settlement was the purpose, settlement always happened. Plaintiffs were more likely to suggest trial and post-trial appointments of masters.

The study is limited to some extent by the reliance on electronic records. It likely fails to pick up appointments of magistrate judges for master-like functions. But it does not seem likely that there are many of these appointments. It may be that the study underreports total master activity by some fraction, but it does not seem likely that the margin is greater than ten percent.

Phase 2 of the study will involve interviews with judges, attorneys, and masters in a sample of the cases to ask more detailed questions. It will be asked whether Rule 53 created problems, whether a clearer rule would have facilitated anything.

Chief Judge Vinson then observed that the question for the Subcommittee is whether to continue to explore Rule 53. The Phase 1 data suggest a need to update Rule 53 to cover pretrial and

post-trial activity. The Subcommittee recommends that work proceed on the Rule 53 draft while the FJC goes on with its study.

It was asked whether the intersection between the duties of magistrate judges and the functions of special masters makes a difference. Magistrate judges, for example, commonly supervise discovery. Similar functions may be assigned to a master. Should this overlap be dealt with in the rule? It was responded that indeed magistrate judges now perform many functions that once might have been performed by a special master. But there may not be enough magistrate judges to displace special masters. Some massive discovery cases may demand more time than a magistrate judge could devote to supervision. And in some districts, there simply are not enough magistrate judges and district judges to meet the needs for discovery supervision. Section 636(b)(2) expressly provides for appointing magistrate judges as special masters, including a provision that allows appointment when the parties consent "without regard to the provisions of Rule 53(b)." And Rule 53(f), somewhat indirectly, provides that a magistrate judge is subject to Rule 53 "only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this Rule."

It was further observed that using a master to enforce a decree in an institutional reform case can lead to reshaping the role of the courts in sensitive areas. Thomas Willging noted that the FJC sample includes some institutional decree enforcement functions, and that these will be explored in Phase 2.

Another committee member noted that there is extensive experience with special masters in environmental cases, and that this practice has proved highly desirable. A master can bring to the case highly specialized knowledge and experience that cannot be provided by a district judge or magistrate judge.

It was noted that Rule 54(d)(2) specifically provides for use of special masters to resolve attorney fee questions.

The motion to continue the Rule 53 study was approved unanimously.

Simplified Procedure

Judge Niemeyer introduced the simplified procedure question by observing that the continued growth in "ADR" mechanisms seems to reflect dissatisfaction with the court system. It suggests that courts are not able to meet the social need for dispute resolution. Some people are turning away from the courts. The federal courts may be particularly feared — the old "making a federal case out of it" epithet has come to be associated with six-figure attorney fees and burdensome procedures. People with claims that are important to them individually cannot afford to litigate their claims; the barriers reach claims of tens or even hundreds of thousands of dollars, and business claims as well as personal claims. One effort to address these problems in part is represented by the "rocket docket" in the Eastern District of Virginia. This system encounters criticism, but also deserves praise. It provides a date certain for a prompt trial, and that is a real benefit. The complaints that emerge seem to focus more on the short time allowed for the trial itself, rather than the expedited pretrial procedure. People manage to live with accelerated pretrial — the result is not "trial by ambush."

The question now is whether it is possible to develop a simplified procedure for some cases, shifting the tasks performed by the pretrial devices of pleading, disclosure, and discovery and ensuring prompt trials. Whenever this idea is mentioned to lawyers or judges, it evokes great interest. When it was suggested to a meeting of the district judge members of the Judicial Conference in September, they were unanimously in favor of pursuing the project and excited by the prospect. When the idea is suggested to lawyers, their reactions seem hesitant and to be based on uncertainty whether the result would be to help them and their clients. But there is little indication that lawyers have actually registered the nature of the proposal.

In pursuing any project such as this, it is important that it not be described as a "small claims" project. The purpose is not to provide a second-class procedure for claims that are deemed unimportant. Instead, the purpose is to provide a procedure that will better enable these claims to be enforced. Plaintiffs will be attracted to a procedure that enables them to move into court and emerge quickly with a final judgment. The focus is on adjudication, not prolonged pretrial work. The system will need a cap on damages. With a cap on damages, the defendant too can save money — without the risk of a runaway damages award, it is sensible to budget litigation expenses accordingly.

Some inspiration for simplified procedure rules may be found in The American Law Institute's Transnational Procedure Rules project. This project aims at developing a set of rules that can be universally accepted as providing for fair and efficient adjudication of controversies. It has the benefit not only of outstanding reporters — including Standing Committee member Professor Geoffrey C. Hazard, Jr. — but also of drawing from the experience of procedure systems and experts all over the world.

Civil Rule 1, promising just and speedy determination of civil actions, has roots as far back as Magna Carta. Magna Carta, indeed, prohibited delay in justice in terms more bold than Rule 1.

A project to do something this broad for our system will be difficult. But we have an initial draft of nine rules that provide one picture of what a simplified system might look like. The Rule 103(b)(2) requirement that documents be attached to the pleadings seems attractive. The Rule 109 firm trial date also seems attractive. The idea draws from practice in a small-claims court that issued a firm trial date when the complaint was filed. A six-month trial date is compatible with the reduced pretrial procedures provided by these rules, apart from cases in which there are obstacles to prompt service of process.

The difficulties, moreover, may not be as great as appears. They can be reduced by following the draft approach, which does not attempt to adopt a self-contained complete system. It is essential that the procedure be fair to both sides — it is not enough to make it less expensive than the regular rules. Fairness is particularly important if the rules are made mandatory for any category of cases, as the draft would do for cases seeking less than $50,000.

Professor Cooper provided a more detailed description of the Simplified Rules draft. The draft is very much a first attempt to illustrate the nature of the issues that must be faced; it is not even close to a model of what might eventually be done.

The first question is whether to make the attempt at all. One part of the concern must be whether an attractive new procedure will bring to federal courts cases that might better remain in state courts: can federal courts handle the new business fairly and well, even if the procedure is itself well designed? Another concern is that the new rules not seem a second-class procedure. It must be clear, both in purpose and result, that the new rules are designed to be better than the ordinary rules for the cases in which they apply.

A basic question of approach is whether to attempt to create a complete set of self-contained rules, or whether to follow the draft approach that simply displaces some of the regular rules. The draft approach has been numbered beginning "Rule 101" and following numbers to emphasize the distinctness of these rules, but also to contain them within the broad framework of the Civil Rules. This approach makes it possible to have a much shorter set of rules, and to rely on the vast body of precedent that gives meaning to the ordinary rules. But it also makes the supplemental rules difficult for pro se litigants. Any attempt to develop a set of rules for pro se litigation must look quite different from this draft, and is likely to involve provisions that will be unattractive for lawyer-managed cases.

The approach taken in this draft is based on the view that the most profitable approach to simplification lies in the package of pleading, disclosure, and discovery rules. It does not address motion practice directly, in part because it is difficult to conceive of a system that does not permit a motion to dismiss for lack of jurisdiction or for failure to state a claim, or does not permit summary judgment. But motion practice may be the source of great delay and expense. If pleading is a proper focus, is it desirable to attempt to restore more detailed fact pleading? Are the early indications of success with the disclosure practice invented by the 1993 version of Rule 26(a)(1)(A) and (B) sufficient to justify building on that version in these rules? Is it possible to enforce a rule that requires greater specificity in demands to produce documents under Rule 34?

The attempt to establish firm trial dates raises obvious questions of courts' abilities to make good on the promise. The draft does not include any provision for shortening trials themselves, a feature that might be important in achieving a firm trial date.

Choice of the actions that come within the rules — the matters covered by draft Rule 102 — also is an important question. The choice will depend in part on what the rules actually do, and on the confidence we have in the rules. The FJC has provided information about the numbers of cases involving various dollar recovery demands brought in federal courts over a ten-year period. The records for about 70% of the cases did not show any stated dollar amount. Often a stated amount was not relevant to the relief requested, but for many of the cases it seems likely that the records were incomplete. Nearly 12% of the cases involved demands for $50,000 or less. Although this is a very large fraction of the cases in which there was a stated demand, that comparison of itself does not provide much guidance to the total portion of the docket that involves demands in this range. Depending on the approach that is taken, it may be important to consider adoption of a requirement that a definite amount be pleaded — either for all actions in federal court, to defeat evasion of a mandatory rule directing that all cases of below a certain dollar level come into the new procedure, or for cases in which the plaintiff seeks to elect the new procedure.

If this project is pursued, it will be important to identify the people who can help. Some help can be found from lawyers who decide not to bring litigation in federal court, although subject-matter jurisdiction is available, because of the complexity of federal procedure. More help may be found from lawyers who do bring to federal court actions that involve rather small amounts of money, or that involve important principles but cannot support big litigation expenditures. Experience in state small-claims courts may be consulted, but it is questionable whether procedures designed for the problems that typically come to small-claims courts will work for the actions that may be brought to federal courts.

Discussion began with the question of pleading dollar demands. It was urged that actual recovery should be limited when the simplified rules are invoked.

It was observed that Massachusetts has a set of pro se rules that are contained in a short pamphlet, expressed in terms that aim at a sixth-grade reading competence. Such rules would be very different than the simplified rules draft advanced here.

Thomas Willging observed both that dollar demands are not relevant in many federal actions, and also that the electronic data reporting forms do not require information about the amount demanded. The FJC figures do not support the conclusion that specific dollar demands are made only in 30% of federal actions.

It was asked what might be done to make simplified rules attractive to plaintiffs, to encourage them to opt into the system to the extent that it might be made optional. One incentive could be provided by establishing both a right to an early trial and an opportunity for a short trial.

Caution was expressed by asking whether there is a sufficient number of cases to make it worthwhile to adopt a set of simplified rules. If application of the rules is made mandatory, as in the draft Rule 102 application to all cases involving less than $50,000, there will be a lot of litigation over the amount actually involved. Plaintiffs may add claims for punitive damages to escape application of the rules. And defendants must have an incentive to the extent that the rules are made elective — the draft would provide a procedure for consent of all parties when the damages demand ranges between $50,000 and $250,000, and another consent procedure applicable to all cases.

The view was expressed that "if you provide it, they will come." There are types of cases where this may make sense. The dollar limits could easily be raised to $500,000. There is a lot of concern over expense and delay. Corporate defendants would like this procedure as something more attractive than the present choice between spending large sums on attorney fees or on paying off plaintiffs to avoid spending large sums on attorney fees.

It was suggested that "good lawyers are doing this now, when the relative uncertainty of jury verdicts puts all parties in fear." But it may not be wise to raise the dollar limits. Perhaps we should rely on agreement of the parties to invoke the new procedure. And a firm dollar cap on damages would provide an incentive to defendants to agree.

It was agreed that surely this project should go forward. But attention should be given to motion practice. Motions can become an important source of expense and delay. The firm six-month trial date also could be a problem. It would help to find a way to build magistrate-judge trial

into the system. To the extent that application of the rules is made to depend on agreement of the parties, it would be easy to provide that trial will be held by a magistrate judge or district judge depending on overall docket management needs.

The dollar limits were approached from another direction, asking why the mandatory limit is set below the amount required for diversity cases. Under this approach, only federal question cases would ever fall within the mandatory reach of the rules. The dollar limit might be set at double the amount required by § 1332 for diversity jurisdiction. Alternatively, an elective procedure could work without any need to refer to dollar limits or limits on other remedies. And Miller Act cases are a good illustration of the types of federal-question cases that might be brought within this procedure.

It was urged that caution should be observed in approaching trial by magistrate judges. Many lawyers are reluctant to consent to trial by magistrate judge because it is difficult to explain the consent to a client "when something goes wrong."

Professor Coquillette observed that simplified procedure reforms are very attractive. In our common-law tradition, they date back at least as far as 1285, when a set of ten simplified rules was adopted for commercial disputes. But we should be careful to consider the question whether these rules, or some other rules, might be adopted to help pro se litigants. At the same time, the simplified rules approach could easily be used for cases that involve more than $50,000.

Drafting in terms of "monetary relief" may prove unwise. There is a lot of state-court litigation over this and similar terms, addressing questions raised by costs, attorney fees, treble damages, punitive damages, and like supplements to compensatory awards.

The question was asked again: what should be done under the draft if a defendant prefers to invoke these rules, and moves to invoke them on the ground that the plaintiff cannot possibly recover more than $50,000?

It was suggested that many lawyers would find some set of simplified procedures attractive for many cases. This led to expanded discussion of the idea of capping damages. Defendants would find simplified rules very attractive if they could be assured that the stakes would not rise above a stated level. Developing litigation budgets would be much more reliable. If consent of the parties is required, there is no need for a dollar limit. It is the cap that is important, not the absolute level of the cap. There may be many cases in which all parties would agree to invoke simplified procedures even though hundreds of thousands of dollars are in issue. And in any event, it was urged that any dollar limit should be high enough to capture some diversity cases.

One of the questions raised in the introductory materials is whether the simplified rules might provide for majority jury verdicts. It was urged that this topic should be put aside. Any such proposal would prove divisive — virtually all plaintiffs would favor majority verdicts, while virtually all defendants would oppose them. Such a feature would discourage use of the new system.

Thomas Willging observed that any new set of simplified procedures would be a dramatic change for the federal courts. "We cannot research the future." Perhaps it would be desirable to find a way to establish a pilot project in a few courts to provide a firm basis for study before seeking to implement a new system for all federal courts. The Federal Judicial Center would be available to

help.

Another committee member observed that in his state lawyers are often reluctant to go to federal court because of the delay, the "paper jungle," and like concerns. A simplified set of procedures would be very attractive. But the dollar limits should be raised. And the nonunanimous jury should be avoided.

A judge noted that a court's ability to ensure a firm trial date is affected by the length of trial. It is much easier to give a firm date if trial is limited to one day or two days. It was added that given an expedited pretrial process, short trials are more likely to occur naturally even if the rules do not include any limit on trial length.

The question was raised about the types of cases that might be reached by new rules. Some would be cases now filed in federal courts. Others would be cases filed in federal court only because of this procedure. And we need to consider pro se cases, and whether the attempt to adopt simplified procedures for some cases would generate momentum to consider also a set of procedures for pro se cases. And it was noted that if there is a satisfactory procedure for money-only cases, demand will emerge to extend the procedure to cases seeking other forms of relief.

The RAND study of the Civil Justice Reform Act showed that discovery is limited in many cases. The more recent FJC study done for this committee made similar findings. It may be useful to look at these studies again to see whether they can afford information about the types of cases best considered for a simplified procedure system.

It was urged again that higher dollar limits are desirable. It was further suggested that there are considerable opportunities to adapt a simplified procedure system to pro se litigants. There is a resemblance to the "tracking" systems that have been adopted in some local rules. The tracks developed for simpler cases could provide good models for this project. We could find out, for example, what kinds of cases went onto the simplified tracks. Thomas Willging supplemented this suggestion by observing that the FJC studies of the "pilot" districts under the Civil Justice Reform Act could also be useful in this regard.

Returning to one of the opening themes, it was noted that the impulse for simplified judicial procedure is kin to the proliferating programs for court-annexed ADR. ADR schemes at times focus on "low-end" cases. There may be useful experience to be gathered here as well.

It was observed that experience in a large law school clinic program has shown that there are many people who have valid federal claims but for amounts so small that no lawyer will take them on. Clinic resources are not adequate to the task, nor are other legal assistance programs. The claimants are left alone, confronting a judicial system that is for all practical purposes inaccessible. But that does not mean that it is practicable to develop a pro se procedure that will meet their needs.

The pro se discussion led to the observation that it is important to remember that pro se prisoner actions claim a large part of the federal docket. These cases require very truncated procedures.

The simplified procedure discussion concluded with unanimous agreement that the project should be pursued. Judge Niemeyer will make final assignments to the Subcommittee. Experience with seeking even relatively modest changes to the class-action rules and the discovery rules has demonstrated the momentum of entrenched procedures. Simplified procedures for some actions, if they can be devised, may provide a new source of momentum that, many years down the road, may help in amending the rules for all cases.

Rule 51

Rule 51 has been on the agenda for some time, in response to a suggestion by the Ninth Circuit Judicial Council that an amendment should be made to legitimate local rules that require requests for jury instructions to be submitted before the start of trial. The committee has concluded that this question should not be left to local rule variation — if it is desirable to authorize a direction that requests be submitted before trial, the national rule should say so. The committee has not determined whether it is desirable to amend Rule 51 in this way, although it is aware that the Criminal Rules Committee has published for comment an amendment of the Criminal Rules that would authorize an order for pretrial requests. Consideration of this issue may also involve other changes designed to clarify the interpretations that have been grafted onto the text of Rule 51. A revised Rule 51 draft is included in the agenda materials for this meeting. It was concluded, however, that the questions presented by the draft are sufficiently complex that it would be better to defer consideration to the spring meeting. Any advice from committee members to the Reporter would be welcome.

Next Meeting

The dates for the spring meeting were tentatively set at April 10 and 11, 2000.

Respectfully submitted,

Edward H. Cooper
Reporter

III

August 1999 Published Civil & Copyright Rules Amendments

The relatively sparse comments on the Civil Rules and Copyright Rules of Practice are summarized with each rule. Changes that deserve discussion are redlined with each rule or Committee Note.

Rule 5(b)

The comments include a suggestion that electronic service should be supplemented by mail. That suggestion seems likely to defeat the purpose of the proposed rule: anyone who wishes to do so can supplement mail service by electronic service now, and without asking consent.

The Department of Justice suggests that consent be in writing. The change is shown in Rule 5(b)(2)(D). It would have to be decided whether an electronic exchange of consent satisfies the "writing" requirement. The value of written consent would be the clear evidence, and also the prospect that forms might be used to elicit useful information.

Some of the comments address a topic that was considered in earlier committee deliberations. Early drafts of the Committee Note spoke to the questions whether consent could be given by registration for all future actions, by blanket consent for all purposes in a particular action, or in more specific terms. The drafts also suggested that local rules might be adopted to address these issues. The committee decided to say as little as possible about these issues, leaving them for natural evolution in practice. Possible language is added to the Committee Note for consideration.

A separate question has been raised by the Appellate Rules Advisory Committee. They believe it is important to add an express provision that attempted electronic service is not effective if the person attempting service learns that the service is not made: "Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received." The Appellate Rules Committee raised this concern earlier; discussion of Rule 5(b) led this committee to add the statement in the published Committee Note — actual notice that the transmission was not received defeats the presumption of receipt, and additional steps must be taken to effect service. A quick computer scan by the Appellate Rules Committee Reporter turned up three cases that pronounce the unthinkable proposition that service by mail is complete even though it is returned undelivered to the party making service. One of them, Wang Labs., Inc. v. U.S., Ct.Int.Trade 1992, 793 F.Supp. 1086, did not involve actual knowledge that the court's order was not received; the court, however, discussed with seeming approval the Freed case noted next. Freed v. Plastic Packaging Materials, Inc., E.D.Pa.1975, 66 F.R.D. 550, involved a defendant whose counsel withdrew. Rule 36 requests to admit were mailed to the defendant, and to its corporate parent; both mailings were returned, one as "addressee unknown" and the other as "out of business." The court found it clear that the requests had never been received, but ruled that the requests were admitted by the failure to answer and granted summary judgment on the basis of these "admissions." The court relied on the general proposition that non-receipt of a paper does not affect the validity of service, and added that a party has a duty to keep the court advised of a current address for service. "If receipt were required to effect service, any party could effectively make service impossible by remaining incognito." The court was part-way right. The circumstances could readily excuse a duty to make actual service, so that actual knowledge that service was not made is not controlling. (The court also was wrong. The defendant had answered before counsel withdrew. Rule 36 should not be read to imply admissions by failure to respond to requests that were not received. The plaintiff should have been made to support its request for summary judgment by affirmative showings.) The third case is In re Franklin Computer Corp., E.D.Pa.1986, 59 B.R. 387. The court clerk twice attempted to serve the proposed findings of the bankruptcy court on the defendant; both letters were returned. The court granted the plaintiff's motion to adopt the proposed findings because no

objections had been filed, observing that service by mail is complete upon mailing. This opinion speaks squarely to the issue: the court knew that service had not been made, but treated the case as if it had been made. Of course the result again could be justified on the ground that although service was not made, further attempts at service were not required.

None of these cases should shake the conviction that service by mail or any other means is not effective if the party attempting service knows that it was not delivered. Three inadequate opinions do not make the law. But there may be more, and there is always a risk that other courts will fall into the same trap. If Rule 5(b) is to address this question, it seems better to speak to all the means of service that can go wrong. The Appellate Rules approach, which speaks only to electronic service, might — by negative implication — increase the risk that other courts will accept as complete returned mail, returned courier delivery, or like known failures. Language to accomplish this result is added as Rule 5(b)(3), which nullifies attempted service by any means if the party making service actually knows it did not reach the person to be served. The only exception is for service made on a person with no known address by leaving a copy with the clerk of the court. (This exception would excuse other attempts to accomplish actual service, comporting with the results in the Freed and Franklin Computer decisions.) It may or may not be desirable to add such a provision; if the addition is to be made, the draft will benefit from close scrutiny.

Rule 5(b)

~~**(b) Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the party or attorney or by mailing it to the party or attorney at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.~~

(b) Making Service.

(1) Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Service under Rule 5(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities.

(3) Service under Rule 5(b)(2), except for Rule 5(b)(2)(C), is not effective if:

(A) the party making service learns that the attempted service did not reach the person to be served, and

(B) the person to be served did not deliberately defeat the attempted service.

Committee Note

Rule 5(b) is restyled.

Rule 5(b)(1) makes it clear that the provision for service on a party's attorney applies only to service made under Rules 5(a) and 77(d). Service under Rules 4, 4.1, 45(b), and 71A(d)(3) — as

well as rules that invoke those rules — must be made as provided in those rules.

Subparagraphs (A), (B), and (C) of Rule 5(b)(2) carry forward the method-of-service provisions of former Rule 5(b).

Subparagraph (D) of Rule 5(b)(2) is new. It authorizes service by electronic means or any other means, but only if consent is obtained from the person served. The consent must be express, and cannot be implied from conduct. Early experience with electronic filing as authorized by Rule 5(d) is positive, supporting service by electronic means as well. Consent is required, however, because it is not yet possible to assume universal entry into the world of electronic communication. Subparagraph (D) also authorizes service by nonelectronic means. The Rule 5(b)(2)(B) provision making mail service complete on mailing is extended in subparagraph (D) to make service by electronic means complete on transmission; transmission is effected when the sender does the last act that must be performed by the sender. *{Note: The next two sentences will be deleted if draft (b)(3) is adopted. See the redlined paragraph below.* As with other modes of service, however, actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service.*}* Service by other agencies is complete on delivery to the designated agency.

Finally, subparagraph (D) authorizes adoption of local rules providing for service through the court. Electronic case filing systems will come to include the capacity to make service by using the court's facilities to transmit all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, making use of the court's transmission facilities to serve the filed paper on all other parties. Because service is under subparagraph (D), consent must be obtained from the persons served.

{Note: if the additional three days are allowed, as discussed with Rule 6(e), this paragraph will be changed.} Service under subparagraph (D) does not allow the additional time provided by Rule 6(e) when service is made by mail under subparagraph (B). Electronic service commonly is effected with great speed. A party should consent to receive service by electronic or other means only as to modes that are trusted to provide prompt actual notice. By giving consent, a party also accepts the responsibility to monitor the appropriate facility for receiving service.

[**Version 1**: If we add this to the rule: Consent to service under Rule 5(b)(2)(D) must be in writing, which can be provided by electronic means. The writing should specify the means of service, including the format for electronic service; the address to be used; and whether consent is given as to all papers in the action or only as to specified papers.] [**Version 2**: Prudent parties will seek and give consent in writing or in preserved electronic form. The writing should specify the means of service, including the format for electronic service; the address to be used; and whether consent is given as to all papers in the action or only as to specified papers. A district court may, by local rule, establish a registry that allows advance consent to service by specified means for future actions.]

Paragraph (3) addresses a question that is most likely to arise from a literal reading of the provisions that service by mail or by means consented to under paragraph 2(D) is complete on mailing, transmission, or delivery to the agency designated to make delivery. None of these means

of notice is infallible. The risk of non-receipt falls on the person being served. This risk has been accepted for traditional means of service; it is justified for the new means of service authorized by paragraph 2(D) by the consent of the person to be served. But the risk should not extend to situations in which the person attempting service learns that the attempted service in fact did not reach the person to be served. Given actual knowledge that the attempt failed, service is not effected. The person attempting service must either try again or show circumstances that justify dispensing with service. Similar questions may arise with respect to service by more traditional means — in sufficiently unusual circumstances, it may become clear that even "delivery" to the person served did not actually "reach" the person, as for example if delivery were made by handing a paper to a sleeping person and the person making service then observed someone else remove the paper. The only situation in which actual knowledge should not defeat service is when service is made on a person who has no known address by leaving a copy with the clerk of the court under subdivision (b)(2)(C). The purpose of (b)(2)(C) is to throw the burden of inquiry onto a party who cannot be identified or who fails to provide the court with current address information.

Summary of Comments

Hurshal C. Tummelson, Esq., 99-CV-002: Addressing his comments to Rules 5(b), 65, 77(d), and 81, focuses on the "consented to by the person served" element of proposed Rule 5(b)(2)(D). Suggests "some specific clarification with reference to this form of service" because "there are so many possible means of service electronically or otherwise which might be used that the end result could be very confusing."

Jack E. Horsley, Esq., 99-CV-004 (Nov. 2, 1999 installment): "[E]lectronic means" may not be clear to all readers. It might be expanded to read: "Internet, fax, computer transmittal or other electronic means." In the November 11 installment concludes that "authorizing service by electronic means is consistent with current developments."

Joseph W. Phebus, Esq., 99-CV-006: Relays information from the firm's computer specialist. The e-mail system used by the firm provides date and time stamping for incoming and outgoing mail. It also automatically provides notice that a message is not delivered. If the address is not valid, notice is provided immediately. If the address is valid, the system attempts delivery every 20 minutes for four hours, then every four hours for the next 48 hours; at the end of that period, notice is given if delivery could not be accomplished.

David E. Romine, Esq., 99-CV-007: Strongly favors the "complete on transmission" rule. This rule is clear. Clarity prevents doubts and ensuing disputes about the time for responding. If service were made complete only on receipt, every party would need to consult every other party to confirm the time of receipt, and then would need feel compelled to send a written memorial of the understanding to every other party. "What a waste." The ambiguity will be even worse when — as often happens — electronic service is made on a Friday afternoon. "[T]here will be a four-day window of plausibility," and the window "would be extended by holidays, vacations, or even business trips * * *." Resolution of disputes, finally, would turn on fact disputes that will be burdensome to litigate.

Charles L. Schlumberger, Esq., 99-CV-008: Opposes electronic service, even with consent. Notes that he had difficulty transmitting these comments to the Administrative Office. Electronic service will be abused — as it is, attorneys often fax papers late in the evening. Is round-the-clock

monitoring of fax and e-mail to be required? Even from out-of-town? Must an attorney defeat the security system that prevents even staff from reading the attorney's e-mail? If papers contain sensitive or protected information, the e-mail system offers no reliable security unless the information is encrypted. There should be express provisions detailing whether consent can be open-ended for an entire action, specific for particular papers, or revoked. Filing by electronic means is proper, notice under Rule 77(d) by electronic means is proper, but not service by attorneys — "I trust the clerks but not the lawyers."

Hon. Susan Pierson Sonderby, 99-CV-010: Service by electronic means or fax "should be valid, irrespective of consent, where available to the recipient." If the recipient is not equipped to receive such messages, the person responsible for making service can resort to mail or personal service. At the least, Rule 5(b) should authorize local district rules that permit electronic service without consent of the person served. And the provision for "other means" is puzzling: commercial express carrier service is routine now, on the theory that delivery constitutes hand delivery.

J. Michael Schaefer, Esq., 99-CV-011: There should be a page limit on fax transmissions: "I have had 50 pages faxes dumped into my machine, creating a burden to deal with unattached bulk paper and dissipating a toner supply." And seems to urge that "any pleading exceeding 10 pages" should be permitted only with the specific consent of the recipient no matter what method of service is used.

Joanne Fitzgerald Ross, Esq., for State Bar of Michigan Committee of the United States Courts, 99-CV-012: Approves proposed Rule 5(b), but would amend the proposal to require simultaneous mailing of a clean copy of any document served by fax.

Committees of the Association of the Bar of the City of New York, 99-CV-013: Supports the basic proposal; the requirement of consent, and the exclusion of initial service of process, "provide adequate safeguards of due process rights." Something should be done to make it clear that consent can be given either for all service during an action or only for service of specified papers. Some recipients may be reluctant to commit to the obligation to monitor continually for electronic receipt, which "may require a technical office capacity that is currently unavailable to some practitioners." It would help to prepare a Consent Form that accommodates various forms of service, provides specific address information, and is filed with the court. The Consent Form would specify whether consent is for all purposes of the action or is more limited. It is proper to make service complete on transmission, but some additional time should be provided to respond because messages often "must travel through multiple servers, compounding the risk of technical failures." See the comment on Rule 6(e).

David W. Ogden, Acting Assistant Attorney General, Civil Division, United States Department of Justice, 99-CV-014: Fully supports use of electronic service with consent of the person served. But there is a risk that implied consent will be found, even from such simple acts as listing a fax or e-mail address on a letterhead. Rule 5(b)(2)(D) should be amended to refer to "other means, including electronic means, consented to in writing by the person served." And the Committee Note should include this added language:

> To be valid under subparagraph (D), consent must be explicit and in writing, and may not be implied. Parties are encouraged to specify the scope and duration of the consent, including, at a minimum, the persons to whom service should be made, the appropriate address or location for such service (e.g., for electronic service, the e-mail address or fax machine number), the format to be used for attachments, and the filings within a lawsuit to which the consent applies (e.g., the consent applies to all filings, only certain filings, or all non-jurisdictional filings). Such written consent may be provided through electronic communication.

Ralph W. Brenner, Esq., David H. Marion, Esq., and Stephen A. Madva, Esq., 99-CV-015: Support Rule 5 and 77 proposals. The "increase in efficiency will allow for our office to provide for more prompt and less costly service for our clients."

Francis Patrick Newell, Esq., 99-CV-016: Supports the Rule 5 and 77 proposals in terms similar to 99-CV-015.

William A. Fenwick,Esq.; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: (1) As a matter of style, urges that in 5(b)(1) and 5(b)(2) the expression "service is made" be changed to "service shall be made"; the change eliminates ambiguity and indicates clearly "that this provision is mandatory." (2) The reference to "address" in 5(b)(2)(B) and (C) should specify home address, office address, or either [present Rule 5(b) does not provide this specification]. (3) The provision that service is complete on "transmission" is ambiguous. The rule or the Committee Note should state that "service is complete upon successfully serving the document from the sender's server to the e-mail address designated in court papers by recipient." And it should make clear that the proper e-mail address is the one specified in the consent or in court papers.

Mark D. Reed, Esq., 99-BK-005: Wholeheartedly approves electronic service "(i.e. facsimile)"; "this manner of service is more effective than ordinary mail."

Rule 6(e)

The Advisory Committee recommended that no change be made in Civil Rule 6(e) to reflect the provisions of Civil Rule 5(b)(2)(D) that, with the consent of the person to be served, would allow service by electronic or other means. Absent change, service by these means would not affect the time for acting in response to the paper served. Comment was requested, however, on the alternative that would allow an additional 3 days to respond. The alternative Rule 6(e) amendments are cast in a form that permits ready incorporation in the Bankruptcy Rules. Several of the comments suggest that the added three days should be provided. Electronic transmission is not always instantaneous, and may fail for any of a number of reasons. Providing added time to respond will not discourage people from asking for consent to electronic transmission, and may encourage people to give consent. The more who consent, the quicker will come the improvements that will make electronic service ever more attractive. Consistency with the Bankruptcy Rules will be a good thing. (Two of the comments suggested that one day should be allowed for electronic service or overnight courier; that may be drawing the line too fine.)

Rule 6(e)

(e) Additional Time After Service ~~by Mail~~ under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party ~~by mail~~ under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

Committee Note

The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including — with the consent of the person served — service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

Summary of Comments

Rule 6(e)

Robert F. Baker, Esq., 99-CV-001: Favors extending the 3-day rule to "any method of service other than personal delivery. This would cover those situations where electronic service is made on week-ends or the recipient is away from their home or office for three days or less."

James E. Seibert, Esq., 99-CV-003: The 3-day rule should apply "to all service, other than personal delivery," so "there will be less confusion" and consistency with the bankruptcy rules.

John P. Calandra, Esq., 99-CV-005: Wants 3-days in electronic service cases. Electronic service late Friday might not be seen until Monday, or after a further week for vacation. "There are enough sources of pressure on our practices without imposing a new one."

Joseph W. Phebus, Esq., 99-CV-006: Relays the responses of the firm's computer specialist. The

specialist, focusing on date and time stamping and eventual notice that a message is not delivered, believes there is no need for the extra three days.

David E. Romine, Esq., 99-CV-007: Favors the added three days. E-mail is not yet as reliable as postal delivery. Most firms now have the capacity to make or receive service by electronic means, but few actually do so. The fear stems from continuing experience that some messages arrive in garbled or completely unusable form. It may take a few days to reach the other attorney and arrange for usable delivery. A party who is thinking of resort to electronic service is not likely to be deterred by a rule allowing an additional three days to respond — "[m]y decision as to method of service has never been driven by my opponent's response time," and the desire to shorten response time does not seem to affect other lawyers in deciding between personal service or mail service. The added three days, in short, will not discourage people from asking for consent to electronic service, and will encourage people to give consent.

Charles L. Schlumberger, Esq., 99-CV-008: The three-day rule should be dropped entirely; all current deadlines could be extended by three or five days. "But ultimately, who really cares? If someone needs three days, they're going to get the extension in just about every case, unless they've managed to badly get on the wrong side of the judge."

Hon. Susan Pierson Sonderby: agrees that Rule 6(e) should not be amended to provide an additional three days following service by electronic means. The three days allowed for service by mail reflects the typical period required for delivery by mail. Electronic service should "entail the presumption of same day delivery."

Joanne Fitzgerald Ross, Esq., for State Bar of Michigan Committee of the United States Courts, 99-CV-012: Recommends against extending the response time when service is made under Rule 5(b)(2)(D), in part because of the recommendation that Rule 5(b)(2)(D) should be amended to require that service by fax be supplemented by simultaneously mailing a clean copy of the document.

Committees of the Association of the Bar of the City of New York, 99-CV-013: Recommends that one additional day be allowed when service is made by electronic means or by overnight courier, and that three additional days be allowed when service is made by non-overnight courier service. This balances the incentives for the party asking for consent to alternative means of service and for the party asked to give consent.

David W. Ogden, Acting Assistant Attorney General, Civil Division, United States Department of Justice, 99-CV-014: Favors at least one added day. Current e-mail technology "is not always instantaneous and is not uniformly reliable." Few e-mail systems have "return receipt" mechanisms that are as reliable as those available for fax transmission. If large volumes of material are transmitted, the receiving equipment may lack the ability to store or print the material. Additional time also will encourage use of electronic service. Expanded use will encourage more rapid development of legal and technical standards, and will prompt lawyers to develop better methods for dealing with incoming materials. These developments will speed the migration toward electronic service.

Ralph W. Brenner, Esq., David H. Marion, Esq., Stephen A. Madva, Esq., 99-CV-015: Comments at the end that consistency between Civil Rules and Bankruptcy Rules "will enhance speedy and

smooth processing of litigation." This comment may be intended to bear on the Rule 6(e) question. (The same comment is made by Francis Patrick Newell, 99-CV-016.)

William A. Fenwick,Esq.; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: The extra three days should be given. This will encourage consent; it reflects the potential for delay in transmission; and it will avoid any incentive to litigation gamesmanship.

Hon. Louise de Carl Adler, for Conference of Chief Bankruptcy Judges of Ninth Circuit, 99-BK-009: There are good arguments on both sides of the extra three-days question, but "we unanimously concluded that whatever policy is ultimately adopted, it should be the same for both the bankruptcy rules and the civil rules."

Martha L. Davis, Esq., for Executive Office for U.S. Trustees, 99-BK-012: Supports giving the additional three days. E-mail and other means of communication are still infants, and will experience technical difficulties. A transmitted message may be received after significant delay, and may not be intact; attached files may be corruped and require retransmission; incompatible wordprocessing programs may create difficulties; offices with many lawyers may need to develop tracking systems. Consent will be encouraged by adding the three days. The three-day rule is familiar for mail service, and has not unduly delayed proceedings. If the three days are not allowed, parties may seek time extensions. And, looking to Civil Rule 6(e), uniformity between the bankruptcy and civil rules is important.

Rule 65. Injunctions

(f) Copyright impoundment. This rule applies to copyright impoundment proceedings.

Committee Note

New subdivision (f) is added in conjunction with abrogation of the antiquated Copyright Rules of Practice adopted for proceedings under the 1909 Copyright Act. Courts have naturally turned to Rule 65 in response to the apparent inconsistency of the former Copyright Rules with the discretionary impoundment procedure adopted in 1976, 17 U.S.C. § 503(a). Rule 65 procedures also have assuaged well-founded doubts whether the Copyright Rules satisfy more contemporary requirements of due process. See, e.g., *Religious Technology Center v. Netcom On-Line Communications Servs., Inc.*, 923 F.Supp. 1231, 1260-1265 (N.D.Cal.1995); *Paramount Pictures Corp. v. Doe*, 821 F.Supp. 82 (E.D.N.Y.1993); *WPOW, Inc. v. MRLJ Enterprises*, 584 F.Supp. 132 (D.D.C.1984).

A common question has arisen from the experience that notice of a proposed impoundment may enable an infringer to defeat the court's capacity to grant effective relief. Impoundment may be ordered on an ex parte basis under subdivision (b) if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. Such no-notice procedures are authorized in trademark infringement proceedings, see 15 U.S.C. § 1116(d), and courts have provided clear illustrations of the kinds of showings that support ex parte relief. See *Matter of Vuitton et Fils S.A.*, 606 F.2d 1 (2d Cir.1979); *Vuitton v. White*, 945 F.2d 569 (3d Cir.1991). In applying the tests for no-notice relief, the court should ask whether impoundment is necessary, or whether adequate protection can be had by a less intrusive form of no-notice relief shaped as a temporary restraining order.

This new subdivision (f) does not limit use of trademark procedures in cases that combine trademark and copyright claims. Some observers believe that trademark procedures should be adopted for all copyright cases, a proposal better considered by Congressional processes than by rulemaking processes.

Summary of Comments

The only comments are incidental to the brief comments on the Copyright Rules of Practice, set out below. They approve the proposal.

Rule 77(d)

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry ~~by mail~~ in the manner provided for in Rule 5(b) upon each party who is not in default for failure to appear, and shall make a note in the docket of the ~~mailing~~ service. Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers. * * *

Committee Note

Rule 77(d) is amended to reflect changes in Rule 5(b). A few courts have experimented with serving Rule 77(d) notices by electronic means on parties who consent to this procedure. The success of these experiments warrants express authorization. Because service is made in the manner provided in Rule 5(b), party consent is required for service by electronic or other means described in Rule 5(b)(2)(D). The same provision is made for a party who wishes to ensure actual communication of the Rule 77(d) notice by also serving notice. *{Note: The next sentence was not deleted when the committee deleted parallel material from the Note to Rule 5(b). It should be deleted unless something of the sort is restored to the Rule 5(b) Note.}* As with Rule 5(b), local rules may establish detailed procedures for giving consent.

Summary of Comments

Rule 77(d)

Jack E. Horsley, Esq., 99-CV-004: Recommends adding these words: "the clerk shall serve a notice of the entry by hand or otherwise in the manner provided for in Rule 5(b) * * *."

Charles L. Schlumberger, Esq., 99-CV-008: Favors electronic notice from the clerk, although not among lawyers. The Eighth Circuit's VIA program seems to work satisfactorily.

Hon. Susan Pierson Sonderby, 99-CV-010: there is a drafting error at the end of the first sentence, to be corrected: "and shall make a note in the docket of the ~~mailing~~ service." (A similar suggestion is made by the Committees of the Association of the Bar of the City of New York, 99-CV-013, except that they would change "mailing" to "transmission." "Service" seems to fit better the general incorporation of Rule 5(b).)

William A. Fenwick,Esq.; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: They propose deleting the second sentence of present Rule 77(d), which authorizes a party to serve notice of the entry of judgment. This provision is characterized as "excess verbiage." The relationship of this sentence to Appellate Rule 4(a)(6)(A) is not noted.

Michael E. Kunz, Clerk of Court, E.D.Pa., 99-CV-018: Provides extensive statistics on the highly successful use of facsimile transmission to provide Rule 77(d) notice. The program "has been remarkably successful," effecting notice more rapidly and at lower cost than postal delivery. Mr.

Kunz is pleased that his recommendation for amendments in Rule 5(b) and 77(d) has been endorsed by the Advisory Committee.

Rule 81. Applicability in General

(a) ~~To What~~ Proceedings to which the Rules Apply~~icable.~~

(1) These rules do not apply to prize proceedings in admiralty governed by Title 10, U.S.C., §§ 7561-7681. They do ~~not~~ apply to proceedings in bankruptcy as provided by the Federal Rules of Bankruptcy Procedure ~~or to proceedings in copyright under Title 17, U.S.C., except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States. They do not apply to mental health proceedings in the United States District Court for the District of Columbia~~. * * *

Committee Note

Former Copyright Rule 1 made the Civil Rules applicable to copyright proceedings except to the extent the Civil Rules were inconsistent with Copyright Rules. Abrogation of the Copyright Rules leaves the Civil Rules fully applicable to copyright proceedings. Rule 81(a)(1) is amended to reflect this change.

The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub.L. 91-358, 84 Stat. 473, transferred mental health proceedings formerly held in the United States District Court for the District of Columbia to local District of Columbia courts. The provision ~~applying~~ that the Civil Rules do not apply to these proceedings is deleted as superfluous.

The reference to incorporation of the Civil Rules in the Federal Rules of Bankruptcy Procedure has been restyled.

Summary of Comments

Prof. Peter Lushing, 99-CV-009: The Committee Note to Rule 81 should say that the amendment deletes the provision that the rules do not apply in D.C. mental health proceedings.

RULES OF PRACTICE AS AMENDED

Rule 1

Proceedings in actions brought under section 25 of the Act of March 4, 1909, entitled "An Act to amend and consolidate the acts respecting copyright", including proceedings relating to the perfecting of appeals, shall be governed by the Rules of Civil Procedure, in so far as they are not inconsistent with these rules.

Rule 3

Upon the institution of any action, suit or proceeding, or at any time thereafter, and before the entry of final judgment or decree therein, the plaintiff or complainant, or his authorized agent or attorney, may file with the clerk of any court given jurisdiction under section 34 of the Act of March 4, 1909, an affidavit stating upon the best of his knowledge, information and belief, the number and location, as near as may be, of the alleged infringing copies, records, plates, molds, matrices, etc., or other means for making the copies alleged to infringe the copyright, and the value of the same, and with such affidavit shall file with the clerk a bond executed by at least two sureties and approved by the court or a commissioner thereof.

Rule 4

Such bond shall bind the sureties in a specified sum, to be fixed by the court, but not less than twice the reasonable value of such infringing copies, plates, records, molds, matrices, or other means for making such infringing copies, and be conditioned for the prompt prosecution of the action, suit or proceeding; for the return of said articles to the defendant, if they or any of them are adjudged not to be infringements, or if the action abates, or is discontinued before they are returned to the defendant; and for the payment to the defendant of any damages which the court may award to him against the plaintiff or complainant. Upon the filing of said affidavit and bond, and the approval of said bond, the clerk shall issue a writ directed to the marshal of the district where the said infringing copies, plates, records, molds, matrices, etc., or other means of making such infringing copies shall be stated in said affidavit to be located, and generally to any marshal of the United States, directing the said marshal to forthwith seize and hold the same subject to the order of the court issuing said writ, or of the court of the district in which the seizure shall be made.

Rule 5

The marshal shall thereupon seize said articles or any smaller or larger part thereof he may then or thereafter find, using such force as may be reasonably necessary in the premises, and serve on the defendant a copy of the affidavit, writ, and bond by delivering the same to him personally, if he can be found within the district, or if he can not be found, to his agent, if any, or to the person from whose possession the articles are taken, or if the owner, agent, or such person can not be found within the district, by leaving said copy at the usual place of abode of such owner or agent, with a person of suitable age and discretion, or at the place where said articles are found, and shall make immediate return of such seizure, or attempted seizure, to the court. He shall also attach to said articles a tag or label stating the fact of such seizure and warning all persons from in any manner interfering therewith.

Rule 6

A marshal who has seized alleged infringing articles, shall retain them in his possession, keeping them in a secure place, subject to the order of the court.

Rule 7

Within three days after the articles are seized, and a copy of the affidavit, writ and bond are served as hereinbefore provided, the defendant shall serve upon the clerk a notice that he excepts to the amount of the penalty of the bond, or to the sureties of the plaintiff or complainant, or both, otherwise he shall be deemed to have waived all objection to the amount of the penalty of the bond and the sufficiency of the sureties thereon. If the court sustain the exceptions it may order a new bond to be executed by the plaintiff or complainant, or in default thereof within a time to be named by the court, the property to be returned to the defendant.

Rule 8

Within ten days after service of such notice, the attorney of the plaintiff or complainant shall serve upon the defendant or his attorney a notice of the justification of the sureties, and said sureties shall justify before the court or a judge thereof at the time therein stated.

Rule 9

The defendant, if he does not except to the amount of the penalty of the bond or the sufficiency of the sureties of the plaintiff or complainant, may make application to the court for the return to him of the articles seized, upon filing an affidavit stating all material facts and circumstances tending to show that the articles seized are not infringing copies, records, plates, molds, matrices, or means for making the copies alleged to infringe the copyright.

Rule 10

Thereupon the court in its discretion, and after such hearing as it may direct, may order such return upon the filing by the defendant of a bond executed by at least two sureties, binding them in a specified sum to be fixed in the discretion of the court, and conditioned for the delivery of said specified articles to abide the order of the court. The plaintiff or complainant may require such sureties to justify within ten days of the filing of such bond.

Rule 11

Upon the granting of such application and the justification of the sureties on the bond, the marshal shall immediately deliver the articles seized to the defendant.

Rule 12

Any service required to be performed by any marshal may be performed by any deputy of such marshal.

Rule 13

For services in cases arising under this section the marshal shall be entitled to the same fees

~~as are allowed for similar services in other cases.~~

Summary of Comments

Jack E. Horsley, Esq., 99-CV-004 (Nov. 2 installment): The observation that the Copyright Rules are antiquated is "well taken." But is concerned that perhaps Copyright Rule 13 should be renumbered and preserved in some form because there is "nothing else which would address the matter of service in disputes involving the marshal or their being entitlement to the same fees as those allowed for similar services."

Charles L. Schlumberger, Esq., 99-CV-008: "Wholeheartedly" agrees with abrogation and the corresponding changes in Rules 65(f) and 81. Not only are some lawyers unaware of the Copyright Rules; "there are some judges who fall into that category, too!"

William A. Fenwick,Esq.; David M. Lisi, Esq.; David C. McIntyre, Esq.; Mitchell Zimmerman, Esq. for Fenwick & West, 99-CV-017: The firm specializes in high technology law, including copyright law. They "fully support" abrogation of the copyright rules and the corresponding changes in Rules 65(f) and 81. "[T]he Copyright Rules of Practice are arcane and fundamentally unfair."

IV

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MEMORANDUM

To: Participants in March 27 Mini-Conference on Discovery of Computerized Information
From: Richard Marcus, Special Reporter, Advisory Committee on Civil Rules
Date: March 8, 2000
Re: Agenda for mini-conference and participants list

The mini-conference will be held in the Alumni Reception Center at Hastings College of the Law, on the second floor of 200 McAllister St., San Francisco. It will begin at 8:30 a.m. on Monday, March 27, 2000. Each participant should receive a background memorandum outlining the issues that we expect to be addressed. This memorandum lays out the agenda and identifies the participants.

The members of the Discovery Subcommittee of the Advisory Committee on Civil Rules are: Hon. David Levi (E.D. Cal.) (chair), Hon. Lee Rosenthal (S.D. Tex.), Hon. Shira Scheindlin (S.D.N.Y), Mark Kasanin, Esq., and Andrew Sherffius, Esq.

The agenda for the mini-conference is as follows. Commentators may be contacting panelists in advance of the event to discuss topics to cover and related matters. Any who have questions might contact me.

Introduction: 8:30-45

Panel I: Problems generated by electronic discovery (8:45 a.m.-10:15 a.m.)

Peter Detkin
Geoffrey Howard
Reed Kathrein
Joe McCray
John F. Tully
Dean Mary Kay Kane (moderator)

Panel II: Possible reactions or solutions to these problems (10:30 a.m.-11:45 a.m.)

Hon. Richard Best
Barbara Caulfield
Hon. James Francis
Hon. Edward Infante
Hon. James M. Rosenbaum
Anne Weismann
Hon. William W Schwarzer (moderator)

Panel III: Technical perspectives on these problems and possible solutions (12:00 a.m.-1:00 p.m.)

Joan E. Feldman
James E. Gordon
Andy Johnson-Laird
Andy Rosen
Kenneth J. Withers (moderator)

Conclusion: 1:00 p.m.

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Discovery of Electronic Information
March 27, 2000

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MEMORANDUM

To: Participants in March 27 Mini-Conference on Discovery of Computerized Information
From: Richard Marcus, Special Reporter, Advisory Committee on Civil Rules
Date: March 8, 2000
Re: Tentative list of issues to be covered

This memorandum sketches the issues that we hope will be addressed during the March 27 Mini-Conference on Discovery of Computerized Information of the Discovery Subcommittee of the Advisory Committee on Civil Rules. The conference will be held in the Alumni Reception Center at Hastings College of the Law, on the second floor of 200 McAllister St., San Francisco.

The purpose of the conference is entirely educational. As set forth in more detail below, over the last three years the Advisory Committee has repeatedly been advised that it should pay special attention to discovery of information stored in electronic form. Because these issues appear to depend on specialized knowledge, the Discovery Subcommittee has determined that it should convene this mini-conference in order that its members can be educated on these questions. In addition, the Federal Judicial Center has an ongoing Electronic Discovery Project, and representatives of the Center will be present to gather information that would assist it in achieving the objectives of that project. Finally, revisions of the Manual for Complex Litigation are under way, and information developed during the mini-conference may be useful in formulating new

provisions for the Manual.

It is important to stress at the outset that at present the Advisory Committee is considering no specific rule amendment to deal with issues related to discovery of electronic materials, and the question whether any rule changes would be appropriate remains very much open. Indeed, one of the major objectives of this mini-conference is to assist the Discovery Subcommittee in reaching a tentative conclusion about whether rule amendments or some other strategy would be preferable methods for addressing any problems generated by discovery of computerized information.

BACKGROUND

"It may well be that Judge Charles Clark and the framers of the Federal Rules of Civil Procedure could not foresee the computer age."[1] But in the 1960's the rulesmakers began to consider the need for discovery regarding computerized material, and Rule 34 was amended in 1970 to include "date compilations from which information can be obtained." Discovery of such material evidently began to become important in the decade or so after that. By 1985, one district judge wrote that "[c]omputers have become so commonplace that most court battles now involve discovery of some computer-stored information."[2] Rule 26(a)(1)(B)'s initial disclosure requirement, added in 1993, also requires disclosure regarding "data compilations." As noted below, one issue is whether more pervasive treatment of such discovery in the rules is warranted.

Given the relatively longstanding provisions for discovery

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[1] National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F.Supp. 1257, 1262 (E.D.Pa. 1980).

[2] Bills v. Kennecott Corp., 108 F.R.D. 459, 462 (D. Utah 1985).

of some computerized information, one might ask why the problem should appear to bear special scrutiny presently. One answer seems to be that reliance on computerized storage of information has continued to grow; many estimate that some 30% to 40% of all business information is never reflected in hard copy form. Of course, it is hard to know how to make confident computations of this nature, but such statistical reports accentuate the importance of discovery of material that is in electronic form. The principal focus of those concerned about discovery of electronic information seems not to be this sort of material, however.

It appears instead that the area of most vigorous discussion has been discovery of e-mail messages and other information about use of the Internet. It seems that the recent upsurge in use of e-mail for business and other purposes, and simultaneous increase in use of the Internet, has provoked widespread concerns. Some report that there has been a great increase in the frequency of discovery regarding such materials.[3] Certainly there have been a number of instances in which e-mails have proved to be important evidence, most prominently in the antitrust action brought by the United States against Microsoft Corp. At the same time, books and articles in the professional press about discovery of electronic materials, and continuing education about these issues, bespeak heightened concern about the potential problems of this sort of discovery. Comments received by the Advisory Committee have repeatedly raised these concerns.

Against this background, the goal of the mini-conference is to assess the importance of these developments and forecast future developments in an effort to determine what reaction, if

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[3] See Alan M. Gahtan, Electronic Evidence 1 n.2 (1999) (reporting the DuPont experienced an increase in frequency of discovery requests explicitly referring to electronic evidence or e-mail from 2% to 30% between 1994 and 1999).

any, is appropriate. The conference will attempt to accomplish this objective by utilizing three panels. The schedule is as follows:

Introduction: 8:30-45

Panel I: Problems generated by electronic discovery (8:45 a.m.-10:15 a.m.)

Peter Detkin
Geoffrey Howard
Reed Kathrein
Joe McCray
John F. Tully
Dean Mary Kay Kane (moderator)

Panel II: Possible reactions or solutions to these problems (10:30 a.m.-11:45 a.m.)

Hon. Richard Best
Barbara Caulfield
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Hon. James M. Rosenbaum
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Hon. William W Schwarzer (moderator)

Panel III: Technical perspectives on these problems and possible solutions (12:00 a.m.-1:00 p.m.)

Joan E. Feldman
James E. Gordon
Andy Johnson-Laird
Andy Rosen
Kenneth J. Withers (moderator)

Conclusion: 1:00 p.m.

Because the goal of the event is educational, participants should feel free to offer thoughts during any panel, or to ask questions. The remainder of this memorandum will suggest some ideas for discussion. Obviously, this is a preliminary and tentative listing; the objective of the conference is to flesh it out and to evaluate the points introduced here.

PANEL I -- THE PROBLEMS

A fundamental starting point for discussing any problems of discovery is to realize that concern about problems of discovery has been almost continuous for more than a quarter century. That concern has produced several episodes of rule revision designed to minimize undue costs while preserving the fundamental commitment to full disclosure of pertinent material. The fruits of the most recent such effort are now being considered by the Supreme Court.

This background is important for the current topic because a central question is whether the concerns voiced about discovery of electronic materials really are qualitatively different from those raised about discovery in the past. The invention of the photocopy machine, for example, meant that much more material was subject to discovery than had previously been the case. And the increasing importance of large organizational litigants has often meant the discovery requests could call for burdensome information gathering from a large variety of places.

Against this background, there may nonetheless be reasons why discovery of electronic material is different, although it is difficult to determine whether, on balance, the difference is qualitative or quantitative.

Initially, distinctive features of electronic material seem to include the following:

(1) Potential ease of searching: At least potentially, it would seem that electronically stored textual information might be searched more easily for certain things (e.g., the occurrence of a certain name or word) than hard copy materials. Indeed, some employers are reportedly employing "electronic sniffers" that monitor e-mail activities of employees. Whether these potential advantages over traditional hard copy review are often important, and whether word searches would be an adequate substitute for laborious document-by-document review, remain open questions.

(2) Additional information on electronic versions of documents: Electronic versions of documents may contain "embedded information" that a hard copy would not. It may be that additional information is available about the dates of creation or modification of a document. In a somewhat similar vein, access to the hard disk of a personal computer may provide details about the Internet usage of the user of the computer due to the presence of "cookies" resulting from visiting Internet sites, or for other reasons. On balance, some electronically stored information may provide insights of a sort not available from hard copy discovery.

(3) Durability: Electronic materials, whether on hard disks or floppy disks, can last almost forever, and using the "delete" function does not actually remove them from the disk. Even overwritten files may sometimes be revived by forensic computer efforts. Although photocopy machines multiplied the number of documents and copies that exist, it would seem that hard copy items are more often effectively discarded than electronic ones.

(4) Additional search locations: Computers offer new places to search that don't exist with hard copy materials.

Backup tapes are often created (albeit for limited periods) to back up an entire computer system's work product. Hard disks may contain backup or other interim versions of a document. Thus, some suggest examining the UNDO file in Wordperfect, which may store the last 300 to 500 document alterations. E-mail messages may be copied and stored on a number of servers. Similarly, printers and fax machines have a memory capacity for several hundred pages of material that could be plumbed if such "heroic" efforts seemed warranted.

(5) Spoliation concerns and problems: Although electronic materials may contain additional "embedded" information that may permit tracing of changes in the documents, they may also be singularly susceptible to alteration. Preventing alteration could involve huge efforts. The simple act of turning on a personal computer might alter material on the hard disk, and using the computer would probably overwrite some "deleted" data, so an extreme version of document preservation could prohibit any use of an organization's computers until copies of all hard disks were made. In a sense, this consequence is a reflection of the unusual durability of "discarded" documents (item 3 above).

(6) Heightened importance of on-site copying or inspection: Given the special features of computerized information, on-site inspection may be considered important more often than with hard copy information. This activity could be designed to permit the party seeking discovery to direct specific inquiries at the responding party's computer system, or to permit the making of a copy of part of the computer system or files of the responding party. In either instance (particularly with copies of a system), there may be specialized trade secret issues resulting from such

access.

No doubt the above list misperceives some aspects of electronically-stored information, and overlooks other ways in which discovery of that information can be viewed as distinctive. Nonetheless, the listing provides a starting place for considering whether the problems that result from this sort of discovery warrant special treatment in the rules, more extensive attention in the Manual for Complex Litigation, or enhanced judicial education efforts. Accordingly, it may be that Panel I will address problems arising in some of the following scenarios:

(1) Large, undifferentiated data files: The requesting party requests production of e-mail messages relevant to the issues in the action. The responding party states that all e-mail is stored in a large database, and there is no readily-available method to search for an retrieve e-mail messages responsive to the request.

It is common for large numbers of digital documents, particularly e-mail and word processing files, to be stored on active, backup, or archival media without an intelligible file structure. This may make discovery of particular documents costly and time-consuming. Judges need to be aware of the technical capabilities and resources of the producing party to answer electronic discovery requests, and conversely, the technical capabilities and resources of the requesting party to effectively manage a potentially large production.

(2) Lack of electronic records management: The requesting party intends to request relevant electronic business documents in a number of categories, and wishes preliminarily to either obtain inventories, file lists, or other records management documentation, or to depose the respondent's electronic records keeper under Rule 30(b)(6).

The responding party states that it is unable to produce any electronic records management documentation. The proffered deponent for the Rule 30(b)(6) deposition is unable to adequately answer the requesting party's questions.

In some businesses, it has reportedly become common for the traditional records management function to be downsized or eliminated entirely. The assumption seems to be that newly created Management Information Services (MIS), Information Technology (IT), or Information Services (IS) departments will save and store all documents in electronic form. In these situations, it is often difficult to create a useful "roadmap" to narrow or guide discovery, or identify a knowledgeable "keeper of the records" for deposition purposes.

(3) Data proliferation: The requesting party requests all non-identical copies and versions of electronic documents. The responding party states that this will multiply the total volume of electronic document production by ten times.

Documents and data are regularly copied for distribution, backup, and archival purposes, often in "interim" or "draft" stages. Ordinary correspondence often goes through several drafts. Reports, contracts, and other documents of greater importance are more likely to be reviewed and revised repeatedly. That process may involve copying the interim versions onto floppy disks that are used at home or other remote locations. Unearthing all these interim versions may be possible, but could involve very substantial efforts. It is unclear to us how often such requests are made, or when such efforts should be considered worthwhile.

(4) Legacy data: The requesting party requests electronic documents within a specified period of time,

several years prior to the commencement of the litigation. The responding party says that the electronic documents requested may or may not exist, but if they do exist they were created using software that is no longer available, created on computers that are no longer available, or stored on media that is no longer in common use. Experts on both sides are ready to debate the feasibility and cost of data restoration, analysis, and ultimate production.

In part due to rapid changes in information technology, and in part due to the failure of many businesses, institutions, and government agencies to establish and maintain consistent records management procedures, a significant portion of a responding party's historical electronic document collection may be difficult, costly, or impossible to retrieve.

(5) Form of production: The requesting party requests all e-mail messages relevant to the issues in dispute. The responding party produces several hundred thousand pages of e-mail messages in chronological order, as they are stored on the respondent's archival media. The requesting party objects to the form of the production, stating that (1) it will be costly and difficult to search the printouts for significant messages, and (2) the printout does not contain system data to enable the requesting party to conclusively identify the sender, recipient, date, or other information necessary for authentication.

Determining the most appropriate form of production for electronic documents is a complicated question involving the technical capabilities and resources of the parties, the intended use of the materials, possible proprietary interests of third parties in the software or hardware necessary to view or manipulate the data, and the accuracy or completeness of the data as presented in various formats or on various media. However,

the fact that the original documentation is in electronic form presents the court with an opportunity to encourage the parties to reduce costs by exchanging documents in electronic form or setting up an electronic document repository. This can be especially cost effective in multi-party and multi-jurisdictional cases.

(6) Nonproduction: The requesting party requests several categories of electronic documents relevant to the issues in dispute. The responding party produces some, but not all of the documents requested. The responding party states that the remaining relevant, non-privileged documents no longer exist, as they were stored on back-up media that were overwritten or destroyed in the normal course of business. The requesting party replies that the responding party has failed to demonstrate that there was a "normal course of business" in regards to electronic document retention, and that the backup media containing relevant documents were overwritten or destroyed, either negligently or with unlawful intent, after the commencement of litigation.

The lack of standard electronic document retention policies and procedures, even in large and sophisticated organizations, can make it likely that relevant electronic documents will be destroyed or misplaced prior to production. Spoliation is also a concern due to the ease with which electronic documents can sometimes be deleted or altered.

(7) Demands for on-site inspection: As a follow-up to the dispute over non-production in (6) above, the requesting party retains a computer forensics expert who states in an affidavit that electronic data rarely is entirely destroyed or deleted, and that the relevant electronic documents may be recovered after inspection of the computers and storage

media involved. The responding party objects to inspection on grounds of burden, privilege, and the proprietary and privacy interests of third parties.

The question whether to order an on-site inspection raises a host of issues that will need to be resolved. The potential intrusiveness is great, but the alternatives are sometimes few. The court may find it necessary to fashion a protocol for inspection, or to appoint a neutral expert to make the inspection.

* * * * *

As noted at the outset, the foregoing overview is certainly incomplete, and it also probably identifies some things as problems that actually are not. One goal of the conference is to sort out these concerns.

PANEL II -- POSSIBLE SOLUTIONS

The foregoing has suggested some ideas about solutions. This panel will address the topic frontally. A key issue is whether the most sensible orientation would be to design amendments to the Civil Rules, to focus more on the Manual for Complex Litigation or a document like it, or to emphasize judicial education.

RULE AMENDMENTS

An initial review of the current rules in light of concerns about electronic discovery suggests a number of places in which changes might be made. In order to provide some food for discussion, this memorandum therefore seeks to identify changes that could be considered. <u>None of the following ideas is being proposed here as an amendment, and none has been considered by</u>

any member of the Advisory Committee. Nonetheless, it is worthwhile reflection on the range of possibilities:

- Rule 26(a)(1): The initial disclosure process might be adapted to require some early exchange of concrete and detailed information about electronic storage of data.

- Rule 26(a)(2): The disclosures about expert testimony might be revised to require disclosure of any use of electronic data by an expert in connection with forming opinions to be expressed at trial.

- Rule 26(b)(1): The rule now says that discovery is authorized about "the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things . . ." This seems out of date and could be revised to include explicitly the electronic materials identified in Rules 26(a)(1) and 34(a).

- Rule 26(b)(5): This rule regarding claims of privilege might be modified to take account of the special problems raised in connection with voluminous electronically stored materials. (Note that the Committee has visited this general area before, and concluded that probably more specific provisions are not needed with regard to conventional privilege logs.)

- Rule 26(c): The protective order rule might be revised to take explicit account of the proprietary information, privacy, and other issues raised by this form of discovery.

- Rule 26(d): This rule imposes the discovery moratorium pending the Rule 26(f) conference. It might be the

place to provide rules about spoliation or preservation of electronic materials, if such things were susceptible to treatment in a rule.

- Rule 26(f): This rule could be amended to address electronic materials explicitly, and Form 35 might also be modified the raise the profile of such materials. In particular, there might be provisions inviting the development of a protocol to deal with issues of preservation and spoliation.

- Rule 26(g): The signature requirement might be modified in instances in which discovery is served or responded to in electronic form.

- Rule 30(b)(2) and (3): As electronic media become more important in depositions one might ask whether the current authorization (added only in 1993) for alternative methods of recordation might be expanded or revised to take account of new methods.

- Rule 30(b)(5): The authorization for a deposition notice to require the witness to bring along "documents and tangible things" might be modified to include material stored electronically, although the invocation of Rule 34 probably does the job to the extent Rule 34 does the job.

- Rule 30(b)(6): One might develop a special procedure in the rules for depositions of information systems managers, etc., to provide useful and inexpensive information about how systems work.

- Rule 30(b)(7): This rule now allows the parties to stipulate, and the court to order, that a deposition

"be taken by telephone or other remote electronic means." As the technology of video conferencing improves, perhaps the rules could more actively promote use of that technique.

- Rule 33(a) and (b): These rules might be changed to direct (or authorize parties to insist upon) service of questions and answers in electronic form. The signing requirements would have to be revised accordingly.

- Rule 33(d): The option to produce business records might be revised in some way to take account of the special problems of producing records that are in electronic form, or the methods by which access to that sort of records is to be given.

- Rule 34(a): The description of electronic materials might be modified. The current description was written in 1970, when much less was known about computers. It might be that specifying what sorts of things fall within the term "data compilations" would be desirable because it would make clear that e-mails, etc. are included.

- Rule 34(a): Provisions relating to preservation of electronic materials could be inserted, possibly linked to the making of a document request for those materials.

- Rule 34(a): One could insert a provision on whether, or when, non-identical electronic copies must be produced.

- Rule 34(a): If an appropriate protocol or set of prerequisites for on-site inspection of computerized

materials could be developed, it could be inserted here as a further specification of the circumstances when one may obtain inspection on designated property.

- Rule 34(b): If there are specialized problems relating to production of materials in electronic format, they might be addressed by special rule provisions. The provision added in 1980 regarding the production either as the records are kept in the usual course of business or to correspond with the categories in the request (the last paragraph of this subdivision) might be the place to focus in developing this set of provisions.

- Rule 34(b): A provision might be added explicitly giving the court authority to authorize a "quick peek" at an opponent's documents without having that cause a privilege waiver.

- Rule 37: Here (or elsewhere) some specialized rules about spoliation of electronic materials might be added.

MANUAL FOR COMPLEX LITIGATION

The pertinent provisions of the Manual relating to discovery of electronic information are §§ 21.446, 33.12, and 33.53, copies of which are attached hereto as Exhibit A (p. 20). Instead of trying to add provisions to the Rules to deal with electronic discovery, similar topics could be treated in the Manual. These topics may be more susceptible to the "advice" mode of the Manual than to the harder-edged provisions of the rules. A survey of the various rule amendment ideas noted above may suggest some topics for inclusion. Alternatively, a separate manual directed to the problems of discovery of this sort of information might be preferable. If it is true that this sort of discovery is

important in most cases, it might not be suitable to include provisions dealing with these problems only in a manual designed for "complex" cases.

JUDICIAL EDUCATION

At least some lawyers seem to think that a prime problem with this form of discovery is that some judges do not adequately understand the technical and related issues involved. Judicial education efforts might be a way to overcome that problem, although it would seem likely that the problem would abate with the passage of time anyway. In the same vein, rather than producing a manual dealing with these discovery problems, one might compile a collection of judicial and related solutions to such problems. Some have already come to our attention, most tailored to specific cases. For purpose of promoting discussion, a number of these are attached hereto as examples:

Exh. B: American Bar Association Civil Discovery Standards 29 and 30 (adopted as ABA policy in Aug., 1999) (p. 27)

Exh. C: Playboy Ent. v. Welles, 60 F.Supp.2d 1050, 1054-55 (S.D. Ca. 1999) (p. 32)

Exh. D: Concord Boat Corp. v. Brunswick Corp., W.D. Ark., No. LR-C-95-781, Order of June 26, 1997 (p. 34)

Exh. E: Shaffer-Kloeppel v. General Motors Corp., W.D. Mo. No. 93-0498-CV-W-8, Order of Nov. 10, 1993 (p. 39)

Exh. F: La France v. Padilla, Dist. Ct. of Harris County, TX, No. 90-021866, Order of July 6, 1993 (p. 43)

Exh. G: Supplemental Order to Initial Case Management

Scheduling Order, Hon. William Alsup (N.D. Cal) (p. 47)

Exh. H: Texas Rule of Civil Procedure 196.4 (p. 53)

Exh. I: Memorandum Regarding Possible Rule 16 Conference Questions (p. 54)

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In sum, the hope is that this panel will conclude with guidance to the Subcommittee on whether and how to devise a response to the peculiar problems of discovery of computerized information.

PANEL III: TECHNICAL INSIGHTS

At present, this is the panel about which we are able to offer the least guidance. Our purpose in inviting those who come to these problems from a technical background rather than the background of lawyers working in litigation is to provide a necessary perspective. We understand that lawyers often find it necessary, or at least desirable, to employ outside consultants to assist them in dealing with problems of electronic discovery. The same sort of assistance seems essential to the Committee if it is to understand the issues before it.

Accordingly, we hope that this final panel will offer several sorts of insights. First, it may identify problems that have not been mentioned. Second, it may demonstrate that difficulties thought by lawyers to be problems actually should not be impediments to efficient discovery. Third, it may identify solutions that have not occurred to the lawyers present. Fourth, it may demonstrate that solutions endorsed by some of the lawyers are flawed for technical reasons, or otherwise likely to

fail. Finally, it may be able to forecast the likely development of computerized information and discovery thereof over the coming years, and therefore the likelihood that the problems and solutions discussed will become more or less important due to technological breakthroughs.

* * * * *

In conclusion, we do not expect that specific and clear answers will emerge from this conference. But we do hope that the conference will make it possible for the Subcommittee to address these problems with considerably more confidence than previously possible.

Exh. A - Manual for Complex Litigation (third) (20)

lation, requests for admission,[185] interrogatories, or depositions (particularly Rule 31 depositions on written questions).

21.446 Discovery of Computerized Data

Computerized data have become commonplace in litigation. Such data include not only conventional information but also such things as operating systems (programs that control a computer's basic functions), applications (programs used directly by the operator, such as word processing or spreadsheet programs), computer-generated models, and other sets of instructions residing in computer memory. Any discovery plan must address the relevant issues, such as the search for, location, retrieval, form of production and inspection, preservation, and use at trial of information stored in mainframe or personal computers or accessible "online." For the most part, such data will reflect information generated and maintained in the ordinary course of business. Some computerized data, however, may have been compiled in anticipation of or for use in the litigation (and may therefore be entitled to protection as trial preparation materials). Discovery requests may themselves be transmitted in computer-accessible form; interrogatories served on computer disks, for example, could then be answered using the same disk, avoiding the need to retype them. Finally, computerized data may form the contents for a common document depository (see *supra* section 21.444).

Some of the relevant issues to be considered follow:

Form of production. Rule 34 provides for the production, inspection, and copying of computerized data (i.e., "data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form"); Rule 33(d) permits parties to answer interrogatories by making available for inspection and copying business records, including "compilations," where "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served." The court will need to consider, among other things, whether production and inspection should be in computer-readable form (such as by translation onto CD-ROM disks) or of printouts (hard copies); what information the producing party must be required to provide (such as manuals and similar materials) to facilitate the requesting party's access to and inspection of the producing party's data; whether to require the parties to agree on a standard format for production

185. *See* Fed. R. Civ. P. 36. While admissions are only binding on the party making them, authenticity (as opposed to admissibility) may be established by the admission of any person having personal knowledge that the proffered item is what the proponent claims it to be, see Fed. R. Evid. 901(a), (b)(1), subject to the right of nonadmitting parties to challenge that persons' basis of knowledge. *See In re* Japanese Elec. Prods. Antitrust Case, 723 F.2d 238, 285 (3d Cir. 1983).

of computerized data;[186] and how to minimize and allocate the costs of production (such as the cost of computer runs or of special programming to facilitate production) and equalize the burdens on the parties.[187] The cost of production may be an issue, for example, where production is to be made of E-mail (electronic mail) or voice-mail messages erased from hard disks but capable of being retrieved.

Search and retrieval. Computer-stored data and other information responsive to a request will not necessarily be found in an appropriately labeled file. Broad database searches may be necessary, and this may expose confidential or irrelevant data to the opponent's scrutiny unless appropriate safeguards are installed. Similarly, some data may be maintained in the form of compilations that may themselves be entitled to trade secret protection or that reflect attorney work product, having been prepared by attorneys in contemplation of litigation. Data may have been compiled, for example, to produce studies and tabulations for use at trial or as a basis for expert opinions.[188]

Use at trial. In general, the Federal Rules of Evidence apply to computerized data as they do to other types of evidence.[189] Computerized data may, however, raise unique issues concerning the accuracy and authenticity of the database. Accuracy may be impaired as a result of incorrect or incomplete entry of data, mistakes in output instructions, programming errors, damage and contamination of storage media, power outages, and equipment malfunctions. The proponent of computerized evidence has the burden of laying a proper foundation by establish-

186. For example, the parties may agree on a particular computer program or language and the method of data storage. *See* Martha A. Mills, Discovery of Computerized Information, Legal Times Seminar, June 22, 1993, at tab 6.

187. See *infra* § 21.433 re protective orders allocating costs. *See also* National Union Elec. Corp. v. Matsushita Elec. Indus. Co., Ltd., 494 F. Supp. 1257 (E.D. Pa. 1980) (Becker, J.).

188. Rule 26(a)(2)(B) requires that, unless otherwise stipulated or ordered, a party must disclose in advance of trial (among other things) "the data or other information considered by" an expert witness in forming the opinions to be expressed. However, records computerized for "litigation support" purposes, not considered by an expert or intended for use at trial, may be protected trial preparation materials under Rule 26(b)(3) to the extent that they reveal counsel's decisions as to which records to computerize and how to organize them.

189. For an analysis and checklists, see Gregory P. Joseph, *A Simplified Approach to Computer-Generated Evidence and Animations*, 156 F.R.D. 327 (1994); see also Daniel A. Bronstein, *Leading Federal Cases on Computer Stored or Generated Data*, Scientific Evidence Review, Monograph No. 1 at 92 (ABA 1993). For example, the "business records" exception to the hearsay rule applies to a "data compilation, in any form." Fed. R. Evid. 803(6). A printout or other output of such data readable by sight is an "original" and is required to prove the contents of the data. Fed. R. Evid. 1001(3), 1002. Noncomputerized materials may be computerized during pretrial proceedings and presented in lieu of the individual records as a chart, summary, or calculation. Fed. R. Evid. 1006.

ing its accuracy.[190] Issues concerning accuracy and reliability of computerized evidence, including any necessary discovery, should be addressed during pretrial proceedings and not raised for the first time at trial.[191]

When the data are voluminous, verification and correction of all items may not be feasible. In such cases, verification may be made of a sample of the data. Instead of correcting the errors detected in the sample—which might lead to the erroneous representation that the compilation is free from error—evidence may be offered (or stipulations made) by way of extrapolation from the sample of the effect of the observed errors on the entire compilation. Alternatively, it may be feasible to use statistical methods to determine the probability and range of error.

The complexity, general unfamiliarity, and rapidly changing character of the technology involved in the management of computerized materials may at times make it appropriate for the court to seek the assistance of a special master or neutral expert. Alternatively, the parties may be called on to provide the court with expert assistance, in the form of briefings on the relevant technological issues.

21.447 Discovery from Nonparties

Under Fed. R. Civ. P. 34(c), a nonparty may be compelled to produce and allow copying of documents and other tangibles or submit to an inspection by service of a subpoena under Rule 45; the producing person need not be deposed or even appear personally.[192] A party seeking such production has a duty to take reasonable steps to avoid imposing undue burden or expense on the person subpoenaed.[193] Objections to production must be made in writing by the subpoenaed person; the requesting party must then move for an order to compel produc-

190. The proponent is not required, however, to prove that the tabulation is free from all possible error. Authentication may be provided by "[e]vidence describing a process or system used to produce a result and showing that the process or system produces an accurate result." Fed. R. Evid. 901(b)(9). The standard for authenticity "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). In the case of summaries, accuracy is an issue "for the trier of fact to determine as in the case of other issues of fact." Fed. R. Evid. 1008. Accordingly, the existence or possibility of errors usually affects only the weight, not the admissibility, of the evidence, except when the problems are so significant as to call for exclusion under Rule 403. Of course, if computerized data provided by a party are offered against that party, inquiry into the accuracy of the data may be unnecessary.

191. The court may order that any objections to the foundation, accuracy, or reliability of data are deemed waived unless raised during pretrial (or good cause is shown for the failure to object). *See* Fed. R. Civ. P. 26(a)(3); Shu-Tao Lin v. McDonnell Douglas Transport, Inc., 742 F.2d 45, 48 & n.3 (2d Cir. 1984).

192. Fed. R. Civ. P. 45(c)(2)(A). Despite the absence of a deposition, notice must be given to other parties. Fed. R. Civ. P. 45(b)(1).

193. Fed. R. Civ. P. 45(c)(1).

33.12 Transactional and Economic Data, and Expert Opinions

Antitrust cases often involve the collection, assimilation, and evaluation of vast amounts of evidence regarding numerous transactions and other economic data. Some of this material may be entitled to protection as trade secrets or confidential commercial information. Effective management of such cases depends on the adoption of pretrial procedures to facilitate the production and utilization of this material and its efficient presentation at trial. Among the measures that may be useful are the following:

- **Limiting scope of discovery.** Early attention to the issues may make feasible establishment of reasonable limits on the scope of discovery. Limits may be fixed with reference to the transactions alleged to be the subject matter of the case, to the relevant products or services, or to geographical areas and time periods. Limits should, however, be subject to modification if a need for broader discovery later appears. See generally *supra* section 21.423.
- **Confidentiality orders.** Protective orders may facilitate the expeditious discovery of materials that may be entitled to protection as trade secret or other confidential commercial information (see *supra* section 21.431). Especially if the parties are competitors, provisions may be included that preclude or restrict disclosure by the attorneys to their clients. Particularly sensitive information, such as customer names and pricing instructions, may be masked by excision, codes, or summaries without impairing the utility of the information in the litigation.
- **Summaries; computerized data.** The court should direct the parties to work out arrangements for the efficient and economical exchange of voluminous data. Where feasible, data that exist in computerized form should be produced in computer-readable format. Identification of computerized data may lead to agreement on a single database on which all expert and other witnesses will rely in their testimony. Other voluminous data can be produced by way of summaries or tabulations, subject to appropriate verification procedures to minimize, and more quickly resolve, disputes about accuracy, and obviating extensive discovery of source documents. Such exhibits should be produced well in advance of trial. See generally *supra* sections 21.446 (discovery of computerized data) and 21.492 (summaries).
- **Other sources.** Relevant economic data may be obtainable from government or industry sources more quickly and cheaply than through discovery from the litigants. Accordingly, the court may wish to make an early determination regarding the admissibility of such evidence under Fed. R. Evid. 803(8), (17), and (18).

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employees are usually available. Moreover, where notice is being given in a (b)(2) action at the employer's request, it may be required to bear the cost.

Collective actions are authorized to be brought by employees asserting claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(b), or the Fair Labor Standards Act (FLSA), 29 U.S.C. § 216(b). While all included plaintiffs need to be similarly situated, the possibility of varying defenses does not vitiate a collective action.[1174] The requirements that apply to class actions under Rule 23 need not be met,[1175] although notice should be given of ADEA collective actions.[1176]

33.53 Discovery

In planning the discovery program for employment discrimination litigation, five characteristics should be taken into account:

1. many aspects of the company's employment practices and its workforce may be potentially relevant as circumstantial evidence;
2. most of the information will be within the control of the employer, often in computerized form;
3. except for actions brought by the government, plaintiffs usually have limited resources;
4. expert testimony and complex statistical evidence will play an important role at trial; and
5. trial will often be conducted in stages.

Identification of source materials. Discovery can be greatly simplified and expedited if the parties are directed to exchange core information before discovery begins. That information should include not only that required under Rule 26(a)(1) and the district's local rules or expense and delay reduction plan, but also potentially relevant documentary materials such as statements of employment policies, policy manuals and guides, and an identification and general explanation—perhaps with samples—of the types of records that contain data that may be relevant to the issues in the case. After obtaining this information, plaintiffs may need to depose or interview informally the personnel director or other person responsible for maintaining these records in order to clarify the nature of the information contained in these records, how the information is coded or compiled, and how data may be extracted from the various sources. Employers frequently maintain the same or similar information in different forms. For ex-

1174. *See* Lockhart v. Westinghouse Credit Corp., 879 F.2d 43 (3d Cir. 1989).

1175. *See* Anson v. University of Tex. Health Science Ctr., 962 F.2d 539 (5th Cir. 1991); Owens v. Bethlehem Mines Corp., 108 F.R.D. 207 (S.D. W. Va. 1985).

1176. *See* Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165 (1989).

ample, earnings information may be kept in a personnel file, in tax records, and in payroll records. Job histories of employees may be determined from periodic transfer and promotion records, from individual work record cards, or from personnel files. The company may also have compiled relevant data regarding its workforce and employment practices for reporting to governmental agencies or for use in other litigation. The parties can then determine the most efficient and economical method for the employer to produce, and plaintiffs to obtain, the most relevant information. Because many aspects of the company's employment practices may have some potential relevance as circumstantial evidence, and various records may contain information about these practices, judgment needs to be exercised in deciding what information is necessary and how that information may be most efficiently produced. Under Fed. R. Civ. P. 26(g), counsel are required to weigh the potential value of particular discovery against the time and expense of production, and under Rule 26(b)(2) the judge is expected to limit discovery to avoid duplication and unjustified expense.

Computerized records. The time and expense of discovery may usually be substantially reduced if pertinent information can be retrieved from existing computerized records. Moreover, production in computer-readable form of relevant files and fields (or even of an entire database) will reduce disputes over the accuracy of compilations made from such data and enable experts for both sides to conduct studies using a common set of data. The parties' computer experts should informally discuss, in person or by telephone, procedures to facilitate retrieval and production of computerized information; the attorneys can then confirm these arrangements in writing. See *supra* section 21.446.

Confidential information. The privacy interests of employees may be protected by excluding from production records or portions of records the contents of which are irrelevant to the litigation (employees' medical histories, for example, are rarely of significance in a discrimination case) or by masking the names of individuals in particular compilations. If the company fears exposure to privacy claims were it to disclose personal information voluntarily, the parties may draft an order for entry by the court, directing the employer to provide the information. A protective order barring unnecessary disclosure of sensitive items may also be useful in facilitating the production of relevant information. The persons to whom plaintiffs' counsel will be permitted to disclose confidential materials will depend on the circumstances. For example, counsel might be allowed to disclose some sensitive information to the plaintiffs or even to class members, but permitted to disclose information about tests only to an expert. See *supra* section 21.43.

Preservation of records. Equal Employment Opportunity Commission (EEOC) regulations require that, when a charge of discrimination or a civil action has been filed, the "employer shall preserve all personnel records relevant to the charge or action until final disposition of the charge or action." 29 C.F.R.

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§ 1602.14. The parties may disagree on which records are covered by this mandate, particularly with respect to computerized data that may be periodically erased as new information is electronically stored. A separate order of the court may be needed both to clarify what records must be preserved and to provide relief from unduly burdensome retention requirements. See *supra* section 21.442.

Statistical evidence and expert testimony. Employment discrimination litigation frequently involves the collection and presentation of voluminous data regarding characteristics of the company's workforce and its employment practices. In addition to using data already computerized by the company, the parties often prepare new databases, electronically storing information manually extracted from other records. To eliminate disagreements about the accuracy of these new databases and to reduce the time and expense otherwise involved in preparing and verifying separate databases, the parties may—with the court's encouragement—be able to agree on joint development of a common database on which their respective experts will conduct their studies. If agreement on a common database cannot be obtained, pretrial verification procedures should be used to eliminate (or quantify) errors in the different databases (see *supra* sections 21.446, 21.493). As discussed in *supra* section 21.492, this information should, whenever possible, be presented at trial through summaries, charts, and other tabulations,[1177] and pretrial procedures should be adopted to facilitate this presentation and reduce disputes over the accuracy of the underlying data and the compilations derived from such data. Indeed, to the extent practicable, disputes at trial regarding statistical evidence should be limited to its interpretation, relevance, and weight, not its accuracy. Experts who will present statistical studies or express opinions should be required to prepare and disclose a written report containing a complete statement of all opinions to be expressed and all exhibits to be used, the basis and reasons for them, and the data and information considered in arriving at them.[1178] The parties' experts' reports should be exchanged before expert depositions are taken.[1179] After reviewing these reports and considering the comments of counsel, the court may conclude that it should appoint an independent statistical expert under Fed. R. Evid. 706. The court should, however, be

1177. In discrimination cases, the parties sometimes attempt to introduce in bulk numerous personnel files, work history cards, and other similar documents. The court may insist on compilations and is not required to "[wade] through a sea of uninterpreted raw evidence." *See, e.g.*, Crawford v. Western Elec. Co., 614 F.2d 1300, 1319 (5th Cir. 1980).

1178. Fed. R. Civ. P. 26(a)(2). See *supra* § 21.48.

1179. For further discussion of discovery from experts, including establishing schedules, see *supra* § 21.48.

Exh. B: ABA Civil Discovery Standards 29 and 30

(27)

28. Inadvertent Disclosure of Privileged Information. The parties should consider stipulating in advance that the inadvertent disclosure of privileged information ordinarily should not be deemed a waiver of that information or of any information that may be derived from it.

Comment

The law among various jurisdictions differs on the effect of an inadvertent production of privileged communications. The better practice, consistent with most jurisdictions' ethical rules governing attorneys, is that an inadvertent disclosure of privileged information ordinarily should not be deemed a waiver, either of that information or any information that can be derived from it. *See* Tex. R. Civ. P. 193.3(d) ("[a] party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules," provided it promptly seeks to rectify the issue; the requesting party must then return the material uncopied pending a court ruling); ABA Formal Op. 92-368 (1992) (a lawyer who receives privileged materials through error should not read them and should return them).

To avoid any uncertainty, particularly in those jurisdictions that do not follow this principle, the parties would be advised to obtain a stipulation and/or court order that the inadvertent production of privileged documents will not constitute a waiver, and that these documents will be immediately returned uncopied to the producing party if the inadvertent disclosure is promptly brought to the receiving party's attention after their disclosure has come to light. *See* Federal Judicial Center, *Manual for Complex Litigation 3d* § 21.431 (1995) (parties may so stipulate or court may so order). This avoids unfairness or overreaching and provides the parties with the assurance that inadvertent errors of counsel, the client or their personnel will not prejudice them or their case.

VIII. TECHNOLOGY

29. Preserving and Producing Electronic Information.

a. Duty to Preserve Electronic Information.

i. A party's duty to take reasonable steps to preserve potentially relevant documents, described in Standard 10 above, also applies to information contained or stored in an electronic medium or format, including a computer word-processing document, storage medium, spreadsheet, database and electronic mail.

ii. Unless otherwise stated in a request, a request for "documents" should be construed as also asking for information contained or stored in an electronic medium or format.

iii. Unless the requesting party can demonstrate a substantial need for it, a party does not ordinarily have a duty to take steps to try to restore electronic information that has been deleted or discarded in the regular course of business but may not have been completely erased from computer memory.

b. Discovery of Electronic Information.

i. A party may ask for the production of electronic information in hard copy, in electronic form or in both forms. A party may also ask for the production of ancillary electronic information that relates to relevant electronic documents, such as information that would indicate *(a)* whether and when electronic mail was sent or opened by its recipient(s) or *(b)* whether and when information was created and/or edited. A party also may request the software necessary to retrieve, read or interpret electronic information.

ii. In resolving a motion seeking to compel or protect against the production of electronic information or related software, the court should consider such factors as *(a)* the burden and expense of the discovery; *(b)* the need for the discovery; *(c)* the complexity of the case; *(d)* the need to protect the attorney-client or attorney work product privilege; *(e)* whether the information or the software needed to access it is proprietary or constitutes confidential business information; *(f)* the breadth of the discovery request; and *(g)* the resources of each party. In complex cases and/or ones involving large volumes of electronic information, the court may want to consider using an expert to aid or advise the court on technology issues

iii. The discovering party generally should bear any special expenses incurred by the responding party in producing requested electronic information. The responding party should generally not have to incur undue burden or expense in producing electronic information, including the cost of acquiring or creating software needed to retrieve responsive electronic information for production to the other side.

iv. Where the parties are unable to agree on who bears the costs of producing electronic information, the court's resolution should consider, among other factors:

(a) **whether the cost of producing it is disproportional to the anticipated benefit of requiring its production;**

(b) **the relative expense and burden on each side of producing it;**

(c) **the relative benefit to the parties of producing it; and**

(d) **whether the responding party has any special or customized system for storing or retrieving the information.**

v. **The parties are encouraged to stipulate as to the authenticity and identifying characteristics (date, author, etc.) of electronic information that is not self-authenticating on its face.**

Comment

Subsection (a). Fed. R. Civ. P. 34(a) and various state rules, e.g., Va. Sup. Ct. R. 4:9(a), provide that the term "documents" includes "data compilations from which information can be obtained [or] translated, if necessary, by the respondent through detection devices into reasonably usable form." *See also* Fed. R. Civ. P. 34(a), 1970 Advisory Committee Note. The 1993 amendment to Fed. R. Civ. P. 26 also makes "data compilations" subject to mandatory disclosure. Tex. R. Civ. P. 196.4 also calls for the production of data or information in electronic or magnetic form, but only if it is specifically requested.

This Standard makes it clear that (a) information contained or stored in an electronic medium or format should be produced pursuant to a "document" request and (b) a party has the same duty when it is aware of potential or pending litigation to take reasonable steps to preserve potentially relevant electronic information as it does to preserve "hard" copies of documents.

Subsection (a)(iii). Attempting to retrieve previously deleted electronic information can be time-consuming and costly. Just as a party ordinarily has no duty to create documents, or to re-create or retrieve previously discarded ones, to respond to a document request, it should not have to go to the time and expense to resurrect or restore electronic information that was deleted in the ordinary course of business. *E.g.*, Tex. R. Civ. P. 196.4 (duty to produce applies only to electronic data that is "reasonably available to the responding party in its ordinary course of business"); Strasser v. Yalamanchi, 669 So. 2d 1142 (Fla. Dist. Ct. App. 1996) (plaintiff may search defendant's computer for purged information only if the plaintiff shows the likelihood of retrieving it and there is no less intrusive way to obtain it; any search must have defined

parameters of time and scope and ensure that the defendant's information remains confidential and its computer and databases are not harmed).

Subsection (b). The Standard contemplates that whether and, if so, how much electronic information is subject to discovery, along with the allocation of the cost of producing it, depends on the factors specific to each case. *See, e.g.*, Tex. R. Civ. P. 196.4 (if objected to, no out-of-the-ordinary efforts to retrieve electronic information are required unless the court orders them; if it does so, the requesting party must pay for them); In re Brand Name Prescription Drugs Antitrust Litig., No. 94-C-897, MDL 997, 1995 U.S. Dist. LEXIS 8281 (N.D. Ill. June 13, 1995) (weighing whether to compel a company to retrieve and produce electronic mail messages at its expense); Anti-Monopoly, Inc. v. Hasbro, Inc., No. 94 Civ 2120, 1995 U.S. Dist. LEXIS 16355, at *4 (S.D.N.Y. Nov. 3, 1995) (neither the fact that material was available in hard copy nor the need for the responding party to create the computerized data necessarily precluded production of the information in computerized form); PHE, Inc. v. Department of Justice, 139 F.R.D. 249, 257 (D.D.C. 1991) (requiring production of computerized records where no program existed to obtain the requested information because the response would require "little effort" and "modest additional expenditures"); National Union Elec. Corp. v. Matsushita Elec. Indus. Co., 494 F. Supp. 1257, 1262 (E.D. Pa. 1980) (requiring production of information on computer-readable magnetic tape in addition to hard copy; the discovering parties were required to pay for making the tapes); In re Air Crash Disaster at Detroit Metro. Airport, 130 F.R.D. 634, 635-36 (E.D. Mich. 1989) (party required to produce simulation data on computer-readable tape in addition to hard copy); Armstrong v. Executive Office of the President, 1 F.3d 1274, 1280 (D.C. Cir. 1993) (printouts were not acceptable substitute because they did not reveal various information such as directories, distribution lists, acknowledgments of receipts and similar materials); *see also* Federal Judicial Center, *Manual for Complex Litigation, 3d* § 21.446 (1995).

An issue arises when responsive information required to be produced is part of a much larger database and no software exists to retrieve only the responsive information. A large database, e.g., the transaction history for every customer of a business, should not be made available as if it was a single "document." The parties should confer in this situation and attempt to agree on what will be produced, the format and who will bear the cost of extracting the information.

30. Using Technology to Facilitate Discovery.

a. In appropriate cases, the parties may agree or the court may direct that some or all discovery materials be produced, at least in the first instance, in an electronic format and how the expenses of doing so will be allocated among the parties.

b. Upon request, a party serving written discovery requests or responses should provide the other party or parties with a diskette or other electronic version of the requests or responses.

Comment

In appropriate cases, technology can streamline and reduce the costs of discovery, pretrial and trial itself for all parties and the court. Hard copies of documents and other information can be scanned into an electronic format, saved in digital form and then retrieved in short order using sophisticated search methods. The cost is constantly going down, but is still relatively expensive. Electronic storage and retrieval is therefore not appropriate in many cases. In cases where the stakes or issues or the volume of documents call for it, the parties and the court should seriously consider whether putting some or all of the relevant documents into an electronic format would help in managing the case and reducing expenses for the parties. *See* Federal Judicial Center, *Manual for Complex Litigation, 3d* § 21.444 (1995).

Many court rules require that responses to discovery requests be preceded by the full text of each request. *E.g.,* U.S.D.C. - C.D. Cal. Local Rule 8.2.3; U.S.D.C. - D.D.C. Local Rule 207(d); N.Y. C.P.L.R. 3133(b). Other courts require that each numbered discovery request leave space for an answer, so that the responding party can simply fill in the information, copy the combined request-and-answer, and send it back to the requesting party. *E.g.,* Va. Sup. Ct. R. 4:8(b). Given that most discovery requests are now prepared on a computer, the responding party should be able to ask the requesting party to give it a diskette containing the requests to use in preparing its response.

Exh. C: Playboy Ent. v. Welles, 60 F. Supp. 2d 1050, 1054-55 (S.D. Ca. 1999) (32)

mining whether a request for discovery will be unduly burdensome to the responding party, the court weighs the benefit and burden of the discovery. Fed.R.Civ.P. 26(b)(2). This balance requires a court to consider the needs of the case, the amount in controversy, the importance of the issues at stake, the potential for finding relevant material and the importance of the proposed discovery in resolving the issues. Fed.R.Civ.P. 26(b)(2).

Plaintiff asserts that these e-mails may provide evidence in support of its trademark infringement and dilution claims, as well as a defense to Defendant's claim for emotional distress. Plaintiff believes that these e-mails may reflect Defendant's knowledge of the "Playmate of the Year" contract, and imply that she knew the contract required her to obtain written approval from Plaintiff before she could use the "Playmate of the Year" designation. Plaintiff also believes these e-mails may negate Defendant's emotional distress claim because they will indicate her state of mind regarding issues addressed in the lawsuit. Finally, Plaintiff believes that the e-mails may support Plaintiff's position that visitors to Defendant's website will view the website as associated with hard core pornography.

Defendant contends that her business will suffer financial losses due to the approximate four to eight hour shutdown required to recover information from the hard drive. Defendant also contends that any recovered e-mails between her and her attorneys are protected by attorney-client privilege. Lastly, Defendant contends that the copying of her hard drive would be an invasion of her privacy.[5]

[3] Considering these factors, the Court determines that the need for the requested information outweighs the burden on Defendant. Defendant's privacy and attorney-client privilege will be protected pursuant to the protocol outlined below, and Defendant's counsel will have an opportunity to control and review all of the recovered e-mails, and produce to Plaintiff only those documents that are relevant, responsive, and non-privileged. Any outside expert retained to produce the "mirror image" will sign a protective order and will be acting as an Officer of the Court pursuant to this Order. Thus, this Court finds that Defendant's privacy and attorney-client communications will be sufficiently protected. Further, Plaintiff will pay the costs associated with the information recovery. Lastly, if the work, which will take approximately four to eight hours, is coordinated to accommodate Defendant's schedule as much as possible, the Court finds that the "down time" for Defendant's computer will result in minimal business interruption.

The Court ORDERS the parties to follow this protocol:

1. First, the Court recognizes Defendant's concern, and argument, that the e-mail recovery simply is not feasible. (*See* Declaration of Richard K. Myers.) However, this Court believes that the probability that at least some of the e-mail may be recovered is just as likely, if not more so, than the likelihood that none of the e-mail will be recovered. To some degree, the burden of attempting the recovery must fall on Defendant as this process has become necessary due to Defendant's own conduct of continuously deleting incoming and outgoing e-mails, apparently without regard for this litigation. (This Court notes that Defendant's declaration did not indicate that Defendant has considered the subject matter of any e-mail, and its relationship to this litigation, before deleting it.) However, to ensure that this Court's assumption is correct, Plaintiff shall, as a predicate to further discovery, submit a declaration from the expert on which it relied in making this motion, to address both Defendant's and the Court's feasibility concerns. Plaintiff shall submit such a declaration by ***August 6, 1999***. Presuming Plaintiff can provide the Court with sufficient evidence th
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4. The parties
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5. In her supplemental letter brief of July 24, Defendant also argued (and presented an expert declaration) that asserted that the recovery of deleted e-mail was "unlikely."

6. Defendant asser
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computer expert
both parties or a
will act as an Off

cient evidence that recovering some deleted e-mail is just as likely as not recovering any deleted e-mail, and that no damage will result to Defendant's computer, the Court will direct the parties to follow this outlined protocol.

2. The Court will appoint a computer expert who specializes in the field of electronic discovery to create a "mirror image" of Defendant's hard drive. The Court requests the parties to meet and confer to agree upon the designation of such an expert.[6] If the parties cannot agree on an expert, the parties shall submit suggested experts to the Court by ***August 13, 1999.*** The Court will then appoint the computer specialist.

3. The Court appointed computer specialist will serve as an Officer of the Court. To the extent the computer specialist has direct or indirect access to information protected by the attorney-client privilege, such "disclosure" will *not* result in a waiver of the attorney-client privilege. Plaintiff herein, by requesting this discovery, is barred from asserting in this litigation that any such disclosure to the Court designated expert constitutes any waiver by Defendant of any attorney-client privilege. The computer specialist will sign the protective order currently in effect for this case. Lastly, any communications between Plaintiff and/or Plaintiff's counsel and the appointed computer specialist as to the payment of fees and costs pursuant to this Order will be produced to Defendant's counsel.

4. The parties shall agree on a day and time to access Defendant's computer. Plaintiff shall defer to Defendant's personal schedule in selecting this date. Representatives of both parties shall be informed of the time and date, but only Defendant and defense counsel may be present during the hard drive recovery.

5. After the appointed computer specialist makes a copy of Defendant's hard drive, the "mirror image" (which the Court presumes will be on or transferred to a disk) will be given to Defendant's counsel. Defendant's counsel with print and review any recovered documents and produce to Plaintiff those communications that are responsive to any earlier request for documents and relevant to the subject matter of this litigation. All documents that are withheld on a claim of privilege will be recorded in a privilege log.

6. Defendant's counsel will be the sole custodian of and shall retain this "mirror image" disk and copies of all documents retrieved from the disk throughout the course of this litigation. To the extent that documents cannot be retrieved from defendant's computer hard drive or the documents retrieved are less than the whole of data contained on the hard drive, defense counsel shall submit a Declaration to the Court together with a written report signed by the designated expert explaining the limits of retrieval achieved.

7. The Court orders that the "mirror image" copying of the hard drive, and the production of relevant documents, shall be completed by ***September 10, 1999.***

B. *Defendant's Tax Returns*

Plaintiff seeks to discover Defendant's personal and corporate income tax returns. Plaintiff has requested financial information from the Defendant, but alleges it has failed to receive sufficient information to determine the damages it has allegedly suffered due to Defendant's use of Plaintiff's trademarks. Plaintiff also asserts that this financial information is important to defend against Defendant's claims of damages from economic loss and/or emo-

6. Defendant asserts that the computer expert may be acting as an agent of Plaintiff because Plaintiff will be paying the costs. However, the Court finds this argument is moot, as the computer expert will either be agreed to by both parties or appointed by the Court and will act as an Officer of the Court. Further, Defendant's attorney-client privilege and privacy concerns will be protected by the protective order, which will be signed by the expert, and this Court's Order finding that this process will not waive any attorney-client privilege.

Exh. D: Concord Boat Corp. v. Brunswick Corp., W.D. Ark. LR-C-95-781 Order of June 26, 1997 (34)

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Concord Boat Corporation, et al — PLAINTIFFS

vs. NO. LR-C-95-781

Brunswick Corporation, a Delaware corporation — DEFENDANT

ORDER

The following questionnaire shall be answered by appropriate Brunswick personnel:

1. Describe and explain in detail the process of creating and sending a Fisher e-mail, including a description and explanation of keystrokes or other steps where necessary to a clear understanding of the process.

2. Could Brunswick's employees' secretaries send or read another person's Fisher e-mail? If so, describe how one person could gain access to another person's Fisher e-mail.

3. Prior to the installation of Lotus Notes, did Brunswick have "different" types of e-mail? If so, describe each type of e-mail. (For example, some e-mail systems allow users to send "notes," that is, regular e-mail that is stored in a recipient's "in box" (or its equivalent), and "messages," that is, short e-mails that are not saved in any computer file).

4. Were there any commands that an author of a Fisher e-mail could attach to an e-mail to ensure that the e-mail is never saved on the Brunswick computer system? (For example, some e-mail systems allow the user to attach the code "nlf" to an e-mail to characterize the e-mail as "no log," which means that the e-mail would not be saved in any file but nevertheless could be read by the recipients).

5. Could a Fisher e-mail user attach any codes to an e-mail to circumvent any automatic backup, memory, or save programs? If so, describe.

6. Was it possible to carbon copy a Fisher e-mail? If so, describe how.

7. Was it possible to blind copy a Fisher e-mail? If so, describe how.

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8. Would a printed Fisher e-mail indicate all recipients of the e-mail that were blind copied, or would this depend on whose e-mail was printed? That is, would only the author's original e-mail indicate who was sent a blind copy of the Fisher e-mail?

9. Would one blind copied recipient's Fisher e-mail indicate all other persons who received blind copies of the same e-mail?

10. Prior to the installation of Lotus Notes, was it possible to attach documents (including spreadsheets, letters, databases, and other computer files) to a Fisher e-mail? If your answer is "yes," describe how this was accomplished, what kind of documents could be attached, and how many documents could be attached at one time.

11. Prior to the installation of Lotus Notes, was it possible to import documents (including spreadsheets, letters, databases and other computer files) into the text of a Fisher e-mail message? If your answer is "yes," describe how this was accomplished, what kind of documents could be imported, and how many documents could be imported into one message.

12. After the installation of Lotus Notes, was it possible to attach documents (including spreadsheets, letters, databases, and other computer files) to a Fisher e-mail? If your answer is "yes," describe how this was accomplished, what kind of documents could be attached, and how many documents could be attached at one time.

13. Could a person forward one Fisher e-mail to another person on the Fisher e-mail system? If your answer is "yes," describe how this was accomplished and how many e-mails could be forwarded at one time.

14. Did the Fisher e-mail system have the equivalent of an "out box," that is, a file that maintained all Fisher e-mails that a person sent to other persons?

15. How long were such "sent" e-mails maintained on Brunswick's computer system?

16. Was it possible for an author of a Fisher e-mail to permanently delete or retract a Fisher e-mail that he or she sent to another person? Would it have been possible to save such Fisher e-mails in some computer file?

17. Describe and explain how a person learned that he or she received a Fisher e-mail from another person.

18. Describe and explain the process of how a person could

"open" or read a Fisher e-mail.

19. Describe and explain each keystroke that was necessary to get to the point of actually "opening" or reading a Fisher e-mail.

20. Could a person delete a Fisher e-mail before reading it? If so, describe how.

21. List and describe each option that a person had after reading a Fisher e-mail.

22. Could a recipient of a Fisher e-mail save the e-mail in order to retrieve or read it at some time in the future? If so, describe how.

23. How long would Brunswick's computer system keep a Fisher e-mail that a Fisher e-mail recipient wanted to save in order to retrieve or read the e-mail at some time in the future? Describe how this process worked.

24. Could a recipient of a Fisher e-mail delete the e-mail? If so, describe how.

25. Describe how Fisher e-mails were stored on Brunswick's computer system. In your answer, please: (a) describe the file(s) that contained (or contain) the Fisher e-mail that a person (1) sent, and (2) received; (b) address if different computer files existed for "sent" Fisher e-mails and "received" Fisher e-mails; (c) address if "sent" and "received" Fisher e-mails were maintained in one or more file(s) that was (were) dedicated to a particular person, department, or group; (d) address specifically where (i.e., the location of) the file(s) that were stored that contained (or contain) Fisher e-mails; (e) identify the name of each file(s) that presently contains Fisher e-mails; and (f) identify all system administrators or other persons that had general access to all Fisher e-mail users' e-mail.

26. Is there any way to recover a deleted Fisher e-mail?

27. Does Brunswick have possession, custody, or control of any "backups" of any files that contain Fisher e-mails? If so, could Brunswick access these backups and print out all Fisher e-mails that pertain to Brunswick's marine businesses? If this is possible, describe the procedure necessary to do so.

28. How far back does Brunswick possess backups for files that contain Fisher e-mails?

29. Suppose that at 8:00 a.m. on January 1, 1996, Brunswick

employee #1 sent a Fisher e-mail (pertaining to Brunswick's sterndrive market share) to Brunswick employee #2. One hour later, employee #2 read and deleted the same e-mail. Questions: (a) At 5:00 p.m. on that same day, could Brunswick access and print out the same Fisher e-mail? If so, how? If not, why not? (b) On January 5, 1996, could Brunswick access and print out the same e-mail? If so, how? If not, why not? (c) On May 30, 1997, could Brunswick access and print out the same e-mail? If so, how? If not, why not?

30. Did Brunswick's computer system automatically delete any Fisher e-mails after some set or defined period of time? If your answer is "yes," describe this process. If your answer is "no," why not?

31. Can Brunswick retrieve and print out every Fisher e-mail that relates to Brunswick's marine businesses that was created after the initiation of this lawsuit? If so, describe the procedure that would be necessary to do so. If your answer is "no," why not?

32. In May 1997, Brunswick provided Messrs. Jones, Gowens, and Patterson's Fisher e-mail to Plaintiffs. With respect to the process of retrieving and printing out this e-mail: (a) describe the process; (b) describe each person that was involved in the process, and for each such person, describe that person's involvement; (c) describe how long the process took for all three persons; (d) describe where these three persons' Fisher e-mail was located; (e) answer if Brunswick is certain that it has now produced all of the Fisher e-mail that Messrs. Jones, Gowens, and Patterson sent or received relating to Brunswick's marine business since December 31, 1995.

33. Prior to the Court's entry of its order preventing destruction of documents (in October 1996), did Brunswick have any plan, policy, or procedure in place to preserve Fisher e-mails? If your answer is "no," why not? If your answer is "yes," describe this plan, policy, or procedure.

34. Prior to the Court's entry of its order preventing the destruction of documents (in October 1996), did Brunswick have any plan, policy, or procedure in place to preserve Lotus Notes e-mails? If your answer is "no," why not? If your answer is "yes," describe this plan, policy, or procedure.

35. What is the name and job title of each person that assisted Brunswick in answering these questions? Where is each such person located?

36. Does each such person swear, under penalty of perjury, that his or her answers to the foregoing questions are true and correct?

By limiting these questions largely to the technical attributes of the e-mail systems, the Court does not intend to finally preclude further inquiry into what may actually have been done while Defendant used the Fisher system. Whether further search and production will be ordered will be decided upon receipt of the answers to these questions and Defendant's response due on July 7, 1997.

Within three days after receipt of this order, Defendant shall notify Plaintiffs and the Court of the amount of time it will reasonably need to answer the questionnaire. Within two days thereafter, Plaintiffs shall make any objection to the proposed time and the Court will then set a deadline.

IT IS SO ORDERED this 26th day of June, 1997.

UNITED STATES MAGISTRATE JUDGE

Exh. E: Shaffer-Kloeppel v. General Motors Corp.; W.D. Mo. 93-0498-CV-W-8 Order of Nov. 10, 1993

(39)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

FELICIA SHAFFER-KLEOPPEL Plaintiff, vs. GENERAL MOTORS CORPORATION, Defendant.	)	93-0498-CV-W-8 Case No.: ~~CV91-0991-CV-W-8~~

STIPULATED ORDER RE COMPUTER SEARCH

Plaintiff has moved to conduct discovery through access to certain General Motors' computer databases listed in her "Motion for Computer Search." Plaintiff's motion was made pursuant to Federal Rule of Civil Procedure 30(b)(4), seeking under this Rule to take the "deposition" of certain computer databases. However, Rule 30(b)(4) does not contemplate the taking of a computer's "deposition." Accordingly, this motion by the plaintiff shall be considered pursuant to Federal Rule of Civil Procedure 34. It is now ORDERED that on a mutually agreeable date and time, plaintiff shall be granted access to certain General Motors Corporation computer databases under the following provisions:

1. At a conference room at the Hampton Inn on Van Dyke Avenue, Warren, Michigan, or other similarly situated hotel facility, General Motors shall provide and place therein a computer and a knowledgeable operator with access to the following computer databases:

(a) MINS database of meeting minutes of the following committees: Automotive Safety Technical Committee

(Automotive Safety Sub-Committee), General Technical Committee, Product Planning Group, and Safety Review Board, Engineering Policy Group and Fuel System Coordinating Committee;

(b) Crash Test Information Database;

(c) Proving Ground database, including engineering report database and manufacturing database.

2. Computers with access to the following databases cannot be physically relocated without significant logistical problems:

(a) Customer Correspondence and 1241 Database;

(b) Collision Performance Injury Report (CPIR) Database; and

(c) Technical Library Database.

General Motors has already conducted searches of the CPIR database and the Customer Correspondence and the 1241 Database. General Motors will provide plaintiff with the search requests it conducted and results. Because of the age of the vehicle in this lawsuit (a 1971 Chevrolet Cheyenne 350 Pickup Truck), documents related to the design and development of this vehicle are not likely to be on the Technical Library Database. General Motors will provide request forms utilized to search the CPIR database and the Customer Correspondence and 1241 Database to plaintiff upon request. Plaintiff can fill out the request forms as needed. These forms will be processed, and the results of the search(es) will be provided to plaintiff subject to the provisions set forth in Paragraph 4 below.

3. Plaintiff's counsel and a representative of their choosing specifically identified and designated five (5) days prior to any examination shall be allowed to appear and to provide search requests within the following parameters:

(a) Pickup trucks with in-cab fuel tanks;

(b) Fuel fed fires involving pickup trucks with in-cab fuel tanks;

(c) Crash tests, sled tests, static tests, design testing and litigation testing (except litigation tests not previously produced or for which work product objections have not been waived) relating to pickup trucks with in-cab fuel tanks; and

(d) Investigation of claims related to pickup trucks with in-cab fuel tanks.

4. General Motors' representatives shall conduct a search of the databases in accordance with this Order and on the topics specified in the preceding paragraph. Prior to exhibiting any document, database entry, or microfiche record to plaintiff's counsel and their representative, General Motors shall have the opportunity to review the document, database entry, or microfiche record out of the view of plaintiff's counsel and their representative. General Motors reserves and does not waive its objections to discovery of documents or portions of documents seen by plaintiff's counsel or their representative prior to General Motors' assertion of its objections.

5. If General Motors raises no objection to a particular document or database entry, plaintiff's counsel and their

representative shall be allowed to review the text of the document or database entry selected by printout or microfiche.

6. Any document, database entry, or microfiche record to which an objection is raised by General Motors, and production refused, shall be resolved at the earliest opportunity during the database searches by means of a hearing before this Court.

7. Documents, database entries, or microfiche records selected by plaintiff's counsel and their representative for production, and to which no objection is made, shall be produced by GM to plaintiff within ten (10) days, pursuant to the terms of a Protective Order governing production of documents to be entered in this case, provided, however, that if a large number of such documents, entries or records are selected, this time period may be enlarged by agreement of the parties or by application to this Court.

8. Plaintiff does not waive the right to pursue searches of other GM databases in the future.

SO STIPULATED:

BRADLEY, LANGDON, BRADLEY, EMISON & ROSS

By _____
Robert L. Langdon (#23233)
J. Kent Emison (#29721)
Carter J. Ross (#35715)
Eight South 10th Street
P.O. Box 130
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Telephone: (816) 259-2288
Fax No.: (816) 259-4571

Exh. F: La France v. Padilla, Dist Ct of Harris County, TX, No. 90-021866 - Order of July 6, 1993

(43)

P.4 BC2X

NO. 90-021866

ERNEST J. LA FRANCE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF RUTH LA FRANCE, ET AL	(	IN THE DISTRICT COURT OF
	(	
	(	HARRIS COUNTY, TEXAS
VS.	(	
	(	
ENRIQUE PADILLA AND HECTOR FUENTES, ET AL	(	127TH JUDICIAL DISTRICT

ORDER REGARDING DISCOVERY THROUGH ACCESS TO COMPUTER DATABASES: MINS DATABASE

IT IS ORDERED that General Motors produce its MINS database, or continue to produce such database, on an expedited basis, in accordance with the following procedures:

1. The production shall occur at the offices of Fulbright & Jaworski, 1301 McKinney, Houston, Texas, 77010-3095, or such other place within or upon the premises of General Motors Corporation in Warren, Michigan, as selected by General Motors, upon due notice to all interested parties, or at such location in proximity to GM's premises as designated by GM or as the parties can agree to. The production shall continue day to day until concluded, and shall be conducted on an expedited basis.

2. Plaintiff will be able to search all databases for Inquiries using key word in context and/or name search capabilities and any other search capabilities that are available for use by General Motors personnel, or are available for use given the software configuration. Such searches shall be conducted within the parameters of the term "Inquiry" as defined. "Inquiry or Inquiries" means key word, topic or other searches within the

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capabilities of the database that are directly or fairly inferable from the outstanding discovery requests pending as of the date of this order, or that are reasonably calculated to lead to the discovery of admissible or relevant evidence at trial ["Inquiry" or "Inquiries"]. As the production proceeds, key word or topic search subjects may be amended or supplemented, as long as the subject matter properly falls within the scope of the Inquiry.

3. Plaintiff has partially conducted a search of the MINS full text database by querying the database with approximately 50 terms. These queries produced "hits" concerning dates for various committee and subcommittee meetings.

4. From the above "hits" the plaintiffs drafted a citation list for the various meeting dates.

5. ~~Plaintiffs and defendant agree that for~~ the "hits" the full text of the meeting will be downloaded to a computer. This full text document will be referred to as the first computer document.

6. As it concerns the "first computer document", plaintiff and defendant agree that they will attempt to reach agreement concerning what portions of the first computer document will be "produced as is", "deleted" or "redlined". The parties will jointly review the first computer document "as is", and when agreement exists as to what should be deleted, deletions will occur to the first computer document at the time of review. Deletions by agreement should proceed expeditiously to the "first computer document," and these deletions will result in the creation of the "agreed computer redacted document." The "agreed computer redacted

document" will then be printed on an attached on-line printer, and will be referred to as the "agreed redacted printed document."

7. When disagreement exists as to what should be deleted, the passage in controversy will be "redlined." The redlined passages together with source and date identifying information will be tendered to the special master, within forty-eight (48) hours of the redlining. The "redlined" passages will be deleted from the "agreed computer redacted document."

8. The "agreed computer redacted document" will be reproduced on a computer disk or tape as parties feel is suitable, at the end of each business day in which the work is completed. From the printed document a "hard copy document" will be created from micro fiche. This document will be created to mirror the "agreed computer redacted document", except that the "redlined" portions will be covered with redaction tape and labeled "this portion tendered to special master".

9. After the redaction tape procedure, the resulting "hard copy document" will be tendered to plaintiffs after bates numbering and case name labeling.

10. The parties agree that the above described procedure will also be utilized for any additional keyword searches in full text databases that reveal hits.

11. Alternatively, if the parties agree the above procedure can be altered to accomplish the same results by first reviewing a "hard copy document" or micro fiche and then agree to what is to be "produced as is", "deleted" or "redlined" in both computer and paper media, then the production can proceed on that basis by

agreement.

12. For this MINS database that is accessed through remote access\modem system, then the discovery will be conducted on a computer to be provided to or by Plaintiff's counsel. Said computer will be equipped with Lexis software version 1.72 or higher, said computer will have 386 processors running at 20 megahertz or better with at least 100 megabyte hard drive and shall be configured with a full size VGA color monitor. Said computer shall be able to function at baud rates which are industry standard (9600) or better; or shall have such operating and speed/retrieval characteristics as can be agreed upon by the parties. To the extent the databases enumerated above exist in electronic or computerized form, the information that is derived shall be presented and the computer utilized shall be configured in such a fashion that there is the capability of on-line printing, and electronic downloading to magnetic tape or disc.

SAVINGS CLAUSE

Notwithstanding any time period set herein, all parties are free to petition the court either orally or in writing, for a shorter or longer time period within which to comply with the terms of this order, upon a showing of good cause.

Signed the 6th day of July, 1993.

Honorable Shaffolyn Wood
127th District Court
301 Fannin
Houston, Texas 77002

Exh. G: Hon. William Alsup Case Management Order (see ##7-10)

(47)

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SUPPLEMENTAL ORDER TO
INITIAL CASE MANAGEMENT SCHEDULING ORDER

1. Plaintiff(s), or for cases removed from state court, the removing defendant(s), must serve this order immediately on each and every party previously served and include a copy with all subsequent service on other parties, in accordance with Rules 4 and 5 of the Federal Rules of Civil Procedure (FRCP).

2. In light of the fact that the undersigned judge was, until recently, in private practice, the Court seeks the assistance of all parties in this action to determine if there are any grounds for recusal under 28 U.S.C. 455. The Court particularly requests that all parties determine and advise whether the undersigned judge's former law firm, Morrison & Foerster, served as counsel concerning the matter-in-suit in this action prior to August 17, 1999, the date the undersigned withdrew as a member of the firm. Counsel and the parties should be aware that the undersigned would not ordinarily have been aware of all engagements undertaken by his former firm and must depend on the parties to bring any such circumstances to the Court's attention. If any party believes, after inquiry, that any ground for recusal exists, then please bring the facts and circumstances to the Court's attention by letter or notice served on all parties no later than twenty days after receipt of this order.

3. In addition to the subjects listed in Local Rule 16-14(b), the parties shall address the following in their joint case management statement (not to exceed twelve pages) due at least ten days before the case management conference and at the case management conference:

(a) The basis for this Court's subject-matter jurisdiction and whether any issue exists regarding personal jurisdiction or venue;

(b) A brief description of the case and defenses and description of any related proceeding, including any administrative proceedings;

(c) A brief summary of the proceedings to date, including whether there has been full compliance with the initial disclosure requirements of Local Rule 16-5 and, in patent cases, Local Rules 16-7 through 16-9, and a summary of any related proceedings;

(d) A list of all pending motions and their current status;

(e) A description of all motions expected before trial;

(f) The extent to which new parties will be added or existing parties deleted;

(g) The extent to which evidentiary, claim-construction or class certification hearings are anticipated;

(h) The extent to which the parties have complied with the evidence-preservation requirements of Paragraph 4 of this Order;

(i) The scope of discovery to date and, separately, the scope yet anticipated; what limits should be imposed on discovery; and what should be the proposed discovery plan;

(j) The extent to which any special discovery or other problems or issues have arisen or are expected;

(k) Proposed deadlines and court dates, including a trial date;

(l) The expected length of trial, the approximate number of witnesses, experts, exhibits, and whether a jury is demanded;

(m) What damages and other relief are sought and what method is used to compute damages;

(n) ADR efforts to date and a specific ADR plan for the case;

(o) The extent to which a magistrate judge or master should be involved;

(p) A service list for all counsel that includes telephone and fax numbers; and

(q) To the extent not addressed above, all other items set forth in Local Rule 16-14.

4. Each party shall be represented at the case management conference by counsel prepared to address all such matters, and with authority to enter stipulations and make admissions. Each party (or a party representative knowledgeable about the facts of the case) must also, absent good cause, attend the conference.

5. Pursuant to Local Rule 16-3, no formal discovery shall be initiated by any party until after the meet-and-confer session required by Local Rule 16-4, except by stipulation or prior court order. As soon as a party has notice of this order, however, the party shall take such affirmative steps as are necessary to preserve evidence related to the issues presented by the action, including, without limitation, interdiction of any document destruction programs and any ongoing erasures of emails, voice mails, and other electronically-recorded material to the extent necessary to preserve information relevant to the issues presented by the action.

6. The remainder of this order will apply to all discovery in this action. For good cause, the parties are invited to propose any modifications in their joint case management conference statement. Unless and until modified, however, the following provisions shall supplement the requirements of the Federal Rules of Civil Procedure and the local rules.

7. In responding to requests for documents and materials under FRCP 34, all parties shall affirmatively state in a written response served on all other parties the full extent to which they will produce materials and shall, promptly after the production, confirm in writing that they have produced *all* such materials so described that are locatable after a diligent search of *all* locations at which such materials might plausibly exist. It shall not be sufficient to object and/or to state that "responsive" materials will be or have been produced.

8. In searching for responsive materials in connection with FRCP 34 requests or for materials required to be disclosed under FRCP 26(a)(1), parties must search computerized files, emails, voice mails, work files, desk files, calendars and diaries, and any other locations and sources if materials of the type to be produced might plausibly be expected to be found there. At the time of the production, the responding party shall provide a written list to the requesting party setting forth in detail each specific source and location searched. The list must also identify, by name and position, all persons

conducting the search and their areas of search responsibility. The producing party shall also provide a list describing the specific source for each produced item as well as for each item withheld on a ground of privilege, using the unique identifying numbers to specify documents or ranges. Materials produced in discovery should bear unique identifying control numbers on each page.

9. To the maximum extent feasible, all party files and records should be retained and produced in their original form and sequence, including file folders, and the originals should remain available for inspection by any counsel on reasonable notice.

10. Except for good cause, no item will be received in evidence if the proponent failed to produce it in the face of a reasonable and proper discovery request covering the item, regardless of whether a motion to overrule any objection thereto was made. A burden, overbreadth or similar objection shall not be a valid reason for withholding requested materials actually known to counsel or a party representative responsible for the conduct of the litigation. Privilege logs shall be promptly provided and must be sufficiently detailed and informative to justify the privilege. See FRCP 26(b)(5). No generalized claims of privilege or work product protection shall be permitted. With respect to each communication for which a claim of privilege or work product is made, the asserting party must at the time of its assertion identify: (a) all persons making and receiving the privileged or protected communication, (b) the steps taken to ensure the confidentiality of the communication, including affirmation that no unauthorized persons have received the communication, (c) the date of the communication and (d) the subject matter of the communication. Failure to furnish this information at the time of the assertion will be deemed a waiver of the privilege or protection.

11. Absent extraordinary circumstances, counsel shall consult in advance with opposing counsel and unrepresented proposed deponents to schedule depositions at mutually convenient times and places. That some counsel may be unavailable shall not, however, be grounds for deferring or postponing a deposition if another attorney from the same firm or who represents a party with similar interests as to that witness is able to attend. Where an agreement cannot be reached as to any party deponent or a deponent represented by counsel of record, the following procedure may be invoked by the party seeking any such deposition that will be completed within three days. The party seeking such a deposition may notice it at least thirty days in advance. If the noticed date and place is unacceptable to the deponent or the deponent's counsel, then within ten days of receipt of the notice, the deponent or counsel for the deponent must reply and counter-propose in writing an alternative date and place falling within thirty days of the date noticed by the party seeking the deposition.

12. If any objection to a request for materials is overruled, the withholding party or counsel must, at the request of any other party, reproduce all deponents under their control or represented by them for further deposition examination as to any new materials germane to that deponent and must bear the expense of doing so, as long as the disputed request was due and pending at the time of the previous deposition. Such supplemental examinations shall ordinarily not be charged against any time limit of the examining party. A party that objects to producing requested materials may not use the existence of its own objections as a basis for postponing any deposition unless such party promptly meets and confers and then, failing an agreement, seeks to bring a prompt motion for protective order. Once a deponent has been examined and the deposition completed, however, the subsequent production of documents due after the deposition will ordinarily not be grounds for re-opening the deposition.

13. Counsel and parties shall comply with FRCP 30(d)(1). Deposition objections must be as to privilege or form only. Speaking objections are prohibited. Under no circumstances should any counsel interject, "If you know," or otherwise coach a deponent. When a privilege is claimed, the witness should nevertheless answer questions relevant to the existence, extent or waiver of the privilege, such as the date of a communication, who made the statement, to whom and in whose presence the statement was made, other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement, unless such information is itself privileged. Private conferences between deponents and attorneys in the course of interrogation, including a line of related questions, are improper and prohibited except for the sole purpose of determining whether a privilege should be asserted.

14. Depositions may, under the conditions prescribed in FRCP 32(a)(1)-(4) or as otherwise permitted by the Federal Rules of Evidence, be used against any party (including parties later added and parties in cases subsequently filed in, removed to or transferred to this court as part of this litigation): (1) who was present or represented at the deposition; (2) who had reasonable notice thereof; or (3) who, within thirty days after the filing of the deposition (or, if later, within sixty days after becoming a party in this court in any action that is a part of this litigation), fails to show just cause why such deposition should not be usable against such party.

15. Short cross-examinations near the close of a deposition immediately following the direct examination and completed on the same day shall not be charged against any time limit of a side.

16. Deponents and their counsel must make a good faith effort to prepare for depositions and to refresh witness memories on important matters in suit about which the witness reasonably should be expected to have knowledge. Deponents who claim to lack recollection but who, at trial, claim to have had their memories refreshed in the interim may be, among other things, impeached with their previous failures of recollection during their depositions or subject to preclusion. In preparing deponents, counsel shall segregate and retain all materials used to refresh their memories and shall provide them to examining counsel at the outset of the deposition.

17. To the maximum extent feasible, deposition exhibits shall be numbered in a manner that will allow the same numbering at trial. In discovery, counsel shall agree on blocks of exhibit numbers to be used by the respective parties. Identical exhibits should not be remarked, but various versions of the same document should be separately marked if used. See Local Rule 30-3.

18. Counsel shall preserve all drafts of expert reports and evidence of communications with experts (or with any intermediaries between counsel and the expert) on the subject of their actual or potential testimony and shall instruct their experts and any intermediaries to do likewise. All such materials shall be produced for inspection and copying upon expert designation.

19. If a dispute arises during a deposition and involves either a refusal to answer a material question on a ground other than privilege or a persistent obstruction of the deposition, counsel may attempt to arrange, while the deposition is still in progress, a telephone conference with the Court through courtroom deputy Dawn Toland at 415-522-2020. Any such conference should be recorded by the court reporter recording the deposition and attended by all counsel at the deposition, as well as the deponent. All other requests for discovery relief must first be summarized in a letter no longer than three pages from the party seeking relief. The Court will then advise the parties concerning whether a response or written motion or a telephone conference will be required. This paragraph does not apply to discovery matters referred to a magistrate judge or a discovery master.

Dated: September 29, 1999.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

Exh, H: Texas Rule of Civil Procedure 196.4

(53)

request must specify a reasonable time (on or after the date on which the response is due) and place for production. If the requesting party will sample or test the requested items, the means, manner and procedure for testing or sampling must be described with sufficient specificity to inform the producing party of the means, manner, and procedure for testing or sampling.

(c) *Requests for Production of Medical or Mental Health Records Regarding Nonparties.*

(1) Service of Request on Nonparty. If a party requests another party to produce medical or mental health records regarding a nonparty, the requesting party must serve the nonparty with the request for production under Rule 21a.

(2) Exceptions. A party is not required to serve the request for production on a nonparty whose medical records are sought if:

(A) the nonparty signs a release of the records that is effective as to the requesting party;

(B) the identity of the nonparty whose records are sought will not directly or indirectly be disclosed by production of the records; or

(C) the court, upon a showing of good cause by the party seeking the records, orders that service is not required.

(3) Confidentiality. Nothing in this rule excuses compliance with laws concerning the confidentiality of medical or mental health records.

196.2 Response to Request for Production and Inspection.

(a) *Time for Response.* The responding party must serve a written response on the requesting party within 30 days after service of the request, except that a defendant served with a request before the defendant's answer is due need not respond until 50 days after service of the request.

(b) *Content of Response.* With respect to each item or category of items, the responding party must state objections and assert privileges as required by these rules, and state, as appropriate, that:

(1) production, inspection, or other requested action will be permitted as requested;

(2) the requested items are being served on the requesting party with the response;

(3) production, inspection, or other requested action will take place at a specified time and place, if the responding party is objecting to the time and place of production; or

(4) no items have been identified—after a diligent search—that are responsive to the request.

196.3 Production.

(a) *Time and Place of Production.* Subject to any objections stated in the response, the responding party must produce the requested documents or tangible things within the person's possession, custody or control at either the time and place requested or the time and place stated in the response, unless otherwise agreed by the parties or ordered by the court, and must provide the requesting party a reasonable opportunity to inspect them.

(b) *Copies.* The responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to produce copies in lieu of originals. If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them.

(c) *Organization.* The responding party must either produce documents and tangible things as they are kept in the usual course of business or organize and label them to correspond with the categories in the request.

196.4 Electronic or Magnetic Data. To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot—through reasonable efforts—retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court must also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

196.5 Destruction or Alteration. Testing, sampling or examination of an item may not destroy or materially alter an item unless previously authorized by the court.

196.6 Expenses of Production. Unless otherwise ordered by the court for good cause, the expense of producing items will be borne by the responding party and the expense of inspecting, sampling, testing, photographing, and copying items produced will be borne by the requesting party.

196.7 Request or Motion for Entry Upon Property.

(a) *Request or Motion.* A party may gain entry on designated land or other property to inspect, measure, survey, photograph, test, or sample the property or any designated object or operation thereon by serving—no later than 30 days before the end of any applicable discovery period—

(1) a request on all parties if the land or property belongs to a party, or

Exh. I

(54)

Federal Judicial Center

tel. 202-502-4065
fax 202-502-4199

memorandum

DATE: 8 March, 2000
TO: District Judge XXX
FROM: Ken Withers
SUBJECT: Rule 16 Conference Questions
FILE: KJW 415.001

You requested suggestions for items to include in an addendum to your Rule 16 case management conference notice to be used when significant electronic discovery is anticipated.

As you know, the Center is working with the Advisory Committee on Civil Rules and its Discovery Subcommittee to study the use of electronic discovery and how it might be improved. We're at the early stages of that, but from my literature review I've pulled together a number of suggestions from law review and law journal articles, the Manual for Complex Litigation, and other sources. These are just suggestions, of course, for you to tailor as you or your colleagues see fit. **You are free to use them but please do not label them as "proposed by the Federal Judicial Center" or otherwise identify them as a Center or Subcommittee product.**

One problem with listing in a Rule 16 notice the many potential repositories of evidence that a party might have is that the notice itself might trigger a more extensive and expensive discovery effort than the parties might otherwise undertake. On the other hand, the judge supervising discovery does not want to have surprises later in the process when one party assumes all possible sources have been examined and another claims that they were never contemplated by the original discovery plan. Judges may wish to consider on a case-by-case basis whether the situation calls for a detailed Rule 16 notice with lists like those presented here, or for a more general one that will allow the judge to see what the parties have in mind for discovery first.

With those caveats in mind, here are some suggested indicators:

WHEN A DETAILED RULE 16 NOTICE MAY BE MOST APPROPRIATE

- When the substantive allegations involve computer-generated records, e.g., software development, e-commerce, unlawful Internet trafficking, etc.

- When the authenticity or completeness of computer records is likely to be contested

- When a substantial amount of disclosure or discovery will involve information or records in electronic form, e.g., email, word processing, spreadsheets, and databases

- When one or both parties is an organization that routinely used computers in its day-to-day business operations during the period relevant to the facts of the case

- When one or both parties has converted substantial numbers of potentially relevant records to digital form for management or archival purposes

- When expert witnesses will develop testimony based in large part on computer data and/or modeling, or when either party plans to present a substantial amount of evidence in digital form at trial

- In any potential "big document" case in which cost associated with managing paper discovery could be avoided by encouraging exchange of digital or imaged documents (especially if multiple parties are involved)

I. Preservation of Evidence

A. What steps have counsel taken to ensure that likely discovery material in their clients' possession (or in the possession of third parties) will be preserved until the discovery process is complete? If counsel have not yet identified all material that should be disclosed or may be discoverable, what steps have been taken to ensure that material will not be destroyed or changed before counsels' investigations are complete?

If more specific direction is needed:

B. Have counsel identified computer records relevant to the subject matter of the action?

- Word processing documents, including drafts or versions not necessarily in paper form

- Databases or spreadsheets containing relevant information

- E-mail, voicemail, or other computer-mediated communications

- Relevant system records, such as logs, Internet use history files, and access records

C. Have counsel located all such computer records?

- Active computer files on network servers

- Computer files on desktop or local hard drives
- Backup tapes or disks, wherever located
- Archival tapes or disks, wherever located
- Laptop computers, home computers, and other "satellite" locations
- Media or hardware on which relevant records may have "deleted" but is recoverable using reasonable efforts

D. Have counsel made sure all relevant computer records at all relevant locations are secure? For instance:

- Suspended all routine electronic document deletion and media recycling
- Segregated and secured backup and archival media
- Created "mirror" copies of all active network servers, desktop hard drives, laptops, and similar hardware

E. Have counsel considered entering into an agreement to preserve evidence?

F. Does either party plan to seek a preservation order from the court?

II. Disclosure and Preliminary Discovery

A. Have counsel designated technical point-persons who know about their clients' computer systems to assist in managing computer records and answering discovery requests?

B. Have counsel prepared a description of their respective party's computer systems for exchange? Does either party need to know more before discovery can proceed?

If, after considering whether the hints in the following list may do more harm than good, the judge determines that the parties are unclear as to what they need to know at this stage and should get further guidance, the judge may suggest that they exchange information on the following points:

- Number, types, and locations of computers currently in use
- Number, types, and locations of computers no longer in use, but relevant to the facts of the case
- Operating system and application software currently in use

- Operating system and application software no longer in use, but relevant to the facts of the case
- Name and version of network operating system currently in use
- Names and versions of network operating systems no longer in use, but relevant to the facts of the case
- File-naming and location-saving conventions
- Disk or tape labeling conventions
- Backup and archival disk or tape inventories or schedules
- Most likely locations of records relevant to the subject matter of the action
- Backup rotation schedules and archiving procedures, including any backup programs in use at any relevant time
- Electronic records management policies and procedures
- Corporate policies regarding employee use of company computers and data
- Identities of all current and former personnel who had access to network administration, backup, archiving, or other system operations during any relevant time

C. Do counsel anticipate the need to notice any depositions or propound any interrogatories to obtain further information about the opposing party's computer systems or electronic records management procedures?

D. Have counsel explored with their clients (in appropriate situations) the procedures and costs involved to:

- Locate and isolate relevant files from email, word processing, and other collections
- Recover relevant files generated on outdated or dormant computer systems (so-called "legacy data")
- Recover deleted relevant files from hard drives, backup media, and other sources

E. Do counsel anticipate the need to conduct an on-site inspection of the opposing party's computer system?

- Consideration of an agreed-upon protocol
- Permission to use outside experts
- Agreement on neutral expert

III. Electronic Document Production

A. Will counsel use computerized litigation support databases to organize and store documents and other discovery material?

B. Have counsel considered common formats for all electronic document exchange, e.g., TIFF images with OCR-generated text, email in ASCII format, etc.?

C. Have counsel (particularly in multi-party cases) considered a central electronic document repository?

D. Have counsel considered an attorney-client privilege non-waiver agreement, to avoid the costs associated with intensive privilege screening prior to production?

E. Do counsel anticipate requesting data in non-routine format, e.g.

- Printing by respondent of electronic documents not normally in print form
- Creation by respondent of customized database reports
- Performance by respondent of customized searches or data mining

F. Have counsel agreed upon cost allocation, e.g.,

- Parties to absorb their own disclosure costs
- Requesting parties to pay non-routine retrieval and production costs
- Parties to negotiate data recovery and legacy data restoration costs

G. Does either party anticipate objecting to the production of computer records or software necessary to manipulate the records based on:

- Trade secret
- Licensing restrictions

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- Copyright restrictions
- Statutory or regulatory privacy restrictions

IV. Testifying Experts

A. Will any testifying expert(s) rely on computer data provided by either party, or rely on his or her own data?

B. Will any testifying expert(s) use custom, proprietary, or publicly-available software to process data, generate a report, or make a presentation?

C. Do counsel anticipate requesting discovery of either the underlying data or the software used by any testifying expert?

V. Anticipating Evidentiary Disputes

Have counsel considered discovery procedures designed to reduce or eliminate questions of authenticity, e.g.,

- Computer discovery supervised by neutral party
- Neutral, secure electronic document repository
- Exchange of read-only disks or CD ROMs
- Chain-of-custody certifications

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March 3,2000

Honorable David F. Levi
United States District Court
United States Courthouse
501 I Street, 14th Floor
Sacramento, California 95814

Re: Subcommittee on Electronic Data

Dear Judge Levi,

I look forward to our March 27,2000, meeting in San Francisco. For your review, I am enclosing two recent articles from the Georgia State Bar Journal on the subject of electronic filing.

I am also sending John copies in the event that you believe distribution to the entire subcommittee is warranted. The authors address both legal and practical considerations and their comments may be helpful.

With best regards.

Yours very truly,

Andrew M. Scherffius

Cc: John Rabiej (with enclosures)

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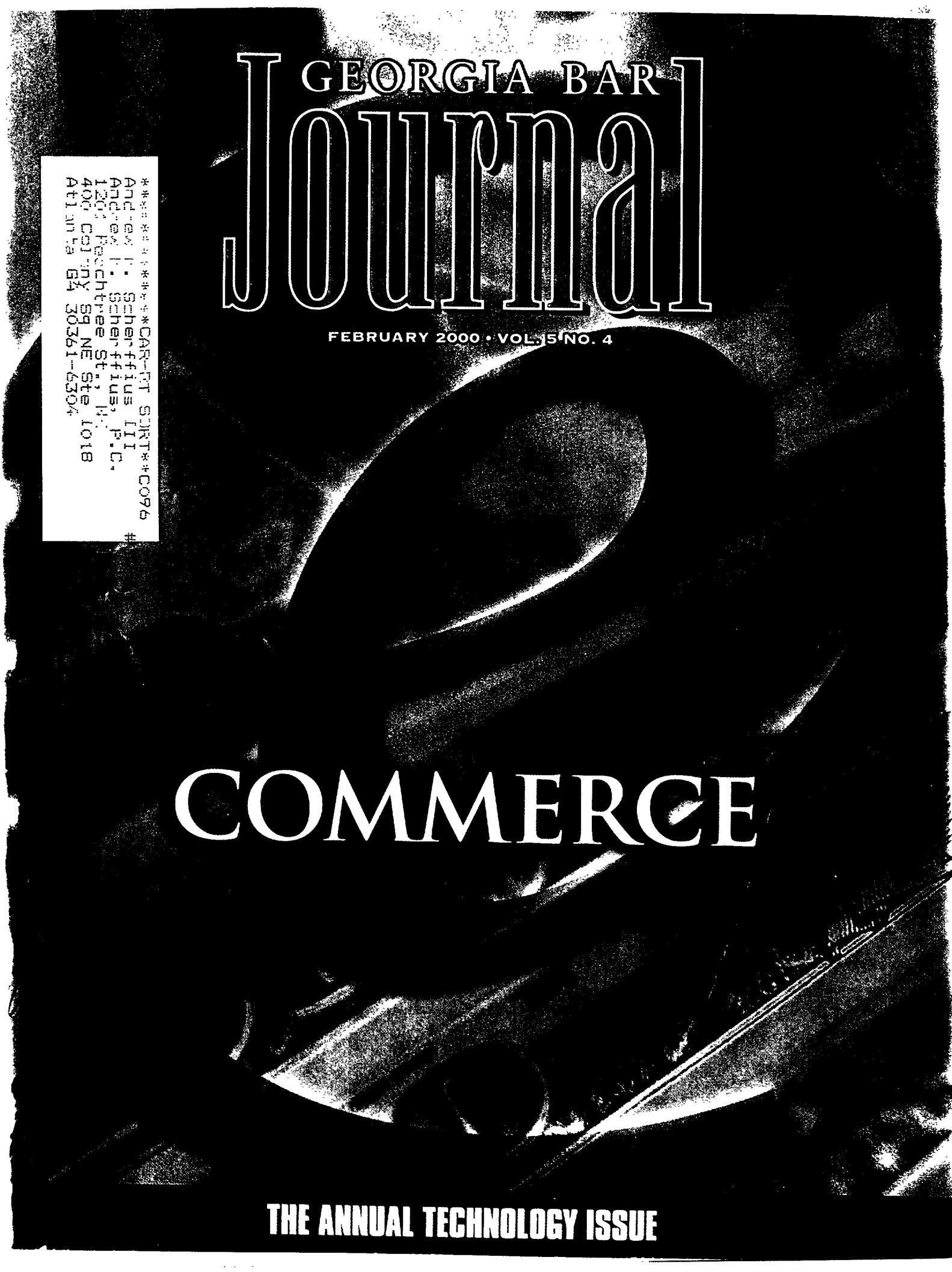


COMMERCE

THE ANNUAL TECHNOLOGY ISSUE

Filing in Courthouses Goes Online

By Nikki Hettinger

Last October, the State Court of Fulton County began requiring electronic filing (e-filing) of court documents in selected cases, beginning with the consolidated asbestos litigation in Judge Henry M. Newkirk's court. The service is being provided by Dallas-based JusticeLink, the exclusive court e-file solutions partner of Lexis-Nexis Group.

Prompted by the overwhelming influx of paper being generated by asbestos cases, several Fulton County State Court personnel including Chief Judge Albert L. Thompson, Judge Newkirk, State Court administrator J. Michael Rary and Clerk Robert E. Cochran II, began studying electronic filing as an alternative. Judge Newkirk issued a stay on asbestos litigation in June and, by October 4, 1999 e-filing was up and running. In fact, once the decision to initiate the project was made, installation of the JusticeLink system took only six weeks.

Said Newkirk, "Ninety-five percent of the views on the subject were very positive, so we decided to go forward." The parties involved were instructed by court order to begin filing all documents electronically, with the exception of complaints, which are still filed and served on paper. Although some attorneys initially resisted the idea, Newkirk said, "One of our fiercest [e-filing] opponents is now one of our most fervent cheerleaders."

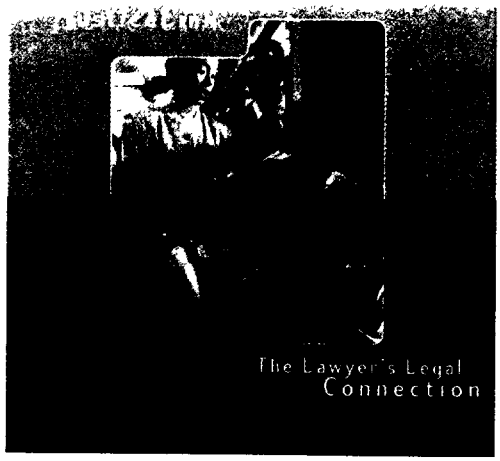
As of December 15, about 2,150 documents had been e-filed with the Fulton State Court and, said Rary with a smile, "It's working." Approximately 350 cases are currently tagged for e-filing, but Newkirk expects another 300 to 400 to go online in the near future. And that's not all, because Rary hopes to open up the e-filing capabilities to non-asbestos cases as soon as this spring. When he does, though, his will not have been the first court in Georgia to do so.

Justice and E-Filing for All in Chatham County

On January 3, the State Court of Chatham County began accepting electronic filing of court documents for *all* cases, civil and criminal. Lawyers (or individuals representing themselves) can now choose to submit anything from lawsuits to continuance motions to entries

as its service provider, and its comprehensive system is the first of its kind in the state.

"It (e-filing) will save attorneys an immense amount of trouble," said Chatham County State Court Clerk and Court Administrator Carlton W. Blair Jr. "I think it is an efficiency move for law firms."



What is E-filing?

Electronic filing improves court and law firm efficiency by replacing the traditional method of filing and serving documents. Instead of photocopying, packaging and physically delivering paper copies of documents to one another, case parties deliver electronic copies through a secure Web site.

Henry Givray, president and CEO of JusticeLink, said in a press release, "We are excited about this opportunity to provide Atlanta's legal community a service that will help simplify and accelerate the litigation process." Givray explained that it is common for a court to introduce electronic filing with complex litigation like asbestos cases, which generate such a vast amount of paperwork.

Electronic filing is a recent development; service providers have been experimenting with e-filing projects only a few years, but the issue has attracted more and more attention, and with good reason. According to an article appearing in the March 1999 issue of *Wired Magazine* (see "Order in the Court" at *www.wired.com*), about 370 million documents are filed in U.S. state and federal courts each year. The same article cited a 1997 study conducted by the Shawnee County, Kansas, court, and published by the National Center for State Courts, which estimated that e-filing would save $218.86 (or 9.63 work hours) for every 100 documents filed.

Last March, the American Bar Association offered four separate presentations on electronic filing at their Annual Technology Show (see "Electronic Filing of Court Documents," by Hon. Arthur M. Monty Ahalt at *www.mdlaw.net/ahalt/*), and the National Center for State Courts presented electronic filing regional conferences last spring in Atlanta, Orlando, Dallas, Hartford, San Francisco and Seattle.

Here at the State Bar of Georgia, President Rudolph Patterson has created the Electronic Filings Committee, which held its first meeting last September with the filing statewide. "The Bar," said Patterson, "along with other groups in the state, recognizes that this [electronic court filing] is going to happen . . . in fact, it is already happening, but sporadically, county by county." Patterson hopes the committee will help unify the e-filing efforts sprouting up throughout Georgia. He sees e-filing as an efficient, cost-effective process whose time has come.

How Does it Work?

The spectrum of e-filing capabilities can vary depending on the service provider used but, in general, e-filing offers attorneys, judges and clerks an alternative to the existing paper-based method of processing court documents.

In Fulton County

All JusticeLink filings are officially recorded, time-stamped and maintained electronically, and documents can be sent via the Internet anytime, anywhere — drastically reducing copying, postage and labor costs.

The system implemented in Fulton County not only allows the filing and serving of documents, it also offers added features: users can send a courtesy notification to announce that a document has been filed and/or served without providing an official service copy; filings can be saved pending authorization or can be authorized to file at a future, user-defined time and date; and users can receive instant notification of time-sensitive activities relating to a case. The service also includes sophisticated search capabilities.

To become a JusticeLink subscriber, your jurisdiction must be enrolled and your case must be earmarked for electronic filing within that jurisdiction. An attorney or party assigned to the case may then subscribe via the JusticeLink Web site, located at *www.justicelink.com*. There is no subscription fee and no retainer is required, but certain computer configuration needs must be met in order to use the system, among them access to the Internet with a supported browser, a hard drive with at least 500 Mb of available space, and Adobe Acrobat Reader 3.0 version or later.

Filing and serving documents to other JusticeLink subscribers costs JusticeLink customers 10 cents per page. "Cost-wise, it is very competitive," said Newkirk. Documents can be served to non-JusticeLink customers

filed by the customer, and there is never a charge to view other documents within JusticeLink. No fees are charged to court users. JusticeLink bills customers on a monthly basis (via regular mail); filing rates and billing procedures remain unchanged at the Fulton State Court. The court has also taken into account the people's right to know by establishing a public-access computer terminal in the clerk's office that allows the research, viewing and printing of electronic court documents.

In Chatham County

According to Samantha James, account executive at *E-Filing.com*, her company is "a lot further along in the [e-filing] process" than other service providers. Her firm will "customize it [the e-filing system] to meet the court's needs," said James, which means for some, *E-Filing.com* offers a direct link into a court's case management system, while for others, downloading and printing capabilities suffice.

E-filing in Chatham County resembles that in Fulton in many ways — 24-hour, seven-day access via the Internet (at Web site *www.e-filing.com*), electronic confirmation of filings, secure document transmission, search capabilities — however, there are some distinct differences.

At JusticeLink, all documents are stored and maintained by the company on its Web site; in Chatham County, all documents are stored at the courthouse in the court's own server. Also, the filing process in Chatham County includes online payment of filing fees. During registration, which is as simple as completing a standard form, filers are asked to submit a credit card number, as well as their bar number and other pertinent data about the document being filed. *E-Filing.com* processes the fees instantly, notifying the user in the event of a credit card problem. If no billing problem exists, the user then proceeds with his or her filing, and the court collects its fees on the same day the filing is made. Several times each day, court personnel download the filed documents from the server. Each document clearly indicates when it was originally filed, however, and the court accepts *that* data, not the date/time of the court's download, as the official filing time.

Since documents electronically filed to Chatham County do require some extra handling (they must be downloaded from the server), e-filing costs $5 more than paper-based filing. In addition, *E-filing.com* charges $15 for each initial filing and $2 per subsequent filing. That price structure, though, can vary from court to court, said James, particularly if complex asbestos or tobacco litigation is involved.

E-filing has been a reality in the U.S. Bankruptcy Court of the Northern District of Georgia for about two years, according to Gary Drake, chief deputy of operations. Drake explained that their system is part of a pilot project originated by the Administrative Office of U.S. Courts. Currently, said Drake, the e-filing option is only available to a specified group of attorneys in Atlanta and Newnan. The project is slated to open up to other federal bankruptcy and district courts in July, however and, once that happens, it will no longer be considered a pilot program.

Also, the Georgia Courts Automation Commission and Georgia State University College of Law are currently working together to develop a "pilot court," for which they will be soliciting volunteer courts. The Commission was created by legislature in 1991 to promote computer automation in the courts. For Executive Director Donald C. Forbes, e-filing is a positive development that "has proven itself to be efficient and economical." He noted that, although the systems implemented in Fulton and Chatham counties differ in format (the former is considered a fully electronic process, while the latter is image-based), he is pleased they are both up and running, "We're glad to see it [the Chatham County project] . . . it is yet another example of how electronic filing can and does work."

On a related note, the Courts Automation Commission's George R. Nolan Jr. managed a separate project that led to the Internet availability, as of last December, of full-text, final, citable opinions of the Supreme Court and Court of Appeals of Georgia. Those opinions can be found at *www.ganet.org/appellatecourt*. Other sources of online Georgia court information include: Cobb County Magistrate Court *(www.mindspring.com/~magcourt/index.html)*, court forms; Cobb County State Court *(www.mindspring.com/~cobbstatecourt/)*, court calendars; Cobb County Superior Court *(www.cobbgasupctclk.com)*, court calendars and court records; DeKalb County Superior Court *(www.ezgov.com)*, real estate records, online payment of property taxes; Dougherty County Clerk of Courts *(www.dougherty.ga.us/dococlk.htm)*, civil, criminal and real estate court records; Floyd County Superior Court *(www.sismich.com/ga/index.html)*, court calendars; Gwinnett County Juvenile Court *(www.courts.co.gwinnett.ga.us/other/juvcourt.htm)*, court calendars and court forms; Gwinnett County Magistrate Court *(www.courts.co.gwinnett.ga.us/magcourt/magindex.htm)*, court calendars and court forms; Gwinnett County State Court *(www.courts.co.gwinnett.ga.us/*

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"ELECTRONIC FILING IS AS EASY AS SENDING an e-mail with an attachment," said Fulton State Court Administrator J. Michael Rary. Once seated at your Windows-equipped computer (preferably Windows 95 or 98), simply establish a connection with your Internet browser, then go to the JusticeLink Web site. Enter your user name and password in the Log On box and click Submit. You are now ready to file, serve, view or print documents.

You can browse and select documents, filing parties, individuals to be served, even individuals to be *notified* of the filing, all with a few clicks of your mouse. As part of the filing process, your document is converted to PDF (portable) format. The result is an electronic document that looks like the real thing, minus the signatures which appear as typed text. Attorneys are instructed to keep all originals of signed documents, however, and if the authenticity of a document's signature is ever questioned, court personnel need only refer back to the hard copy. Also, all files are read-only, so no document can be modified once it has been filed, and the name of the originator is automatically inserted at the beginning of each document, so you always know the identity of the person doing the filing or serving.

Fulton State Court Judge Henry M. Newkirk demonstrates how lawyers can e-file using JusticeLink in asbestos cases.

Of course, any new computer system, no matter how user-friendly, requires some type of training. In the case of Fulton County, that need was met by the service provider. "JusticeLink," said Judge Henry M. Newkirk, "is very customer-service oriented." The company sent representatives to Atlanta for the sole purpose of training all of the system users in Fulton County. And how long was the training? "However long it took for the user to get comfortable with the system," replied Newkirk.

According to Kenneth S. Canfield of the firm of Doffermyre, Shields, Canfield, Knowles & Devine in Atlanta, "The best thing about electronic filing, from the attorney's perspective, is that you are not bound by a 5 p.m. deadline," since the system is available even after the clerk's office has closed for the day. Canfield had been aware of e-filing prior to the Fulton decision, but this is the first time he's had an opportunity to participate in it, and he welcomes the process, "Working on asbestos cases, you can get buried in paper." E-filing, he said, has helped eliminate "the three- to six-inch pile of paper" that used to appear on his desk every day.

Although he has not performed an official e-filing cost analysis, Canfield said, "I suspect it does save money overall." He looks forward to the day when e-filing is made available across the board, although he does find the JusticeLink Web site "cumbersome . . . I think it's not as user-friendly as it could be." On the whole, however, he counts himself among e-filing's advocates and has this to say to attorneys not yet exposed to it, "Try it, you'll like it."

John D. Jones of the law firm of Greene, Buckley, Jones & McQueen in Atlanta is another attorney assigned to use e-filing in the Fulton Court. And how does he feel about the project? "I think it holds forth great promise, and Lord knows how many trees we are going to save," said Jones, who expects e-filing will lead to "a substantial amount of economy." He also communicated the overall relief of his administrative staff from the burden of tedious and time-consuming paper processing tasks, "It's a salvation for them, too."

John E. Guerry III, lead plaintiff attorney in one of Judge Newkirk's asbestos cases, was familiar with e-filing long before receiving the Fulton County State Court order. He is with the firm of Ness, Motley, Loadholt, Richardson & Poole, which has been at the forefront of asbestos litigation, among other important product liability actions, since the 1970s. Although headquartered in Charleston, South Carolina, the firm tries asbestos cases throughout the U.S., and Guerry first

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stacourt/staindex.htm), court calendars; Gwinnett County Superior Court (*www.courts.co.gwinnett.ga.us/supcourt/supindex.htm)*, court calendars and court forms; Thomas County Superior Court (*home.rose.net/~thosct/*), court calendars; Liberty County Office of the Clerk (*www.libertyco.com/*), court calendars and court forms as well as a link to the Georgia Superior Court Clerks' Cooperative Authority Web site (*www.gsccca.org/default.htm*), which contains a statewide index of Georgia Consolidated Real Estate and Uniform Commercial Code (UCC) filings (at a cost of $9.95 per month (unlimited use) plus $0.25 per downloaded page, and $10 per debtor name for UCC certified searches).

Jay C. Stephenson, clerk of the Superior Court of Cobb County, has been following the development of digital technology for ten years or so. It wasn't until about three or four years ago, however, that he felt systems had evolved to the point where they were sophisticated enough and affordable enough to meet his needs. Then he went to work. "I was literally running out of space to make deed books," said Stephenson, explaining why he opted to switch from a "paper-based" to an "image-based" record-keeping system. "Once you reach a certain volume, even a good paper-based system is inefficient to the point where you have trouble keeping up." The Cobb County Superior Court does not offer electronic *filing* of documents. What it *does* offer is an advanced, searchable online database of the court's public records, located at Web site *www.cobbgasupctclk.com*. "I am really excited about it because I am an attorney, and I think this type of access is going to make the practice of law a lot more efficient," said

present, as well as images of all real estate documents filed in 1998 and 1999. But that's not all. Visitors to the site can also view a searchable electronic index of civil and criminal data dating back to 1982, and images of all court documents filed as of January 1, 2000. "The system is very sophisticated in its search capabilities," said Stephenson, who plans on expanding the Web site's offerings to include all of the court's real estate documents (which date back to the Civil War) in the next one-and-a-half years. In time, he said, "Every public record we have is going to be on the Internet."

The new and improved Web site, which is an updated version of the original site established by the court four years ago, became operable on December 1, 1999, and by the end of December, it had already received 100,000 hits. Said Stephenson, "It works even better than I thought it would." He explained that it will eventually be possible to run a title solely from Internet information, and that members of the press, for example, will be able to search for and view indictments or accusations filed during a specific time period. The court will also be posting all its financial data on the site. And all of this will be available at no charge. "The purpose of our court's original Web site, which was limited in its capabilities, was to begin educating folks and generating a demand for useful online information," Stephenson explained. It quickly became evident that a need existed. Stephenson cited one example of a Georgia housepainter who made use of the Web site as a source of new customers by looking up the names and addresses of people who had recently bought a home.

Fulton E-Filing Continued from Page 59

encountered e-filing while litigating in Texas, so when the Fulton project commenced, "I was one of their early proponents – an avid supporter," said Guerry. The fledgling Texas initiative was also a JusticeLink project, but Guerry notes that the Fulton County system is greatly improved and much easier to use than that early version, and he looks forward to even further advancements, "It is the wave of the future."

Guerry lists copy cost savings and efficiency among e-filing's benefits, "It is a great time management tool." But he cautions procrastinators who may become even more so, due to the system's 24-hour availability, "It could become a danger to those who don't manage their time well." Also, he advises attorneys using e-filing to read their computer screens thoroughly, rather than just browsing and printing documents, or they could overlook important information, "Read the menus carefully, and stay on your toes."

Obviously, e-filing requires access to certain computer equipment and, as Guerry points out, not all firms or attorneys can afford the technology. "I am fortunate to be at a firm that offers the resources necessary to make e-filing possible . . . but I would hate to see a sole practitioner shut out due to lack of funds." Other e-filing hurdles include the general apprehension individuals feel toward new technology. Said Guerry, "It's new, and a lot of people aren't used to it yet." He hopes future versions of the system will be even more user friendly, which will help increase its use. Guerry also added, "We need to address the issue legislatively, then electronic filing can be implemented in total." ■

— *Nikki Hettinger*

...y improve its efficiency — and so it has. According to Stephenson, the court's "gap time" (the time it takes for a filed document to be made available to the public) has been reduced from three to four weeks (using a paper-based system) to an astounding one-and-a-half to four hours. Stephenson does point out, however, the philanthropic possibilities of this project, "By making these records ...cessible remotely, we are reducing people's need to drive to the courthouse, which will impact traffic, parking and air quality." He also envisions the potential to positively influence the overall image of lawyers, "We are all well aware of the public perception of attorneys," he said. "I think that is largely due to the fact that the practice of law has become so inefficient, lawyers are forced to charge ...gh fees in order to make a living." Stephenson reasons ...at "if we can make the practice of law more efficient, then attorneys will become more efficient . . . and they will be able to practice more law with less effort."

Recognizing that these benefits would multiply exponentially if other courts were to adopt similar systems, Stephenson has been collaborating with other superior court clerks in the state. In fact, he and the clerks ...rom Bibb, DeKalb, Fulton and Muscogee counties formed the Metropolitan Court Clerks Association of Georgia last year. "As a clerk's jurisdiction reaches a certain size," said Stephenson, "you run into common problems," so the clerks formed this committee to address issues specific to their courts.

"Our plan," said DeKalb County Superior Court ...lerk Jeanette Rozier, "is to try to make the process as simple as possible for every tax payer." To that end, her court has implemented a system that allows Internet users to search for and view real estate records as well as actually *pay* property taxes online. Although to the user, DeKalb's site (located at *www.ezgov.com*) looks quite different from the Cobb Superior Court site, the two ...erate on exactly the same principle. The DeKalb Court ...s currently still in the process of inputting existing documents into the system, but the online database should be complete in a matter of weeks. Rozier is pleased with the public's response to the site, which went online last year and received one-half million hits during its first 30 days of operation.

She is also interested in e-filing, "That is the only ...ay to go, that's the future." In fact, her plans for the coming months include an e-filing pilot project of one-page real estate documents. Other developments Rozier is currently exploring include the posting of civil and criminal files on the DeKalb Web site as well as the possibly of installing a computer in the courtroom that attorneys who may have questions regarding recent court developments. She may be reached via the Internet at *www.dekalb.ga.ezgov.com/ezdeeds/ezdeed_contact.html*.

The Bibb County Superior Court is "very interested" in electronic filing, too, according to Clerk Dianne Brannen, although the project there is still in the planning stage. As a member of the Metropolitan Court Clerks Association, Brannen shares the group's desire for a uniform e-filing system, "One of our main goals is to assure that the program is the same for all." She is also aware of the privacy concerns involving e-filing — namely, the fact that the Internet provides an ease and a scope of access many people find unsettling — and believes those need to be addressed.

Linda Pierce is the Muscogee County Superior Court clerk and president of the Metropolitan Court Clerks Association. She has been working alongside Stephenson over the last few years as the Cobb Superior Court Web site was developed and implemented, and the Muscogee Court will soon be unveiling a site of its own based on that same format. The Metropolitan Association, said Pierce, is making a conscious effort to "standardize the data elements" of sites containing public records, so that the same type of information is presented for every county. She sees electronic filing as "inevitable" and has participated in preliminary discussions on the subject, but her court has no immediate plans for its use.

The Fulton County Superior Court is another proponent of e-filing and Internet access of court documents. "It's a wonderful way to go," said Information Systems Manager Cyndy Laurie. She anticipates that the Fulton Superior Court should begin implementing certain online capabilities, including e-filing, in about one year.

Georgia attorneys wishing to learn more about electronic filing are encouraged to call the Georgia Courts Automation Commission at (800) 298-8203 or (404) 651-6328 in Atlanta.

If your court system currently offers online capabilities and is not mentioned in this piece, or if you foresee future advances to your court's existing system that you would like to publicize, please contact the Communications Department of the State Bar of Georgia for possible inclusion in future articles.

Nikki Hettinger is the communications coordinator for the State Bar.

Service of Process by E-mail

By J. William Boone, William C. Humphreys Jr. and Jeffrey J. Swart

The lyrical apex of Karla Bonoff's 1980's hit song *Personally*[1] centered around the following:

I've got something to give you
That the mailman can't deliver...
I'm bringing it to you personally

For most litigators and for most cases, those lyrics aptly describe service of process. Although the bankruptcy rules routinely provide for service of process by first-class mail,[2] the rank and file of all lawsuits filed today are served in a manner consistent with the philosophy of Bonoff's song – personally. In the absence of a waiver, it is generally necessary to make service by

> delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.[3]

As many litigators will attest, accomplishing personal service or its equivalent can be an aggravating procedure. Most defendants do not relish the idea of being served, making the process server about as popular as the tax collector or the grim reaper. In particular, individual defendants have a way of keeping on the move, of keeping their "usual place of abode" a matter of some mystery, and of being a bit short on persons of "suitable age and discretion then residing therein" and eager to accept delivery of the suit papers.

And if domestic defendants have some talent for

avoiding service, foreign defendants have that talent in prodigious quantities. A well-heeled foreign defendant can easily avoid service. By staying with friends and moving from country to country, the would-be adversary can keep the plaintiff's counsel playing hide-and-seek for months or years while waiting for the defendant to sit still long enough for service to be effected pursuant to international rules.[4] In the meantime, the lawsuit languishes, and the money that otherwise might be used to pay the judgment is being spent on plane tickets, hotel rooms, and fine Parisian dining. Could there be a better way to approach this problem?

Relatively recent, but widely used, developments in communications technology suggest that there *is* a better way. As almost everyone with a laptop computer is thoroughly aware, electronic mail technology makes it possible for people on the go to check their e-mail messages from just about anywhere. It is as simple as a telephone call. In just about any airport, one is sure to see travelers with their computers plugged in, checking their e-mails between flights. If that method of communication is good enough for business travelers, why isn't it good enough for the elusive defendant? Is it possible to bypass the doomed efforts to put a physical copy of the summons and complaint in the hands of the moving target and simply deliver those same documents with a stroke of a computer keyboard?

Recently, the United States Bankruptcy Court for the Northern District of Georgia became the first court in this country to answer "yes" to that question. In an order entered by Chief Judge Stacey Cotton, Chapter 7 Trustee Herbert C. Broadfoot II was authorized to effect service on a foreign defendant by electronic mail, as well as several other methods for substituted service.[5] Because no court in the United States had authorized service by e-mail before, that order, though unpublished, has received considerable

legal underpinnings of that order help illuminate whether and to what extent we can expect service by e-mail to become more commonplace in the future.

A Foreign Defendant on the Run

In May 1999, our firm found itself representing a plaintiff in a lawsuit for which obtaining authorization to serve process by unconventional means stood to make the difference between bringing an alleged wrongdoer before the court or walking away from otherwise viable claims. We had been engaged as special counsel to represent the Chapter 7 Trustee in a federal bankruptcy case, and as part of that case, the Trustee had filed a lawsuit against former officers and directors of a company in bankruptcy. In the complaint, the Trustee alleged, among other things, that the former officers and directors had breached their fiduciary duties to the company, wasted corporate assets, and fraudulently transferred corporate funds. Although the lawsuit stated claims against a number of officers and directors, one of the central figures charged with wrongdoing was Mr. Arjuna Diaz, the company's chairman and sole shareholder.

No provision of the Federal Rules specifically authorizes or prohibits service by electronic mail.

Unfortunately, Mr. Diaz had taken up residence out of the country by the time the lawsuit was filed. More problematically, the Trustee's attempts to ascertain Mr. Diaz's whereabouts were unsuccessful. Mr. Diaz was traveling throughout Europe and the Far East and declined to say where he would be at any given moment. In short, Mr. Diaz was a "moving target," making it virtually impossible for the Trustee to effect service by any of the traditional means specified by the Federal Rules of Civil Procedure.

The frustration created by Mr. Diaz's international mobility was exacerbated by the fact that he had provided the Trustee a means for communicating with him — an electronic mail address and facsimile number. Mr. Diaz could receive facsimile transmissions that were forwarded to him, and they were stored on his electronic mail. The Trustee also had discovered a second electronic mail address for Mr. Diaz, an address maintained by a foundation to which Mr. Diaz had allegedly transferred corporate funds. In effect, Mr. Diaz had insulated himself from service of process by conventional means through confining himself to methods of communication not specifically mentioned in the Federal Rules.

Convinced that Mr. Diaz should not be allowed to evade justice so easily, the Trustee was committed to finding a solution. The difficulty, however, was finding a solution that would fit within the letter and spirit of the federal rules, as well as satisfy constitutional due process requirements.

Notably, no provision of the Federal Rules specifically authorizes or prohibits service by electronic mail, or by any of the other technologically sophisticated communication methods that have become commonplace in recent years. Although individuals and businesses transact important business every day via facsimile, electronic mail, and interactive Internet pages, the law has been slow to adapt to these new technologies. Although the U.S. Supreme Court has held that the Constitution requires only that service be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections,"[7] federal rulemakers have not adopted broad amendments to the Federal Rules to specifically permit service by the myriad of alternative communications technologies available today. As an institution that draws much of its credibility from history and tradition, the legal system has yet to embrace fully the possibilities created by electronic communication.

To avoid walking away from the claims against Mr. Diaz, the Trustee had to find a constitutionally-permitted alternative method of service notwithstanding the absence of an explicit federal rule addressing the issue. In other words, the Trustee was required to find a way to work within the strictures of the federal rule generally governing service on foreign defendants – Rule 4(f)(3). This Rule expressly authorizes three methods of service upon individuals in foreign countries:

(1) pursuant to "any internationally agreed means reasonably calculated to give notice";[8]

(2) if no international agreement is applicable, as "prescribed by the law of the foreign country," as directed by a specified foreign authority, or if not prohibited by foreign law, by personal service or return-receipt mail addressed and dispatched by the clerk of court;[9] or

(3) *"by other means not prohibited by international agreement as may be directed by the court."*[10]

precedent authorizing service by that means. In fact, only one other case in the world had authorized service by electronic mail and that case had originated in England.[11]

Despite the absence of a domestic precedent for service by electronic mail (and in the absence of any viable alternative for effecting service), the Trustee filed a motion and brief arguing that both the letter and spirit of Rule 4(f)(3), as well as prior courts' interpretations of the rule,[12] supported the view that service upon Mr. Diaz by alternative means, including electronic mail, should be authorized under the circumstances. Additionally, the Trustee contended that such service satisfied constitutional requirements, because the use of communication methods identified and utilized by the defendant himself would be reasonably calculated to give the defendant actual notice of the lawsuit and an opportunity to present his defense.

After receiving evidence and hearing oral argument on the issue, Chief Judge Cotton agreed and entered an order authorizing service of process under Rule 4(f)(3). Pursuant to the court's order, the Trustee was authorized to serve process upon Mr. Diaz by electronic mail, facsimile transmission, and by mail to Mr. Diaz's last known address. As a result of the court's recognition that a traditional rule contained enough flexibility for application to new technologies, a defendant who otherwise might have avoided service would be held accountable for his actions in a court of law.

Lessons for the Future

Judge Cotton's order does not represent a sea change in the way process may be served in the ordinary case. Although the reluctance of the law to adapt to new technologies means that service of process is typically accomplished today in much the same manner as it would have been accomplished two centuries ago, most litigants suffer little real harm from this technological hesitancy. While it might take a little longer and cost a little more to hand-deliver a summons and complaint to a defendant than to send the defendant an electronic mail message or facsimile transmission, personal service usually can be accomplished — even upon a foreign defendant. Moreover, most litigants are likely to find it far more cost-effective to adhere to conventional service techniques than to attempt to persuade courts that the rules also authorize more novel approaches.

Nevertheless, it would be surprising if the first domestic order authorizing service of process by electronic mail were also the last. In today's growing global [illegible] it, attempting to evade service until their adversaries look elsewhere for satisfaction or simply give up. Many of those individuals will have e-mail accounts. Thanks to Rule 4(f)(3), some of them may get an unexpected message when they log on.

Conclusion

In law, as in many other disciplines, there is an inherent reluctance to embrace new technologies and to apply traditional concepts in unfamiliar contexts. Over time, however, even the most staid of institutions must adapt so as to avoid obsolescence or irrelevance. Although service of process by electronic mail is not the norm and is not likely to become the norm in the near future, the authorization of such service in a single case is a small but meaningful step in the path of the law's progress in the information age. We can be sure there will be more.[13]

In the meantime, don't forget to check your e-mail. ■

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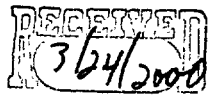
Endnotes

1. Karla Bonoff, *Personally*, on Wild Heart of the Young (Columbia Records 1982). According to Billboard's survey of sales and broadcast play for singles in the pop music field, Bonoff's version of *Personally* reached No. 19 on August 6, 1982.
2. *See* Fed. R. Bankr. P. 7004(b). The Federal Rules of Civil Procedure also authorize the plaintiff to send the complaint to the defendant by "first-class mail or other reliable means" and to request waiver by the defendant of the right to personal service. Fed. R. Civ. P. 4(d).

ant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents. *See* Fed. R. Civ. P. 4(f)(1).

5. *See* Broadfoot v. Diaz (*In re* International Telemedia Assocs., Inc., Ch. 7 Case No. 98-75533-SWC, Adv. No. 99-6233) (Bankr. N.D. Ga. June 22, 1999) (Order Authorizing Service of Process on Defendant Arjuna Diaz by Facsimile Transmission, Electronic Mail, and Mail to Defendant's Last Known Address).
6. *See Can Foreign Defendant Be Served by E-Mail?*, LAWYERS WEEKLY USA, Nov. 1, 1999, at 6; *Bankruptcy Court Issues Default Judgment Based on Failure to Answer E-Mailed Service*, UNITED STATES LAW WEEK, Sept. 28, 1999, at 2167; Barney Tumey, *Bankruptcy Court Issues Default Judgment Based on Failure to Answer E-Mailed Service,* ELECTRONIC COMMERCE & LAW REPORT, Sept. 22, 1999, at 86; Barney Tumey, *Bankruptcy Court Issues Default Judgment Based on Failure to Answer E-Mailed Service,* BNA'S BANKRUPTCY LAW REPORTER, Sept. 23, 1999, at 796; Barney Tumey, *Bankruptcy Court Issues Default Judgment Based on Failure to Answer E-Mailed Service,* DAILY REPORT FOR EXECUTIVES, Sept. 17, 1999, at A-7; *Served by E-Mail*; ATLANTA BUSINESS CHRON., Sept. 3-9, 1999, at 6A; *Bankruptcy Court Authorizes Service Via E-Mail, Fax*, INTERNET LAW & REGULATION, June 22, 1999 (Internet article available at *http://internetlaw.pf.com*). Additionally, the Smithsonian Institution has elected to include a case study based on this development in its permanent research collection in connection with its "Computerworld Smithsonian Awards" program. *See generally* http://innovate.si.edu (homepage for Computerworld Smithsonian Awards program).
7. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306,
8. Fed. R. Civ. P. 4(f)(1).
9. *See* Fed. R. Civ. P. 4(f)(2).
10. Fed. R. Civ. P. 4(f)(3) (emphasis added).
11. *See* Frank Conley, Comment, *:-) Service with a Smiley: The Effect of E-mail and Other Electronic Communications on Service of Process*, 11 TEMP. INT'L & COMP. L.J. 407, 427-28 (1997) (examining English High Court case authorizing service by electronic mail); *see also* Wendy R. Liebowitz, *U.K. Court: Serve Process Via E-mail*, NAT'L L. J., July 8, 1996, at B1.
12. *See* International Controls Corp. v. Vesco, 593 F.2d 166, 176-78 (2d Cir. 1979) (approving service by mail to last known address); Federal Home Loan Mortgage Corp. v. Mirchandani, No. 94 CV 1201 (FB), 1996 WL 534821, at *4 (E.D.N.Y. Sept. 18, 1996) (unreported decision) (allowing service by publication in a law journal); Mayatextil, S.A. v. Liztex U.S.A., Inc., No. 92 CIV. 4528(SS), 1994 WL 198696, at *5 (S.D.N.Y. May 19, 1994) (unreported decision) (authorizing delivery to defendant's attorney-agent); New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co., 495 F. Supp. 73, 80 (S.D.N.Y. 1980) (allowing service by telex for Iranian defendants); Levin v. Ruby Trading Corp., 248 F. Supp. 537, 541-44 (S.D.N.Y. 1965) (holding that service by ordinary mail was proper under the circumstances).
13. *See, e.g.*, Proposed Amendment to Federal Rule of Civil Procedure 5(b) (authorizing service of pleadings other than initial process by electronic mail when such service is consented to by the person served).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT



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March 21, 2000

Allen D. Black, Esquire
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Dear Allen:

Many thanks for sending the Wall Street Journal article. I'm afraid this area will be problematic for a long time.

You will be interested to know that the Civil Rules' subcommittee on discovery is looking into these "electronic" matters. The subcommittee chair is Judge David Levi. I will pass on the article in the event they missed it.

Thanks again.

Sincerely,

Anthony J. Scirica

AJS:dm

cc: Professor Geoffrey Hazard
John Rabiej

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March 10, 2000

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Philadelphia, PA 19106

Prof. Geoffrey C. Hazard, Jr.
University of Pennsylvania
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3400 Chestnut Street
Room 101
Philadelphia, PA 19104-6204

Re: Federal Rules of Civil Procedure
Discovery of Electronically Stored Information

Dear Tony and Geoff:

The enclosed article from Tuesday's Wall Street Journal illustrates yet another example of a matter unfamiliar to current discovery practice that, as a practical matter, should be dealt with by the discovery rules - not the privacy aspect, but the question whether and under what circumstances such "keystroke logs" should be discoverable.

Is anything happening on the electronic front?

Sincerely,

Allen D. Black

THE WALL STREET JOURNAL.

CCXXXV NO. 47 EE/PR ★★★ TUESDAY, MARCH 7, 2000 wsj.com

Thinking Out Loud

You Assumed 'Erase' Wiped Out That Rant Against the Boss? Nope

Keystroke Loggers Save It, So Companies Can Peek Inside Employees' Heads

'Moen...Money...Scholarship'

By MICHAEL J. MCCARTHY
Staff Reporter of THE WALL STREET JOURNAL

The American workplace has been put on notice that office computers can be monitored. But who could have imagined the keystroke cops?

In a new threat to personal privacy on the job, some companies have begun using surveillance software that covertly monitors and records each keystroke an employee makes: every letter, every comma, every revision, every flick of the fingertip, regardless of whether the data is ever saved in a file or transmitted over a corporate computer network. As they harvest those bits and bytes, the new programs, priced at as little as $99, give employers access to workers' unvarnished thoughts — and the potential to use that information for their own ends.

Say you draft a rant to the boss or a client, and then, thinking better of it, delete the whole thing. Too late. One by one, all the keystrokes have been sucked up and stored on your computer's hard drive or sent as e-mail that a computer system administrator or manager can retrieve at his convenience.

Aspiring Aviator

Last December, Poplar Grove Airport in northern Illinois suspected that one of its employees might be running a business of his own from his office PC. So the privately run airport bought a "keystroke logger" called Silent Watch and a license permitting it to install the program on six of the airport's computers. Along the way, however, the electronic stakeout snared some other workers.

Describing her career ambitions, a young office worker seemed to have no clue her employer could delve so deeply into her computer. Soon after arriving at her desk on Christmas Eve morning — at 9:24:09, to be precise — she poured out her soul on a blank page of Microsoft Word.

"I plan to obtain flight time by instructing and/or flying commuter planes," she wrote. She then backspaced over "planes," and substituted "jets." As she tapped away, it became apparent she was drafting a scholarship application for a flight-science program at Western Michigan University. "I know this is the career I want to pursue and the moen" — she backspaced over the "en"-and typed "ney."

After correcting that typo, according to the airport's keystroke log, she stopped again, backspaced over the word "money" and changed it to "scholarship." So the sentence then began, "I know this is the career I want to pursue and the scholarship I would receive . . ."

This wasn't an e-mail or a document she sent over the company's network. It was a work in progress, a draft, reconstructed letter by letter, typos and all.

"We used to tell our people we could monitor everything—even before we really could — just as a deterrent," says Chris Pauli, the airport's computer-system administrator. "Now we really can."

"When else can you peer into someone's raw thought process?" asks Peter A. Steinmeyer, a lawyer at Epstein Becker & Green in Chicago who has studied Internet and privacy issues and who represents management clients. Nonetheless, he says, while an employee may try to argue that he reasonably expected his "draft" thoughts to remain his own, courts have consistently held that communications written on company-provided computers aren't private under current law.

Prominent Customers

"There's no legal qualm about it," says Richard Eaton, who wrote and now sells a keystroke-capturing program called Investigator. "There may be an ethical one."

Mr. Eaton says his company, WinWhatWhere Corp., Kennewick, Wash., has sold more than 5,000 Investigator software licenses since the product was launched in August 1998. Customers, he adds, include Exxon Mobil Corp., Delta Air Lines and Ernst & Young LLP. Lockheed Martin Corp. says it is considering using the software for "ethics investigations."

For all its sleuthing capabilities, Investigator is nothing more than a shiny silver CD-ROM that costs $99 or less with volume discounts. Mr. Eaton, who developed the program, burns the CDs right in his home, which is also company headquarters.

"At first, I thought it was controversial," says the 47-year-old entrepreneur, who sports close-cropped hair and a diamond-stud earring. "Slimy," he adds.

The keystroke tracker evolved from a program he had been selling to help companies measure how much time computer users were spending on various projects. But after clients kept asking for keystroke surveillance, he says, "I saw there is a legitimate security need for it."

The keystroke software is part of a new "offline" workplace battle. Many companies are concluding that they may be missing computer mischief that doesn't involve the Internet or the corporate network, both of which they can monitor. Right at their desktop PCs, employees could be copying sales leads or pornography to or from disks or CD-ROMs, or downloading bookkeeping software to run their own businesses — all of which could elude conventional surveillance methods.

But some uses are strictly personal. Many people have bought the Investigator program, Mr. Eaton says, to run down suspicions that their spouses are being unfaithful in Internet chat rooms. They simply download the software, then later see exactly what their partners were typing. One mother ordered it to check on her teenage children's computer use while she was away on vacation.

The Investigator program is designed to be covert. It doesn't show up as an icon on the screen, and is hard to find among computer files even when someone specifically searches for it. It is usually installed on a worker's computer after hours, but it can also be disguised in an e-mail attachment for an unsuspecting employee to download as an "upgrade."

Recently, however, Mr. Eaton has added an onscreen notice, informing the user that the PC could be monitored—an alert a systems manager can choose to have automatically displayed or not. "If your purpose is to humiliate them, then don't tell them," Mr. Eaton says. "If you want to stop abuse, tell them. Usually the threat alone is enough."

Once Investigator is installed, the computer manager can choose "alert" words like "boss" or "union" or specific names. Then any time they appear in the text of an e-mail, note or memo, those documents will be automatically e-mailed over a company's computer network to the employee's supervisor or other designee. (On a stand-alone computer, the document would have to be retrieved directly from the hard drive.)

On the WinWhatWhere Web site's "We Get Mail" section is an e-mail from Michael Nogrady, a computer techniciari. "Maybe someday you will be ashamed," he writes. "Who knows, some people will do anything for a dollar. I am not saying this to be cruel, just asking if you have looked at this program morally."

Says Mr. Eaton, "I don't want to violate privacy—I like my privacy. But I don't want to be in a position of deciding who gets it and who doesn't."

Customers generally don't have much to say about Investigator. Exxon says it has a longstanding policy of not discussing products it uses, lest it seem like an endorsement. Accounting firm Ernst & Young confirms that it uses Investigator, but won't say how widely or for what purpose. A spokesman for Delta says the airline's information-technology division bought one copy of the software last year and used it for internal testing "in one tiny area" of the division. "We decided it's not something we want to pursue. It died a pretty quick death," the spokesman says. "We don't want to be a police agency."

While Mr. Eaton insists Investigator poses no legal problems, he says his lawyer suggested he include a disclaimer in the licensing agreement: "Any use of this software in conjunction with any hardware, device or apparatus to surreptitiously intercept wire, oral or electronic communications may violate state and federal laws."

Mr. Eaton refuses to discuss the specifics of how the software intercepts keystrokes, and does so even before they reach the author's screen. He does say, however, that Investigator is hooked into the system before something called the "keyboard driver."

When a key is depressed, that action alone doesn't create the corresponding letter on the monitor. Rather, pressing the "A" key, say, causes a slight surge in the electrical current in a circuit board below. Within 0.2 millisecond, a processor embedded in the keyboard begins to generate a "scan code" for that key. It is then sent to the keyboard driver, which translates it and tells the monitor to display an "A." This roundabout route allows for keyboards with foreign alphabets.

For sleuthing purposes, the fraction the route requires is time enough to intercept the codes as they travel between the keys and the monitor. The tiny time lag is important because sophisticated hackers sometimes encrypt messages to outwit computer-system administrators. Investigator, though, merely captures each keystroke before it can be encoded.

A similar alphabetic interchange underlay last December's intrigue at Poplar Grove Airport. About six months earlier, the airport and an affiliate, Emery Air Charter Inc., in nearby Rockford, Ill., had hired a programmer to design Web sites and work on special projects for both companies at a salary of about $50,000. Both businesses, which have about 120 workers combined, were growing rapidly, building hangars for private pilots, running charter flights and offering refueling and other aviation services.

But for weeks, says Steve Thomas, the 47-year-old chief executive and owner of both businesses, their programmer was missing in action. He disappeared into his office and produced almost nothing. Mr. Pauli, the chief financial officer who doubles as system administrator, would stop by to check on him. But Mr. Pauli says the man "would always blank off his screen so I couldn't see what he was doing."

When pressed, they say, the man was vague about his progress. "He was always busy, and we couldn't tell on what," says Mr. Pauli, 30. "But I could see he was storing things on a CD-ROM."

Worried the man might be "trying to pirate some of our strategies and secrets," Mr. Pauli says, he and Mr. Thomas huddled. "We couldn't tap the phones—it's illegal. We explored a camera to videotape him," Mr. Thomas recalls.

One surveillance camera they looked at cost $3,500. But they couldn't figure out how to position it to get good computer-screen resolution or how to conceal it. Besides, Mr. Thomas adds, "we weren't certain about the legality."

Then Mr. Pauli went on the Internet and found the maker of Silent Watch. Adavi Inc., Dunkirk, Md., says it has sold more than 1,000 copies of the $159 monitoring program, which it started marketing last July. Aside from keystroke logging, the desktop-monitoring software can be programmed to send to a manager's screen via e-mail a replica of precisely what is on an employee's screen at any given moment—text, graphics and all. Adavi says it has big corporate clients, but that they are adamant in their refusal to be identified.

Shelling out $237 for six licenses to Silent Watch—"very affordable," says Mr. Pauli—he installed the software on the computer of the mysterious programmer and on five others. In no time, the keystroke logs revealed the man was making repeated visits to pornographic Web sites, and sending and receiving numerous sexually explicit e-mails, which he channeled through Internet mail servers outside the airport's scrutiny.

"We were relieved our business wasn't being compromised," says Mr. Thomas, but the programmer had to be confronted, and fired. Messrs. Thomas and Pauli planned a sting. After monitoring the keystroke log for several days, they say, they could see he routinely visited the "inappropriate" sites early in the day.

Software Raises Workplace Privacy Issues

Continued From First Page

So early one morning in late December, they prepared to swoop. As Mr. Pauli watched the keystrokes spit out on the Toshiba laptop computer in the CEO's office, Mr. Thomas grabbed a manila folder and posted himself outside the closed door of the man's office, just down the hall. When Mr. Pauli was certain the man had a pornographic page on display, he gave the CEO the high sign, and Mr. Thomas flung the door open. He says the man rapidly opened another screen to cover the window he had been viewing.

After asking him what he was working on, Mr. Thomas says he insisted the man show him what was behind the window "maximized" on his screen. After objecting, the man finally complied, and Mr. Thomas says, he saw something he will only describe as "raunchy."

Mr. Thomas then launched into a dressing-down. "I have whole logs here," he recalls saying, thrusting out the folder, which was filled with printouts. "We don't pay you for that. You don't work here anymore. Get your things, and get off the property," he remembers telling the programmer, whom he refuses to identify, but who he says appeared stunned. "His jaw dropped," Mr. Thomas says.

A few days later, he says, the airport got a fax from the man that threatened legal retaliation. "We talked about it, and then ignored it," Mr. Thomas says. "We never heard from him again."

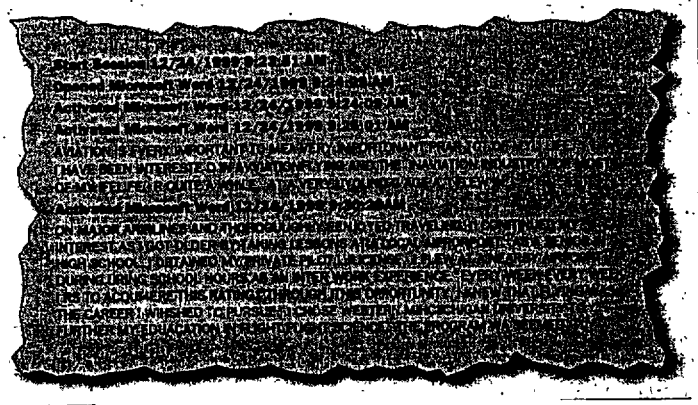
Since then, the company has acquired an additional 19 licenses for Silent Watch. Mr. Pauli says he uses them mostly to trouble-shoot computer glitches. With them, he adds, he discovered that some employees were downloading a video game called Mercenary during their weekend work shifts. "I printed out the installing logs, and then showed them to their immediate supervisors," he says. "There hasn't been a problem since."

Mr. Pauli says he generally is using Silent Watch to keep an eye on compiter misuse that hurts productivity, adding, "I don't care if they type personal letters."

Neither does the software. A couple of days after December's sting operation, Silent Watch was soaking up the scholarship plea of the office worker, who the company declines to name but who it says received a verbal reprimand for doing personal chores on company time. "In addition to taking lessons," her note said at one point, "I worked at an airport to learn the 'behind the scenes' "—she then backspaced over that, changing it to say—"to learn the other aspects of aviation besides flying."

A Personal Work in Progress

Part of a Poplar Grove Airport office worker's college-scholarship application, as recorded—typos and all—by Adavi Inc.'s Silent Watch software.



V

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

M E M O R A N D U M

Date: March 28, 2000

To: Members, Advisory Committee on the Federal Rules of Civil Procedure

From: Lee H. Rosenthal, Chair, Class Action Subcommittee

The materials attached are intended to achieve two modest purposes for the April 10 meeting of the Rules Committee. The first purpose is to remind the Committee of the complexity of the issues raised by any proposal to amend the rules governing class action litigation. This Committee spent seven years in its last study of the different approaches to class action rule revision. Those years of thoughtful

study have provided a staggering amount of material, including drafts of rule proposals and accompanying notes; minutes of meetings reflecting lengthy discussions; thousands of pages of testimony and comment; the Mass Tort Working Group report that spun off from the class action work; and the empirical studies provided by the Federal Judicial Center and the Rand Corporation. The daunting initial task facing us now is to use this wealth of information to decide what areas of the Rule present the greatest problems and offer the most promise for meaningful and successful rule amendment.

Our last foray into Rule 23 resulted in the adoption of the highly significant interlocutory appeal amendment. The impact of this revision on class action practice cannot yet be fully appreciated. Our last foray into Rule 23 revealed the extent to which any revision to the language setting the limits of this procedural mechanism impacts substantive rights, or is perceived as doing so. The subcommittee recognizes that the tensions between individual and representative litigation are no less present today than when we last examined Rule 23. The subcommittee recognizes that the varieties and complexities of class litigation are no less numerous today than when we last examined Rule 23. Mass tort suits and consumer class suits proliferate, with particular increases occurring in the state courts. The issues have not become easier with the passage of time.

At the same time, the prior work and subsequent developments,

particularly the first two Supreme Court decisions on class actions in a number of years, *Amchem* and *Ortiz*, have presented us with a great opportunity. That opportunity is to identify discrete, yet important areas of class action practice that can be feasibly be improved by changes to the existing rule. Accordingly, the subcommittee has begun its work by examining possible amendments to the rules governing the criteria for certifying settlement classes; the process and criteria for determining whether to approve the terms of a proposed settlement; and the process and criteria for appointing class counsel and ruling upon their applications for fees.

The material is organized into sections for each of these areas. The first two sections raise the issue of the criteria for certifying settlement classes. These sections are set out as follows:

I. Settlement Classes Beyond *Amchem*

A. Through Rule 23(b)(4)

B. Through Rule 23(b)(3)

II. Settlement Classes Within *Amchem* and Confirming *Amchem*

Section I sets out a proposal for a rule that would permit certification of a settlement-only class that could not be certified for trial, moving beyond the limits that the Supreme Court found in the *Amchem* case. (A copy of the *Amchem* and the *Ortiz* decisions is at the end of the materials, behind Tab IX). Section I contemplates the ability of a court to certify for settlement a class that could meets the requirements

of Rule 23(a), but does not meet all the requirements of the present Rule 23(b) and accordingly could not be certified as a class for trial. The proposed rule in effect adopts the approach taken in Justice Breyer's dissent in the *Amchem* case and permits a court to recognize that the fact of the settlement is in itself is a factor that unifies the class and weighs significantly in favor of certification. The constitutional limits of notice and due process that both the majority and the dissent discussed in *Amchem* continue to limit the ability of a court to certify a class that includes the settlement of "future claims," a feature of mass tort personal injury cases involving latent injury or disease. Notice and due process concerns prevent defendants seeking global peace from obtaining resolution within Rule 23 of claims by individuals who may not even know that they were exposed to an agent that may result in disease at some unknown future time. Within these limits, however, Section I proposes an approach that relaxes the requirements for certifying a settlement class beyond that presently available in federal courts.

Section II sets out a proposal for a rule that would confirm and make explicit in the Rule *Amchem*'s holding that a court can certify a settlement class that meets the Rule 23(a) requirements and one of the 23(b) categories except for trial manageability. This proposal goes beyond the present rule in making explicit the criteria that a court is to consider and apply in deciding whether to certify a class for settlement purposes. It does allow a court to consider the fact of settlement in

deciding whether the criteria for certification have been met. However, a court may not give such weight to that factor that the court relaxes the requirements of Rule 23(a) and one of the (b) categories, except that a court may consider the fact that problems of trial manageability do not stand in the way of certifying a settlement class. This proposal identifies the factors that a court should consider in deciding whether to certify a class for the purpose of settlement, rather than trial.

The first issue on which the subcommittee seeks guidance from the Committee is whether to continue examination of a proposed rule that goes beyond *Amchem* and facilitates class action litigation by making it easier to settle such cases. Section I, A and B of the materials attached provide a rough outline of what a proposed rule to accomplish this might look like. Section II sets out an alternative draft of a proposed rule that confirms *Amchem* and makes what it permits, and what it limits, explicit. The amendment proposed in Section II sets out the authority of a court to certify a class for settlement purposes, but only if it met all the certification requirements for an adjudicative class except for trial manageability. The choice is an important one. It is recognized that insisting on the limitations of *Amchem* may continue the trend to an increased reliance on the state courts for class actions, even class actions that are national in scope. On the other hand, relaxing the requirements for settlement class certification further strains the principles that justify representational litigation as a limited substitute for individual suits for specific

purposes. Relaxing the requirements for certifying settlement-only classes is likely to make the use of the class action device more ubiquitous. The Supreme Court's opinion, and Professor Cooper's notes, outline some of the problems recognized in making the settlement- only class more easily obtainable. Because the choice is so fundamental and will largely dictate the direction of significant other work, we ask the Committee to give us its thoughts.

Section III sets out a proposal for a revised Rule 23(e) to codify the "best practices" of courts considering whether a class settlement should be approved. The proposed amendment applies to all classes, whether certified for settlement only or for all purposes. In our last consideration of class actions, the Committee heard a number of complaints about both the process and the criteria used to judge proposed settlements. We heard of settlements in consumer class action cases in which the defendant achieved peace, the plaintiffs' counsel achieved a large fee, and the class members achieved coupons. We heard of settlements in personal injury class action cases in which the defendant achieved peace, and the plaintiffs' counsel achieved a large fee, but because of a "reverse auction," the class members achieved results that some believed to be much less than they should have obtained. The proposed rule attempts to articulate factors that a court can apply to evaluate settlement terms proposed. The factors are based in large part on the case law. The proposal sets out both the procedure that should be followed to examine the fairness of a proposed

settlement and the criteria that allow a court to make a meaningful and trustworthy evaluation of the terms presented. The proposal includes an effort to grapple with the competing concerns that objectors raise and the benefits and complications they bring to class settlements.

Section IV and V propose amendments in the rules governing court appointments of class counsel and court approval of counsel's request for fee awards at the conclusion of the case. Both are areas that generated anecdotes of problematic processes and results in our last examination of class actions. The class action appointment rule sets out suggestions that are meant to emphasize the fiduciary obligation on the part of class counsel. The subcommittee believes that these areas are opportunities for discrete but significant improvements in the rules governing class action practice. The proposals are very rough and are included only to inform the committee of the beginning of our work in this area and, of course, solicit suggestions and guidance.

Section VI is a section drawn from the materials resulting from the prior work of this Committee. The Committee spent a great deal of time examining whether there is an appropriate, and feasible, role for "opt-in" classes. The absence of such a feature, combined with the difficulty of providing clear notice and the fact of a low incidence of "opt-outs," throws into question the "representative" nature of class actions. At the same time, it is this representative nature that provides the

principled justification for certifying a class action litigation in the first place. The Committee heard much information about the practical difficulties of crafting any opt-in rule. The materials attached propose a continued examination of the feasibility and desirability of a very limited opt-in class application. Section VI sets out a proposal for an opt in class limited to small claim damages consumer class actions. The subcommittee invites the comments of the full Committee on such a targeted approach.

Section VII provides the draft minutes from the February 18, 2000 subcommittee meeting.

Section VIII sets out an underlined, and redlined, version of the March 1996 draft Rule, with February 2000 modifications. The underlined sections are the proposals made in March 1996 to change the present rule. The redlined sections are the February 2000 changes to those proposals. This material is not included as a suggestion that we revisit all we did in March 1996 through 1998. Rather, it is included as a reminder of what we did examine and a way of highlighting how some of the proposals the subcommittee has identified so far as candidates for continued examination might fit in the rule.

The material does suggest changes that we did not adopt before that might merit further study. They include, but are by no means limited to, the following:

a. Notice. It is hard to fault a proposal that would require clear, plainly written notices in class actions. It has proven equally hard for courts successfully to require lawyers to include all the necessary information, in plain and clear terms. The subcommittee proposes to include the requirement in the rule. The subcommittee has also sought the assistance of the Federal Judicial Center. Tom Willging, who has extensively studied class action litigation, will head an FJC effort to gather class action notices and identify the best features of those notices. The FJC will develop model or form "notices," for a securities class suit, for a personal injury or property damage suit, for an employment case, and for a consumer claim suit. These model notices could greatly assist judges in insisting on compliance with a rule requiring clear and plain notices.

b. Standards for certification: common evidence. There have been proposals for a number of years that the Rule 23(a) commonality and predominance requirements be strengthened by focusing on common evidence rather than common questions of law or fact. These proposals continue, with additional arguments based on recent certification of mass tort class suits, particularly in the state courts.

c. Issues relating to the extent to which a merits examination is appropriate before certification.

Section IX provides a copy of the *Amchem* and *Ortiz* decisions, for ease of reference.

The subcommittee is still working on the threshold issue of identifying the proposals and areas on which to focus. Your assistance in this task is greatly appreciated.

1

I. Rule 23 Settlement Classes Beyond *Amchem*

A. Through New Rule 23(b)(4)

B. Through New Rule 23(b)(3)

R 23 Settlement Class:

Beyond *Amchem* By New R 23(b)(4)

(b) ~~**Class Actions Maintainable**~~ **When Class Actions May be Certified.** An action may be ~~maintained~~ certified as a class action for purposes of settlement or trial if the prerequisites of subdivision (a) are satisfied, and in addition * * *.

(4) Members of the class share an interest in resolving by a class settlement claims that arise out of a common course of conduct by a person opposing the class [and the court finds that exploration of class settlement is desirable in light of:

(A) the prospect that a class will not be certified for trial under Rule 23(b)(1), (2), or (3);

(B) the nature of the controversy;

(C) the nature of the relief that might be demanded by litigation or settlement;

(D) potential conflicts of interest among class members;

(E) the inefficiency, impracticability, or unfairness of separate actions;

(F) the practical ability of [individual] class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;

(G) the maturity of the underlying substantive issues, as measured by experience in adjudicating other actions, the development of scientific knowledge, and other facts that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages;

(H) [individual] class members' ability to effectively determine whether to request exclusion from the class;

(I) the opportunity for effective participation by representative class members in the settlement process;

(J) the court's ability to administer a settlement; and

(n) [Additional factors to be developed, particularly in light of recent case law]

[A draft Committee Note is set out below. The notice provisions are the same as those included in the March 1996 draft rule and Committee Note, set out at the end.]

Rule 23(b)(4): Settlement Classes Beyond *Amchem*

DRAFT COMMITTEE NOTE

Subdivision (b)(4). New subdivision (b)(4) creates a settlement-only class that expands the limits of present Rule 23 as interpreted by the Supreme Court in *Ortiz v. Fibreboard Corp.*, 1999, 119 S.Ct. 2295, and *Amchem Prods., Inc. v. Windsor*, 1997, 521 U.S. 591. It is designed to permit class certification solely for the purpose of settlement when settlement on a class basis promises benefits that cannot be achieved by other means, a factor that in itself provides an cognizable interest shared by potential class members.

Experience seems to show three rough settlement categories. The simplest category occurs when a class is certified for all purposes and then settles. This category is not as distinct as may seem, however, since the parties may anticipate settlement at the time of certification. A second category occurs when a class is certified for purposes of settlement at a time when there is no settlement agreement. This category blends by imperceptible degrees into the first and the third. The third category occurs in its pure form when the action is initially filed with a request for certification after would-be class representatives have negotiated the terms of settlement with the class adversary. Although there may be many shades along the

spectrum that ends in settlement, these three categories identify a progression of concerns that surround class-action settlements.

Binding class members by settlement is least problematic if a class is certified for trial at a time when there is no understanding as to possible settlement, or if the class is first certified — whether for settlement or for trial — after extensive proceedings, in the class-action court or elsewhere, that have educated the parties and the court about the underlying claims. In these situations the class representatives have all the bargaining power that derives from representation of the class and the threat of enforcement through trial. The court has the greatest opportunity to become familiar with the merits of the litigation, or is already familiar with the merits, and thus enjoys the best prospect of effective review of any proposed settlement. If it seems desirable, the court also has the best opportunity to control the designation of class representatives — including class counsel — and to control the settlement process.

Certification only for settlement purposes weakens the court's position, and also weakens the position of class representatives. The class adversary's incentive to settle is driven by the prospect of litigation in some other form, not by litigation against this class as it has been defined for settlement. This incentive may remain powerful, and indeed may be more powerful than the incentive that derives from the

threat of litigating with this class. Settlement with a broad class may reduce the defendant's transaction costs so far, and offer so substantial a reward in global peace, as to be more valuable than any alternative mode of disposition. The court may have valuable reassurances of the quality of class representation and the cogency of the settlement terms, moreover, if there has been substantial precertification litigation, establishing the maturity of the underlying dispute and ensuring the experience of class counsel. At the other end of the spectrum, however, there is much less negotiating power if class members typically hold small claims that would not support litigation by other means. There is substantial concern that in these circumstances it may be possible for a class adversary to engage in a "reverse auction" by threatening to negotiate a more favorable settlement with others willing to represent the same class in a different court. The court, moreover, may be completely dependent on class representatives and their adversary for information about a proposed settlement — and when all appear to argue in favor of the settlement they have reached, there may be little assurance that the court can reach a satisfactory appraisal of the probable merits of the class position, the costs of pursuing the position through litigation by any means, and the value of the relief proposed.

The court may in some ways be in the weakest position when a settlement is negotiated before any action has been filed. There is little opportunity to influence

the selection of class representatives or counsel, and no litigation basis in this action to provide information beyond that revealed in the process of seeking settlement approval. Neither is there any opportunity to seek to structure the settlement process. The prefiling cooperation among the parties may raise real concerns whether a genuine case or controversy is presented. On the other hand, the first notice of the class action will include the terms of the settlement, affording maximum opportunity for class members to appraise the proposed settlement and to request exclusion from a (b)(3) or (b)(4) class.

Many benefits may flow from class settlement when many individuals have claims that arise from a common course of conduct pursued by a common adversary. The nature and importance of the benefits depend in part on the nature of the underlying claims, issues, and defenses. In determining whether to certify a (b)(4) settlement class a court should keep in mind these distinctions. Small-consumer-claims classes are different from classes that involve both large and small claims governed by federal law. "Mass tort" classes that involve personal injury and are governed by state law are distinctively different from other classes. Employment-practices classes may differ from securities-law classes. The distinctions are many; indeed, it may be that no two class actions are quite alike.

One benefit of the settlement class can be counted under present Rule 23(b)(3). The *Amchem* decision makes it clear that a class can be certified for settlement even though manageability problems would defeat certification for trial. Settlement, to be sure, may include terms that impose burdens of administration and individualized adjudication. Benefits often may flow to individual class members on terms that require notice to class members, proof of individual claims, and resolution of disputed individual claims. These burdens, however, may be more manageable than the greater burdens and confusions that would attend litigation and decision of class and individual claims.

Other benefits of class-wide settlement cannot be counted under present Rule 23(b)(3). Often these benefits encounter parallel risks. New Rule 23(b)(4) is drafted in open-ended terms that invite consideration of both the potential benefits and the potential costs of certification for settlement only. The factors described in paragraphs (A) through (J) often look in both directions, encouraging consideration of both the potential advantages and the potential disadvantages of a settlement class. These factors reflect a list of competing concerns too complex, and often too elusive, to be catalogued completely. The survey offered here is incomplete and does not indicate limits on the concerns that may be considered.

Paragraph A, looking to the prospect that a class will not be certified for trial under Rule 23(b)(1), (2), or (3), is the first illustration of concerns that can weigh for or against certification of a settlement class under new subdivision (b)(4). The reasons that defeat certification for trial or for settlement under any of the present subdivision (b) categories deserve great respect. In considering these reasons, the court need not finally determine that it would never certify a class under (b)(1), (2), or (3). But the potential advantages of certification for trial, or of certification in circumstances that warrant denial of the opportunity to request exclusion from the class, require that the court seriously evaluate the alternatives to certification under (b)(4). If certification on any other basis seems unlikely, however, the opportunity to achieve class-wide resolution by settlement becomes more important.

Paragraph (B), focusing on the nature of the controversy between class members and the party opposing the class, invites consideration of both private and public interests in ways that overlap many of the other factors. An action that grows out of widespread small injuries, for example, involves at once the public interest in enforcing the relevant legal principles, the private interest of the claimants in winning relief that may not be available by any other means, and the offsetting interest of the defendant in not being subjected to the risks and costs that go with a class action on a claim that may deserve to fail. A class that involves both small and large claims

may involve a different blend of these interests, while a class that involves serious personal injuries may involve a still different blend. An action that does not quite qualify for certification as a mandatory class under subdivision (b)(1) or (b)(2) may involve yet different concerns of the sort reflected by those forms of class proceedings.

The distinction between state- and federal-law claims is another important aspect of the nature of the controversy. Enforcement of state-law claims by class action in a federal court, whether in diversity or supplemental jurisdiction, generates choice-of-law problems. These problems may bear on the definition of the class, perhaps requiring certification of several classes, or may defeat certification of any class. A settlement class affects the choice-of-law problem by supporting a homogenization of the legal issues. Homogenization may be desirable or undesirable. When a common course of conduct affects people in many states, or throughout the United States, it may advance fairness to treat all of them in the same way for settlement purposes. Common treatment, however, may trample over the distinctions of social policy that underlie the conflicting laws of the several states. Common treatment also may deprive some class members of the opportunity to seek out different courts that apply more favorable law or that, despite similar legal principles, give more favorable awards. A court struggling with these conundrums may also

consider the prospect that absent class certification in a federal court, a nationwide class may be certified in a state court that follows different choice-of-law principles than those the federal court must borrow from the state where it sits.

Paragraph C points to the nature of the relief that might be demanded by litigation or settlement. One distinction is between money damages and injunctive relief. If litigation in some less aggregated form creates a risk of overlapping or conflicting injunctions, for example, a common resolution by class settlement may be superior. If relief to individual class members would involve small or inconsequential sums of money, settlement may provide more useful means of enforcing the underlying law without risk of denying important benefits to individuals. If some class members, or perhaps all, have claims for large sums of money or other individually important relief, special care must be taken before authorizing disposition without adjudication.

The nature of the relief that may be achieved by settlement includes administrative systems for resolving individual claims. Great efficiencies may be achieved in this way, providing for expeditious processing and prompt resolution of disputes. Formulas or grids may be established that support even-handed relief. Such systems may transfer greater benefits to more class members than any alternative form of disposition. With careful court review of the initial settlement terms under

Rule 23(e), and careful supervision of implementation, the results may handily outstrip the results that could be achieved by any other means. Settlement, however, is not adjudication, and class-based settlement is not the same as individual settlement. Great care must be taken in shaping and reviewing claims-processing systems.

Paragraph (D) serves as a reminder of the pervasive need to protect against conflicting interests both in defining a class and in assessing the prospect of adequate representation. Reasonable class definition and adequate representation are required for all class actions by Rule 23(a). Settlement classes may demand particularly close scrutiny on these accounts. Choice-of-law problems, for example, may be obscured by the pressure to reach a convenient settlement package. The *Amchem* decision serves as a reminder that if settlement is to reach individuals who do not yet have ripe claims for present injury — often called "future" claimants — there must be unconflicted representation as well as other protections to ensure notice at a meaningful time, and protection of the right to request exclusion from the class and settlement at a time when a meaningful exclusion choice can be made.

Paragraph (E) addresses directly the balance between class settlement and individual litigation by looking to the inefficiency, impracticability, or unfairness of separate actions. Efficiency affects both court systems and litigants. When separate

actions by many individual class members are practicable, the result may be substantial docket congestion in some set of courts, state, federal, or both. The efficiency of class disposition may affect individual litigants more directly by reducing the transaction costs that siphon large sums away from claimants and defendants alike and into litigation. Many classes present the different problem that many individual class members cannot practicably pursue individual litigation — the efficiency of class disposition, by settlement or otherwise, is the only means to redress their claims. Efficiency in these circumstances overlaps the direction to consider the impracticability of separate actions. When potential claimants include both those for whom separate actions are practicable and those for whom they are not, the court may choose to define the class to exclude those who likely are able to sue separately, or — because those who could sue separately may prefer to enjoy the efficiencies of class litigation — may seek ways to ensure that the opportunity to request exclusion is easily exercised. Assessment of the practicability of separate actions also may take account of the reality that may underlie the form of separate actions. In some circumstances a single lawyer or firm may undertake individual representation of hundreds or even thousands of claimants with similar claims. Individual claims may be processed in ways that are difficult to distinguish from class-action disposition, but at a greater price.

The unfairness dimension included in paragraph (E) is particularly elusive. Separate pursuit of separate individual actions may work to the benefit of some claimants at the expense of others. This prospect is most important when there is a risk that early plaintiffs may exhaust the assets available for litigation and compensation, leaving nothing for later plaintiffs. There also may be a risk of unfairness to defendants who are subjected to successive awards of punitive damages; this unfairness may in time come to harm claimants as well if punitive awards exhaust resources that might have gone for compensation. A class action can help to ensure an orderly approach to determining whether there will be adequate assets to compensate all claims, present and future, and to ordering the disposition of funds as they become available. During a period of uncertainty as to the availability of compensation for all injuries, it also is possible to arrange the order of payment so those most in need are protected.

The unfairness concern, coupled with other factors in subdivision (b)(4), permit the court to reach beyond the narrow "limited fund" concept that has been invoked in some attempts to resolve mass-tort litigation. The *Ortiz* decision shows the difficulty of determining the limits of the "fund" by any means short of transferring ownership of the defendant to the class. Settlement, however, can generate a surplus that is not available through litigation. A defendant that remains under the

unquantifiable threat of massive litigation may be denied access to capital. Resolution of the uncertainty by settlement can restore the defendant to financial health, but there is little incentive to settle unless the defendant can share in this benefit. The class, the defendant and its owners and creditors, and the public interest all may be better served by a class-wide settlement than by years of costly and disparate litigation.

If a settlement class includes claimants whose injuries and claims have not matured, these "futures" claimants must be represented separately from those who have present claims. The conflicts of interest between these groups preclude common representation.

Paragraph (F) parallels some of the factors listed in Rule 23(b)(3) for determining the superiority of class treatment. It reinforces the focus on the advantages of separate actions and the real-world availability of separate actions. In considering the alternatives to class certification, the court should consider the possibility of aggregation by other means, including smaller class actions.

Paragraph (G) addresses the maturity of the underlying substantive issues, a factor more important in some cases than in others. The concern with maturity is greatest with respect to mass torts that may inflict serious personal injury or extensive property damage arising from events that are dispersed in time and place. Individual

litigation is possible, and often is pursued. A settlement class should be certified in these circumstances only after it is clear that additional litigation is not likely to improve significantly the information available to inform both negotiation of a settlement and court review of the settlement terms. Many class actions, on the other hand, grow out of unique and closed events, and often present issues that cannot realistically be resolved outside the class-action context. In these circumstances, there may be little reason to hope for improved understanding through independent litigation.

Paragraph (H) focuses on the effective ability to request exclusion from the class. A settlement class is most effective when class members can fully understand the right to request exclusion and can make an intelligent decision whether to exercise that right. One element of this calculation turns on the ability to provide clear notice. Notice depends in part on the complexity of the underlying dispute, the clarity of the consequences of class treatment, and the ability to express these matters in clear and concise language. Notice depends also on the ability to identify class members and to bring home to them actual knowledge of the notice. If an attempt is made to reach future claimants, special care must be taken to ensure that the right to request exclusion survives as to each class member for a reasonable period beyond the time when that class member learns, or reasonably should learn, of the manifestation of

injury that creates a ripe claim. Another element that affects the opportunity to request exclusion is the probability that professional advice is available. Members of a class for serious personal injuries are likely to have access to counsel, and to be able to make a well-informed decision whether to request exclusion.

Paragraph (I) looks to the ability of representative class members to participate in the settlement process. The central concern is that class counsel be guided by people who represent the needs and interests of the class as a whole. There is useful reassurance from participation by class members who were not selected by class counsel. This participation may involve particularly concerned or sophisticated individual class members, or a "steering committee" or other group of class members, or a class guardian appointed by the court on terms that do not create conflicting incentives to accept terms that are not the best the class can win. Still other forms of participation may emerge to bolster the quality of the settlement negotiations and agreement.

Paragraph (J) calls for a forecast whether the court will be able to administer a settlement. The nature of the claims will provide an indication of the probable need to resolve the details of individual claims. It may be possible to foresee other difficulties of administration. The forecast may be quite well informed when the parties present a proposed settlement in conjunction with the request for class

certification, and in other cases may be so elusive as to be of little help in resolving the certification question. Before anticipating unmanageable tasks, however, it is wise to remember that a creative settlement may include methods of resolving individual claims that can be effectively managed without imposing undue burdens on the court.

Part of an amendment of Rule 23 to expand the certification of settlement classes beyond the existing rule limits *Amchem* and *Ortiz* identified but without moving beyond constitutional limits includes amendments to Rule 23(c) to reflect the right to opt out of a (b)(4) settlement class. Rule 23(e) is amended to confirm the right to opt out of the actual settlement whether or not there was an earlier period to request exclusion that expired before the settlement was reached. If a class settlement undertakes to reach claims that have not yet matured held by "futures" claimants, particular care must be taken in providing notice. Notice at the time of certification and — if it comes later — at the time of reviewing a proposed settlement should use descriptions and methods of communication designed to inform as many of the futures claimants as possible. When state court systems are willing, notice also should be provided in a fashion that will enable a state court to notify individual litigants as they come to file their future claims. The ultimate assurance of notice, however, will rely on the defendant's self-interest in raising the class settlement as

a defense in individual actions; the settlement terms should provide a period for electing to request exclusion from the class action and the settlement after notice is received from the defendant.

R 23 Settlement Class:

Beyond *Amchem* Through R 23(b)(3)

(b) ~~**Class Actions Maintainable**~~ **When Class Actions May be Certified.** An action may be ~~maintained~~ certified as a class action for purposes of settlement or trial if the prerequisites of subdivision (a) are satisfied, and in addition * * *.

(3) the court finds (i) that the questions of law or fact common to the certified class ~~members of the class~~ predominate over ~~any~~ individual questions ~~affecting only individual members~~ included in the class action, and (ii) that a class action is superior to other available methods for the fair and efficient ~~adjudication~~ disposition of the controversy. The matters pertinent to ~~the~~ these findings include:

(A) the need for class certification to accomplish effective enforcement of individual claims;

(B) the ~~interest of members of the class in individually controlling the prosecution or defense of~~ practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;

(C) the extent, ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of the class~~;

(D) the desirability ~~or undesirability~~ of concentrating the litigation or settlement ~~of the claims~~ in the particular forum;

(E) the likely difficulties ~~likely to be encountered in the management~~ ~~of~~ in managing a class action that will be avoided or significantly reduced if the controversy is adjudicated or resolved by other available means; and

(F) the opportunity to settle on a class basis claims that could not be litigated on a class basis or could not be litigated by or against a class as comprehensive as the settlement class.

[This proposal would reach the same result for (b)(3) classes, of permitting the certification of classes for settlement that could not be certified for trial, but through a different mechanism, revising present (b)(3) rather than creating a new (b)(4). This approach would limit the possibility of a settlement-only class to (b)(3) classes].

II. Rule 23 Settlement Classes

Within and Confirming *Amchem*

R 23 Settlement Class:

Within *Amchem's* Limits, through R 23(b)(3)

(b) ~~**Class Actions Maintainable**~~ **When Class Actions May be Certified.** An action may be ~~maintained~~ certified as a class action for purposes of settlement or trial if the prerequisites of subdivision (a) are satisfied, and in addition * * *:

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action; and

(E){Version 1} the opportunity to settle on a class basis claims that could not be litigated by [or against?] a class as comprehensive as the settlement class.

(E){Version 2} the opportunity to settle claims that could not be managed for trial on behalf of [or against] the same class.

{Version 3 would continue (D) rather than add a new (E): the difficulties likely to be encountered in the management of a class action in pretrial, at trial, for settlement, or in administering relief for individual class members}.

[The first part of the draft Committee Note begins on the next page, and would emphasize that the amendment is intended to confirm, not expand, *Amchem*.]

Rule 23 Settlement Classes: Within *Amchem*

Draft Committee Note

Subdivision (b) is amended to confirm the ruling in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619 (1997) that it is proper to certify a class for settlement, even when the court might not certify the same class — or any class — for trial. Settlement classes have become a familiar and useful means of resolving some disputes. The common use of settlement classes is reflected in T.E. Willging, L.L. Hooper, and R.J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, 34-35, 61-62 (1996). Settlement classes continue to be certified in the wake of the *Amchem* decision. See, e.g., *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir.1998); *In re Lease Oil Antitrust Litigation*, 186 F.R.D. 403 (S.D.Tex.1999); *Bussie v. Allmerica Fin. Corp.*, No. 97-40204-NMG, 1999 U.S. Dist. LEXIS 7795 (D.Mass. May 19, 1999); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D.54 (D.Mass. 1999); *Lyons v. Scitex Corp.*, 987 F.Supp. 271 (S.D.N.Y. 1997).

This amendment permits certification of a settlement class so long as the subdivision (a) prerequisites are satisfied and certification is proper under paragraphs (1), (2), or (3) of current subdivision (b), except that the superiority of class treatment as to trial manageability need not be satisfied. The terms of proposed Rule 23(e)

protect the interests of class members in many ways, including the right to request exclusion from the settlement.

III. The Settlement Process:

Revised Rule 23(e)

The Settlement Process: Revised Rule 23(e)

(e) Settlement, Dismissal, ~~or~~ and Compromise.

(1) A class or subclass representative may, with the court's approval, settle, dismiss, or compromise all or part of the class or subclass claims, issues, or defenses.

(2) The court may not approve settlement, dismissal, or compromise of all or part of ~~A~~an action certified as a class action ~~shall not be dismissed or compromised~~ without a hearing, and notice of ~~the~~ a proposed settlement, dismissal, or compromise ~~shall~~ must be given to all members of the class in such reasonable manner as the court directs. [The notice of a proposed settlement, dismissal, or compromise must include a summary of the terms of all agreements or understandings made in connection with the proposed settlement, dismissal, or compromise.]

[(3) A settlement, dismissal, or compromise of a class action binds a class member only if the class member was afforded an opportunity to request exclusion from the class after notice of the terms of the settlement, dismissal, or compromise, unless the class member had an opportunity

to request exclusion after notice of a proposed settlement, dismissal, or compromise that was less favorable to the class member.]

(4)(A) Any class or subclass member may [, subject to the obligations set forth in Rule 11,] object to a proposed settlement. An objector must be afforded discovery reasonably calculated to appraise the apparent merits of the class claims, issues, or defenses[, and to reveal the terms of any incidental agreements or understandings]. The court may award as costs the actual reasonable expenses (including attorney fees) incurred to support a successful objection.

(B) An objector may settle, dismiss, or compromise the objections in the trial court or on appeal only with the trial court's approval. The court may approve a settlement or compromise that affords the objector terms more favorable than the terms of the class settlement only if the objector's terms are reasonably proportioned to facts or law that distinguish the objector's position from the position of other class members.

(5) In reviewing a proposed settlement, the court should consider, among other factors:

(A) the probability that the litigation could be continued through trial [on a class basis];

(B) a trial's probable cost, duration, and outcome on liability and damages as to the claims, issues, or defenses of the class and individual class members;

(C) the maturity of the underlying substantive issues, as measured by experience in adjudicating individual actions, the development of scientific knowledge, and other facts that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages;

(D) the extent of participation in the settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master;

(E) the number and force of objections by class members;

(F) the total resources available to the parties agreeing to pay money under the settlement and the probable ability to enforce a litigated class judgment;

(G) the existence and probable outcome of claims by other classes and subclasses;

(H) the comparison between the results achieved by the settlement for individual class or subclass members and the results achieved — or likely to be achieved — for other claimants;

[**(I)** whether class or subclass members are accorded the right to opt out of the settlement;]

(J) the reasonableness of any provisions for attorney fees, including agreements with respect to the division of fees among attorneys and the nature or absence of any agreements affecting the fees to be charged for representing individual claimants or objectors;

(K) whether the procedure for processing individual claims under the settlement is fair and reasonable;

(L) whether a substantially similar settlement for a similar class has been rejected by another court; and

(M) the apparent intrinsic fairness of the settlement terms.

(6) A proposal to settle, dismiss, or compromise part or all of an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent investigation and report to the court on the fairness of the proposal. The expenses of the

investigation and report and the fees of a person specially appointed will be paid by the parties as directed by the court.

Draft Committee Note

Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. It applies to all classes, whether certified only for settlement; certified as an adjudicative class and then settled; or presented to the court as a settlement class but found to meet the requirements for certification for trial as well.

Paragraph (1) expressly recognizes the power of a class representative to settle class claims, issues, or defenses. The reference to settlement is added as a term more congenial to the modern eye than "compromise."

Paragraph (2) confirms the common practice of holding hearings as part of the process of approving dismissal or compromise of a class action. The factors to be considered under paragraph (5) are complex, and should not be presented simply by stipulation of the parties. A hearing should be held to explore a proposed settlement even if the proponents seek to waive the hearing and no objectors have appeared. [*Reporter's Note: The paragraph (2) provision for notice of related agreements is an alternative to the discovery provision on paragraph (4).*

Class settlements at times have been accompanied by separate agreements or understandings that involve such matters as resolution of claims outside the class settlement, positions to be taken on later fee applications, the freedom to bring related actions in the future, or still other matters. Any such agreements must be disclosed to the court so that the notice to class members can include a verifiable summary of the agreement terms, and so that these agreements can be considered in reviewing the class settlement terms.]

[*Reporter's Note: Paragraph 3 met opposition in Subcommittee discussion on the ground that a right to opt out of the settlement would defeat many settlements. But it also was observed that in most cases class certification and tentative approval of a settlement occur at the same time, so that there is an opportunity to request exclusion at a time when settlement terms are known. This provision is retained in the draft to support further discussion.* Paragraph (3) recognizes the essential difference between disposition of a class member's rights by official adjudication and disposition by private negotiation between court-confirmed representatives and a class adversary. No matter how careful the inquiry into the settlement terms, settlement does not carry the same reassurance of justice as an adjudicated resolution. A class member is better protected by a right to request exclusion after the terms of a proposed settlement are known. There is no need for a second opportunity to

request exclusion, however, if there was a right to request exclusion after a proposed settlement and a new settlement is reached on terms that are unambiguously more favorable to class members. The right to opt out does not mean much when there is little realistic alternative to class litigation, although even then there may be an incentive to negotiate a settlement that encourages class members to remain in the class. The protection is quite meaningful as to class members whose individual claims will support litigation by individual action, or by aggregation on some other basis — including another class action. The settlement agreement can be negotiated on terms that allow any party to withdraw from the agreement if a specified number of class members request exclusion. The negotiated right to withdraw protects the class adversary against being bound to a settlement that does not deliver the repose initially bargained for, and that may merely set the threshold recovery that all subsequent settlement demands will seek to exceed.]

Paragraph (4) increases the support provided those who wish to object to a proposed settlement. This support is important even though there also is a right to request exclusion. Class disposition may be the most efficient means of resolving class members' claims, and often may be the only means. Discovery as to the apparent merits of the class position is particularly important if the settlement agreement has been reached without substantial discovery in the class action or in

other litigation. [*This sentence about discovery of incidental agreements is an alternative to the provision for disclosure and notice in subparagraph (2).* Discovery as to any "incidental agreements or understandings" should extend to all arrangements proximately related to the class settlement, including contemporaneous settlements of other claims, agreements with respect to representation of future clients, and understandings as to attorney fees.]

[*Reporter's Note: The draft originally included a provision for discovery "reasonably calculated * * * to reveal the course of settlement negotiations." This provision has been deleted in the belief that it would intrude too far, adversely affecting negotiations for the sake of appearances. It would be possible to add to the Note a statement that discovery also may be proper as to the course of settlement negotiations if an objector makes a prima facie showing of "collusion" or impropriety.*]

The provisions for awarding expenses to objectors recognize the vital importance of objections in the settlement review process. Our judicial system is designed to depend on adversary presentation. Effective adversary exploration of a proposed settlement can be provided only by objectors. The reasonable expenses of making a successful objection generally should be compensated. An objection may

be counted as successful for this purpose if it provokes changes in a proposed settlement without the need for a court ruling.

As valuable as objectors can be, there is a risk that objections may be advanced for improper purposes. An objection may be ill-founded, yet exert a powerful strategic force. Litigation of an objection can be costly, and even a weak objection may have a potential influence beyond what its merits would justify in light of the inherent difficulties that surround review and approval of a class settlement. Both initial litigation and appeal can delay implementation of the settlement for months or even years, denying the benefits of recovery to class members. Delayed relief may be particularly serious in cases involving large financial losses or severe personal injuries. The provisions of Rule 11 apply to objections, and it seems helpful to include an express reminder of Rule 11 obligations in this rule.

Paragraph 4(B) responds to a problem illustrated in one form by *Duhaime v. John Hancock Mut. Life Ins. Co.*, 1st Cir.1999, 183 F.3d 1. An objector may remain a class member, make objections on behalf of the class, and then settle the objections without seeking court approval. Settlement might involve abandonment of the objections and acceptance of the settlement terms as they apply to all other class members. But settlement also may involve terms that are more favorable to the objector than the terms generally available to other class members. The different

terms may reflect genuine distinctions between the objector's position and the positions of other class members, and make up for an imperfection in the class definition that lumped all together. Different terms, however, also may reflect the strategic value that objections may have. So long as an objector is objecting on behalf of the class, it is appropriate to impose on the objector the same fiduciary duty to the class as a named class representative assumes. The objector may not seize for private advantage the strategic power of objecting. To avoid this risk, any settlement with the objector must be approved by the court, and terms more favorable than the class settlement can be approved only on showing a reasonable relationship to facts or law that distinguish the objector's position from the position of other class members. It suffices to show reasonable ground to believe that the distinguishing facts or law exist; the court need not actually try the issues and make findings of fact or conclusions of law.

Paragraph (5) sets out an incomplete list of factors that should be considered in determining whether to approve a proposed settlement. See *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir.1998). Many of the factors reflect practices that are not fully described in Rule 23 itself, but that may bear on the probable fairness of the settlement. Application of these factors will be influenced by a range of variables that is not included in the list.

The character of the action will be important. One dimension involves the nature of the substantive class claims, issues, or defenses. Another involves the nature of the class, whether mandatory or opt-out. Another involves the mix of individual claims — a class involving only small claims may be the only opportunity for relief, and also pose less risk that the settlement terms will cause significant individual sacrifice by class members; a class involving a mix of large and small individual claims may involve conflicting interests; a class involving many claims that are individually important, as for example a mass-torts personal-injury class, may require special care. Still other dimensions of difference will emerge. Here, as elsewhere, it is important to remember that class actions span a wide range of heterogeneous characteristics that are important in appraising the fairness of a proposed settlement, as well as for other purposes.

Settlement is designed to avoid trial and the settlement terms properly reflect the uncertainties of the trial process. Subparagraph (A) emphasizes one of the most basic uncertainties — whether the action could in fact be pursued through trial and [whether it could be maintained on a class basis]. If resolution by trial is not likely, comparison to the likely outcome of a trial does not provide a realistic basis for appraising the settlement. Consideration of this factor often may be more complicated than the already daunting task of predicting whether the parties have the

resources and determination to complete a trial [on a class basis]. If the class is certified only for settlement, review of a proposed settlement is likely to involve some measure of reconsideration of the elements that made settlement for this class seem more promising than litigation in other forms. Even if the class was certified for trial, consideration should include the prospect that trial might be more probable if the class were redefined [or if the class certification could not be maintained and the litigation had to proceed as individual cases or smaller classes].

The cost and probable outcome of trial, on both liability and damages, and the delay in preparing for and concluding the trial process as opposed to settlement, are the most important measures of settlement fairness. Unfortunately, often they are the most unmanageable. Predictions of cost will be made by those with a motive to bolster the settlement, and predictions of staggering costs will draw force from comparison to the vast sums that have been spent on complex actions. Attempts by a court to second-guess expenditure predictions, or to control actual expenditures, may intrude deep into the adversary process. With respect to single-event transactions that have not been litigated to judgment in separate actions, the only secure basis for predicting the outcome might be an actual trial. Curtailed showings as part of the settlement review may be highly persuasive in some cases, but less satisfactory in others. If the class action involves a subject that has been litigated or

settled in a substantial number of actions before the class settlement is proposed, there may be a very strong basis for predicting outcomes. Subparagraph (B) serves as a reminder of these central factors, but without attempting to detail the ways in which they may prove elusive.

The maturity of the underlying substantive issues, described in subparagraph (C), is more important in some cases than in others. The concern with maturity is greatest with respect to mass torts that inflict serious personal injury or extensive property damage in events that are dispersed in time and place. Individual litigation is possible, and often is pursued. Settlements in these circumstances should be concluded only after it is clear that the results of individual cases have provided significant and reliable information necessary to evaluate the terms proposed. Many class actions, on the other hand, grow out of unique and closed events, and often present issues that cannot realistically be litigated outside the class-action context. In these circumstances, there may be little reason to hope for improved understanding through independent litigation.

Negotiation of a class action settlement entirely among class lawyers and their adversaries may generate understandable concerns about the fairness and effectiveness of the settlement terms. Subparagraph (D) does not require that others participate in the negotiations, in part because attempts to control the negotiation

process by rule may often do more harm than good. But subparagraph (B) does encourage efforts to engage class members, representatives of class members, or judicial personnel in appropriate ways. Class representatives may be the named representatives, but a court might appoint or obtain information from a class guardian, a class steering committee, or other independent class representative during the settlement process. If a judge or other judicial officer is significantly involved in the settlement negotiations, review of the resulting settlement agreement should be provided by a different judge.

Although the focus of subparagraph (E) on the number and force of objectors may seem redundant, it directs attention to the tensions discussed with subdivision (4). The fact that a settlement draws few objections, or none at all, may mean only that class members are apathetic because individual stakes are low or because it has not been possible to communicate information about the settlement in an easily accessible form. A settlement that draws many objections may be a good settlement, particularly if the number of objections is low in proportion to the total size of the class. Seemingly plausible objections may lack force because they rest on grandiose but ill-informed notions about the costs and uncertainties of litigating the class position.

Settlement is a pragmatic process that must take account of a defendant's ability to pay. If a settling party asserts that its ability to answer claims is constrained by its resources in relation to these and other claims against it, a showing should be made as to its assets and claims. Reasonably anticipated difficulties in actually enforcing a class judgment by execution or contempt should be treated in the same way. Discovery on these issues will be an important part of the review process.

A settlement on behalf of a class that does not include all potential claimants is properly affected by the existence and probable outcome of claims by other classes or subclasses. This subparagraph (G) factor, and the corresponding subparagraph (H) factor, seem to invite speculation as to the comparative merits of other class claims. Some exploration of these comparisons may be appropriate, but the court must guard against the risk of litigating a claim not before it. The claims of others present other difficult questions when a defendant may lack resources sufficient to pay all claims. The defendant's ability actually to perform the settlement may be affected by the unresolved claims. And actual performance of a present settlement may impair the ability of others to win comparably effective relief. Response to these problems may be complicated. Concern for other claimants cannot readily be implemented by disapproving a settlement as too generous to the class before the court, but might warrant an effort to bring the other claimants into the proceedings. One approach

might be to expand the class definition and then establish subclasses to represent groups with conflicting interests. Concern for class members may require modification of settlement terms to establish adequate assurances of performance.

Both in negotiating settlements and in appraising a particular settlement, people naturally consider the actual or probable disposition of similar claims. Subparagraph (H) recognizes the importance of this factor.

[*Subparagraph (I) is inserted in the expectation that the paragraph (3) right to opt out will prove controversial. If there is always a right to opt out of the class after notice of settlement terms, subparagraph (I) will be deleted. If paragraph (3) is deleted, the Note observations will be modified to suit subparagraph (I).*]

The reasonableness of attorney fees provided by settlement is important element to the public perception of fairness. Excessive fees also raise the image of conflicting interests, in which attorneys have bargained away possible class relief in favor of their own fees. Application of subparagraph (J) should be affected by the negotiation process and the source of fees. There are structural reassurances of reasonableness if fees are negotiated separately after conclusion of the class-relief portion of the settlement, and if the fees are to be paid by the class adversary rather than out of class relief.

Apart from the reasonableness of the fees to be paid to class attorneys, evaluation of a settlement may also take account of any incidental agreements dividing fees among counsel. A division that seems calculated to forestall possible objections to the settlement, for example, might properly be modified or rejected. In addition, it may be proper to consider whether attorneys representing individual claimants will remain free to enforce full-rate contingent fee agreements in circumstances that present little risk and exact little effort.

Settlements often establish procedures for processing individual claims. Proofs of claim often are required and may be indispensable, and there may be systems for resolving disputed facts. Other procedures may be very useful in providing low-cost and accurate resolution of individual entitlements under the settlement. Subparagraph (K) underscores the importance of ensuring that these procedures are fair and reasonable.

Subparagraph (L) addresses the possibility that parties who have achieved a class settlement that has been rejected by one court may attempt to "shop" the settlement by filing an action in another court on behalf of substantially the same class. It is tempting to prohibit approval of a settlement that has once been rejected, invoking the principles of res judicata to protect the class against the risks that inhere in the settlement review process. Res judicata principles, however, may not allow

sufficient flexibility to recognize changed circumstances. Disapproval of a settlement may be followed by improved information about the facts, intervening changes of law, results in individual adjudications that undermine the class position, or other events that enhance the apparent fairness of a settlement that earlier seemed inadequate. Discretion to reconsider and approve should be recognized. A second court, however, should approach the settlement review responsibility much as it would approach a request that it reconsider its own earlier disapproval, demanding a strong showing to overcome the presumption that the earlier refusal to approve.

All of the factors enumerated in paragraph (5), and others that might be named, bear on fairness. Fairness often is measured in addition by a process that is not readily articulated. Subparagraph (M) recognizes the legitimacy of considering apparent intrinsic fairness on a basis that draws from accumulated judicial wisdom and experience.

Paragraph 6 establishes an opportunity to acquire independent information about the wisdom of a proposed class action settlement. The parties who support the settlement cannot always be relied upon to provide adequate information about the reasons for rejecting the settlement. Information may be provided through objections by class members, and paragraph 4 is designed to enhance the objection process. But objectors often find it difficult to acquire sufficient information, and the burdens of

framing comprehensive and persuasive objections may be insurmountable. A magistrate judge or person specially appointed by the court to make an independent investigation and report may be better able to acquire the necessary information and — with expenses paid by the parties — better able to bear the burdens of acquiring and using the information. The opportunity provided by this paragraph should, however, be exercised with restraint. In most cases it is better that the trial judge assume responsibility for directing the parties to provide sufficient information to evaluate a proposed settlement. Direction by the judge will ensure that the judge receives the needed information and bears the primary responsibility for evaluating the settlement in light of this information.

The choice whether to appoint a magistrate judge to conduct the paragraph 6 investigation will depend on a variety of factors. The costs to the parties are reduced because there is no need to pay fees for the magistrate judge's time. A magistrate judge provides the reassurances of expertness and impartiality that go with public office. Appointment of a private person to undertake the inquiry may be desirable, however, if the inquiry is to extend beyond the traditional judicial role of receiving information provided by the parties. It may seem out of role for a magistrate judge to undertake or direct an active investigation of the sort traditionally left to adversary

parties. If the judge contemplates an investigation of the sort that might be taken by a well-supported but impartial objector, it may be better to appoint a private person.

An appointment under paragraph 6, whether of a magistrate judge or a private person, is not made under Rule 53 and is not subject to its constraints. [This assertion may go too far. It may be better to provide for appointment of a special master as one alternative under paragraph (6), and then to provide a more elaborate Note. The central suggestion would be that a "special master" designation is appropriate if the court intends to appoint a surrogate judge in circumstances that defeat the opportunity to review the settlement initially or to rely on a magistrate judge. If a more open-ended investigation is contemplated, then the procedures and strictures of Rule 53 — as it now is or as it may be revised — do not make sense.]

IV. The Class Action Attorney Appointment Rule

CLASS-ACTION ATTORNEY APPOINTMENT RULE

(a) Appointment of Class Counsel. When persons sue or are sued as representatives of a class, the court must appoint counsel to represent the best interests of the class as fiduciary for the class.

(b) Notice, Applications, Hearing, and Order.

(1) The court may not certify a class action until at least one application for appointment as class counsel is filed.

(2) Applications for appointment as class counsel should include information about the following, among other matters:

(A) counsel's experience in litigating actions that grow out of the subject matter of the class claims, issues, or defenses;

(B) counsel's experience in litigating class actions and other complex actions;

(C) counsel's ability to administer the action;

(D) whether counsel represents a client who might be a class representative;

(E) whether counsel has done independent work in identifying and investigating potential class claims, issues, or defenses;

(F) the resources that counsel will commit to representing the class;

(G) the terms proposed for attorney fees and expenses; and

(H) whether appointment of counsel who represents parties or a class in parallel litigation may facilitate coordination or consolidation with the class before the court.

(3) The court must hold a hearing to appoint class counsel if one or more applications are filed. [Note: if the intent to not to require courts to hold an oral or evidentiary hearing before appointing class counsel, particularly if there is only one applicant, the note should make this clear].

(4) The court must consider the matters described in paragraph (2) in appointing class counsel and must not consider [or should not give significant weight to] whether any applicant has filed the action in which appointment is requested.

(5) The court may reject all applications, recommend that an application be modified, invite new applications, and make any appropriate orders to select and appoint class counsel.

Draft Committee Note

[The Subcommittee rejected a provision that would have required "publication in suitable public media of notice that describes the subject of the action and invites applications for appointment as class counsel." This model, drawn from the Private Securities Litigation Reform Act, was thought inappropriate for general adoption. The cost of notice may prove crippling in many forms of class actions, not only those to enforce small "consumer" claims but also those for civil rights relief and the like. Often there will be little point in inviting applications — many class actions continue to be brought as matters of principle, not profit, and there will be no contenders for the honor of vindicating the principles involved. Other actions may invite a chaos of applications that seek a free ride on the work initially done by the lawyer who filed the action. The latter concerns suggest that there is no point in exploring such low-cost means of notice as development of a "class-action register" on the judiciary web page. For the moment, at least, subdivision (b)(5) would authorize the court to reject all applications for appointment and "invite new applications." Perhaps this authority too should be deleted.]

[Subdivision (b)(2)(H) is a very tentative and limited illustration of the possibility that one approach to the problem of overlapping and competing class actions may be to appoint common counsel. Enthusiastic pursuit of this course by several courts at once might accomplish some surprising things. But there are obvious problems not only of conflicting interests but of home-player preferences. We should open the prospect that rules governing attorney appointment and fees might accomplish something in this area, but legislative provisions for removal, transfer, and consolidation seem better.]

V. The Class Action Attorney Fee Rule

CLASS ACTION ATTORNEY FEE RULE

(a) Class Counsel Fee. The judgment in an action certified as a class action may award a reasonable fee to class counsel, to be paid:

(1) from the relief awarded to the class;

(2) by members of the class;

(3) by a party opposing the class; or

(4) by any combination of the sources described in paragraphs (1), (2), and (3).

(b) Notice of Fee Application. Notice of an application for a fee award to class counsel must be served on all parties, and provided by reasonable means to class members.

(c) Objections. A party or class member may object to an application for a fee award to class counsel. The court may allow discovery in aid of proposed objections, including discovery on any factor described in subdivision (e).

(d) Hearing. The court must hold a hearing on an application for a fee award to class counsel whether or not any objection has been made.

(e) Fee amount. In setting the amount of a fee award to class counsel, the court should consider, among other factors, the following:

(1) the results achieved;

(2) the time reasonably devoted to the action;

(3) the terms proposed by counsel in seeking appointment;

(4) the financial risks borne in discharging the duties of class counsel;

(5) the professional quality of the representation;

(6) any agreements among the parties with respect to the fee application;

(7) any agreements by class counsel to divide the fee with others;

(8) any fees to be charged by class counsel or others for representing individual claimants or objectors; and

(n) * * *.

Draft Committee Note

[The Note seems the more likely place to address several of the recommendations advanced in the recent RAND report: in assessing "the results achieved," courts should: (1) consider the amounts actually distributed to class members, not only the theoretically possible distributions; (2) view coupons skeptically (unless, perhaps, a clearing house is established); (3) also view skeptically the claim that injunctive relief is worth great sums; (4) phase the distribution of fee awards if class recovery is spread out over time (RAND seems to express this as a function of uncertainty whether the full possible relief actually will be paid, but it seems useful more generally); (5) require detailed expense reports. Several of the factors should combine together to support the RAND suggestion that a percentage-of-recovery approach should recognize that smaller percentages are appropriate when the aggregate recovery is large. It is difficult to guess from the RAND summary at the reasoning for reducing the award when a cy pres recovery goes to recipients who are not class members. It is hard to suppose that a cy pres beneficiary is more worthy than the unreachable class member who actually was injured; expenses of administering the award are likely to be reduced, but that can be accounted for directly.]

This proposal is intended to identify criteria for fee awards in the class action context that would apply whether the law of the applicable forum recognizes a lodestar approach or follows a different method in evaluating requests for fee awards.

VI. Opt-In Proposal for Small Claims Consumer Class Actions

Opt-In Class Alternative For Small Claims

Earlier Rule 23 drafts provided a variety of approaches to opt-in classes. These efforts arose primarily from the belief that opt-in classes provide a convenient method of permissive joinder that might help in addressing the problems arising from dispersed mass torts. Several benefits were perceived. An opt-in class could be defined in relatively open-ended terms, since only those who in fact accept the invitation to join the action would be affected. By the same token, concerns about conflicts of interest among those brought together in the class would be substantially reduced. Opt-in classes could provide a basis for sharing the costs of litigation among all class members. The class could be defined in terms that require consent to particular choices of law and to defined means of resolving individual issues after common issues are resolved. Adequate representation would still be required, but those who opt in would be likely to protect their own interests in ways that reduce the problems of assuring adequacy. In effect, an opt-in class would provide a clear and well-defined framework, drawing from class-action practice, for permissive joinder.

The suggestion that an opt-in class provision be geared to the small-claims concerns identified by proposed Rule 23(b)(3)(F) responds to quite different concerns. The purpose of requiring affirmative action to join the litigation is to ensure that class members actually wish to be involved, to have their potential claims resolved through representation. Failure to opt out is thought weak evidence on this point. Small-stakes claimants, however, are the class members least likely to have any alternative means to enforce their claims. The presumption of consent seems if anything stronger for them than for class members who have a meaningful alternative in individual litigation. And if the presumption of consent is thought to turn on the realistic availability of separate litigation, most members of most opt-out classes have no meaningful alternative. Few claims of $500, $1,000, or even $5,000 will support separate individual litigation. The doubts most often expressed about small-stakes classes arise from sources other than the relationship between implied consent and claim size. Doubts about the fallibility of the factfinding process, the distorting pressures that arise from class certification, and the indeterminacy of much modern law are central to concerns about (b)(3) class actions. The connection between such doubts and the size of individual claims seems weak. At most, it can be said that the justification for any litigation is the actual desire of a party to win relief. We can assume that most people desire relief that is not insignificant, small, or trivial. We should not assume that most people desire small relief obtained at great cost. Class-action enforcement of many small claims is appropriate only if actual interest is demonstrated by affirmative action to opt into the proposed class.

The next step involves the relationship between the general opt-out class provisions of Rule 23(b)(3) and any new opt-in class provision. The relationship is direct only if all (b)(3) classes are converted to opt-in classes. Otherwise the relationship must be determined. Should the court be allowed to choose freely between an opt-in and an opt-out class, as proposed by the Committee's first drafts? Or should the court be required to consider first the possibility of a (b)(3) opt-out class, turning to the opt-in possibility only after concluding that an opt-out class could not be certified even if there were no opt-in class alternative? If opt-in classes are tied to the

small-claims concern, it likely will prove desirable to tie the opt-in small-claims class to an explicit (b)(3) provision. The most obvious approach is to continue something like factor (F) in (b)(3), and to allow consideration of an opt-in class only after certification of an opt-out class is denied for the reasons expressed in (F).

If the opt-in approach is tied to small claims, and particularly if it turns on prior denial of an opt-out class, it is necessary to decide whether the opt-in approach should apply to situations that involve a range of individual damages. If a significant number of claims are not insignificant, should an opt-out class be certified for the larger claims only, or also for the smaller claims that would not alone support certification? What should be done if the more substantial individual claims are not alone sufficient to warrant certification in relation to the costs of proceeding, but the whole set of claims is sufficient? How far should the court take account of the proposition that many people with individual claims of $100 or $1000 or even more will fail to opt in — not from indifference, but from fear of entanglement? Should these issues be postponed to the stage of administering relief by setting a threshold that cuts off claims below a designated amount?

It also may be useful to ask what reasons might support denial of an opt-in opportunity. If representatives appear and seek the opportunity to give notice and invite opt-ins, bearing the costs of notice, what burdens on the opposing party might justify a refusal to test the level of interest in participating through opt-in?

All of these questions go directly to the questions that surround an opt-in rule that is geared to small-claims "consumer" classes. Any opt-in proposal, including this one, must address a number of more general questions as well.

The first question is whether an opt-in class is a "class" in the accepted Rule 23 sense. It seems better to recognize the opt-in class as a framework for permissive joinder, no more. Class-action practice provides a familiar means of organizing a proceeding in which most litigants participate only through representation. But the definition of the "class" serves only to define the universe of those who are invited to join the action. Those who do not choose to join do not become members of a class in any functional sense. They are not bound by the judgment and they remain free to bring independent actions. Any other approach would bring back all the headaches of opt-out classes, aggravated by the greater burden placed on class members. Members of an opt-out class who do nothing may lose their claims, but they also may win relief. If members of an opt-in class who do not elect to join may not win, but may lose, they must be given even greater protection than members of an opt-out class. Only then could there be sufficient assurance that the decision not to opt in represents an informed decision to waive the claim.

If an opt-in class does not bind those who fail to join, it must be decided whether to apply the general prerequisites in Rule 23(a). Typicality and common issues surely should be required. Adequacy of representation may seem more ambiguous, but the better answer seems to be that adequacy should be required. The only difference is that the opt-in character of the class may be considered in applying the always elusive tests of adequacy. Numerosity is the most obvious debating point, since the numbers in the class will not be known until the opt-in period has closed. Even here, however, it seems better to apply Rule 23(a). The court can, if it wishes, set an advance minimum number of opt-ins that will be required to support further class proceedings. Other

than such case-specific thresholds, it should be enough that there is a reasonable prospect of sufficient opt-ins to justify going forward with notice.

A permissive-joinder concept eases the notice requirements for an opt-in class. In effect, notice can be whatever seems reasonably calculated to achieve the purpose of testing the breadth and depth of interest in the litigation. The difference cannot be exaggerated, however, lest the opt-in class be a fruitless exercise that imposes burdens on the party opposing the class without any real prospect of meaningful proceedings. The question is particularly sharp in small-claims consumer actions. Notice calculated to reach large numbers of dispersed class members is likely to be expensive, even if it relies only on repeated but noticeable advertisements in the mass media. A simple one-shot notice of modest dimensions is not likely to accomplish much.

Notice ties also to the binding effect of an opt-in class. Although those who fail to opt in should not be barred from pursuing individual actions, should they also be barred from seeking certification of a class — whether opt-out or opt-in — in another action? The analogy to preclusion by representation in present Rule 23, and to emerging concepts of mandatory intervention, might justify a rule that prohibits participation in any other action by those who declined an invitation to opt in to the first class. But this theory is likely to work, if at all, only with respect to those who had notice cast in a form that gives a meaningful opportunity to opt in. Individual notice accompanied by a postcard reply form might well be sufficient, but the cost could be undue. If the rule is cast in a form that permits successions of opt-in classes, however, the preclusion benefits of an opt-out class may come to seem more attractive. This prospect raises the question whether a defendant should be able to ask for certification of an opt-out plaintiff class as an alternative to an opt-in class. The prospect of imposing representation of an opt-out class on unwilling representative plaintiffs may seem unattractive, but the prospect may not often be faced. Plaintiffs may well routinely seek certification of opt-out classes, viewing opt-in classes as an unattractive second-best alternative.

If an opt-in class judgment binds only those who in fact opted in, the specter of "one-way intervention" must be addressed. Opt-in classes could become very attractive if they enable plaintiffs to win for a vast class by way of nonmutual issue preclusion, while limiting the loss to those who actually opt in. The only obvious deterrent to routine filing of small opt-in classes, to be followed by large classes in which recovery can be guaranteed by way of issue preclusion, would be the fear that someone else would win the race to file the succeeding action. A defendant faced with the risk of nonmutual preclusion, moreover, would risk just as much in an opt-in class as in an opt-out class. The pressure to settle on terms that defeat any issue preclusion could be substantial. These are strong reasons for providing that the judgment in an opt-in class cannot be used against any party by anyone who did not participate in the action. (Although nonmutual preclusion might be held available to those who were not within the class invited to opt in, this compromise might lead to complicated gerrymandering of the initial class definition.)

A permissive joinder concept raises other questions about the consequences of an opt-in class. Should those who join be liable for a share of the costs of prosecuting the action — indeed, is there any reason for denying liability? How far should the court

seek to regulate the terms of attorney-fee arrangements, and reflect them in the class notice that invites participation? How far are individual participants subject to discovery and counterclaims? Should the effect of filing on statutes of limitations differ — and should any difference be triggered by the decision to deny certification of a mandatory or opt-out class, by the certification of an opt-in class, by expiration of the period set for opting in, or some other event? Is it better to leave such issues to evolution in practice, or to address them head-on in Rule 23?

With all of these open questions, the following draft is merely suggestive. The assumption is that some form of (b)(3)(F) will be recommended; the predicate for addressing a small-claims opt-in class would be quite different if there is no (b)(3)(F). The draft adopts the permissive joinder approach of earlier opt-in drafts, and addresses notice and binding effects in brief terms.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: * * *

(4) certification of a (b)(3) class is denied by application of subparagraph (F), but the court determines that permissive joinder should be accomplished by allowing putative members to elect to be included in a class.

(c) Determination by Order Whether Class Action To Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions. * * *

(3) When ordering certification of an opt-in class action under subdivision (b)(4), the court shall direct that appropriate notice be given to the class in a manner calculated to accomplish the purposes of the certification. The notice must:

(A) concisely and clearly describe the action and the terms on which members can request to be included in the class;

(B) advise that the judgment will include only those who elected to be included in the class and who were not dismissed from the action on terms that exclude them from the judgment; and

(C) state that the judgment will bind the party opposing the class only as to those who are included in the judgment under subparagraph (B).

NOTE

New subdivision (b)(4) creates an opt-in class that is available only when a court has denied certification of a (b)(3) class by applying new subparagraph (b)(3)(F). Subparagraph (F) authorizes denial of certification when the tenuous nature of the benefits to individual class members raises serious questions whether failure to request exclusion reasonably implies consent to participate and be bound. Certification of an opt-in class can test the interest of class members in the litigation by creating an opportunity to request inclusion.

The opt-in class created under subdivision (b)(4) is a new permissive joinder device that is controlled by Rule 23 class-action principles. Class-action procedures are adopted because they provide a familiar framework for participation by

representation. This framework is peculiarly well suited to effect the aggregation of small claims that do not warrant substantial expenditures of effort or money by each individual claimant. Because this remains a class action, the prerequisites of subdivision (a) must be satisfied, although application of the prerequisites should be adjusted to reflect the nature of the opt-in class. The numerosity prerequisite, in particular, can be applied in light of the number of class members who actually request to be included.

Some of the incidents of a (b)(4) opt-in class are specified by new subdivision (c)(3).

Notice to members of an opt-in class can be provided by means that are designed to accomplish the purpose of determining the value of class adjudication. Little good will be accomplished by notice that reaches only a small portion of those who may be interested in requesting inclusion. Expensive individual notice, on the other hand, would defeat one of the purposes of avoiding the costs associated with a (b)(3) opt-out class. Since members of the class will not be bound by the judgment unless they learn of the action and opt in, the concerns that support individual notice in (b)(3) classes are greatly reduced. The court should follow a pragmatic approach.

The notice must describe the subject of the action. It also must state the terms on which members can request to be included in the class. At a minimum, the identified terms should describe those who will be permitted to request inclusion; set a date that closes the opt-in period; and state whether and how those who opt in may be liable to share in the costs, expenses, and attorney fees attributable to the class. The court also may wish, when possible, to set out the apparent number of those who are eligible to intervene, and to state the parties' contentions as to the amounts of individual and aggregate recoveries. It might be desirable to offer advice on the limitations effects of inclusion, but few cases if any will present circumstances that support meaningful information on this subject.

Notice of the preclusion effects of the judgment must state that the judgment will include only those who elected to be included in the class and who were not dismissed on terms that exclude them from the judgment. It might also state that those who do not elect to be included remain free to commence independent proceedings, including independent class actions.

The notice also must state that the judgment will bind the party opposing the class only as to those who are included in the judgment under subparagraph (B). An opt-in class judgment does not provide an appropriate basis for nonmutual issue preclusion. Members who had notice of the opportunity to request inclusion should not be able to remain aloof, hoping to win a risk-free adjudication of liability in circumstances that leave them free to initiate a second opt-in class should the first class fail. Preclusion also is inappropriate as to members who did not have notice of the action. Those who did not receive notice of the action have not been deprived of any opportunity by the action or judgment. Administering a preclusion line that depends on actual notice, particularly in a system that will rely in large part on published notice, would be difficult. And the party opposing the class should be able to conduct the litigation in ways measured by exposure to the opt-in class members, not all potential claimants who may remain.

Rule 23(c)(2) Opt-in Class Alternative

A different approach might be taken to the opt-in class alternative for small claims, building on Rule 23(c)(2) without touching Rule 23(b)(3). By definition, this approach would not need to be tied to any version of the published (b)(3)(F) proposal. Instead, it would build on the present curious Rule 23 structure. As Rule 23 now stands, there is nothing in subdivision (b) to indicate that (b)(1) and (b)(2) classes are "mandatory," while (b)(3) classes are opt-out. The opt-out right appears only in the provision that requires the notice to describe the right to request exclusion. The logic of this structure would support an alternative opt-in class structure, also built on the (b)(3) class. Without attempting to redraft all of (c)(2) to satisfy current style conventions, the rule could look like this:

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that ~~(A) the court will exclude the member from the class if the member so requests by a specified date;~~ (~~B~~A) the judgment, whether favorable or not, will include all class members ~~who do not request exclusion~~; and (~~C~~B) any member ~~who does not request exclusion~~ may, if the member desires, enter an appearance through counsel. The notice also must advise each member that the court will exclude the member from the class if the member so requests by a specified date, unless the court determines that the class will include only those members who request to be included in the class. When the relief likely to be awarded to individual class members does not appear to justify the costs and burdens of class litigation and the court has reason to question whether class members would wish to resolve their claims through class representation, the notice must advise each member that the member will be included only if the member so requests by a specified date.

VII. Draft Minutes, February 18, 2000 Subcommittee Meeting

Draft Minutes

Rule 23 Subcommittee, Civil Rules Advisory Committee

February 18, 2000

The Rule 23 Subcommittee of the Civil Rules Advisory Committee met on February 18, 2000, at the Administrative Office of the United States Courts in Washington, D.C. All subcommittee members were present — Hon. Lee H. Rosenthal, Chair, and Sheila L. Birnbaum, Esq.; Hon. David W. Ogden; and Andrew M. Scherffius, Esq. Edward H. Cooper attended as Advisory Committee Reporter. Thomas E. Willging represented the Federal Judicial Center. The Administrative Office was represented by Peter G. McCabe, John K. Rabiej, and Mark Shapiro.

Judge Rosenthal opened the subcommittee deliberations by observing that the subcommittee has been formed to carry through the Rule 23 project that began in 1991. Only one rule change has so far emerged from this work, the interlocutory appeal provision of new Rule 23(f), and it is already beginning to support the development of more appellate jurisprudence on class certification. A vast body of untapped work remains, however. New guideposts have been set by the Supreme Court decisions in the Amchem and Ortiz cases. Congress continues to be interested in class-action topics, including several — such as the reach of state-court class actions — that are outside the reach of the Enabling Act process. The Mass Torts Working Group has developed new knowledge, and the Federal Judicial Center supplemented its Rule 23 study for the Advisory Committee by three new mass torts studies. All of this work, together with the testimony and written comments on the Rule 23 proposals that were published in 1996, help to refine our understanding of the problems.

Many observers believe that the problems that first drew Advisory Committee attention remain, and if anything are "more sharply present today." But we must be careful in approaching the borders that separate problems that might be addressed within the Enabling Act framework from those that can be addressed only by legislation. It is not always wise to push to the limits of the Enabling Act, even when it seems possible to develop new rules. And even when it is clear that a helpful proposal is well within the reach of the Enabling Act, there are limits on the number of changes that can be pursued all at once. There must be time for careful work by the subcommittee and Advisory Committee; the Standing Committee should not be confronted with a mass of intricate changes; the public comment process should not be distracted; and so on through the process. It is better to select and focus on the most important changes.

In selecting important changes, one approach can be to identify areas in which there are tried and proved better practices that are followed in many courts, but not in all courts. Examples are provided by settlement practices. Many courts hold hearings in reviewing proposed class-action settlements, even if there are no objectors. The FJIC study shows that not all courts do. Many circuits have developed detailed lists of factors that should be considered in reviewing the adequacy and fairness of a proposed settlement; explicit enumeration of these factors in Rule 23 might improve the practice in district courts that may not have followed these factors as closely as they might.

The first broad set of issues to be faced asks whether we should devote further work to

subdivisions (a) and (b). A number of drafts have been prepared that offer many minor changes and no small number of more important changes. Many who have reviewed these drafts have reacted not by addressing the particular proposals but by expressing alarm at the sheer number of proposals. Even academic reviewers have feared that pursuit of too many changes will overload the process. Many observers believe that since 1966 the lower courts have developed a workable body of precedent that has brought reasonable order to application of Rule 23. Attempts to make minor improvements will cause significant disruption. Attempts to make major improvements are justified only if it is clear that there are major problems and also clear that any changes will be for the better.

Despite these reservations, the question of settlement classes remains on the table. The FJIC study showed that settlement classes were well developed outside the mass tort area before the Supreme Court decided the Amchem and Ortiz cases. Impressionistic review of practice since the Amchem decision suggests that, outside mass torts, settlement classes continue to be used. "We all know that settlements occur; Rule 23 is not in synch with present practice." It may be desirable to confirm the better present practice in the rule, recognizing that even this modest step may act as an invitation to increase the use of settlement classes and to bring still further class actions to the federal courts. Even that change may require some small amendment of Rule 23(a) or (b). Should an effort be made to explore the territory left open by the Supreme Court in an effort to expand the use of settlement classes, more significant changes are likely to be made in subdivisions (a) or (b).

We must recognize that federal courts now play a more marginal role in class actions than formerly. State courts are drawing an increased share of this business. It has been represented that 40 states have class-action rules more or less modeled on Federal Rule 23, while only 2 states have no class-action rule at all. Interpretation of the state rules, however, often departs from the interpretation of Federal Rule 23 by the federal courts. It may be easier to win certification of a nationwide class in many state courts than it is in the federal courts. If we act to tighten Federal Rule 23, one result is likely to be still further migration to the state courts. We cannot write a procedural rule that limits state courts to statewide classes; if anything should be done on that score, it is work for Congress.

One of the most pressing problems today is presented by competing, overlapping, and conflicting class actions, usually in different courts. Perhaps we should try to craft a procedural rule that deals with these problems, recognizing that it may be impossible to reach actions in state courts.

It was agreed that the subcommittee should focus on the real issues, without attempting to make minor improvements simply because improvement can be effected. Focus on the real issues may well show that many cannot be addressed effectively, but that is where the subcommittee should devote its energy. The main question is where are the real problems in practice. Nothing seems to have changed much since 1991, apart from the increasing shift of class-action business to the state courts.

Common Proof - Rule 23(b)(3) Predominance

We continue to hear that some district courts are certifying classes that do not meet the criteria of Rule 23(b)(3). John Beisner has written a lengthy letter with many suggestions, including a suggestion that subdivision (b)(3) should be changed to focus not simply on common questions

but also on "common answers." The idea would be to focus on the issue whether the evidence likely to be admitted at trial of the class action would bear equally on all the elements of all the claims of all class members, supporting a uniform "yes" or "no" answer as to each. (The issue of individual damages is put aside, treating that as a matter of "remedy" rather than an "element of the claim.")

It was noted that any changes that may be made in Rule 23 are likely to be adopted by many states, but that adoption of the same language will not always lead to the same interpretations. Although many states now have rules similar to Rule 23, it is more difficult to persuade a federal court to certify a national class than it is to persuade many state courts. Indeed some observers think it is nearly impossible to certify a nationwide mass tort class in federal court today, although the American Home Products litigation is pursuing settlement on a nationwide class basis. So many attorneys migrate to state court. In one recent case, a state trial court, with a six-person jury, has awarded a billion dollar verdict to a national class of insurance policy holders whose insurer has repaired damaged automobiles with crash parts that were not made by the original automobile manufacturers. This practice is common throughout the nation, was supposed to be authorized by the policy language, is lawful in almost every state, and may be required in a few states. Yet a single state has imposed its view of the law on all states, arguably denying due process to the insurer. Correction may or may not be found on appeal. There remain a small number of states that, by reason of practices such as these, become very attractive to plaintiffs' lawyers. The identity of the states changes over time, but the process continues.

Turning to the "common proof" suggestion, it was noted that this suggestion simply reopens the question of issues classes. The early advisory committee revisions included many small changes designed to emphasize the authority now provided by Rule 23(c)(4) to certify a class only as to specified issues. An issues class satisfies the "predominance" requirement of Rule 23(b)(3) almost automatically, so long as the issues are properly defined. This aspect of the early drafts reflected a cautious approach to mass torts, with the thought that it might prove possible to resolve once for all class members such questions as the highly disputed "general causation" issues that have characterized some mass torts. But it is dangerous to have one or two issues decided in a vacuum. Defendants often fear this separation, and plaintiffs too may prefer the less antiseptic trial of all liability issues along with at least some individual proofs of injury. Thus the Agent Orange litigation included conditional class certification on the issue raised by the "government contractor" defense; that was horrid for the plaintiffs. We should not emphasize issues classes. But the interaction of common proof with the predominance requirement in (b)(3) remains a matter that the subcommittee should study further.

General discussion called to mind such questions as reliance in securities and consumer cases, choice-of-law in many state-law cases, and employment cases: the predominance requirement is interpreted differently in different circumstances, demanding higher levels of common proof in some kinds of cases than is demanded in others.

It was ventured that it might help to focus on whether the trial evidence really will be the same for each class member with respect to the issues that will bind them all.

Settlement Classes

Many of the complaints of abuse have centered on class certification for settlement only. The fear of abuse is expressed most vigorously when the parties simultaneously present a joint request for certification and preliminary approval of an agreed-upon settlement. The FJC study showed that 40% of all class certifications were for settlement only; only a quarter to a third of those involved simultaneous presentation of certification and proposed settlement. But such bare descriptions do not tell the full story. The situation may involve a high level of active litigation, before this court or in other courts, before the class settlement is proposed.

The Amchem decision, working within the framework of present Rule 23, recognizes that certification for settlement may be proper when manageability problems would thwart certification for trial. That is the only apparent relaxation of Rule 23(a) or (b) requirements that is now available. The Amchem and Ortiz decisions together leave open the question whether Rule 23 should be revised to provide for settlement classes. A related question is whether an effort should be made to frame a "limited fund" rule for mass tort cases, whether it be through subdivision (b)(1) or by a separate provision. The problem of "futures" remains also, including both those who know they are at risk and those who do not even know that they fall into the class of potential future victims.

The limited fund problem with Ortiz was in part the very clear showing that Fibreboard did not contribute all that it could; the fund was, to that extent, limited by bargaining rather than ability to pay. But there may be settings where even this approach to a limited fund will prove far better for the claimants as well as the defendants. In the fen-phen litigation, one defendant is a small start-up company whose only present product was Redux. It has licenses for two new products, and has enough money only to conduct the clinical trials that will prove whether the new products can be marketed. The licenses for these products self-destruct if the company enters bankruptcy proceedings. The company also has $30,000,000 of insurance. The proposed settlement would deliver all of the insurance coverage to the claimants, rather than eat it all up with defense costs. It would deliver to the claimants any money not needed for the clinical trials on new products. It would give the claimants royalties for a period of years on any successful development of the new products. Most plaintiffs' lawyers loved the proposal, but it was rejected by the district court in the belief that the Ortiz decision bars approval. The Third Circuit has not decided whether to permit a Rule 23(f) appeal from this decision. If ever there was a reason for a limited-fund class, this case is it. Although the defendant hopes to emerge as a profitable enterprise, the settlement creates a surplus that is divided between the claimants and the defendant. The alternative, continued litigation, will do much worse for the claimants and for the defendant. There is no incentive for defendants to enter into a true limited fund settlement, in which the defendant simply assigns complete equity ownership of the defendant to the class so that the class can decide for itself on the best course to maximize the defendant's value for the class. But if we are to attempt to authorize this form of modified limited-fund class, it should be done apart from subdivision (b)(1), and should be very closely confined. One focus might be on the ability to generate a surplus from settlement that can be divided among claimants and defendant.

It was suggested that even if settlement-only certification is permitted, the certification question will be terribly abstract. There are few concrete guideposts for applying the criteria of

subdivisions (a) and (b). Defining the class will be difficult before a settlement agreement is reached; the terms of settlement and the reach of the class commonly are interdependent. Defining the class according to the terms of the settlement actually reached also may seem troubling — the difficulties of working through potential conflicts of interest within the class as defined by the settlement merge with the settlement negotiation process.

The proposal published in 1996 would have permitted certification of a settlement class only after the parties had reached agreement. This approach has been much criticized because it seems to accept only the most dangerous situation, one that reduces to the lowest level the opportunities to ensure the adequacy of representation, the propriety of the negotiating process, and the unfettered opportunity to consider the superiority of alternative means of disposition. But the abstract goal of protecting against the "done deal" will be difficult to implement through a rule that takes a completely opposite approach.

It was agreed that it will not work to insist that nothing at all be done, whether initial settlement explorations, or discovery on the merits, or discovery about class size and characteristics, or dispositive motions, before determination of the certification issue. At least that possible limit on settlement classes should not be pursued further.

Further discussion of settlement classes brought the reminder that recent discussion of mass torts should not be allowed to obscure the many other types of class actions that may be involved with settlement classes. Mass tort classes commonly involve at least some class members who have experienced serious injuries or death and who can readily pursue individual actions. The concern is that in an effort to achieve global peace, the claims of absent class members will be surrendered at grossly inadequate prices. The lawyers are handsomely compensated, and the injured receive very little in relation to the nature of their injuries. Willing class representatives may be found to sell out the class. Consumer classes, for example, often involve quite different claims that rest on injuries that exist more in the eye of the law — if even there — than in fact. Entrepreneurial lawyers benefit, but class members derive no meaningful benefit. "Coupon" settlements are the most commonly derided manifestation of these classes.

This picture of mass tort settlement dangers was met with the observation that the concern is more academic than real. Mass torts, and any mass-tort class action, do not lead to quiet deals out of the public eye. "There is a marketplace." Many lawyers are familiar with each mass tort, and objectors always appear. Objectors took the Amchem and Ortiz settlements to the Supreme Court. A settlement happens only when almost everyone involved thinks a good deal has been reached.

Mass-tort settlements, however, frequently present problems of conflicting interests that have not been addressed. The problems may arise from simultaneous representation of individual clients and representation of the class. They may arise from conflicting interests among class members. Class members from states that have favorable law, and class members who could file their claims in high-yield judicial systems, are at risk that some of the real-world value of their claims will be bargained off in a settlement that treats them in the same way as class members from less favorable states.

A distinct problem arises from settlements addressed to class members who have no present injury in the sense that law has traditionally measured injury. All that can be shown is a risk of future injury, and perhaps the discomfort of contemplating that risk. Can we address these phenomena in any meaningful way? One aspect of the problem is that a risk of future tangible injury is itself an injury — insurance is a tangible manifestation of the cost of risk. A similar illustration is provided by the claims that grow out of diminished market values for products that are believed to create an unusual risk of injury. Contemplation of future injury also is a real burden. A few states have recognized remedies for these forms of intangible injury. But few claims are likely to be made unless through the vehicle of a class action.

Quite a number of mass torts involve many claimants who face a risk of future injury and a few who have incurred present injury, and perhaps severe present injury. In fen-phen, some plaintiffs have primary pulmonary hypertension, a condition so serious that they have been excluded from the class. There are many plaintiffs who have no discernible present consequences at all; the proposed settlement provides for medical monitoring or cash payments, leaving these plaintiffs free to pursue future claims if actual physical injuries develop. And there are other plaintiffs with heart valve damage; these plaintiffs present very difficult questions of causation. It remains difficult to settle the valve damage cases in a marketplace that has generated thousands of individual actions.

Writing a rule for all of these different kinds of actions will be complex. But it remains better to try than to undertake a separate rule for mass torts.

When discussion returned to settlement classes, it was proposed that Rule 23 should be amended only to make explicit the interpretation that Amchem has fixed on the present rule. Settlement bears on certification only with respect to the manageability dimension of Rule 23(b)(3)'s "superiority" requirement. All other requirements of subdivisions (a) and (b) must be satisfied without regard to the settlement. That will leave the stage clear to address such other questions as sorting through the objection process, articulating criteria to evaluate settlements, and notice. The Note could address the competing view that settlement also bears on the superiority of class litigation in other ways, and may bear as well on the predominance of common questions. In one way, the settlement creates common questions; the common questions can be seen to arise from what the district court in Georgine (Amchem) characterized as the shared interest of class members in settlement, and from the need to appraise the fairness and adequacy of the settlement.

The counter view was that Justice Breyer was right in Amchem. The settlement was a good deal, achieving better justice than will follow disapproval of the settlement. Many of the defendants will exhaust all available assets before all claimants have an opportunity for ratable compensation. In one sense, there is a need to accommodate conflicting interests through a process that adequately resolves them: adequate representation of the group of victims avoids the competition for compensation that now often results in large portions of the total awards going to people with little or no injury, in long delays in getting necessary compensation to the most severely injured, and in the real risk that future claimants will get nothing at all.

But it was suggested that an expansion of Rule 23 that would accommodate the Amchem settlement would draw waves of protest. At the same time, we should report to the Advisory

Committee that this is the first question: should we attempt to recognize in the rule the view of Justice Breyer that settlement makes a difference. The difference can be articulated in terms of present Rule 23(b)(3) requirements of predominance and superiority, or it can be articulated in independent terms. Whatever articulation is chosen, it will be necessary to recognize the constitutional questions that arise from the need for notice and adequate representation, particularly as to future claimants. Still, plaintiffs and defendants alike are willing to have a rule that supports settlement of at least present claims in a (b)(3) framework; at least some defendants are willing to subordinate the desire for comprehensive disposition, including all future claims, to the possibility of achieving at least comprehensive disposition of all present claims.

Further support was expressed for creating a draft that would reflect more support for settlement classes. Mass torts will continue to emerge and to occupy the courts. It is unrealistic to create a wide-open tort litigation system without also providing a way to get out of it. Amchem has made it more difficult to settle some types of cases. The difficulties of settlement are not necessarily desirable. The defense bar is as much conflicted as the plaintiff bar. Some defendants do not want class actions at all; they would prefer to raise barriers to settlement so high that there will be no class actions. (This view seems to assume that most classes now certified cannot actually be tried.) This view is shortsighted, at least when it looks to the federal rules, because closing class actions out of the federal courts will only accelerate the migration to state courts. Other forms of aggregation will continue to be possible, moreover, even if all courts cut back on class actions. On the other side of the conflict, other defendants want settlement classes to provide an avenue out of the mess of mass tort litigation. And of course many defendants are conflicted within themselves — in one setting any particular defendant may resist class certification, while welcoming it at a later stage in the same set of actions or in a different set of actions.

The American Home Products settlement may prove a test case, either for present Rule 23 or as impetus to expanding beyond the limits set in Amchem. The settlement has a grid for determining damages, and carves out the serious injuries. If certification for trial is contemplated, individual issues of causation and damages must necessarily predominate over any common issues in actions of this sort. But for settlement purposes, courts will struggle to find that the common issue predominate.

In preparing an alternative draft of settlement class provisions, the Note should express the view that the Amchem approach is too narrow. Federal courts are attempting to find predominance and superiority to ease the path to settlement on a class basis, and denying this option to federal courts will simply drive the nationwide classes to state courts.

Settlement: Objectors

There are special problems with objectors. There are lawyers whose careers consist of objecting to proposed class settlements. "Legitimate objections in the sunshine are fine." Objectors often perform an important public function in facilitating informed judicial review of a proposed settlement, and even in making the parties themselves aware of unperceived problems. But there also is a corruption of the process that is not good for the system. Professional objectors often seek only to be bought off, shedding an aura of legitimacy on the process by bargaining for trivial

modifications of good settlements and then being awarded fees for their services. "The same lawyers go from settlement to settlement." It would be good to find something to do about this, a means of distinguishing legitimate objectors from "the pirates."

It was asked why it is not protection enough that the court looks at how the fees are paid out — there is an expediency in paying fees to the objectors, but the court can protect against undue pressure. The response was that the pressure is too great. An objector can tie up a settlement for two years by the objection process. The objection has to be tried if it is not settled. Then there is the opportunity to appeal if the objection is rejected. The parties believe they have a good settlement, and members of the plaintiff class deserve — and indeed may desperately need — to begin receiving distributions.

It was repeated that objectors can perform valuable services, and that there should be good notice of a proposed settlement to preserve the opportunity to object. But we must be careful that the opportunity to object does not create too many obstacles to settlement.

In this vein, it was asked whether new Rule 23 provisions can contribute something to protect against misuse of the process for making objections. The need for objectors is real. The need takes on a special character with mass torts. A mass-tort settlement involves not only the parties, but also the court as a "player." The court wants the attention and respect that flow from achieving disposition of a mass tort. The settling parties appear to persuade an eager court of the value of their agreement, presenting a united front. Objectors are needed to ensure that nothing is seriously amiss. Often the objectors are plaintiffs in state-court actions, even conceivably in other class actions. Objectors to the proposed fen-phen settlement, for example, have emerged from the large numbers of lawyers who have deliberately taken their cases to state courts to escape the consolidated federal proceedings. They have objected that the proposed settlement ensures large fees for lead lawyers who represent few if any clients, but inadequate recovery for class members. Many lawyers are opting their plaintiffs out of the settlement; in part they are dissatisfied with the terms that limit attorney fees to 25%, and that impose a 9% tax on any recovery to be paid to the MDL-class lawyers.

There is a fundamental skepticism in many quarters about the ability of a judge to make a real determination whether a proposed settlement is adequate. The fear of inappropriate harmony between class counsel and the class adversary often is expressed as a fear of "collusion"; although the word is strong, the concern remains that the self-interest and pride of class counsel may sell the class claims for an inadequate price.

The dangers that emerge from an absence of objectors are more likely to appear in small-consumer-claims classes than in mass torts. These are the settlements that have a particular tendency to bring class actions into public disrepute, awarding little in the way of class benefit and huge fees. An earlier proposal sought to address these problems by the "just ain't worth it" factor that would allow a court at the certification stage to balance the public and private benefits of a prospective class judgment against the anticipated burdens of class proceedings. That proposal was highly controversial, and seems to have been quietly abandoned. Perhaps these problems can be addressed instead by rule criteria that must be met in an open and public way, but the need remains to account for the public interest in enforcement. The most cogent objection to the settlement must be that there

was no violation, and hence no public value to be served by extracting a settlement, but that objection is difficult to implement without a preliminary trial of the merits. An earlier proposal to consider the probable merits at the certification stage was abandoned in the face of opposition by plaintiff and defendant representatives alike.

The draft Rule 23(e)(4) provides that expenses, including reasonable attorney fees, must be awarded to successful objectors and may be awarded to unsuccessful objectors. The provision for fees for unsuccessful objectors was found undesirable. To be sure, unsuccessful objectors may provide a public service by improving the quality of the court's review and enhancing public confidence that the settlement indeed is fair. But who is to pay the award? Should it come out of the class recovery, though there is no tangible benefit to the class? Or should it be paid by the defendant, although the defendant in fact had agreed to fair and adequate terms?

There are similar difficulties with a requirement that expenses "must" be awarded to a successful objector. One practical danger is that mandatory compensation will encourage objectors to engage in lengthy discovery for the purpose of increasing the fee award. Other dangers go to the theory of mandatory awards. A person who appears to successfully oppose certification of any class is not compensated. An objector whose objections result in a narrowing of the class definition and a diminution of the settlement is "successful," but who should pay for this service? If the successful objection is made to preserve the opportunity to pursue a separate action — as when the time to request exclusion has expired — or to pursue a parallel class action, there is no need for separate compensation. The concept of "successful" objection is, in short, ambiguous. Even the objector who has no client and who claims merely to represent the abstract interests of the class may be pursuing private goals that conflict with the class interest in confirming what is in fact a desirable settlement. The provision for compensating successful objectors should be made discretionary, not mandatory. But it should be retained; support for good objectors may make it more possible to raise barriers against "bad" objectors.

Yet another problem is that of off-the-books settlements with objectors. One version of this problem arises when an appeal by objectors is settled on terms that are not disclosed and that are not available to other class members. It is not clear how common this problem is, nor whether it deserves explicit attention in the rules.

One means of addressing frivolous or bad-faith objections is to impose sanctions. At least three approaches are possible. Rule 11 applies to such objections. The use of Rule 11 could be urged in the Note to any amended Rule 23. Or Rule 11 could be expressly incorporated, in a fashion similar to Rules 8(b) and 8(e). Or specific sanctions provisions could be built into Rule 23. Some doubt was expressed about reliance on Rule 11, springing from the view that "Rule 11 has disappeared in the federal courts." The bad-faith and frivolous objectors are a real problem, and help to give the courts a bad name. But there is no empirical measure of this problem, and we must be careful not to chill valid objections.

In the end, it was agreed that it is not desirable to develop a separate sanction provision for Rule 23 objectors. Reference to Rule 11 in some manner, perhaps by incorporation in Rule 23(e), will suffice.

Settlement Processes

The settlement process remains an important topic that may benefit from more elaborate rules provisions.

One proposal has been that no settlement negotiations can occur before the court has certified a class. This proposal would enhance the court's ability to ensure adequate representation, both by named class representatives and by counsel. It might support greater efforts to add other assurances of fairness, such as creation of a steering committee of class members, appointment of a guardian for the class, or other structural requirements for the negotiation.

This proposal was met with the observation that cases come to settle in many ways. An illustration is a case that just settled after four years of MDL litigation. During these four years all parties agreed to defer determination of the certification question. The plaintiffs feared that the case had not been developed to a point that would warrant class certification. The defendants did not want class certification for trial, but wanted to hold open the opportunity to settle on a class basis. The court had four years to become familiar with the case before the settlement and class certification. Certification was essential to the settlement. Settlement discussions before the certification are essential; without this opportunity, there will be no settlement and perhaps no eventual certification. The class certified for settlement was not a class that could be certified for trial. Events like this happen every day. And the opposite picture does not happen — no one goes in with a proposed certification and proposed settlement in circumstances that do not involve some prior litigation in one form or another.

A related observation was that employment cases against the government commonly involve administrative complaints. Administrative resolution is strongly favored. The government must be able to negotiate before the claims come to court.

Settlement Review

In looking at the draft Rule 23(e) that enumerates a number of factors to be considered in reviewing a proposed settlement, it was observed that the circuits have developed good lists of this sort. It would be helpful to survey the decisions and develop a synthesis to be embodied in the rule. This is a setting in which it will be helpful to reflect the better current practices in the text of the rule.

One factor listed in the draft, Rule 23(e)(5)(A), looks to the maturity of the dispute in terms that affect the court's ability to predict the probable outcome on the merits of liability and damages issues. It is not clear whether this fairly reflects the Third Circuit decision cited in the Note, nor whether any departure from the Third Circuit formulation is desirable.

Another range of factors in reviewing "who is giving up what" raises issues that also go to the desirability of certifying a settlement class. Choice-of-law tradeoffs are a problem at both stages. In certification, they present the problem of conflicting interests that may defeat the requirement that the class present common issues. It is difficult to provide adequate representation of a class whose members' claims would be governed by differently favorable law. One response is to certify multiple classes or subclasses, not a single nationwide class. But settlement is likely to involve all classes, presenting a still more inscrutable question whether the settlement terms unfairly

homogenize the claims of class members whose individual claims would rest on distinctly favorable — or unfavorable — law. Opting out or objecting may address this problem, but that is not certain.

One effective means of ensuring the adequacy of a class settlement is available when individual class claims are sufficiently substantial to support individual representation. The draft Rule 23(e) allows an opportunity to request exclusion after settlement terms are known. This opportunity often arises under present practice, when class certification and preliminary settlement approval occur at the same time. But when the initial opportunity to request exclusion expires before the settlement agreement is announced, there may not now be a second opportunity to request exclusion. The opportunity provides a good test, if only in the classes that involve substantial individual claims. But the opportunity was challenged on the ground that it also will defeat any realistic possibility of settlement.

This observation led to the further observation that actual application of the factors for reviewing a settlement is likely to be different in different types of cases. The Note should speak to the possible differences among mass torts, small-claims-consumer actions, employment actions, and federal regulatory claims. Care also should be taken to examine the ways in which application of the factors may depend on whether the class was certified for settlement only.

The proposed Rule 23(e)(5)(B) factor speaks, among other things, to the participation — if any — of "unofficial representatives" of class members. This term is too vague. If the class includes minors, a guardian can be appointed. Steering committees may be valuable in some circumstances. But actual settlement negotiations can be effective only with a single set of negotiators for each side. Scrutiny cannot be built into the negotiation process. The reference to "unofficial representatives" should be dropped.

For similar reasons, the proposal in 23(e)(4) for discovery by objectors as to "the course of settlement negotiations" should be dropped. Such discovery should be allowed only if there is a prima facie showing of collusion — that is the present law, and is good law. Review of the fairness of the settlement is good enough. Whatever problems may arise from the lack of any real client supervision of the negotiation or actual bargain, intrusion into the settlement negotiations is not an answer.

The Rule 23(e)(4) draft also provides for discovery by objectors of "incidental agreements or understandings." The fear is that settlements are getting reviewed without a complete disclosure of all of the terms that have induced agreement. What we need is a direct provision for disclosure of all terms of the agreement, not simply discovery by objectors who may become suspicious. But the need depends on the problem — are there really agreements that are not disclosed? Are there related settlements that, because formally not involved with the class settlement, remain hidden? Are there agreements about launching future actions, or about destroying or returning discovery materials, or other matters that may have influenced the attorneys to accept terms that might have been different otherwise? And what about side agreements with objectors? Often the agreements with objectors are made public in order to support a court order for fees, but are there other agreements that are not? No conclusion was reached as to these issues.

Attorney Selection and Fees

One of the drafts presented for consideration provides for court appointment of class representatives and class counsel. The underlying concern is that too many class actions are brought by entrepreneurial lawyers who find figurehead class representatives and proceed to litigate without any review or control by any real client. A model is provided by the class-action provisions of the Private Securities Litigation Reform Act. This model, however, may not be good for all varieties of class actions. It works in securities litigation because typically there are sophisticated investors who hold large stakes. Such class members can be effective class representatives and can exercise the power to select class counsel with wisdom. In other forms of class actions the result may be a free-for-all contest among contending counsel, while in still others it will not work because the only lawyer interested is the one who dreamed up the claim in the first place. And whatever else can be said, only chaos could result from an effort to interject the court into appointment of counsel after settlement negotiations have begun — and today it is common for settlement negotiations to begin before an action is even filed.

Even if there is a role for court appointment of class counsel, the result is likely to be that the same small network of experienced counsel and their successors are appointed time and again. It will be difficult to persuade courts to open the circle in the way that can happen now.

For many classes, such as small-claims-consumer classes, further, there is not likely to be any competition for the right to represent the class. (Some doubt was expressed on this score; there at least are tales of multiple competing class actions even on small consumer claims. The lawyer's fee for a coupon settlement can be substantial.) The cost of providing notice will be considerable, and perhaps crippling.

Despite these problems, court responsibility for appointing counsel may be desirable when there are competing classes. Courts today commonly appoint steering committees or lead counsel when there are multiple contenders. But even then it can happen that someone who is not directly involved in the litigation establishes a settlement.

One approach may be to preserve much of the draft, without the feature that requires notice and a court-sponsored competition to be counsel. Express responsibility for appointing counsel, and a list of factors to be considered in reviewing a request for appointment, may be desirable to supplement the inquiry already undertaken under Rule 23(a)(4) as part of the inquiry into adequate representation.

Another approach might be to incorporate the appointment of counsel question with the problem of overlapping and competing classes. This approach would move the court beyond the present Rule 23(a)(4) inquiry only when need or opportunity arise for bringing order out of competing actions by designating one counsel as lead. The drafting chore will be complex, but perhaps it can be managed. One set of problems will arise from the prospect that competing actions are likely to be filed in different courts. A procedure rule cannot provide for transfer, and it will be difficult to designate one court to take the lead in establishing coordination through designation of counsel.

The fee draft provides that the court must award fees to class counsel, but that the fee may be nothing. It was readily concluded that it would be better to change "must" to "may" and drop the reference to an award of nothing.

What happens now is that notice to the class says that a fee will be awarded up to a stated maximum. There is then a separate negotiation. The court tends to have a hearing on the settlement first, and if the settlement is approved to move on to a hearing on fees. But no one actually shows up for the fee hearing. In part this may be because the details of the fee request are not described in the notice. In part it is because the arrangements for paying fees typically do not result in any significant consequence for individual class members. The Rule should make it clear when notice is to be given. The notice should be clear on what the fees are to be, and on how to mount a challenge. The relationship of this notice to the settlement notice should be made clear. There is a paradox at work. People tend to be outraged in general at the public reports of large attorney fees, but no one shows up at the fee hearings.

The process of negotiating settlements includes fees for class counsel. It seems better to do as much as can be done to preserve as much separation as possible between negotiation of class relief and negotiation of fees. Defendants do not particularly care about the division of a total payment between class relief and fees, apart from ensuring that there is a reasonable deal that merits judicial approval. Negotiation of a separate fee award, not to be paid out of the class recovery, often takes the form of agreeing to pay a reasonable fee as determined by the court, up to a stated maximum. But it is not feasible for courts to really review what class attorneys have done. Great detail is provided, but could be reviewed effectively only with the aid of a magistrate judge or special master. In bankruptcy proceedings there is an established practice of providing great detail; computer records in law firms make it easy to sort the detail into meaningful array. Perhaps more can be done in a meaningful way.

Notice

Rule 23 does not now require any form of notice to the class before certification under (b)(1) or (b)(2). Many courts order some form of notice. Notice seems important, and will be even more important if courts should undertake to search for additional or different class representatives. But many (b)(1) and (b)(2) classes are not well financed — they do not promise the high dollar awards that many (b)(3) classes promise. Notice costs could impose onerous burdens on the plaintiffs in some civil rights actions and the like.

It was noted that a majority of the (b)(2) classes in the FJC study provided notice. In some of them, notice was provided for a class certification made before settlement and notice of the settlement.

Notice of certification is a greater practical problem than notice in conjunction with settlement, because defendants commonly agree to pay for notice of settlement. One of the proposals that has been advanced is that there should be a decision on class certification before doing anything directed to the class claim, including any settlement negotiation. If that proposal is taken up, the practical impact of enhanced notice requirements will be magnified. There clearly will have to be two notices — one for certification, and another for the settlement.

It was agreed that notice questions should be pursued further.

Opt-in Classes

The question of opt-in classes was raised at the close of the meeting. One proposal that has been left open has been whether opt-in classes should be used as a substitute for the "just ain't worth it" proposal. Under this approach, discretion would be established to convert a (b)(3) class to an opt-in class if the court determines that the major benefit of a proposed class will flow to counsel rather than the public interest and class members. The opt-in class would be used to prove the extent of individual interest: if a sufficient number of class members opt in, making the action viable, so much the better. But if class members vote against representation by failing to opt in, the class claim would be effectively mooted. It was agreed that this approach is not likely to prove viable. It would be seen as an indirect attack on small-claims-consumer class actions, and resisted as such.

Other Issues

It was agreed that this meeting did not exhaust the topics that the subcommittee might consider. The problems of competing and overlapping classes, noted at the beginning, deserve more discussion. Repetitive requests for certification of a class that has been rejected may be restricted, recognizing that circumstances may change and warrant reconsideration. Efforts to "shop" settlements should be explored, with an eye to effective control.

Respectfully submitted,

Edward H. Cooper
Reporter

VIII. March 1996 Draft Rule, with February 2000 Modifications

Rule 23. Class Actions (March 1996 draft, Feb. 2000 form)

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all ~~only~~ if ~~—~~ with respect to the claims, defenses, or issues certified for class action treatment —

(1) the ~~class is~~ members are so numerous that joinder of all members is impracticable~~;~~;

(2) there are questions of law or fact common to the class~~;~~;

(3) ~~the claims or defenses of the representative parties are typical of the claims or defenses~~ the representative parties' positions typify those of the class~~;~~; and

(4) the representative parties and their attorneys will fairly and adequately discharge the fiduciary duty to protect the interests of ~~the~~ all persons while members of the class until relieved by the court from that fiduciary duty.

(b) ~~Class Actions Maintainable~~ When Class Actions May be Certified. An action may be ~~maintained~~ certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class ~~which~~ that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class ~~which~~ that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate~~ final injunctive or declaratory relief ~~or corresponding declaratory relief~~ may be appropriate with respect to the class as a whole; or

(3) the court finds (i) that, considering the evidence likely to be admitted at trial, the questions of law or fact common to the certified class ~~members of the class~~ predominate over ~~any~~ individual questions ~~affecting only individual members~~ included in the class action, (ii) that a class action is superior to other available methods and necessary for the fair and efficient ~~adjudication~~ disposition of the controversy, and — if such a finding is requested by a party opposing certification of a class — (iii) that {the class claims, issues, or defenses are not insubstantial on the merits} [alternative:] {the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification}. The matters pertinent to ~~the~~ these findings include:

(A) the need for class certification to accomplish effective enforcement of individual claims;

(B) the ~~interest of members of the class in individually controlling the prosecution or defense of~~ practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;

(C) the extent, ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of the class~~;

(D) the desirability ~~or undesirability~~ of concentrating the litigation ~~of the claims~~ in the particular forum;

(E) the likely difficulties ~~likely to be encountered in the management of~~ in managing a class action that will be avoided or significantly reduced if the controversy is adjudicated by other available means;

(F) the probable success on the merits of the class claims, issues, or defenses;

(G) whether the public interest in — and the private benefits of — the probable relief to individual class members justify the burdens of the litigation; and

(H) the opportunity to settle on a class basis claims that could not be litigated on a class basis or could not be litigated by [or against?] a class as comprehensive as the settlement class; or

[(4) Members of the class share an interest in resolving by a class settlement claims that arise out of a common course of conduct by a person

opposing the class [and the court finds that exploration of class settlement is desirable in light of:

(A) the prospect that a class will not be certified for trial under Rule 23(b)(1), (2), or (3);

(B) the nature of the controversy;

(C) the nature of the relief that might be demanded by litigation or settlement;

(D) potential conflicts of interest among class members;

(E) the inefficiency, impracticability, or unfairness of separate actions;

(F) the practical ability of [individual] class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;

(G) the maturity of the underlying substantive issues, as measured by experience in adjudicating other actions, the development of scientific knowledge, and other facts that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages;

(H) [individual] class members' ability to effectively determine whether to request exclusion from the class;

(I) the opportunity for effective participation by representative class members in the settlement process;

(J) the court's ability to administer a settlement; and

(n) ??]

(5) the court finds that permissive joinder should be accomplished by allowing putative members to elect to be included in a class. The matters pertinent to this finding will ordinarily include:

(A) the nature of the controversy and the relief sought;

(B) the extent and nature of the members' injuries or liability;

(C) potential conflicts of interest among members;

(D) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and

(E) the inefficiency or impracticality of separate actions to resolve the controversy; or

(6) the court finds that a class certified under subdivision (b)(2) should be joined with claims for individual damages that are certified as a class action under subdivision (b)(3) or (b)(4).

(c) Determination by Order Whether Class Action to Be ~~Maintained~~ Certified; Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses.

(1) ~~As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.~~ When persons sue or are sued as representatives of a class, the court shall

determine by order whether and with respect to what claims, defenses, or issues the action ~~should~~ will be certified as a class action.

(A) An order certifying a class action must describe the class. When a class is certified Rule 23(b)(3) or *(b)(4)*, the order must state when and how [putative] members (i) may elect to be excluded from the class, and (ii) if the class is certified only for settlement, may elect to be excluded from any settlement approved by the court under subdivision (e). When a class is certified under subdivision (b)(*5*), the order must state when, how, and under what conditions [putative] members may elect to be included in the class; the conditions of inclusion may include a requirement that class members bear a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be [is] conditional, and may be altered or amended before ~~the decision on the merits~~ final judgment, but an order denying class certification precludes certification of substantially the same class by any other court unless a change of law or fact creates a new certification issue.

(2) (A) When ordering certification of a class action under this rule, the court shall direct that appropriate notice be given to the class. The notice must concisely and clearly describe the nature of the action, the claims, issues, or defenses with respect to which the class has been certified, the right to elect to be excluded from a class certified under subdivision (b)(3) *or (b)(4)*, the right to elect to be included in a class certified under subdivision (b)(*5*), and the potential consequences of class membership. [The court may

order a defendant to advance part or all of the expense of notifying a plaintiff class if, under subdivision (b)(3)(E), the court finds a strong probability that the class will win on the merits.]

(i) In any class action certified under subdivision (b)(1) or (2), the court shall direct a means of notice calculated to reach a sufficient number of class members to provide effective opportunity for challenges to the class certification or representation and for supervision of class representatives and class counsel by other class members.

(ii) In any class action ~~maintained~~ certified under subdivision (b)(3) *or (b)(4)*, the court shall direct to ~~the~~ members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort[, but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the generally small value of individual members' claims.] The notice shall advise each member that ~~(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and~~ ~~(C)~~ any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(iii) In any class action certified under subdivision (b)(5), the court shall direct a means of notice calculated to accomplish the purposes of certification.

(3) Whether or not favorable to the class,

(A) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(1) or ~~(b)~~ (2)~~, whether or not favorable to the class,~~ shall include and describe those whom the court finds to be members of the class.~~:~~;

(B) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(3) *or (b)(4)*~~, whether or not favorable to the class,~~ shall include and specify or describe those to whom the notice provided in subdivision (c)(2)(A)(ii) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.~~:~~; and

(C) The judgment in an action certified as a class action under subdivision (b)(*5*) shall include all those who elected to be included in the class and who were not earlier dismissed from the class.

(4) ~~When appropriate (A)~~ An action may be ~~brought or maintained~~ certified as a class action —

(A) with respect to particular claims, defenses, or issues; or

(B) ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly~~ by or against multiple classes or subclasses, which need not separately satisfy the requirement of subdivision (a)(1).

(d) Orders in Conduct of Class Actions. ~~In the conduct of actions to which this rule applies, the court may make appropriate orders:~~

(1) Before determining whether to certify a class the court may decide a motion made by any party under Rules 12 or 56 if the court concludes that decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay.

(2) As a class action progresses, the court may make orders that:

(A) ~~(1)~~ determine~~ing~~ the course of proceedings or prescribe~~ing~~ measures to prevent undue repetition or complication in ~~the~~ presenting~~ation~~ ~~of~~ evidence or argument;

(B) ~~(2)~~ require~~ing~~, ~~for the protection of~~ to protect the members of the class or otherwise for the fair conduct of the action, ~~that~~ notice ~~be directed~~ to some or all ~~of the~~ members of:

(i) refusal to certify a class;

(ii) any step in the action; ~~, or of~~

(iii) the proposed extent of the judgment; ~~,~~ or ~~of~~

(iv) the members' opportunity ~~of the members~~ to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, ~~or~~ to otherwise come into the action, or to be excluded from or included in the class;

(C) ~~(3)~~ impose~~ing~~ conditions on the representative parties, class members, or ~~on~~ intervenors;

(D) ~~(4)~~ require~~ing~~ that the pleadings be amended to eliminate ~~therefrom~~ allegations ~~as to~~ about representation of absent persons, and that the action proceed accordingly;

(E) ~~(5)~~ deal~~ing~~ with similar procedural matters.

(3) ~~The orders~~ An order under subdivision (d)(2) may be combined with an order under Rule 16~~;~~ and may be altered or amended ~~as may be desirable from time to time~~.

(e) Dismissal ~~or~~ and Compromise.

(1) Before a certification determination is made under subdivision (c)(1) in an action in which persons sue [or are sued] as representatives of a class, court approval is required for any dismissal, compromise, or amendment to delete class issues.

(2) An ~~class~~ action certified as a class action shall not be dismissed or compromised without the approval of the court, and notice of ~~the~~ a proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(3) A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent investigation and report to the court on the fairness of the proposed dismissal or compromise. The expenses of the investigation and report and the fees of a person specially appointed shall be paid by the parties as directed by the court.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying a request for class action certification

under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

DRAFT ADVISORY COMMITTEE NOTE

March 1996; amended February 2000

. Class action practice has flourished and matured under Rule 23 as it was amended in 1966. Subdivision (b)(1) continues to provide a familiar anchor that secures the earlier and once-central roles of class actions. Subdivision (b)(2) has cemented the role of class actions in enforcing a wide array of civil rights claims, and subdivision (b)(3) classes have become one of the central means of protecting public interests through enforcement of large numbers of small claims that would not support individual litigation. The experience of more than three decades has shown the wisdom of those who crafted the 1966 rule, in matters both foreseen and unforeseen. Inevitably, this experience also has shown ways in which Rule 23 can be improved. These amendments will effect modest expansions in the availability of class actions in some settings, and modest restrictions in others. A new "opt-in" class category is created by subdivision (b)(4). Settlement problems are addressed, both by confirming the propriety of "settlement classes" and by strengthening the procedures for reviewing proposed settlements. Changes are made in a number of ancillary procedures, including the notice requirements. Many of these changes will

bear on the use of class actions as one of the tools available to accomplish aggregation of tort claims. The Advisory Committee debated extensively the question whether more adventurous changes should be made to address the problems of managing mass tort litigation, particularly the problems that arise when a common course of conduct causes injuries that are dispersed in time and space. At the end, the Committee concluded that it is too early to anticipate the lessons that will be learned from the continuing and rapid development of practice in this area.

Stylistic changes also have been made.

At the request of the Advisory Committee, the Federal Judicial Center undertook an empirical study designed to illuminate the general use of class actions not only in settings that capture general attention but also in more routine settings. The study is published as T.E. Willging, L.L. Hooper, and R.J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996)*. The study provided much useful information that has helped shape these amendments.

Subdivision (a). Subdivision (a) is amended to emphasize the opportunity to certify a class that addresses only specific claims, defenses, or issues, an opportunity that exists under the current rule. The change, in conjunction with parallel changes

in subdivision (b)(3) and elsewhere in the rule, may make it easier to address mass tort problems through the class action device. One or two common issues may be certified for common disposition, leaving individual questions for individual litigation or for aggregation on some other basis — including aggregation by certification of different, and probably smaller, classes.

Paragraph (4) is amended to emphasize the fiduciary responsibilities of counsel and representative parties. The new language is intended only to provide a forceful reminder to court, counsel, and representative parties that attorneys who undertake to represent a class owe duties of professional responsibility to the entire class and all members of the class. It does not answer any specific question.

Subdivision (b). Subdivision (b)(2) is amended to make it clear that a defendant class may be certified in an action for injunctive or declaratory relief against the class. Several courts have resolved the ambiguity in the 1966 language by permitting certification of defendant classes. Defendant classes can be useful, but particular care must be taken to ensure that the defendants chosen to represent the class do not have significant conflicts of interest with other class members and actually provide adequate representation. Care also must be taken to ensure that the responsibilities of adequately representing a class do not unfairly increase the expense and other

burdens placed on the class representatives, and do not coerce or impede settlement by class representatives as individual parties rather than as class representatives.

Subdivision (b)(3) has been amended in several respects. Some of the changes are designed to redefine the role of class adjudication in ways that sharpen the distinction between the aggregation of individual claims that would support individual adjudication and the aggregation of individual claims that would not support individual adjudication. Current attempts to adapt Rule 23 to address the problems that arise from torts that injure many people are reflected in part in some of these changes, but these attempts have not matured to a point that would support comprehensive rulemaking. When Rule 23 was substantially revised in 1966, the Advisory Committee Note stated: "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." Although it is clear that developing experience has superseded that suggestion, the lessons of experience are not yet so clear as to support detailed mass tort provisions either in Rule 23 or a new but related rule.

The probability that a claim would support individual litigation depends both on the probability of any recovery and the probable size of such recovery as might be won. One of the most important roles of certification under subdivision (b)(3) has been to facilitate the enforcement of valid claims for small amounts. The median recovery figures reported by the Federal Judicial Center study all were far below the level that would be required to support individual litigation, unless perhaps in a small claims court. This vital core, however, may branch into more troubling settings. The mass tort cases frequently sweep into a class many members whose individual claims would easily support individual litigation, controlled by the class member. Individual class members may be seriously harmed by the loss of control. Class certification may be desired by defendants more than most plaintiff class members in such cases, and denial of certification or careful definition of the class may be essential to protect many plaintiffs. As one example, a defective product may have inflicted small property value losses on millions of consumers, reflecting a small risk of serious injury, and also have caused serious personal injuries to a relatively small number of consumers. Class certification may be appropriate as to the property damage claims, but not as to the personal injury claims.

In another direction, class certification may be sought as to individual claims that would not support individual litigation because of a dim prospect of prevailing

on the merits. Certification in such a case may impose undue pressure on the defendant to settle. Settlement pressure arises in part from the expense of defending class litigation. More important, settlement pressure reflects the fact that often there is at least a small risk of losing against a very weak claim. A claim that might prevail in one of every ten or twenty individual actions gathers compelling force — a substantial settlement value — when the small probability of defeat is multiplied by the amount of liability to the entire class.

Individual litigation may play quite a different role with respect to class certification. Exploration of mass tort questions time and again led experienced lawyers to offer the advice that it is better to defer class litigation until there has been substantial experience with actual trials and decisions in individual actions. The need to wait until a class of claims has become "mature" seems to apply peculiarly to claims that at least involve highly uncertain facts that may come to be better understood over time. New and developing law may make the fact uncertainty even more daunting. A claim that a widely used medical device has caused serious side effects, for example, may not be fully understood for many years after the first injuries are claimed. Pre-maturity class certification runs the risk of mistaken decision, whether for or against the class. This risk may be translated into settlement

terms that reflect the uncertainty by exacting far too much from the defendant or according far too little to the plaintiffs.

Item numbers have been added to emphasize the individual importance of each of the three requirements enumerated in the first paragraph of subdivision (b)(3).

Item (i) has been amended to reflect the other changes that emphasize the availability of issues classes. The predominance of law or fact questions common to the class is measured only in relation to individual questions that also are to be resolved in the class action. Individual questions that are left for resolution outside the class action are not included in measuring predominance. One frequently discussed example is provided by certification of issues of design defect and general causation as the only matters to be resolved on a class basis, leaving individual issues of comparative fault, specific causation, and damages for resolution in other proceedings. Item (i) also is amended to emphasize that if a class is certified for trial, the predominance inquiry should focus on the evidence likely to be admitted at trial of the claims, issues, or defenses included within the scope of the class certification.

Item (ii) in the findings required for class certification has been amended by adding the requirement that a (b)(3) class be necessary for the fair and efficient [adjudication] of the controversy. The requirement that a class be superior to other

available methods is retained, and the superiority finding — made under the familiar factors developed by current law, as well as the new factors (E), (F), and (G)(H) — will be the first step in making the finding that a class action is necessary. It is no longer sufficient, however, to find that a class action is in some sense superior to other methods of [adjudicating] "the controversy." It also must be found that class certification is necessary. Necessity is meant to be a practical concept. In adding the necessity requirement, it also is intended to encourage careful reconsideration of the superiority finding without running the drafting risks entailed in finding some new word to substitute for "superior." Both necessity and superiority are together intended to force careful reappraisal of the fairness of class adjudication as well as efficiency concerns. Certification ordinarily should not be used to force into a single class action plaintiffs who would be better served by pursuing individual actions. A class action is not necessary for them, even if it would be more efficient in the sense that it consumes fewer litigating resources and more fair in the sense that it achieves more uniform treatment of all claimants. Nor should certification be granted when a weak claim on the merits has practical value, despite individually significant damages claims, only because certification generates great pressure to settle. In such circumstances, certification may be "necessary" if there is to be any [adjudication] of the claims, but it is neither superior nor necessary to the fair and efficient

[adjudication] of the claims. Class certification, on the other hand, is both superior and necessary for the fair and efficient [adjudication] of numerous individual claims that are strong on the merits but small in amount.

Superiority and necessity take on still another dimension when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. Even though many individual plaintiffs would be better served by racing to secure and enforce the earlier judgments that exhaust the available assets, fairness may require aggregation in a way that marshals the assets for equitable distribution. Bankruptcy proceedings may prove a superior alternative, but the certification decision must make a conscious choice about the best method of addressing the apparent problem.

Item (iii) has been added to the findings required for class certification, and is supplemented by the addition of new factor (E) (F) to the list of factors considered in making the findings required for certification. It addresses the concern that class certification may create an artificial and coercive settlement value by aggregating weak claims. It also recognizes the prospect that certification is likely to increase the stakes substantially, and thereby increase the costs of the litigation. These concerns justify preliminary consideration of the probable merits of the class claims, issues, or defenses at the certification stage if requested by a party opposing certification. If the

parties prefer to address the certification determination without reference to the merits, however, the court should not impose on them the potential burdens and consequences entailed by even a preliminary consideration of the merits.

{***Version 1***} Taken to its full extent, these concerns might lead to a requirement that the court balance the probable outcome on the merits against the cost and burdens of class litigation, including the prospect that settlement may be forced by the small risk of a large class recovery. A balancing test was rejected, however, because of its ancillary consequences. It would be difficult to resist demands for discovery to assist in demonstrating the probable outcome. The certification hearing and determination, already events of major significance, could easily become overpowering events in the course of the litigation. Findings as to probable outcome would affect settlement terms, and could easily affect the strategic posture of the case for purposes of summary judgment and even trial. Probable success findings could have collateral effects as well, affecting a party's standing in the financial community or inflicting other harms. And a probable success balancing approach must inevitably add considerable delay to the certification process.

The "first look" approach adopted by item (iii) is calculated to avoid the costs associated with balancing the probable outcome and costs of class litigation. The court is required only to find that the class claims, issues, or defenses "are not

insubstantial on the merits." This phrase is chosen in the belief that there is a wide — although curious — gap between the higher possible requirement that the claims be substantial and the chosen requirement that they be not insubstantial. The finding is addressed to the strength of the claims "on the merits," not to the dollar amount or other values that may be involved. The purpose is to weed out claims that can be shown to be weak by a curtailed procedure that does not require lengthy discovery or other prolonged proceedings. Often this determination will be supported by precertification motions to dismiss or for summary judgment. Even when it is not possible to resolve the class claims, issues, or defenses on motion, it may be possible to conclude that the claims, issues, or defenses are too weak to justify the costs of certification.

{***Version 2***} These risks can be justified only by a preliminary finding that the prospect of class success is sufficient to justify them. The prospect of success need not be a probability of 0.50 or more. What is required is that the probability be sufficient in relation to the predictable costs and burdens, including settlement pressures, entailed by certification. The finding is not an actual determination of the merits, and pains must be taken to control the procedures used to support the finding. Some measure of controlled discovery may be permitted, but the procedure should be as expeditious and inexpensive as possible. At times it may be wise to integrate

the certification procedure with proceedings on precertification motions to dismiss or for summary judgment. A realistic view must be taken of the burdens of certification — bloated abstract assertions about the crippling costs of class litigation or the coercive settlement effects of certification deserve little weight. At the end of the process, a balance must be struck between the apparent strength of the class position on the merits and the adverse consequences of class certification. This balance will always be case-specific, and must depend in large measure on the discretion of the district judge.

The prospect-of-success finding is readily made if certification is sought only for purposes of pursuing settlement, not litigation. If certification of a settlement class is appropriate under the standards discussed [with factor (G)(H) and subdivision (e)] below, the prospect of success relates to the likelihood of reaching a settlement that will be approved by the court, and the burdens of certification are merely the burdens of negotiations that the parties can abandon when they wish.

Care must be taken to ensure that subsequent proceedings are not distorted by the preliminary finding on the prospect of success. If a sufficient prospect is found to justify certification, subsequent pretrial and trial proceedings should be resolved without reference to the initial finding. The same caution must be observed in subsequent proceedings on individual claims if certification is denied.

{{These paragraphs follow either Version 1 or Version 2.}}

It may happen that different parties appear, seeking to represent the same class or overlapping classes. Or it may happen that parties appear to request certification of a class for purposes of a settlement that has been partly worked out, but not yet completed. These and still other situations will complicate the task of integrating the preliminary appraisal of the merits with the other proceedings required to determine the class-certification question. No single solution commends itself. These complications must be worked out according to the circumstances of each case.

One court's refusal to certify for want of a sufficient prospect of class success is not binding by way of res judicata if another would-be representative appears to seek class certification in the same court or some other court. The refusal to recognize a class defeats preclusion through the theories that bind class members. Even participation of the same lawyers ordinarily is not sufficient to extend preclusion to a new party. The first determination is nonetheless entitled to substantial respect, and a significantly stronger showing may properly be required to escape the precedential effect of the initial refusal to certify.

[Alternative that would reflect substitution of new factor (A) in the matters pertinent to finding superiority for the proposed item (ii) requirement that a class

action be "necessary" for the fair and efficient disposition of the controversy.] The list of factors that bear on the finding whether a class action is superior to other available methods for the fair and efficient [disposition] of the controversy has been amended in several ways.

Factor (A) is added to focus on the question whether class certification is needed to accomplish effective enforcement of individual claims. The need for class certification is a practical concept. This factor is intended to underscore the importance of individual fairness as well as overall fairness and efficiency. Certification is needed for the fair and efficient [adjudication] of numerous individual claims that are strong on the merits but small in amount. Such classes provide the traditional and abiding justification for (b)(3) certification. Certification ordinarily should not be used, on the other hand, to force into a single class action plaintiffs who would be better served by pursuing individual actions. A class action is not needed for them, even if it would be more efficient in the sense that it consumes fewer litigating resources, and also more fair to the extent that it may achieve more uniform treatment of all claimants. Nor should certification be granted when a weak claim on the merits has practical value, whether or not there are individually significant damages claims, only because certification generates great pressure to settle. In such circumstances, certification may be needed if there is to be any [adjudication] of the

claims, but it is neither superior nor needed for the fair and efficient [adjudication] of the claims.

The need for class certification takes on still another dimension when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. Even though many individual plaintiffs would be better served by racing to secure and enforce the earlier judgments that exhaust the available assets, fairness may require aggregation in a way that marshals the assets for equitable distribution. This need may justify certification under subdivision (b)(3), or in appropriate cases may justify certification under subdivision (b)(1). Bankruptcy proceedings may prove a superior alternative. The decision whether a (b)(3) class is needed must rest on a conscious choice about the best method of addressing the apparent problem.

Yet another problem, presented by some recent class-action settlements, arises from efforts to resolve future claims that have not yet matured to the point that would permit present individual enforcement. A toxic agent, for example, may have touched a broad universe of persons. Some have developed present injuries, most never will develop any injury, and many will develop injuries at some indefinite time in the future. Class action settlements, much more than adjudications, can be structured in ways that provide for processing individual claims as actual injuries develop in the

future. Class disposition may be the only possible means of resolving these "futures" claims. These situations present issues that cannot now be resolved by rule. Classes have been certified on a "limited fund" theory under subdivision (b)(1), limiting any question of exclusion from the class to the settlement terms approved by the court. Subdivision (b)(3) also may present an opportunity for certification, presenting difficult questions as to the means for protecting the right to opt out of the class. It is difficult to provide effective notice to future claimants, and particularly difficult as to those who may not even know that they have been exposed to the common class risk. It also is difficult to make an intelligent decision whether to opt out when the prospect and nature of any future injury are uncertain. Yet any realistic prospect of settlement is likely to be destroyed if the opportunity to request exclusion is extended to include a reasonable period after each future claimant becomes aware of actual injury and of the class settlement and judgment. These problems can be addressed explicitly only in light of the lessons to be learned from developing experience.

Factor (B), formerly factor (A), is amended to emphasize the ability of individual class members to pursue their claims through means other than the proposed class. Often the alternative means will be individual litigation, fully controlled by the litigant. The alternative separate actions, however, also may involve

aggregation on some other basis, including certification of a differently defined class that is not individually controlled by all parties.

Factor (C), formerly factor (B), has been amended in several respects. Other litigation can be considered so long as it is "related" and involves class members; there is no need to determine whether the other litigation somehow concerns the same controversy. The focus on other litigation "already commenced" is deleted, permitting consideration of litigation without regard to the time of filing in relation to the time of filing the class action. The more important change authorizes consideration of the "maturity" of related litigation. In one dimension, maturity can reflect the need to avoid interfering with the progress of related litigation already well advanced toward trial and judgment. When multiple claims arise out of dispersed events, however, maturity also reflects the need to support class adjudication by experience gained in completed litigation of several individual claims. If the results of individual litigation begin to converge, class adjudication may seem appropriate. Class adjudication may continue to be inappropriate, however, if individual litigation continues to yield inconsistent results, or if individual litigation demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis.

Factor (E), formerly factor (D), has been amended to set the difficulties of managing a class action in perspective. If other means of adjudication would create greater difficulties than class adjudication for the judicial system as a whole — including state as well as federal courts — certification should not be defeated by the difficulties of managing a class action.

Factor (E) (F) has been added to subdivision (b)(3) to complement the addition of new item (ii) and the addition of the necessity element to item (iii) and the addition of new factor (A). The role of the probable success of the class claims, issues, or defenses is discussed with those items.

Factor (F) (G) has been added to subdivision (b)(3) to effect a retrenchment in the use of class actions to aggregate trivial individual claims. It bears on the item (iii) requirement that a class action be superior to other available methods and necessary needed within the meaning of factor (A) for the fair and efficient [adjudication] of the controversy. It permits the court to deny class certification if the public interest in — and the private benefits of — probable class relief do not justify the burdens of class litigation. This factor is distinct from the evaluation of the probable outcome on the merits called for by item (ii) and factor (E) (F). At the extreme, it would permit denial of certification even on the assumption that the class position would certainly prevail on the merits.

Administration of factor (F) (G) requires care and sensitivity. Subdivision (b)(3) class actions have become an important private means for supplementing public enforcement of the law. Legislation often provides explicit incentives for enforcement by private attorneys-general (including qui tam provisions), attorney-fee recovery, minimum statutory penalties, and treble damages. Class actions that aggregate many small individual claims and award "common-fund" attorney fees serve the same function. Class recoveries serve the important functions of depriving wrongdoers of the fruits of their wrongs and deterring other potential wrongdoers. There is little reason to believe that the Committee that proposed the 1966 amendments anticipated anything like the enforcement role that Rule 23 has assumed, but there is equally little reason to be concerned about that belief. What counts is the value of the enforcement device that courts, aided by active class-action lawyers, have forged out of Rule 23(b)(3). In most settings, the value of this device is clear.

The value of class-action enforcement of public values, however, is not always clear. It cannot be forgotten that Rule 23 does not authorize actions to enforce the public interest on behalf of the public interest. Rule 23 depends on identification of a class of real persons or legal entities, some of whom must appear as actual representative parties. Rule 23 does not explicitly authorize substituted relief that flows to the public at large, or to court- or party-selected champions of the public

interest. Adoption of a provision for "fluid" or "cy pres" class recovery would severely test the limits of the Rules Enabling Act, particularly if used to enforce statutory rights that do not provide for such relief. The persisting justification of a class action is the controversy between class members and their adversaries, and the final judgment is entered for or against the class. It is class members who reap the benefits of victory, and are bound by the res judicata effects of victory or defeat. If there is no prospect of meaningful class relief, an action nominally framed as a class action becomes in fact a naked action for public enforcement maintained by the class attorneys without statutory authorization and with no support in the original purpose of class litigation. Courts pay the price of administering these class actions. And the burden on the courts is displaced onto other litigants who present individually important claims that also enforce important public policies. Class adversaries also pay the price of class enforcement efforts. The cost of defending class litigation through to victory on the merits can be enormous. This cost, coupled with even a small risk of losing on the merits, can generate great pressure to settle on terms that do little or nothing to vindicate whatever public interest may underlie the substantive principles invoked by the class.

The prospect of significant benefit to class members combines with the public values of enforcing legal norms to justify the costs, burdens, and coercive effects of

class actions that otherwise satisfy Rule 23 requirements. If probable individual relief is so slight as to be essentially trivial or meaningless, however, the core justification of class enforcement fails. Only public values can justify class certification. Public values do not always provide sufficient justification. An assessment of public values can properly include reconsideration of the probable outcome on the merits made for purposes of item (ii) and factor (E). If the prospect of success on the merits is slight and the value of any individual recovery is insignificant, certification can be denied with little difficulty. But even a strong prospect of success on the merits may not be sufficient to justify certification. It is no disrespect to the vital social policies embodied in much modern regulatory legislation to recognize that the effort to control highly complex private behavior can outlaw much behavior that involves merely trivial or technical violations. Some "wrongdoing" represents nothing worse than a wrong guess about the uncertain requirements of ambiguous law, yielding "gains" that could have been won by slightly different conduct of no greater social value. Disgorgement and deterrence in such circumstances may be unfair, and indeed may thwart important public interests by discouraging desirable behavior in areas of legal indeterminacy.

Factor (G) (H) is added to resolve some, but by no means all, of the questions that have grown up around the use of "settlement classes." Factor (G) (H) bears only

on (b)(3) classes. Among the many questions that it does not touch is the question whether it is appropriate to rely on subdivision (b)(1) to certify a mandatory non-opt-out class when present and prospective tort claims are likely to exceed the "limited fund" of a defendant's assets and insurance coverage. This possible use of subdivision (b)(1) presents difficult issues that cannot yet be resolved by a new rule provision. Subdivisions (c)(1)(A)(2) and (e) also bear on settlement classes.

A settlement class may be described as any class that is certified only for purposes of settling the claims of class members on a class-wide basis, not for litigation of their claims. The certification may be made before settlement efforts have even begun, as settlement efforts proceed, or after a proposed settlement has been reached.

Factor (G) (H) makes it clear that a class may be certified for purposes of settlement even though the court would not certify the same class, or might not certify any class, for litigation. At the same time, a (b)(3) settlement class continues to be controlled by the prerequisites of subdivision (a) and all of the requirements of subdivision (b)(3). The only difference from certification for litigation purposes is that application of these Rule 23 requirements is affected by the differences between settlement and litigation. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are

to be litigated. Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigation would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation. Important and even vitally important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

For all the potential benefits, settlement classes also pose special risks. The court's Rule 23(e) obligation to review and approve a class settlement commonly must surmount the informational difficulties that arise when the major adversaries join forces as proponents of their settlement agreement. Objectors frequently appear to reduce these difficulties, but it may be difficult for objectors to obtain the information required for a fully-informed challenge. The reassurance provided by official adjudication is missing. These difficulties may seem especially troubling if the class would not have been certified for litigation, particularly if the action appears to have been shaped by a settlement agreement worked out even before the action was filed.

These competing forces are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded to class members. Subdivision (c)(1)(A)(ii) requires that if the class was certified only for settlement, class members be allowed to opt out of any settlement after the terms of the settlement are approved by the court. Parties who fear the impact of such opt-outs on a settlement intended to achieve total peace may respond by refusing to settle, or by crafting the settlement so that one or more parties may withdraw from the settlement after the opt-out period. The opportunity to opt out of the settlement creates special problems when the class includes "futures" claimants who do not yet know of the injuries that will one day bring them into the class. As to such claimants, the right to opt out created by subdivision (c)(1)(A)(ii) must be held open until the injury has matured and for a reasonable period after actual notice of the class settlement.

The right to opt out of a settlement class is meaningless unless there is actual notice. Actual notice in turn means more than exposure to some official pronouncement, even if it is directly addressed to an individual class member by name. The notice must be actually received and also must be cast in a form that conveys meaningful information to a person of ordinary understanding. A class member is bound by the judgment in a settlement-class action only after receiving actual notice and a reasonable opportunity to opt out of the judgment.

Although notice and the right to opt out provide the central means of protecting settlement class members, the court must take particular care in applying some of Rule 23's requirements. Definition of the class must be approached with care, lest the attractions of settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are no disabling conflicts of interests among people who are urged to form a single class. If the case presents facts or law that are unsettled and that are likely to be litigated in individual actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

When a (b)(3) settlement class seems premature, the same goals may be served in part by forming an opt-in settlement class under subdivision (b)(4). An opt-in class will bind only those whose actual participation guarantees actual notice and voluntary choice. The major difference, indeed, is that the opt-in class provides clear assurance of the same goals sought by requiring actual notice and a right to opt out of a (b)(3) settlement-class judgment. Other virtues of opt-in classes are discussed separately with subdivision (b)(4).

{If the "(b)(4) Beyond Amchem" model were adopted, that discussion of settlement classes would substitute for the foregoing discussion. For ease of reference, former draft (b)(4) has been renumbered as (5).}

Subdivision (b)(5) creates a new power to certify an opt-in class. The opt-in class is identified as a means of permissive joinder. Joinder under Rule 23 may prove attractive for a variety of reasons. Certification of an opt-in class may provide a ready means of focusing joinder that avoids the difficulties of more diffuse aggregation devices. Reliance on the familiar incidents of Rule 23 can provide a framework for managing the action that need not be reinvented with each new attempt to join many parties.

Opt-in classes may be a particularly attractive means for joining groups of defendants. There is less need to worry about adequate representation of class members who have opted in, and there are far more effective means of reducing the burdens imposed on the representative defendants.

Opt-in classes also may provide an attractive means of addressing dispersed mass torts. The class can be defined to resolve problems that could not be readily resolved without the consent that is established by opting in and accepting the definition. The law chosen to govern the dispute can be stated, terms for

compensating counsel announced, procedures established for resolving individual questions in the class action or by other means, and so on. Questions of power over absent parties, analogous to personal jurisdiction questions, are avoided. Claims disposition procedures can be established that facilitate settlement. Perhaps most important, an opt-in class provides a means more effective than the now familiar opt-out class to sort out those who prefer to pursue their claims in individual litigation. Subdivision (b)(*5*) thus complements subdivision (b)(3), providing an alternative means of addressing dispersed mass torts. Although a court should always consider the alternative of certification under (b)(3) in determining whether to certify a class under (b)(*5*), certification under (b)(*5*) is proper even in circumstances that also would support certification under (b)(3). The same is true as to certification under subdivision (b)(2), although there are not likely to be many circumstances that support an opt-in class for injunctive or declaratory relief. If certification is proper under subdivision (b)(1), on the other hand, reliance should be placed on (b)(1), not (b)(4).

The matters specified in factors (A) through (E) bear on the choice between certifying an opt-in class, certifying an opt-out or mandatory class, and allowing the underlying disputes to be resolved outside Rule 23.

Factors (A) and (B), looking to the nature of the controversy, the relief sought, and the extent and nature of the members' injuries or liability, emphasize closely related considerations. A common course of conduct, for example, may inflict minor injury on many victims and severe injury on a few. An opt-out class makes sense for those who suffered minor injury; an opt-in class, managed in conjunction with the opt-out class, may best protect the interests of those who suffered severe injury. As another example, an opt-in class may make more sense than an opt-out class when damages are demanded against a defendant class.

Factor (C) is a reminder that potential conflicts of interest among class members can cut both ways. An opt-in class may withstand somewhat greater potential conflicts than classes certified under other subdivisions because the members all have elected to join the action. This factor may push toward reliance on an opt-in class rather than attempts to combine subclasses of apparently congruent interest into a single class action. Substantial conflicts, however, may make the class unwieldy or unworkable.

Factor (D) emphasizes the need to consider the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy. In compelling circumstances, this interest justifies certification of a (b)(1)(A) class. It also may bear on certification of a (b)(2) class. In less compelling circumstances,

it may justify certification of an opt-out class under (b)(3), including a settlement class. Resort to a (b)(4) opt-in class should be had only after canvassing the suitability of certification under these other subdivisions.

Factor (E), looking to the inefficiency or impracticality of resolving the controversy by separate actions, looks in part to the interests of our several judicial systems in bringing together closely related disputes. These interests are served by an opt-in class, however, only to the extent that individual litigants voluntarily take advantage of the invitation to join together. A (b)(4) class is a new permissive-joinder device that takes advantage of developed class-action procedures, not a means of serving judicial interests in efficiency by expanding mandatory joinder rules.

Paragraph 5 addresses class actions that seek to combine individual damages recoveries with class-based declaratory or injunctive relief. It requires that damages claims be certified under (b)(3) or (b)(5). Individual damages claims should be included in a mandatory class only if certification is appropriate under (b)(1). Proper certification under (b)(2) for declaratory or injunctive relief does not ensure the appropriateness of class treatment for damages claims. That question must be addressed separately.

Subdivision (c). The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is deleted. The notice provisions are substantially revised. Notice now is explicitly required in (b)(1) and (b)(2) classes; notice in (b)(3) classes need not be directed to all identifiable members of the class if the cost is excessive in relation to the generally small value of individual claims; *the right to request exclusion from a (b)(4) settlement class is added;* and notice in a (b)(5) class is designed to accomplish the purpose of inviting joinder. A denial of class certification is made binding on other courts unless circumstances change so that a new certification issue is presented. Other changes are made as well.

The Federal Judicial Center study showed many cases in which it was doubtful whether determination of the class-action question was made as soon as practicable after commencement of the action. This result occurred even in districts with local rules requiring determination within a specified period. The appearance may suggest only that practicability itself is a pragmatic concept, permitting consideration of all the factors that may support deferral of the certification decision. If the rule is applied to require determination "when" practicable, it does no harm. The requirement is deleted, however, to support implementation of other changes in Rule 23. Significant preliminary preparation may be required in a (b)(3) action, for

example, to appraise probable success on the merits and to determine whether the public interest and private benefits justify the burdens of class litigation. These and similar inquiries should not be made under pressure of an early certification requirement. {Consideration of a precertification motion to dismiss or for summary judgment under subdivision (d)(1), for example, readily justifies postponement of the certification decision.} If related litigation is approaching maturity, indeed, there may be positive reasons for deferring the class determination pending developments in the related litigation.

Subdivision (c)(1)(A) requires that the order certifying a (b)(3) class, not the notice alone, state when and how class members can opt out. It does not address the questions that may arise when settlement occurs after expiration of the initial period for requesting exclusion, or when the class includes members who, because not yet injured at the time of certification or settlement, do not become aware of their membership in the class until the action has been settled. The court has power to condition approval of a settlement on adoption of terms that permit class members to opt out of the settlement. This power should be exercised with restraint, however, because the parties must be allowed to decline the condition and the prospect of extensive exclusions may easily defeat any settlement.

The order certifying a (b)(4) opt-in class may state conditions that must be accepted by those who opt to join the class. The conditions may control not only procedures for managing the action but also such matters as the law chosen to govern decision. The power to require contribution by class members to litigation expenses is noted separately to emphasize this feature of opt-in classes, a matter that may be particularly important when a defendant class is certified under (b)(4).

Subparagraph (B) permits alteration or amendment of an order granting or denying class certification at any time before final judgment. This change avoids any possible ambiguity in the earlier reference to "the decision on the merits." Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. The definition of a final judgment should have the same flexibility that it has in defining appealability, particularly in protracted institutional reform litigation. Proceedings to enforce a complex decree may generate several occasions for final judgment appeals, and likewise may demonstrate the need to adjust the class definition.

A further change in subparagraph (B) provides that an order denying class certification precludes certification of substantially the same class by any other court unless a change of law or fact creates a new certification issue. Preclusion attaches at the time certification is denied, without awaiting final judgment in the action. This

provision will reduce the opportunities to enlist dueling courts in a repeated quest to seek reconsideration of an initial certification defeat. The effect of the provision is weakened, however, by the limit that recognizes the need to allow reconsideration when changes of fact or law generate a new certification issue. This limit means that state courts remain free to determine that differences between their own class-action jurisprudence and Civil Rule 23 always present a new and different certification issue.

Subdivision (c)(2) amends the requirements for notice of a determination to certify a class action. In all cases, the order must be both concise and clear. Clarity should have pride of place, but it must be remembered that many class members will not bother to read even a clear notice that is too long. The requirements of concision and clarity can be adjusted to reflect the probable sophistication of class members, but in most cases the notice should be cast in terms that an ordinary person can understand. Description of the right to elect exclusion from a (b)(3) class should include the (c)(1)(A) right to elect exclusion from any settlement in an action certified only for purposes of settlement.

The provisions that require consideration of the merits in determining whether to certify a (b)(3) class may show a strong probability that a plaintiff class will win

on the merits. In such circumstances, subdivision (c)(2)(A) authorizes the court to order that a defendant advance part or all of the expense of notifying the class.

Item (i) adopts a functional notice requirement for (b)(1) and (b)(2) class actions. Notice should be directed to all identifiable members of the class in circumstances that support individual notice without substantial burden. If a party addresses regular communications to class members for other purposes, for example, it may be easy to include the class notice with a routine mailing. If substantial burdens would be imposed by an effort to reach all class members, however, the means of notice can be adjusted so long as notice is calculated to reach a sufficient number of class members to ensure the opportunity to protect class interests in the questions of certification and adequate representation. The notice requirement is less exacting than the notice requirement for (b)(3) actions because there is no right to opt out of a (b)(1) or (b)(2) class. If a (b)(3) class is certified in conjunction with a (b)(2) action according to the requirements of subdivision (b)(5), the notice requirements for a (b)(3) action must be satisfied as to the (b)(3) class.

Item (ii) continues the provisions for notice in a (b)(3) class action. The provisions for notice of the right to be excluded and of the potential consequences of class membership are shifted to the body of subparagraph (A). A new provision is added, allowing notice to be limited to a sampling of class members if the cost of

notice to all members is excessive in relation to the generally small value of individual claims. The sample should be designed to ensure adequate opportunity for supervision of class representatives and class counsel.

Item (iii) provides a flexible notice system for (b)(4) classes. Notice should be adapted to the purpose of inviting participation, and in some circumstances may be addressed to lawyers conducting related litigation. Although the court need not worry about the effects of the judgment on nonparties, it should direct a reasonable effort to make the opportunity to participate practically available.

Subdivision (c)(3) includes a new subparagraph (C) that specifies the effect of the judgment in an opt-in class certified under new subdivision (b)(4).

Subdivision (c)(4) is amended to provide that the "numerosity" requirement of subdivision (a)(1) need not be satisfied as to each of multiple classes or subclasses. The court is free to choose between the advantages of small subclasses and the advantages of requiring individual joinder of a small number of people who have distinctive interests.

Subdivision (d). Only modest changes, generally stylistic, are made in subdivision (d).

Paragraph (1) is new. It confirms the general practice found by the Federal Judicial Center: courts frequently rule on motions under Rules 12 and 56 before determining whether to certify a class. Some courts have feared that this practice might violate the former requirement that a class determination be made as soon as practicable after the action is filed. Elimination of that requirement should banish any doubt, but this paragraph is added to remind courts and parties of this helpful practice.

Paragraph (2) is adjusted to include notice of matters affecting opt-in classes, and to confirm the potentially useful practice of providing notice of refusal to certify a class.

Subdivision (e). Paragraphs (1) and (3) are new.

Paragraph (1) requires court approval of any dismissal, compromise, or deletion of class issues attempted before a class certification determination is made in an action brought as a class action. This provision is designed to protect the interests of nonrepresentative class members who may have relied on the pending action and the proposed representation.

Paragraph (3) establishes an opportunity to acquire independent information about the wisdom of a proposed class-action settlement. The parties who support the

settlement cannot always be relied upon to provide adequate information about the reasons for rejecting the settlement. Information may be provided through objections by class members, but objectors often have found it difficult to acquire sufficient information, and the burdens of framing comprehensive and persuasive objections may be insurmountable. {A magistrate judge or person specially appointed by the court to make an independent investigation and report may be better able to acquire the necessary information and — with expenses paid by the parties — better able to bear the burdens of acquiring and using the information.} [The opportunity provided by this paragraph should, however, be exercised with restraint. In most cases it is better that the trial judge assume the responsibility for directing the parties to provide sufficient information to evaluate a proposed settlement. Direction by the judge will ensure that the judge receives the information needed by the judge, and that the judge bears the front-line responsibility for evaluating the settlement in light of this information.] Appointments under this paragraph are not made under Rule 53 and are not subject to its constraints.

(f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of Rule 23 order is covered by this provision. It is designed on the model of §

1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals. The procedures that apply to the request for court of appeals permission to appeal under § 1292(b) should apply to a request for permission to appeal under Rule 23(f). At the same time, subdivision (f) departs from § 1292(b) in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." These differences warrant modest differences in the procedure for seeking permission to appeal from the court of appeals. Appellate Rule 5.1 has been modified to provide the appropriate procedure.

Only a modest expansion of the opportunity for permissive interlocutory appeal is intended. Permission to appeal should be granted with great restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify some

expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. [The prior draft added that if a plaintiff class is certified after judgment for the representative plaintiffs, the result may be "one-way" intervention. That does not seem much of a concern to me — if indeed there is a valid claim on the merits, why should we be concerned that the late-certified class members have not had to take a sporting chance on losing their valid claims?] An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

The expansion of appeal opportunities effected by subdivision (f) is indeed modest. Court of appeals discretion is as broad as under § 1292(b). Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of law. Such questions are most likely to arise during the early years of experience with new class-action

provisions as they may be adopted into Rule 23 or enacted by legislation. Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

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AMCHEM PRODUCTS, INC., et al., Petitioners,
v.
George WINDSOR et al.

No. 96-270.

Supreme Court of the United States

Argued Feb. 18, 1997.

Decided June 25, 1997.

Asbestos products manufacturers who were members of Center for Claims Resolution (CCR), and whose stipulation of proposed global settlement of claims by persons exposed to asbestos had been court-approved, moved to enjoin actions against them by individuals who failed to timely opt out of class. The United States District Court for the Eastern District of Pennsylvania, Lowell A. Reed, Jr., J., 878 F.Supp. 716, granted injunction under All-Writs Act and Anti-Injunction Act. Parties objecting to class certification appealed, and the Court of Appeals for the Third Circuit, 83 F.3d 610, vacated and remanded with directions to decertify class. Certiorari was granted, and the Supreme Court, Justice Ginsburg, held that: (1) district court faced with request for settlement-only class certification need not inquire whether case would present intractable problems of trial management, but other requirements for certification must still be satisfied, abrogating In re Asbestos Litigation, 90 F.3d 963, White v. National Football League, 41 F.3d 402, In re A.H. Robins Co., 880 F.2d 709, and Malchman v. Davis, 761 F.2d 893, and (2) requirements for class certification of commonality of issues of fact and law and adequacy of representation were not met.

Affirmed.

Justice Breyer filed an opinion concurring in part and dissenting in part in which Justice Stevens joined.

Justice O'Connor took no part in the consideration or decision of the case.

[1] FEDERAL CIVIL PROCEDURE ⚿161

170Ak161
Requirements of rule governing class actions must be interpreted in keeping with both Article III constraints on federal jurisdiction and Rules Enabling Act, which instructs that rules of procedure shall not abridge, enlarge, or modify any substantive right. U.S.C.A. Const. Art. 3, § 2, cl. 2; 28 U.S.C.A. § 2072(b); Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[2] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
Rule allowing certification of class action where separate actions by or against individual class members would risk establishing incompatible standards of conduct for party opposing class takes in cases where party is obliged by law to treat members of class alike, such as a utility acting toward customers or a government imposing a tax, or where party must treat all alike as matter of practical necessity, such as riparian owner using water as against downriver owners. Fed.Rules Civ.Proc.Rule 23(b)(1)(A), 28 U.S.C.A.

[3] FEDERAL CIVIL PROCEDURE ⚿165
170Ak165
While text of rule allowing certification of class action where questions of law and fact common to class members predominate and class action is superior to other methods of resolution does not exclude from certification cases in which individual damages run high, drafters of rule had dominantly in mind vindication of rights of groups of people who individually would be without effective strength to bring their opponents into court at all. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[4] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
Policy at very core of class action mechanism is to overcome problem that small recoveries do not provide incentive for any individual to bring a solo action prosecuting his or her rights; class action solves this problem by aggregating relatively paltry potential recoveries into something worth someone's, usually an attorney's, labor. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[5] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
Settlement is relevant to certification of proposed class action. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[6] COMPROMISE AND SETTLEMENT ⚿67
89k67

While district court which is confronted with request for settlement-only class certification need not inquire whether case, if tried, would present intractable management problems, for proposal is that there be no trial, other specifications of rule establishing requirements for certification, which are designed to protect absentees by blocking unwarranted or overbroad class definitions, demand undiluted, even heightened, attention in settlement context; such attention is of vital importance, for court asked to certify settlement class will lack opportunity, present when case is litigated, to adjust class, informed by proceedings as they unfold; abrogating In re Asbestos Litigation, 90 F.3d 963; White v. National Football League, 41 F.3d 402; In re A.H. Robins Co., 880 F.2d 709; Malchman v. Davis, 761 F.2d 893. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[6] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
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[7] FEDERAL CIVIL PROCEDURE ⚿21
170Ak21
Federal rules take effect after extensive deliberative process involving many reviewers, and text of rule thus proposed and reviewed limits judicial inventiveness, as courts are not free to amend rule outside process Congress ordered, which is properly tuned to instruction of Rules Enabling Act that rules of procedure shall not abridge any substantive right. 28 U.S.C.A. § 2072(b).

[8] COMPROMISE AND SETTLEMENT ⚿55
89k55
Rule providing that class action shall not be dismissed or compromised without approval of court, and that notice of proposed dismissal or compromise shall be given to all members of class in such manner as court directs, was designed to function as additional requirement, not superseding direction, for "class action" to which rule is one qualified for certification as class action. Fed.Rules Civ.Proc.Rule 23(a, b, e), 28 U.S.C.A.

[8] COMPROMISE AND SETTLEMENT ⚿68
89k68
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[8] FEDERAL CIVIL PROCEDURE ⚿177.1
170Ak177.1
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[8] FEDERAL CIVIL PROCEDURE ⚿1696
170Ak1696
Rule providing that class action shall not be dismissed or compromised without approval of court, and that notice of proposed dismissal or compromise shall be given to all members of class in such manner as court directs, was designed to function as additional requirement, not superseding direction, for "class action" to which rule is one qualified for certification as class action. Fed.Rules Civ.Proc.Rule 23(a, b, e), 28 U.S.C.A.

[8] FEDERAL CIVIL PROCEDURE ⚿1708
170Ak1708
Rule providing that class action shall not be dismissed or compromised without approval of court, and that notice of proposed dismissal or compromise shall be given to all members of class in such manner as court directs, was designed to function as additional requirement, not superseding direction, for "class action" to which rule is one qualified for certification as class action. Fed.Rules Civ.Proc.Rule 23(a, b, e), 28 U.S.C.A.

[9] COMPROMISE AND SETTLEMENT ⚿67
89k67
Rules provisions which establish prerequisites to certification of class action and types of class actions which are maintainable focus court attention on whether proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives, and that dominant concern persists when settlement, rather than trial, is proposed. Fed.Rules Civ.Proc.Rule 23(a, b), 28 U.S.C.A.

[9] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
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[10] COMPROMISE AND SETTLEMENT ⚿67
89k67
Safeguards provided by criteria for qualification of action as class action are not impractical impediments, or checks shorn of utility, in context of proposed settlement class; standards set for protection of absent class members serve to inhibit appraisals of chancellor's foot kind, or class certifications dependent upon court's gestalt judgment or overarching impression of settlement's fairness, and if fairness inquiry controlled certification and permitted class designation despite impossibility of litigation, both class counsel and the court would be disarmed. Fed.Rules Civ.Proc.Rule 23(a, b, e), 28 U.S.C.A.

[10] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
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[11] FEDERAL CIVIL PROCEDURE ⚿181
170Ak181
Requirement for certification of class action that common questions of law or fact predominate over any questions affecting only individual members was not met in proposed class action which sought to achieve global settlement of current and future asbestos-related claims; benefits asbestos-exposed persons might gain from establishment of compensation scale was not pertinent to predominance inquiry, fact that all members had been exposed to asbestos products was insufficient to meet predominance standard, as different members were exposed to different products for different amounts of time in different ways, and differences in state law compounded those disparities. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[12] FEDERAL CIVIL PROCEDURE ⚿165
170Ak165
Inquiry into whether common questions of law or fact predominate over any questions affecting only individual members of class, as will allow certification of class action, tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[13] COMPROMISE AND SETTLEMENT ⚿55
89k55
Inquiry appropriate under rule which prohibits dismissal or compromise of class action without approval of court and notice to all class members protects unnamed class members from unjust or unfair settlements affecting their rights when representatives become fainthearted before action is adjudicated or are able to secure satisfaction of their individual claims by compromise. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[13] FEDERAL CIVIL PROCEDURE ⚿1696
170Ak1696
Inquiry appropriate under rule which prohibits dismissal or compromise of class action without approval of court and notice to all class members protects unnamed class members from unjust or unfair settlements affecting their rights when representatives become fainthearted before action is adjudicated or are able to secure satisfaction of their individual claims by compromise. Fed.Rules Civ.Proc.Rule 23(e), 28 U.S.C.A.

[14] COMPROMISE AND SETTLEMENT ⚿55
89k55

It is not mission of rule which prohibits dismissal or compromise of class action without approval of court and notice to class members to assure class cohesion that legitimizes representative action in the first place, and if common interest in fair compromise could satisfy predominance requirement for certification, that vital prescription would be stripped of any meaning in settlement context. Fed.Rules Civ.Proc.Rule 23(b)(3), (e), 28 U.S.C.A.

[14] FEDERAL CIVIL PROCEDURE ⚿1696
170Ak1696
It is not mission of rule which prohibits dismissal or compromise of class action without approval of court and notice to class members to assure class cohesion that legitimizes representative action in the first place, and if common interest in fair compromise could satisfy predominance requirement for certification, that vital prescription would be stripped of any meaning in settlement context. Fed.Rules Civ.Proc.Rule 23(b)(3), (e), 28 U.S.C.A.

[15] FEDERAL CIVIL PROCEDURE ⚿165
170Ak165
Requirement for certification of class action that common questions of law or fact predominate over any questions affecting only individual members is test readily met in certain cases alleging consumer or securities fraud or violations of antitrust laws, and also may, depending upon the circumstances, be satisfied in mass tort cases arising from common cause or disaster. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

[16] FEDERAL CIVIL PROCEDURE ⚿181
170Ak181
Requirement for certification of class action that named parties will fairly and adequately protect interests of class was not met in proposed class action which sought to achieve global settlement of current and future asbestos- related claims; named parties sought to act on behalf of single giant class rather than on behalf of discrete subclasses, goal of class members who were currently injured of receiving generous immediate payments conflicted with interest of exposure-only plaintiffs in ensuring ample, inflation-protected fund for the future, and proposed settlement had no structural assurance of fair and adequate representation for diverse groups and individuals affected. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[17] FEDERAL CIVIL PROCEDURE ⚿164
170Ak164
Requirement for certification of class action that named parties will fairly and adequately protect interests of class serves to uncover conflicts of interest between named parties and class they seek to represent. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[18] FEDERAL CIVIL PROCEDURE ⚿164
170Ak164
In order to satisfy requirement for certification of class action that named parties will fairly and adequately protect interests of class, class representative must be part of class and possess same interest and suffer same injury as class members. Fed.Rules Civ.Proc.Rule 23(a)(4), 28 U.S.C.A.

[19] FEDERAL CIVIL PROCEDURE ⚿164
170Ak164
Adequacy-of-representation requirement for certification of class action tends to merge with commonality and typicality criteria of rule, which serve as guideposts for determining whether maintenance of class action is economical and whether named plaintiff's claim and class claims are so interrelated that interests of class members will be fairly and adequately protected in their absence, and adequacy heading also factors in competency and conflicts of class counsel. Fed.Rules Civ.Proc.Rule 23(a), 28 U.S.C.A.

****2234 *591** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. Never intending to litigate, the settling parties--petitioners and the representatives of the plaintiff class described below--presented to the District Court a class action complaint, an answer, a proposed settlement agreement, and a joint motion for conditional class certification. The complaint identifies nine lead plaintiffs, designating them and members of their families as representatives of a class comprised of all persons who had not previously sued any of the asbestos-manufacturing companies that are petitioners in this suit, but who (1) had been exposed--occupationally or through the occupational exposure of a spouse or household member--to asbestos

attributable to a petitioner, or (2) whose spouse or family member had been so exposed. Potentially hundreds of thousands, perhaps millions, of individuals may fit this description. All named plaintiffs alleged exposure; more than half of them alleged already manifested physical injuries; the others, so- called "exposure-only" claimants, alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the entire class.

The exhaustive agreement, inter alia, (1) proposed to settle, and to preclude nearly all class members from litigating, claims not previously filed against petitioners; (2) detailed an administrative mechanism and a schedule of payments to compensate class members who meet defined exposure and medical criteria; (3) described four categories of compensable cancers and nonmalignant conditions, and specified the range of damages to be paid qualifying claimants for each; (4) did not adjust payments for inflation; (5) capped the number of claims payable annually for each disease; and (6) denied compensation for family members' loss-of-consortium claims, for exposure-only plaintiffs' claims for emotional distress, enhanced risk of disease, and medical monitoring, and for "pleural" claims involving lung plaques but no physical impairment, even if otherwise applicable state law recognized such claims.

*592 The District Court approved the settling parties' plan for giving notice to the class and certified the proposed class for settlement only. The court found, over numerous challenges raised by the objectors, that the settlement was fair, the court's jurisdiction properly invoked, and representation and notice adequate. Pending the issuance of a final order, the District Court enjoined class members from separately pursuing asbestos suits in any federal or state court. The Third Circuit ultimately vacated the District Court's orders. Although the objectors maintained that the case was not justiciable and that the exposure-only claimants lacked standing to sue, the Court of Appeals declined to reach these issues, reasoning that they would not exist but for the class certification. The court acknowledged that a class action may be certified for settlement only, but held that the certification requirements of Rule 23 must be met as if the case were going to be litigated, without taking the settlement into account. The court nevertheless homed in on the settlement's terms in examining aspects of the case under Rule 23 criteria. The Court of Appeals explained that certification was inappropriate because the class failed to satisfy, among other provisions, Rule 23(b)(3)'s requirement that questions common to the class "predominate over" other questions, and Rule 23(a)(4)'s adequacy of representation requirement. The court therefore ordered the class decertified.

Held:

1. The class certification issues are dispositive here in that their resolution is logically antecedent to the existence of any Article III issues. This Court therefore declines to resolve objectors' assertions that no justiciable case or controversy is presented and that the exposure-only claimants lack standing **2235 to sue. Cf. Arizonans for Official English v. Arizona, 520 U.S. 43, ----, 117 S.Ct. 1055, 1068, 137 L.Ed.2d 170. The Court follows this path mindful that Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act's instruction that procedural rules not abridge, enlarge, or modify any substantive right. Pp. 2244-2245.

2. The sprawling class the District Court certified does not satisfy Rule 23's requirements. Pp. 2245-2252.

(a) Rule 23 gained its current shape in a 1966 revision. Its subdivisions (a) and (b) enumerate criteria that must be met for a class to be certified. Rule 23(b)(3) was the most adventuresome innovation of the 1966 Amendments, permitting judgments for money that would bind all class members save those who opt out. To gain certification under Rule 23(b)(3), a class must satisfy the requirements of Rule 23(a), among them, that named class representatives will fairly and adequately protect class interests; the class must also meet the Rule 23(b)(3) criteria *593 that common questions "predominate over any questions affecting only individual members" and that class resolution be "superior to other available methods for the fair and efficient adjudication of the controversy." To alert Rule 23(b)(3) class members to their right to "opt out," Rule 23 requires "the best notice practicable under the circumstances." Rule 23(c)(2). Finally, Rule 23(e) specifies that a class action cannot be settled without the court's approval, and that notice of the proposed compromise must be given to all class members in such manner as the court directs. Pp. 2245-2247.

(b) Because settlement is relevant to the propriety of class certification, the Third Circuit's statement that

Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement" bears modification. But the Third Circuit did not, in fact, ignore the settlement. The court homed in on settlement terms in explaining why it found absentees' interests inadequately represented. The Third Circuit's inspection of the settlement agreement in that regard was altogether proper. Whether trial would present intractable management problems, see Rule 23(b)(3)(D), is not a consideration when settlement-only certification is requested, for the proposal is that there be no trial. But other specifications of the rule designed to protect absentee class members by blocking unwarranted or overbroad class definitions are of vital importance in the settlement context, for the court in such a case will lack the opportunity to adjust the class as litigation unfolds. See Rule 23(c) and (d). And, of overriding importance, courts must be mindful that they are bound to enforce the rule as now composed, for Federal Rules may be amended only through the extensive deliberative process Congress prescribed. Rule 23(e)'s settlement prescription was designed to function as an additional requirement, not a superseding direction, to the class-qualifying criteria of Rule 23(a) and (b). Cf. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176-177, 94 S.Ct. 2140, 2151-2152, 40 L.Ed.2d 732. The dominant concern of Rule 23(a) and (b)--that a proposed class have sufficient unity so that absentees can fairly be bound by class representatives' decisions--persists when settlement, rather than trial, is proposed. Those subdivisions' safeguards provide practical checks in the settlement context. First, their standards serve to inhibit class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness. Second, if a Rule 23(e) fairness inquiry controlled certification, eclipsing Rule 23(a) and (b), and permitting certification despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation. Federal courts, in any case, lack authority to substitute ***594** for Rule 23's certification criteria a standard never adopted by the rulemakers--that if a settlement is "fair," then certification is proper. Pp. 2247-2249.

(c) Rule 23(b)(3)'s predominance requirement is not met by the factors relied on by the District Court and the settling parties: class members' shared experience of asbestos exposure; their common interest in ****2236** receiving prompt and fair compensation, while minimizing the risks and transaction costs inherent in the tort system's asbestos litigation process; and the settlement's fairness. The benefits asbestos-exposed persons might gain from a grand-scale compensation scheme is a matter fit for legislative consideration, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement, and tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. In contrast, the Rule 23(e) inquiry protects unnamed class members from unjust or unfair settlements agreed to by fainthearted or self-interested class representatives; the Rule 23(e) prescription was not designed to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy Rule 23(b)(3)'s predominance requirement, that vital prescription would be stripped of any meaning in the settlement context. The predominance criterion is not satisfied by class members' shared experience of asbestos exposure, given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions. No settlement class called to the Court's attention is as sprawling as the one certified here. Although mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement, the Advisory Committee for the 1966 Rule 23 revision advised that such cases are ordinarily not appropriate for class treatment, and warned district courts to exercise caution when individual stakes are high and disparities among class members great. The certification in this case does not follow the counsel of caution. That certification cannot be upheld, for it rests on a conception of Rule 23(b)(3)'s predominance requirement irreconcilable with the rule's design. Pp. 2249-2250.

(d) Nor can the class approved by the District Court satisfy Rule 23(a)(4)' s adequate representation inquiry. That inquiry serves to uncover conflicts of interest between named parties and the class they seek to represent. See General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157-158, n. 13, 102 S.Ct. 2364, 2370-2371, n. 13, 72 L.Ed.2d 740. Representatives must be part of the class and possess the same interest and suffer the same injury as the class ***595** members. E.g., East Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S.Ct. 1891, 1896-1897, 52 L.Ed.2d 453. In this case,

named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure- only plaintiffs in ensuring an ample, inflation-protected fund for the future. Cf. General Telephone Co. of Northwest v. EEOC, 446 U.S. 318, 331, 100 S.Ct. 1698, 1706-1707, 64 L.Ed.2d 319. The disparity between the currently injured and exposure-only categories of plaintiffs, and the diversity within each category, are not made insignificant by the District Court's finding that petitioners' assets suffice to pay settled claims. Although this is not a Rule 23(b)(1)(B) "limited fund" case, the settlement's terms--e.g., no inflation adjustments, only a few claimants per year permitted to opt out at the back end, and loss-of-consortium claims extinguished--reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. Thus, the settling parties achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. The Third Circuit found no assurance here that the named parties operated under a proper understanding of their representational responsibilities. That assessment is on the mark. Pp. 2250-2252.

(e) In light of the conclusions that the class does not satisfy the requirements of common issue predominance and adequacy of representation, this Court need not rule, definitively, on the adequacy of the notice given here. The Court recognizes, however, the gravity of the question whether class action **2237 notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous as the class certified by the District Court. P. 2252.

(f) The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load the settling parties and the District Court heaped upon it. P. 2252.

83 F.3d 610, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which *596 STEVENS, J., joined. O'CONNOR, J., took no part in the consideration or decision of the case.

Stephen M. Shapiro, for petitioners.

Laurence H. Tribe, Cambridge, MA, for respondents.

For U.S. Supreme Court Briefs See:

1996 WL 721635 (Resp.Brief)

1996 WL 721641 (Pet.Brief)

1997 WL 13204 (Resp.Brief)

1997 WL 13206 (Resp.Brief)

1997 WL 13207 (Resp.Brief)

1997 WL 13208 (Resp.Brief)

1996 WL 722038 (Amicus.Brief)

1996 WL 722039 (Amicus.Brief)

1996 WL 722040 (Amicus.Brief)

1996 WL 744852 (Amicus.Brief)

1997 WL 13567 (Amicus.Brief)

1997 WL 13585 (Amicus.Brief)

1997 WL 13596 (Amicus.Brief)

1997 WL 13605 (Amicus.Brief)

1997 WL 14807 (Amicus.Brief)

1997 WL 16348 (Amicus.Brief)

For Transcript of Oral Argument See:

1997 WL 83675 (U.S.Oral.Arg.)

*597 Justice GINSBURG delivered the opinion of the Court.

This case concerns the legitimacy under Rule 23 of the Federal Rules of Civil Procedure of a class-action certification sought to achieve global settlement of current and future asbestos-related claims. The class proposed for certification potentially encompasses hundreds of thousands, perhaps millions, of individuals tied together by this commonality: each was, or some day may be, adversely affected by past exposure to asbestos products manufactured by one or more of 20 companies. Those companies, defendants in the lower courts, are petitioners here.

The United States District Court for the Eastern District of Pennsylvania certified the class for settlement only, finding that the proposed settlement was fair and that representation and notice had been adequate. That court enjoined class members from separately pursuing asbestos-related personal- injury suits in any court, federal or state, pending the issuance of a final order. The Court of Appeals for the Third Circuit vacated the District Court's orders, holding that the class certification failed to satisfy Rule 23's requirements in several critical respects. We affirm the Court of Appeals' judgment.

I
A

The settlement-class certification we confront evolved in response to an asbestos-litigation crisis. See Georgine v. Amchem Products, Inc., 83 F.3d 610, 618, and n. 2 (C.A.3 1996) (citing commentary). A United States Judicial Conference ***598** Ad Hoc Committee on Asbestos Litigation, appointed by THE CHIEF JUSTICE in September 1990, described facets of the problem in a 1991 report:

> "[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s. On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.
>
> "The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction ****2238** costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether." Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar.1991).

Real reform, the report concluded, required federal legislation creating a national asbestos dispute-resolution scheme. See id., at 3, 27-35; see also id., at 42 (dissenting statement of Hogan, J.) (agreeing that "a national solution is the only answer" and suggesting "passage by Congress of an administrative claims procedure similar to the Black Lung legislation"). As recommended by the Ad Hoc Committee, the Judicial Conference of the United States urged Congress to act. See Report of the Proceedings of the Judicial Conference of the United States 33 (Mar. 12, 1991). To this date, no congressional response has emerged.

***599** In the face of legislative inaction, the federal courts--lacking authority to replace state tort systems with a national toxic tort compensation regime--endeavored to work with the procedural tools available to improve management of federal asbestos litigation. Eight federal judges, experienced in the superintendence of asbestos cases, urged the Judicial Panel on Multidistrict Litigation (MDL Panel), to consolidate in a single district all asbestos complaints then pending in federal courts. Accepting the recommendation, the MDL Panel transferred all asbestos cases then filed, but not yet on trial in federal courts to a single district, the United States District Court for the Eastern District of Pennsylvania; pursuant to the transfer order, the collected cases were consolidated for pretrial proceedings before Judge Weiner. See In re Asbestos Products Liability Litigation (No. VI), 771 F.Supp. 415, 422-424 (Jud.Pan.Mult.Lit. 1991). [FN1] The order aggregated pending cases only; no authority resides in the MDL Panel to license for consolidated proceedings claims not yet filed.

FN1. In a series of orders, the MDL Panel had previously denied other asbestos-case transfer requests. See In re Asbestos and Asbestos Insulation Material Products Liability Litigation, 431 F.Supp. 906, 910 (JPML 1977); In re Asbestos Products Liability Litigation (No. II), MDL-416 (JPML Mar. 13, 1980) (unpublished order), In re Asbestos School Products Liability Litigation, 606 F.Supp. 713, 714 (JPML 1985); In re Ship Asbestos Products Liability Litigation, MDL-676 (JPML Feb. 4, 1986) (unpublished order); In re Leon Blair Asbestos Products Liability Litigation, MDL-702 (JPML Feb. 6, 1987)

(unpublished order).

B

After the consolidation, attorneys for plaintiffs and defendants formed separate steering committees and began settlement negotiations. Ronald L. Motley and Gene Locks--later appointed, along with Motley's law partner Joseph F. Rice, to represent the plaintiff class in this action--co-chaired the Plaintiffs' Steering Committee. Counsel for the Center for Claims Resolution (CCR), the consortium of ***600** 20 former asbestos manufacturers now before us as petitioners, participated in the Defendants' Steering Committee. [FN2] Although the MDL order collected, transferred, and consolidated only cases already commenced in federal courts, settlement negotiations included efforts to find a "means of resolving ... future cases." Record, Doc. 3, p. 2 (Memorandum in Support of Joint Motion for Conditional Class Certification); see also Georgine v. Amchem Products, Inc., 157 F.R.D. 246, 266 (E.D.Pa.1994) ("primary purpose of the settlement talks in the consolidated MDL litigation was to craft a national settlement that would provide an alternative resolution mechanism for asbestos claims," including claims that might be filed in the future).

FN2. The CCR Companies are Amchem Products, Inc.; A.P. Green Industries, Inc.; Armstrong World Industries, Inc.; Asbestos Claims Management Corp.; Certainteed Corp.; C.E. Thurston & Sons, Inc.; Dana Corp.; Ferodo America, Inc.; Flexitallic, Inc.; GAF Building Materials, Inc.; I.U. North America, Inc.; Maremont Corp.; National Services Industries, Inc.; Nosroc Corp.; Pfizer Inc.; Quigley Co.; Shook & Fletcher Insulation Co.; T & N, PLC; Union Carbide Corp.; and United States Gypsum Co. All of the CCR petitioners stopped manufacturing asbestos products around 1975.

In November 1991, the Defendants' Steering Committee made an offer designed to settle all pending and future asbestos cases by providing a fund for distribution by plaintiffs' ****2239** counsel among asbestos-exposed individuals. The Plaintiffs' Steering Committee rejected this offer, and negotiations fell apart. CCR, however, continued to pursue "a workable administrative system for the handling of future claims." Id., at 270.

To that end, CCR counsel approached the lawyers who had headed the Plaintiffs' Steering Committee in the unsuccessful negotiations, and a new round of negotiations began; that round yielded the mass settlement agreement now in controversy. At the time, the former heads of the Plaintiffs' Steering Committee represented thousands of plaintiffs with then-pending asbestos- related claims--claimants the parties ***601** to this suit call "inventory" plaintiffs. CCR indicated in these discussions that it would resist settlement of inventory cases absent "some kind of protection for the future." Id., at 294; see also id., at 295 (CCR communicated to the inventory plaintiffs' attorneys that once the CCR defendants saw a rational way to deal with claims expected to be filed in the future, those defendants would be prepared to address the settlement of pending cases).

Settlement talks thus concentrated on devising an administrative scheme for disposition of asbestos claims not yet in litigation. In these negotiations, counsel for masses of inventory plaintiffs endeavored to represent the interests of the anticipated future claimants, although those lawyers then had no attorney-client relationship with such claimants.

Once negotiations seemed likely to produce an agreement purporting to bind potential plaintiffs, CCR agreed to settle, through separate agreements, the claims of plaintiffs who had already filed asbestos-related lawsuits. In one such agreement, CCR defendants promised to pay more than $200 million to gain release of the claims of numerous inventory plaintiffs. After settling the inventory claims, CCR, together with the plaintiffs' lawyers CCR had approached, launched this case, exclusively involving persons outside the MDL Panel's province--plaintiffs without already pending lawsuits. [FN3]

FN3. It is basic to comprehension of this proceeding to notice that no transferred case is included in the settlement at issue, and no case covered by the settlement existed as a civil action at the time of the MDL Panel transfer.

C

The class action thus instituted was not intended to be litigated. Rather, within the space of a single day, January 15, 1993, the settling parties--CCR defendants and the representatives of the plaintiff class described below-- presented to the District Court a complaint, an answer, a proposed***602** settlement agreement, and a joint motion for conditional class certification. [FN4]

FN4. Also on the same day, the CCR defendants filed a third-party action against their insurers,

seeking a declaratory judgment holding the insurers liable for the costs of the settlement The insurance litigation, upon which implementation of the settlement is conditioned, is still pending in the District Court. See, e.g., Georgine v Amchem Prods., Inc., No. 93- 0215, 1994 WL 502475 (E.D.Pa., Sept.2, 1994) (denying motion of insurers to compel discovery).

The complaint identified nine lead plaintiffs, designating them and members of their families as representatives of a class comprising all persons who had not filed an asbestos-related lawsuit against a CCR defendant as of the date the class action commenced, but who (1) had been exposed--occupationally or through the occupational exposure of a spouse or household member--to asbestos or products containing asbestos attributable to a CCR defendant, or (2) whose spouse or family member had been so exposed. [FN5] Untold numbers of individuals ****2240** may fall within this description. All named plaintiffs alleged that they or a member of their family had been exposed to asbestos- containing products of ***603** CCR defendants. More than half of the named plaintiffs alleged that they or their family members had already suffered various physical injuries as a result of the exposure. The others alleged that they had not yet manifested any asbestos-related condition. The complaint delineated no subclasses; all named plaintiffs were designated as representatives of the class as a whole.

FN5. The complaint defines the class as follows: "(a) All persons (or their legal representatives) who have been exposed in the United States or its territories (or while working aboard U.S. military, merchant, or passenger ships), either occupationally or through the occupational exposure of a spouse or household member, to asbestos or to asbestos-containing products for which one or more of the Defendants may bear legal liability and who, as of January 15, 1993, reside in the United States or its territories, and who have not, as of January 15, 1993, filed a lawsuit for asbestos-related personal injury, or damage, or death in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability). "(b) All spouses, parents, children, and other relatives (or their legal representatives) of the class members described in paragraph (a) above who have not, as of January 15, 1993, filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) above in any state or federal court against the Defendant(s) (or against entities for whose actions or omissions the Defendant(s) bear legal liability) " 1 App. 13-14.

The complaint invoked the District Court's diversity jurisdiction and asserted various state-law claims for relief, including (1) negligent failure to warn, (2) strict liability, (3) breach of express and implied warranty, (4) negligent infliction of emotional distress, (5) enhanced risk of disease, (6) medical monitoring, and (7) civil conspiracy. Each plaintiff requested unspecified damages in excess of $100,000. CCR defendants' answer denied the principal allegations of the complaint and asserted 11 affirmative defenses.

A stipulation of settlement accompanied the pleadings; it proposed to settle, and to preclude nearly all class members from litigating against CCR companies, all claims not filed before January 15, 1993, involving compensation for present and future asbestos-related personal injury or death. An exhaustive document exceeding 100 pages, the stipulation presents in detail an administrative mechanism and a schedule of payments to compensate class members who meet defined asbestos-exposure and medical requirements. The stipulation describes four categories of compensable disease: mesothelioma; lung cancer; certain "other cancers" (colon-rectal, laryngeal, esophageal, and stomach cancer); and "non-malignant conditions" (asbestosis and bilateral pleural thickening). Persons with "exceptional" medical claims--claims that do not fall within the four described diagnostic categories--may in some instances qualify for compensation, but the settlement caps the number of "exceptional" claims CCR must cover.

For each qualifying disease category, the stipulation specifies the range of damages CCR will pay to qualifying claimants. ***604** Payments under the settlement are not adjustable for inflation. Mesothelioma claimants--the most highly compensated category--are scheduled to receive between $20,000 and $200,000. The stipulation provides that CCR is to propose the level of compensation within the prescribed ranges; it also establishes procedures to resolve disputes over medical diagnoses and levels of compensation.

Compensation above the fixed ranges may be obtained for "extraordinary" claims. But the settlement places both numerical caps and dollar limits on such claims. [FN6] The settlement also imposes "case flow maximums," which cap the number of claims payable for each disease in a given year.

FN6. Only three percent of the qualified mesothelioma, lung cancer, and "other cancer" claims, and only one percent of the total number of qualified "non-malignant condition" claims can be designated "extraordinary." Average expenditures are specified for claims found "extraordinary", mesothelioma victims with compensable extraordinary claims, for example, receive, on average, $300,000.

Class members are to receive no compensation for certain kinds of claims, even if otherwise applicable state law recognizes such claims. Claims that garner no compensation under the settlement include claims by family members of asbestos-exposed individuals for loss of consortium, and claims by so-called "exposure-only" plaintiffs for increased risk of cancer, fear of future asbestos-related injury, and medical monitoring. "Pleural" claims, which might be asserted by persons with asbestos-related plaques on their lungs but no accompanying physical impairment, are also excluded. Although not entitled to present compensation, exposure-only claimants and pleural claimants may qualify for benefits when and if they develop a compensable disease and meet the relevant exposure and medical criteria. Defendants forgo defenses **2241 to liability, including statute of limitations pleas.

Class members, in the main, are bound by the settlement in perpetuity, while CCR defendants may choose to withdraw *605 from the settlement after ten years. A small number of class members--only a few per year--may reject the settlement and pursue their claims in court. Those permitted to exercise this option, however, may not assert any punitive damages claim or any claim for increased risk of cancer. Aspects of the administration of the settlement are to be monitored by the AFL-CIO and class counsel. Class counsel are to receive attorneys' fees in an amount to be approved by the District Court.

D

On January 29, 1993, as requested by the settling parties, the District Court conditionally certified, under Federal Rule of Civil Procedure 23(b)(3), an encompassing opt-out class. The certified class included persons occupationally exposed to defendants' asbestos products, and members of their families, who had not filed suit as of January 15. Judge Weiner appointed Locks, Motley, and Rice as class counsel, noting that "[t]he Court may in the future appoint additional counsel if it is deemed necessary and advisable." Record, Doc. 11, p. 3 (Class Certification Order). At no stage of the proceedings, however, were additional counsel in fact appointed. Nor was the class ever divided into subclasses. In a separate order, Judge Weiner assigned to Judge Reed, also of the Eastern District of Pennsylvania, "the task of conducting fairness proceedings and of determining whether the proposed settlement is fair to the class." See 157 F.R.D., at 258. Various class members raised objections to the settlement stipulation, and Judge Weiner granted the objectors full rights to participate in the subsequent proceedings. Ibid. [FN7]

FN7. These objectors, now respondents before this Court, include three groups of individuals with overlapping interests, designated as the "Windsor Group," the New Jersey "White Lung Group," and the "Cargile Group " Margaret Balonis, an individual objector, is also a respondent before this Court. Balonis states that her husband, Casimir, was exposed to asbestos in the late 1940s and was diagnosed with mesothelioma in May 1994, after expiration of the opt-out period, see infra, at 2241, 2242. The Balonises sued CCR members in Maryland state court, but were charged with civil contempt for violating the federal District Court's anti-suit injunction. Casimir Balonis died in October 1996 See Brief for Balonis Respondents 9-11.

*606 In preliminary rulings, Judge Reed held that the District Court had subject-matter jurisdiction, see Carlough v. Amchem Products, Inc., 834 F.Supp. 1437, 1467-1468 (E.D.Pa.1993), and he approved the settling parties' elaborate plan for giving notice to the class, see Carlough v. Amchem Products, Inc., 158 F.R.D. 314, 336 (E.D.Pa.1993). The court-approved notice informed recipients that they could exclude themselves from the class, if they so chose, within a three-month opt-out period.

Objectors raised numerous challenges to the settlement. They urged that the settlement unfairly disadvantaged those without currently compensable conditions in that it failed to adjust for inflation or to account for changes, over time, in medical understanding. They maintained that compensation levels were intolerably low in comparison to awards available in tort litigation or payments received by the inventory plaintiffs. And they objected to the absence of any compensation for certain claims, for example, medical monitoring, compensable under the tort law of several States. Rejecting these and all other objections, Judge Reed concluded that the settlement

terms were fair and had been negotiated without collusion. See 157 F.R.D., at 325, 331-332. He also found that adequate notice had been given to class members, see id., at 332-334, and that final class certification under Rule 23(b)(3) was appropriate, see id., at 315.

As to the specific prerequisites to certification, the District Court observed that the class satisfied Rule 23(a)(1)'s numerosity requirement, [FN8] see ibid., a matter no one debates. The *607 Rule 23(a)(2) and (b)(3) requirements **2242 of commonality [FN9] and preponderance [FN10] were also satisfied, the District Court held, in that

> FN8. Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable."
>
> FN9. Rule 23(a)(2) requires that there be "questions of law or fact common to the class."
>
> FN10. Rule 23(b)(3) requires that "the [common] questions of law or fact ... predominate over any questions affecting only individual members."

"[t]he members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system. Whether the proposed settlement satisfies this interest and is otherwise a fair, reasonable and adequate compromise of the claims of the class is a predominant issue for purposes of Rule 23(b)(3)." Id., at 316.

The District Court held next that the claims of the class representatives were "typical" of the class as a whole, a requirement of Rule 23(a)(3), [FN11] and that, as Rule 23(b)(3) demands, [FN12] the class settlement was "superior" to other methods of adjudication. See ibid.

> FN11. Rule 23(a)(3) states that "the claims ... of the representative parties [must be] typical of the claims ... of the class."
>
> FN12. Rule 23(b)(3) requires that "a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy."

Strenuous objections had been asserted regarding the adequacy of representation, a Rule 23(a)(4) requirement. [FN13] Objectors maintained that class counsel and class representatives had disqualifying conflicts of interests. In particular, objectors urged, claimants whose injuries had become manifest and claimants without manifest injuries should not have common counsel and should not be aggregated in a single *608 class. Furthermore, objectors argued, lawyers representing inventory plaintiffs should not represent the newly-formed class.

> FN13. Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class."

Satisfied that class counsel had ably negotiated the settlement in the best interests of all concerned, and that the named parties served as adequate representatives, the District Court rejected these objections. See id., at 317-319, 326-332. Subclasses were unnecessary, the District Court held, bearing in mind the added cost and confusion they would entail and the ability of class members to exclude themselves from the class during the three-month opt-out period. See id., at 318-319. Reasoning that the representative plaintiffs "have a strong interest that recovery for all of the medical categories be maximized because they may have claims in any, or several categories," the District Court found "no antagonism of interest between class members with various medical conditions, or between persons with and without currently manifest asbestos impairment." Id., at 318. Declaring class certification appropriate and the settlement fair, the District Court preliminarily enjoined all class members from commencing any asbestos-related suit against the CCR defendants in any state or federal court. See Georgine v. Amchem Products, Inc., 878 F.Supp. 716, 726-727 (E.D.Pa.1994).

The objectors appealed. The United States Court of Appeals for the Third Circuit vacated the certification, holding that the requirements of Rule 23 had not been satisfied. See Georgine v. Amchem Products, Inc., 83 F.3d 610 (1996).

E

The Court of Appeals, in a long, heavily detailed opinion by Judge Becker, first noted several challenges by objectors to justiciability, subject-matter jurisdiction, and adequacy of notice. These challenges, the court said, raised "serious concerns." Id., at 623. However, the court observed, "the jurisdictional issues in this case would not exist but for

the [class action] certification." Ibid. Turning to the class-***609** certification issues and finding them dispositive, the Third Circuit declined to decide other questions.

****2243** On class-action prerequisites, the Court of Appeals referred to an earlier Third Circuit decision, In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768 (C.A.3), cert. denied, 516 U.S. 824, 116 S.Ct. 88, 133 L.Ed.2d 45 (1995) (hereinafter GM Trucks), which held that although a class action may be certified for settlement purposes only, Rule 23(a)'s requirements must be satisfied as if the case were going to be litigated. 55 F.3d, at 799-800. The same rule should apply, the Third Circuit said, to class certification under Rule 23(b)(3). See 83 F.3d, at 625. But cf. In re Asbestos Litigation, 90 F.3d 963, 975-976, and n. 8 (C.A.5 1996), cert. pending, Nos. 96-1379, 96-1394. While stating that the requirements of Rule 23(a) and (b)(3) must be met "without taking into account the settlement," 83 F.3d, at 626, the Court of Appeals in fact closely considered the terms of the settlement as it examined aspects of the case under Rule 23 criteria. See id., at 630- 634.

The Third Circuit recognized that Rule 23(a)(2)'s "commonality" requirement is subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class "predominate over" other questions. The court therefore trained its attention on the "predominance" inquiry. See id., at 627. The harmfulness of asbestos exposure was indeed a prime factor common to the class, the Third Circuit observed. See id., at 626, 630. But uncommon questions abounded.

In contrast to mass torts involving a single accident, class members in this case were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time; some suffered no physical injury, others suffered disabling or deadly diseases. See id., at 626, 628. "These factual differences," the Third Circuit explained, "translate [d] into significant legal differences." Id., at 627. State law governed and varied widely ***610** on such critical issues as "viability of [exposure- only] claims [and] availability of causes of action for medical monitoring, increased risk of cancer, and fear of future injury." Ibid. [FN14] "[T]he number of uncommon issues in this humongous class action," the Third Circuit concluded, ibid., barred a determination, under existing tort law, that common questions predominated, see id., at 630.

FN14. Recoveries under the laws of different States spanned a wide range. Objectors assert, for example, that 15% of current mesothelioma claims arise in California, where the statewide average recovery is $419,674--or more than 209% above the $200,000 maximum specified in the settlement for mesothelioma claims not typed "extraordinary." See Brief for Respondents George Windsor et al. 5-6, n. 5 (citing 2 App. 461).

The Court of Appeals next found that "serious intra-class conflicts preclude[d] th[e] class from meeting the adequacy of representation requirement" of Rule 23(a)(4). Ibid. Adverting to, but not resolving charges of attorney conflict of interests, the Third Circuit addressed the question whether the named plaintiffs could adequately advance the interests of all class members. The Court of Appeals acknowledged that the District Court was certainly correct to this extent: " '[T]he members of the class are united in seeking the maximum possible recovery for their asbestos-related claims.' " Ibid. (quoting 157 F.R.D., at 317). "But the settlement does more than simply provide a general recovery fund," the Court of Appeals immediately added; "[r]ather, it makes important judgments on how recovery is to be allocated among different kinds of plaintiffs, decisions that necessarily favor some claimants over others." 83 F.3d, at 630.

In the Third Circuit's view, the "most salient" divergence of interests separated plaintiffs already afflicted with an asbestos-related disease from plaintiffs without manifest injury (exposure-only plaintiffs). The latter would rationally want protection against inflation for distant recoveries. See ibid. They would also seek sturdy back-end opt-out rights and "causation provisions that can keep pace with changing ***611** science and medicine, rather than freezing in place the science of 1993." Id., at 630-631. Already injured parties, in contrast, would care little about such provisions and would rationally trade them for higher current payouts. See id., at 631. These and other adverse interests, the Court of Appeals carefully explained, strongly suggested that an undivided set of representatives ****2244** could not adequately protect the discrete interests of both currently afflicted and exposure-only claimants.

The Third Circuit next rejected the District Court's determination that the named plaintiffs were "typical" of the class, noting that this Rule 23(a)(3) inquiry overlaps the adequacy of representation question:

"both look to the potential for conflicts in the class." Id., at 632. Evident conflict problems, the court said, led it to hold that "no set of representatives can be 'typical' of this class." Ibid.

The Court of Appeals similarly rejected the District Court's assessment of the superiority of the class action. The Third Circuit initially noted that a class action so large and complex "could not be tried." Ibid. The court elaborated most particularly, however, on the unfairness of binding exposure- only plaintiffs who might be unaware of the class action or lack sufficient information about their exposure to make a reasoned decision whether to stay in or opt out. See id., at 633. "A series of statewide or more narrowly defined adjudications, either through consolidation under Rule 42(a) or as class actions under Rule 23, would seem preferable," the Court of Appeals said. Id., at 634.

The Third Circuit, after intensive review, ultimately ordered decertification of the class and vacation of the District Court's anti-suit injunction. Id., at 635. Judge Wellford concurred, "fully subscrib[ing] to the decision of Judge Becker that the plaintiffs in this case ha[d] not met the requirements of Rule 23." Ibid. He added that in his view, named exposure-only plaintiffs had no standing to pursue the ***612** suit in federal court, for their depositions showed that "[t]hey claimed no damages and no present injury." Id., at 638.

We granted certiorari, 519 U.S. ----, 117 S.Ct. 379, 136 L.Ed.2d 297 (1996), and now affirm.

II

Objectors assert in this Court, as they did in the District Court and Court of Appeals, an array of jurisdictional barriers. Most fundamentally, they maintain that the settlement proceeding instituted by class counsel and CCR is not a justiciable case or controversy within the confines of Article III of the Federal Constitution. In the main, they say, the proceeding is a nonadversarial endeavor to impose on countless individuals without currently ripe claims an administrative compensation regime binding on those individuals if and when they manifest injuries.

Furthermore, objectors urge that exposure-only claimants lack standing to sue: Either they have not yet sustained any cognizable injury or, to the extent the complaint states claims and demands relief for emotional distress, enhanced risk of disease, and medical monitoring, the settlement provides no redress. Objectors also argue that exposure-only claimants did not meet the then-current amount-in-controversy requirement (in excess of $50,000) specified for federal-court jurisdiction based upon diversity of citizenship. See 28 U.S.C. § 1332(a).

[1] As earlier recounted, see supra, at 2242, the Third Circuit declined to reach these issues because they "would not exist but for the [class action] certification." 83 F.3d, at 623. We agree that "[t]he class certification issues are dispositive," ibid.; because their resolution here is logically antecedent to the existence of any Article III issues, it is appropriate to reach them first, cf. Arizonans for Official English v. Arizona, 520 U.S. 43, ----, 117 S.Ct. 1055, 1068, 137 L.Ed.2d 170 (1997) (declining to resolve definitively question whether petitioners had standing because mootness issue was dispositive of the case). We therefore follow the path taken by the Court of Appeals, mindful that ***613** Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). See also Fed. Rule Civ. Proc. 82 ("rules shall not be construed to extend ... the [subject matter] jurisdiction of the United States district courts"). [FN15]

FN15. The opinion dissenting in part does not find the class certification issues dispositive--at least not yet, and would return the case to the Third Circuit for a second look. See post, at 2253, 2258. If certification issues were genuinely in doubt, however, the jurisdictional issues would loom larger. Concerning objectors' assertions that exposure- only claimants do not satisfy the $50,000 amount-in-controversy and may have no currently ripe claim, see Metro-North Commuter R. Co. v. Buckley, --- U.S. ----, ----, 117 S.Ct. 379, ----, 136 L.Ed.2d 297 (Federal Employers' Liability Act, 35 Stat 65, as amended, 45 U.S.C. § 51 et seq., interpreted in light of common-law principles, does not permit "exposure-only" railworker to recover for negligent infliction of emotional distress or lump-sum damages for costs of medical monitoring).

****2245** III

To place this controversy in context, we briefly describe the characteristics of class actions for which the Federal Rules provide. Rule 23, governing federal-court class actions, stems from equity practice

and gained its current shape in an innovative 1966 revision. See generally Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L.Rev. 356, 375-400 (1967) (hereinafter Kaplan, Continuing Work). Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality (named parties' claims or defenses "are typical ... of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interests of the class").

[2] ***614** In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3). Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing " incompatible standards of conduct for the party opposing the class," Fed. Rule Civ. Proc. 23(b)(1)(A), or would "as a practical matter be dispositive of the interests" of nonparty class members "or substantially impair or impede their ability to protect their interests," Fed. Rule Civ. Proc. 23(b)(1) (B). Rule 23(b)(1)(A) "takes in cases where the party is obliged by law to treat the members of the class alike (a utility acting toward customers; a government imposing a tax), or where the party must treat all alike as a matter of practical necessity (a riparian owner using water as against downriver owners)." Kaplan, Continuing Work 388 (footnotes omitted). Rule 23(b)(1)(B) includes, for example, "limited fund" cases, instances in which numerous persons make claims against a fund insufficient to satisfy all claims. See Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., pp. 696-697 (hereinafter Adv. Comm. Notes).

Rule 23(b)(2) permits class actions for declaratory or injunctive relief where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples. Adv. Comm. Notes, 28 U.S.C.App., p. 697; see Kaplan, Continuing Work 389 (subdivision (b)(2) "build[s] on experience mainly, but not exclusively, in the civil rights field").

In the 1966 class-action amendments, Rule 23(b)(3), the category at issue here, was "the most adventuresome" innovation. See Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L.Rev. 497, 497 (1969) (hereinafter Kaplan, Prefatory Note). Rule 23(b)(3) added to the complex-litigation arsenal class actions for damages designed to secure judgments binding all class members save those who affirmatively elected to be ***615** excluded. See 7A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1777, p. 517 (2d ed.1986) (hereinafter Wright, Miller, & Kane); see generally Kaplan, Continuing Work 379-400. Rule 23(b)(3) "opt out" class actions superseded the former "spurious" class action, so characterized because it generally functioned as a permissive joinder ("opt in") device. See 7A Wright, Miller, & Kane § 1753, at 28-31, 42-44; see also Adv. Comm. Notes, 28 U.S.C.App., p. 695.

Framed for situations in which "class-action treatment is not as clearly called for" as it is in Rule 23(b)(1) and (b)(2) situations, Rule 23(b)(3) permits certification where class suit "may nevertheless be convenient and desirable." Adv. Comm. Notes, 28 U.S.C.App., p. 697. To qualify for certification under Rule 23(b)(3), a class must meet ****2246** two requirements beyond the Rule 23(a) prerequisites: Common questions must "predominate over any questions affecting only individual members"; and class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." In adding "predominance" and "superiority" to the qualification-for-certification list, the Advisory Committee sought to cover cases "in which a class action would achieve economies of time, effort, and expense, and promote ... uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." Ibid. Sensitive to the competing tugs of individual autonomy for those who might prefer to go it alone or in a smaller unit, on the one hand, and systemic efficiency on the other, the Reporter for the 1966 amendments cautioned: "The new provision invites a close look at the case before it is accepted as a class action...." Kaplan, Continuing Work 390.

Rule 23(b)(3) includes a nonexhaustive list of factors pertinent to a court's "close look" at the predominance and superiority criteria:

***616** "(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

In setting out these factors, the Advisory Committee for the 1966 reform anticipated that in each case, courts would "consider the interests of individual members of the class in controlling their own litigations and carrying them on as they see fit." Adv. Comm. Notes, 28 U.S.C.App., p. 698. They elaborated:

"The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand, these interests may be theoretic rather than practical; the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impracticable." Ibid.

See also Kaplan, Continuing Work 391 ("Th[e] interest [in individual control] can be high where the stake of each member bulks large and his will and ability to take care of himself are strong; the interest may be no more than theoretic where the individual stake is so small as to make a separate action impracticable.") (footnote omitted). As the Third Circuit observed in the instant case: "Each plaintiff [in an action involving claims for personal injury and death] has a significant interest in individually controlling the prosecution of [his case]"; each "ha[s] a substantial stake in making individual decisions on whether and when to settle." 83 F.3d, at 633.

[3][4] ***617** While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." Kaplan, Prefatory Note 497. As concisely recalled in a recent Seventh Circuit opinion:

"The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (1997).

To alert class members to their right to "opt out" of a (b)(3) class, Rule 23 instructs the court to "direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. Rule Civ. Proc. 23(c)(2); see Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173-177, 94 S.Ct. 2140, 2150-**2247 2152, 40 L.Ed.2d 732 (1974) (individual notice to class members identifiable through reasonable effort is mandatory in (b)(3) actions; requirement may not be relaxed based on high cost).

No class action may be "dismissed or compromised without [court] approval," preceded by notice to class members. Fed. Rule Civ. Proc. 23(e). The Advisory Committee's sole comment on this terse final provision of Rule 23 restates the rule's instruction without elaboration: "Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action." Adv. Comm. Notes, 28 U.S.C.App., p. 699.

In the decades since the 1966 revision of Rule 23, class action practice has become ever more "adventuresome" as a means of coping with claims too numerous to secure their ***618** "just, speedy, and inexpensive determination" one by one. See Fed. Rule Civ. Proc. 1. The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue. See generally J. Weinstein, Individual Justice in Mass Tort Litigation: The Effect of Class Actions, Consolidations, and Other Multiparty Devices (1995); Schwarzer, Settlement of Mass Tort Class Actions: Order out of Chaos, 80 Cornell L.Rev. 837 (1995).

Among current applications of Rule 23(b)(3), the "settlement only" class has become a stock device. See, e.g., T. Willging, L. Hooper, & R. Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 61-62 (1996) (noting large number of such cases in districts studied). Although all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes, courts have divided on the extent to which a proffered settlement affects court surveillance under Rule 23's certification criteria.

In GM Trucks, 55 F.3d, at 799-800, and in the instant case, 83 F.3d, at 624-626, the Third Circuit held that a class cannot be certified for settlement when certification for trial would be unwarranted. Other courts have held that settlement obviates or reduces the need to measure a proposed class against

the enumerated Rule 23 requirements. See, e.g., In re Asbestos Litigation, 90 F.3d, at 975(C.A.5) ("in settlement class context, common issues arise from the settlement itself") (citing H. Newberg & A. Conte, 2 Newberg on Class Actions § 11.28, at 11-58 (3d ed.1992)); White v. National Football League, 41 F.3d 402, 408 (C.A.8 1994) ("adequacy of class representation ... is ultimately determined by the settlement itself"), cert. denied, 515 U.S. 1137, 115 S.Ct. 2569, 132 L.Ed.2d 821 (1995); In re A.H. Robins Co., 880 F.2d 709, 740(C.A.4) ("[i]f not a ground for certification per se, certainly settlement should be a factor, and an important factor, to be considered when determining certification"), cert. denied sub nom. Anderson *619 v. Aetna Casualty & Surety Co., 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); Malchman v. Davis, 761 F.2d 893, 900 (C.A.2 1985) (certification appropriate, in part, because "the interests of the members of the broadened class in the settlement agreement were commonly held"), cert. denied, 475 U.S. 1143, 106 S.Ct. 1798, 90 L.Ed.2d 343 (1986).

A proposed amendment to Rule 23 would expressly authorize settlement class certification, in conjunction with a motion by the settling parties for Rule 23(b)(3) certification, "even though the requirements of subdivision (b)(3) might not be met for purposes of trial." Proposed Amendment to Fed. Rule Civ. Proc. 23(b), 117 S.Ct. No. 1 CXIX, CLIV to CLV (Aug.1996) (Request for Comment). In response to the publication of this proposal, voluminous public comments--many of them opposed to, or skeptical of, the amendment--were received by the Judicial Conference Standing Committee on Rules of Practice and Procedure. See, e.g., Letter from Steering Committee to Oppose Proposed Rule 23, signed by 129 law professors (May 28, 1996); Letter from Paul D. Carrington (May 21, 1996). The Committee has not yet acted on the matter. We consider the certification at issue under the rule as it is currently framed.

IV

We granted review to decide the role settlement may play, under existing Rule 23, in determining the propriety of class certification. **2248 The Third Circuit's opinion stated that each of the requirements of Rule 23(a) and (b)(3) "must be satisfied without taking into account the settlement." 83 F.3d, at 626 (quoting GM Trucks, 55 F.3d, at 799). That statement, petitioners urge, is incorrect.

[5] We agree with petitioners to this limited extent: settlement is relevant to a class certification. The Third Circuit's opinion bears modification in that respect. But, as we earlier observed, see supra, at ----, the Court of Appeals in fact did not ignore the settlement; instead, that court homed in on settlement terms in explaining why it found the absentees' *620 interests inadequately represented. See 83 F.3d, at 630- 631. The Third Circuit's close inspection of the settlement in that regard was altogether proper.

[6] Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the rule-- those designed to protect absentees by blocking unwarranted or overbroad class definitions--demand undiluted, even heightened, attention in the settlement context. Such attention is of vital importance, for a court asked to certify a settlement class will lack the opportunity, present when a case is litigated, to adjust the class, informed by the proceedings as they unfold. See Fed. Rule Civ. Proc. 23(c), (d). [FN16]

> FN16. Portions of the opinion dissenting in part appear to assume that settlement counts only one way--in favor of certification. See post, at 2252-2253, 2258. But see post, at 2255. To the extent that is the dissent's meaning, we disagree. Settlement, though a relevant factor, does not inevitably signal that class action certification should be granted more readily than it would be were the case to be litigated. For reasons the Third Circuit aired, see 83 F.3d 610, 626-635 (1996), proposed settlement classes sometimes warrant more, not less caution on the question of certification.

[7] And, of overriding importance, courts must be mindful that the rule as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See 28 U.S.C. §§ 2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure "shall not abridge ... any substantive right." § 2072(b).

[8][9] Rule 23(e), on settlement of class actions, reads in its entirety: "A class action shall not be

dismissed or compromised *621 without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." This prescription was designed to function as an additional requirement, not a superseding direction, for the "class action" to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b). Cf. Eisen, 417 U.S., at 176-177, 94 S.Ct., at 2151-2152 (adequate representation does not eliminate additional requirement to provide notice). Subdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives. That dominant concern persists when settlement, rather than trial, is proposed.

[10] The safeguards provided by the Rule 23(a) and (b) class-qualifying criteria, we emphasize, are not impractical impediments--checks shorn of utility--in the settlement class context. First, the standards set for the protection of absent class members serve to inhibit appraisals of the chancellor's foot kind--class certifications dependent upon the court's gestalt judgment or overarching impression of the settlement's fairness.

Second, if a fairness inquiry under Rule 23(e) controlled certification, eclipsing Rule 23(a) and (b), and permitting class designation despite the impossibility of litigation, both class counsel and court would be disarmed. Class counsel confined to settlement negotiations could not use the threat of litigation **2249 to press for a better offer, see Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L.Rev. 1343, 1379-1380 (1995), and the court would face a bargain proffered for its approval without benefit of adversarial investigation, see, e.g., Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1352 (C.A.7 1996) (Easterbrook, J., dissenting from denial of rehearing en banc) (parties "may even put one over on the court, in a staged performance"), cert. denied, 520 U.S. ----, 117 S.Ct. 1569, 137 L.Ed.2d 714 (1997).

*622 Federal courts, in any case, lack authority to substitute for Rule 23's certification criteria a standard never adopted--that if a settlement is "fair," then certification is proper. Applying to this case criteria the rulemakers set, we conclude that the Third Circuit's appraisal is essentially correct. Although that court should have acknowledged that settlement is a factor in the calculus, a remand is not warranted on that account. The Court of Appeals' opinion amply demonstrates why--with or without a settlement on the table--the sprawling class the District Court certified does not satisfy Rule 23's requirements. [FN17]

FN17. We do not inspect and set aside for insufficient evidence district court findings of fact. Cf. post, at 2254, 2257-2258. Rather, we focus on the requirements of Rule 23, and endeavor to explain why those requirements cannot be met for a class so enormously diverse and problematic as the one the District Court certified.

A

[11] We address first the requirement of Rule 23(b)(3) that "[common] questions of law or fact ... predominate over any questions affecting only individual members." The District Court concluded that predominance was satisfied based on two factors: class members' shared experience of asbestos exposure and their common "interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F.R.D., at 316. The settling parties also contend that the settlement's fairness is a common question, predominating over disparate legal issues that might be pivotal in litigation but become irrelevant under the settlement.

The predominance requirement stated in Rule 23(b)(3), we hold, is not met by the factors on which the District Court relied. The benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration, see supra, *623 at 2237-2238, but it is not pertinent to the predominance inquiry. That inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement. [FN18]

FN18. In this respect, the predominance requirement of Rule 23(b)(3) is similar to the requirement of Rule 23(a)(3) that "claims or defenses" of the named representatives must be "typical of the claims or defenses of the class." The words "claims or defenses" in this context--just as in the context of Rule 24(b)(2) governing permissive intervention--"manifestly refer to the kinds of claims or defenses that can be raised in courts of law as part of an actual or impending law suit." Diamond v. Charles, 476 U.S. 54, 76-77, 106 S.Ct. 1697, 1711, 90 L.Ed.2d 48 (1986) (O'CONNOR, J., concurring in part and concurring in judgment).

[12][13][14] The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. See 7A Wright, Miller, & Kane 518-519. [FN19] The inquiry appropriate under Rule 23(e), on the other hand, protects unnamed class members "from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." See 7B Wright, Miller, & Kane § 1797, at 340-341. But it is not the mission of Rule 23(e) to assure the class cohesion that legitimizes representative action in the first place. If a common interest in a fair compromise could satisfy the predominance requirement of Rule 23(b)(3), that **2250 vital prescription would be stripped of any meaning in the settlement context.

> FN19. This case, we note, involves no "limited fund" capable of supporting class treatment under Rule 23(b)(1)(B), which does not have a predominance requirement. See Georgine v. Amchem Products, Inc., 157 F.R.D. 246, 318 (E.D.Pa.1994); see also id., at 291, and n. 40. The settling parties sought to proceed exclusively under Rule 23(b)(3).

The District Court also relied upon this commonality: "The members of the class have all been exposed to asbestos products supplied by the defendants...." 157 F.R.D., at 316. Even if Rule 23(a)'s commonality requirement may be satisfied *624 by that shared experience, the predominance criterion is far more demanding. See 83 F.3d, at 626-627. Given the greater number of questions peculiar to the several categories of class members, and to individuals within each category, and the significance of those uncommon questions, any overarching dispute about the health consequences of asbestos exposure cannot satisfy the Rule 23(b)(3) predominance standard.

The Third Circuit highlighted the disparate questions undermining class cohesion in this case:

> "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma.... Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> "The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories." Id., at 626.

Differences in state law, the Court of Appeals observed, compound these disparities. See id., at 627 (citing Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823, 105 S.Ct. 2965, 2980, 86 L.Ed.2d 628 (1985)).

[15] No settlement class called to our attention is as sprawling as this one. Cf. In re Asbestos Litigation, 90 F.3d, at 976, n. 8 ("We would likely agree with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy [Rule 23] requirements due to the huge number of individuals and *625 their varying medical expenses, smoking histories, and family situations."). Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws. See Adv. Comm. Notes, 28 U.S.C.App., p. 697; see also supra, at 2246. Even mass tort cases arising from a common cause or disaster may, depending upon the circumstances, satisfy the predominance requirement. The Advisory Committee for the 1966 revision of Rule 23, it is true, noted that "mass accident" cases are likely to present "significant questions, not only of damages but of liability and defenses of liability, ... affecting the individuals in different ways." Ibid. And the Committee advised that such cases are "ordinarily not appropriate" for class treatment. Ibid. But the text of the rule does not categorically exclude mass tort cases from class certification, and district courts, since the late 1970s, have been certifying such cases in increasing number. See Resnik, From "Cases" to "Litigation," 54 Law & Contemp.Prob. 5, 17-19 (Summer 1991) (describing trend). The Committee's warning, however, continues to call for caution when individual stakes are high and disparities among class members great. As the Third Circuit's opinion makes plain, the certification in this case does not follow the counsel of caution. That certification cannot be upheld, for it rests on a conception of Rule 23(b) (3)'s predominance requirement irreconcilable with the rule's design.

B

[16][17][18][19] Nor can the class approved by the District Court satisfy Rule 23(a)(4)'s requirement that

the named parties "will fairly and adequately protect the interests of the class." The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. See General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157-158, n. 13, 102 S.Ct. 2364, 2370-2371, n. 13, 72 L.Ed.2d 740 (1982). "[A] class representative **2251 must be part of the class and 'possess *626 the same interest and suffer the same injury' as the class members." East Tex. Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 52 L.Ed.2d 453 (1977) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216, 94 S.Ct. 2925, 2930, 41 L.Ed.2d 706 (1974)). [FN20]

FN20. The adequacy-of-representation requirement "tend[s] to merge" with the commonality and typicality criteria of Rule 23(a), which "serve as guideposts for determining whether ... maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence " General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 157, n. 13, 102 S.Ct. 2364, 2370, n. 13, 72 L.Ed.2d 740 (1982). The adequacy heading also factors in competency and conflicts of class counsel. See id., at 157-158, n. 13, 102 S.Ct., at 2370-2371, n. 13. Like the Third Circuit, we decline to address adequacy- of-counsel issues discretely in light of our conclusions that common questions of law or fact do not predominate and that the named plaintiffs cannot adequately represent the interests of this enormous class.

As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned. Most saliently, for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future. Cf. General Telephone Co. of Northwest v. EEOC, 446 U.S. 318, 331, 100 S.Ct. 1698, 1707, 64 L.Ed.2d 319 (1980) ("In employment discrimination litigation, conflicts might arise, for example, between employees and applicants who were denied employment and who will, if granted relief, compete with employees for fringe benefits or seniority. Under Rule 23, the same plaintiff could not represent these classes.").

The disparity between the currently injured and exposure-only categories of plaintiffs, and the diversity within each category are not made insignificant by the District Court's finding that petitioners' assets suffice to pay claims under the settlement. See 157 F.R.D., at 291. Although *627 this is not a "limited fund" case certified under Rule 23(b)(1)(B), the terms of the settlement reflect essential allocation decisions designed to confine compensation and to limit defendants' liability. For example, as earlier described, see supra, at 2240-2241, the settlement includes no adjustment for inflation; only a few claimants per year can opt out at the back end; and loss-of-consortium claims are extinguished with no compensation.

The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the whole, not for a separate constituency. In another asbestos class action, the Second Circuit spoke precisely to this point:

> "[W]here differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." In re Joint Eastern and Southern Dist. Asbestos Litigation, 982 F.2d 721, 742-743 (C.A.2 1992), modified on reh'g sub nom. In re Findley, 993 F.2d 7 (C.A.2 1993).

The Third Circuit found no assurance here--either in the terms of the settlement or in the structure of the negotiations--that the named plaintiffs operated under a proper understanding of their representational responsibilities. See *628 83 F.3d, at 630-631. That assessment, we conclude, is on the mark.

**2252 C

Impediments to the provision of adequate notice, the Third Circuit emphasized, rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement. Id., at 633; cf. In re

Asbestos Litigation, 90 F.3d, at 999-1000 (Smith, J., dissenting). Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciate the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.

Family members of asbestos-exposed individuals may themselves fall prey to disease or may ultimately have ripe claims for loss of consortium. Yet large numbers of people in this category--future spouses and children of asbestos victims--could not be alerted to their class membership. And current spouses and children of the occupationally exposed may know nothing of that exposure.

Because we have concluded that the class in this case cannot satisfy the requirements of common issue predominance and adequacy of representation, we need not rule, definitively, on the notice given here. In accord with the Third Circuit, however, see 83 F.3d, at 633-634, we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.

V

The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos ***629** exposure. [FN21] Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it. As this case exemplifies, the rulemakers' prescriptions for class actions may be endangered by "those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the rule] with distaste." C. Wright, Law of Federal Courts 508 (5th ed.1994); cf. 83 F.3d, at 634 (suggesting resort to less bold aggregation techniques, including more narrowly defined class certifications).

FN21. The opinion dissenting in part is a forceful statement of that argument.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Third Circuit is

Affirmed.

Justice O'CONNOR took no part in the consideration or decision of this case.

Justice BREYER, with whom Justice STEVENS joins, concurring in part and dissenting in part.

Although I agree with the Court's basic holding that "settlement is relevant to a class certification," ante, at 2248, I find several problems in its approach that lead me to a different conclusion. First, I believe that the need for settlement in this mass tort case, with hundreds of thousands of lawsuits, is greater than the Court's opinion suggests. Second, I would give more weight than would the majority to settlement-related issues for purposes of determining whether common issues predominate. Third, I am uncertain about the Court's determination of adequacy of representation, ***630** and do not believe it appropriate for this Court to second-guess the District Court on the matter without first having the Court of Appeals consider it. Fourth, I am uncertain about the tenor of an opinion that seems to suggest the settlement is unfair. And fifth, in the absence of further review by the Court of Appeals, I cannot accept the majority's suggestions that "notice" is inadequate.

These difficulties flow from the majority's review of what are highly fact- based, complex, and difficult matters, matters that are inappropriate for initial review before this Court. The law gives broad leeway to district courts in making class certification decisions, ****2253** and their judgments are to be reviewed by the Court of Appeals only for abuse of discretion. See Califano v. Yamasaki, 442 U.S. 682, 703, 99 S.Ct. 2545, 2558-2559, 61 L.Ed.2d 176 (1979). Indeed, the District Court's certification decision rests upon more than 300 findings of fact reached after five weeks of comprehensive hearings. Accordingly, I do not believe that we should in effect set aside the findings of the District Court. That court is far more familiar with the issues and litigants than is a court of appeals or are we, and therefore has "broad power and discretion ... with respect to matters involving the certification" of class actions. Reiter v. Sonotone Corp., 442 U.S. 330, 345, 99 S.Ct. 2326, 2334, 60 L.Ed.2d 931 (1979); cf. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402, 110 S.Ct. 2447, 2459, 110 L.Ed.2d 359 (1990)

(district court better situated to make fact-dependent legal determinations in Rule 11 context).

I do not believe that we can rely upon the Court of Appeals' review of the District Court record, for that review, and its ultimate conclusions, are infected by a legal error. E.g., Georgine v. Amchem Products, Inc., 83 F.3d 610, 626 (C.A.3 1996) (holding that "considered as a litigation class," the class cannot meet Rule 23's requirements) (emphasis added). There is no evidence that the Court of Appeals at any point considered the settlement as something that would help the class meet Rule 23. I find, moreover, the fact-related issues presented here sufficiently ***631** close to warrant further detailed appellate court review under the correct legal standard. Cf. Reno v. Bossier Parish School Bd., 520 U.S. 471, 117 S.Ct. 1491, 1501, 137 L.Ed.2d 730 (1997). And I shall briefly explain why this is so.

I

First, I believe the majority understates the importance of settlement in this case. Between 13 and 21 million workers have been exposed to asbestos in the workplace--over the past 40 or 50 years--but the most severe instances of such exposure probably occurred three or four decades ago. See Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation, pp. 6-7 (Mar.1991) (Judicial Conference Report); App. 781-782, 801; B. Castleman, Asbestos: Medical and Legal Aspects 787-788 (4th ed.1996). This exposure has led to several hundred thousand lawsuits, about 15% of which involved claims for cancer and about 30% for asbestosis. See In re Joint Eastern and Southern Dist. Asbestos Litigation, 129 B.R. 710, 936-937 (E. and S.D.N.Y.1991) (Joint Litigation). About half of the suits have involved claims for pleural thickening and plaques--the harmfulness of which is apparently controversial. (One expert below testified that they "don't transform into cancer" and are not "predictor[s] of future disease," App. 781.) Some of those who suffer from the most serious injuries, however, have received little or no compensation. In re School Asbestos Litigation, 789 F.2d 996, 1000 (C.A.3 1986); see also Edley & Weiler, Asbestos: A Multi- Billion-Dollar Crisis, 30 Harv. J. Legis. 383, 384, 393 (1993) ("[U]p to one- half of asbestos claims are now being filed by people who have little or no physical impairment. Many of these claims produce substantial payments (and substantial costs) even though the individual litigants will never become impaired"). These lawsuits have taken up more than 6% of all federal civil filings in one recent year, and are subject to a delay that is twice that of other civil suits. Judicial Conference Report 7, 10-11.

***632** Delays, high costs, and a random pattern of noncompensation led the Judicial Conference Ad Hoc Committee on Asbestos Litigation to transfer all federal asbestos personal-injury cases to the Eastern District of Pennsylvania in an effort to bring about a fair and comprehensive settlement. It is worth considering a few of the Committee's comments. See Judicial Conference Report 2 (" 'Decisions concerning thousands of deaths, millions of injuries, and billions of dollars are entangled in a litigation system whose strengths have increasingly been overshadowed by its weaknesses.' The ensuing five years have seen the picture worsen: increased filings, larger backlogs, higher costs, more bankruptcies and poorer prospects that judgments--if ever obtained--can be collected' ") (quoting Rand Corporation Institute for Civil Justice); id., at 13 ("The transaction ****2254** costs associated with asbestos litigation are an unconscionable burden on the victims of asbestos disease," and citing Rand finding that "of each asbestos litigation dollar, 61 cents is consumed in transaction costs.... Only 39 cents were paid to the asbestos victims"); id., at 12 ("Delays also can increase transaction costs, especially the attorneys' fees paid by defendants at hourly rates. These costs reduce either the insurance fund or the company's assets, thereby reducing the funds available to pay pending and future claimants. By the end of the trial phase in [one case], at least seven defendants had declared bankruptcy (as a result of asbestos claims generally)"); see also J. Weinstein, Individual Justice in Mass Tort Litigation 155 (1995); Edley & Weiler, supra, at 389-395.

Although the transfer of the federal asbestos cases did not produce a general settlement, it was intertwined with and led to a lengthy year-long negotiation between the co-chairs of the Plaintiff's Multi-District Litigation Steering Committee (elected by the Plaintiff's Committee Members and approved by the District Court) and the 20 asbestos defendants who are before us here. Georgine v. Amchem Products, Inc., 157 F.R.D. 246, 266-267, (E.D.Pa.1994); App. 660-662. ***633** These "protracted and vigorous" negotiations led to the present partial settlement, which will pay an estimated $1.3 billion and compensate perhaps 100,000 class members in the first 10 years. 157 F.R.D., at 268, 287. "The negotiations included a substantial exchange of information" between class counsel and the 20 defendant companies, including "confidential data"

showing the defendants' historical settlement averages, numbers of claims filed and settled, and insurance resources. Id., at 267. "Virtually no provision" of the settlement "was not the subject of significant negotiation," and the settlement terms "changed substantially" during the negotiations. Ibid. In the end, the negotiations produced a settlement that, the District Court determined based on its detailed review of the process, was "the result of arms-length adversarial negotiations by extraordinarily competent and experienced attorneys." Id., at 335.

The District Court, when approving the settlement, concluded that it improved the plaintiffs' chances of compensation and reduced total legal fees and other transaction costs by a significant amount. Under the previous system, according to the court, "[t]he sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease." Ibid. The court believed the settlement would create a compensation system that would make more money available for plaintiffs who later develop serious illnesses.

I mention this matter because it suggests that the settlement before us is unusual in terms of its importance, both to many potential plaintiffs and to defendants, and with respect to the time, effort, and expenditure that it reflects. All of which leads me to be reluctant to set aside the District Court's findings without more assurance than I have that they are wrong. I cannot obtain that assurance through comprehensive review of the record because that is properly the job of the Court of Appeals and that court, understandably, but as we now hold, mistakenly, believed that settlement ***634** was not a relevant (and, as I would say, important) consideration.

Second, the majority, in reviewing the District Court's determination that common "issues of fact and law predominate," says that the predominance "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." Ante, at 2249 (footnote omitted). I find it difficult to interpret this sentence in a way that could lead me to the majority's conclusion. If the majority means that these pre-settlement questions are what matters, then how does it reconcile its statement with its basic conclusion that "settlement is relevant" to class certification, or with the numerous lower court authority that says that settlement is not only relevant, but important? See, e. g., In re A.H. Robins Co., 880 F.2d 709, 740(C.A.4), cert. denied sub nom. Anderson v. Aetna Casualty & Surety Co., 493 U.S. 959, 110 S.Ct. 377, 107 L.Ed.2d 362 (1989); In re Beef Industry Antitrust Litigation, ****2255** 607 F.2d 167, 177-178 (C.A.5 1979), cert. denied sub nom. Iowa Beef Processors, Inc. v. Meat Price Investigators Assn., 452 U.S. 905, 101 S.Ct. 3029, 69 L.Ed.2d 405 (1981); 2 H. Newberg & A. Conte, Newberg on Class Actions § 11.27, pp. 11-54 to 11-55 (3d ed.1992).

Nor do I understand how one could decide whether common questions "predominate" in the abstract--without looking at what is likely to be at issue in the proceedings that will ensue, namely, the settlement. Every group of human beings, after all, has some features in common, and some that differ. How can a court make a contextual judgment of the sort that Rule 23 requires without looking to what proceedings will follow? Such guideposts help it decide whether, in light of common concerns and differences, certification will achieve Rule 23's basic objective--"economies of time, effort, and expense." Advisory Committee's Notes on Fed. Rule Civ. Proc. 23(b)(3), 28 U.S.C.App., p. 697. As this Court has previously observed, "sometimes it may be necessary for the court to probe behind the pleadings before coming to ***635** rest on the certification question." General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 160, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982); see also C. Wright, A. Miller, & M. Kane, 7B Federal Practice and Procedure § 1785, p. 107, and n. 34 (1986). I am not saying that the " settlement counts only one way." Ante, at 2248 n. 16. Rather, the settlement may simply "add a great deal of information to the court's inquiry and will often expose diverging interests or common issues that were not evident or clear from the complaint" and courts "can and should" look to it to enhance the "ability ... to make informed certification decisions." In re Asbestos, 90 F.3d 963, 975 (C.A.5 1996).

The majority may mean that the District Court gave too much weight to the settlement. But I am not certain how it can reach that conclusion. It cannot rely upon the Court of Appeals, for that court gave no positive weight at all to the settlement. Nor can it say that the District Court relied solely on "a common interest in a fair compromise," ante, at 2249, for the District Court did not do so. Rather, it found the settlement relevant because it explained the importance of the class plaintiffs' common features and common interests. The court found predominance in part because:

> "The members of the class have all been exposed to asbestos products supplied by the defendants and all share an interest in receiving prompt and fair compensation for their claims, while minimizing the risks and transaction costs inherent in the asbestos litigation process as it occurs presently in the tort system." 157 F.R.D., at 316.

The settlement is relevant because it means that these common features and interests are likely to be important in the proceeding that would ensue--a proceeding that would focus primarily upon whether or not the proposed settlement fairly and properly satisfied the interests class members had in common. That is to say, the settlement underscored the importance ***636** of (a) the common fact of exposure, (b) the common interest in receiving some compensation for certain rather than running a strong risk of no compensation, and (c) the common interest in avoiding large legal fees, other transaction costs, and delays. Ibid.

Of course, as the majority points out, there are also important differences among class members. Different plaintiffs were exposed to different products for different times; each has a distinct medical history and a different history of smoking; and many cases arise under the laws of different States. The relevant question, however, is how much these differences matter in respect to the legal proceedings that lie ahead. Many, if not all, toxic tort class actions involve plaintiffs with such differences. And the differences in state law are of diminished importance in respect to a proposed settlement in which the defendants have waived all defenses and agreed to compensate all those who were injured. Id., at 292.

These differences might warrant subclasses, though subclasses can have problems of their own. "There can be a cost in creating more distinct subgroups, each with its own representation.... [T]he more subclasses created, the more severe conflicts bubble to ****2256** the surface and inhibit settlement.... The resources of defendants and, ultimately, the community must not be exhausted by protracted litigation." Weinstein, Individual Justice in Mass Tort Litigation, at 66. Or these differences may be too serious to permit an effort at group settlement. This kind of determination, as I have said, is one that the law commits to the discretion of the district court--reviewable for abuse of discretion by a court of appeals. I believe that we are far too distant from the litigation itself to reweigh the fact-specific Rule 23 determinations and to find them erroneous without the benefit of the Court of Appeals first having restudied the matter with today's legal standard in mind.

***637** Third, the majority concludes that the "representative parties" will not "fairly and adequately protect the interests of the class." Rule 23(a)(4). It finds a serious conflict between plaintiffs who are now injured and those who may be injured in the future because "for the currently injured, the critical goal is generous immediate payments," a goal that "tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation- protected fund for the future." Ante, at 2251.

I agree that there is a serious problem, but it is a problem that often exists in toxic tort cases. See Weinstein, supra, at 64 (noting that conflict "between present and future claimants" "is almost always present in some form in mass tort cases because long latency periods are needed to discover injuries"); see also Judicial Conference Report 34-35 ("Because many of the defendants in these cases have limited assets that may be called upon to satisfy the judgments obtained under current common tort rules and remedies, there is a 'real and present danger that the available assets will be exhausted before those later victims can seek compensation to which they are entitled' ") (citation omitted). And it is a problem that potentially exists whenever a single defendant injures several plaintiffs, for a settling plaintiff leaves fewer assets available for the others. With class actions, at least, plaintiffs have the consolation that a district court, thoroughly familiar with the facts, is charged with the responsibility of ensuring that the interests of no class members are sacrificed.

But this Court cannot easily safeguard such interests through review of a cold record. "What constitutes adequate representation is a question of fact that depends on the circumstances of each case." Wright, Miller, & Kane, 7A Federal Practice and Procedure, § 1765, at 271. That is particularly so when, as here, there is an unusual baseline, namely, the " 'real and present danger' " described by the Judicial Conference Report above. The majority's use of the ***638** lack of an inflation adjustment as evidence of inadequacy of representation for future plaintiffs, ante, at 2251, is one example of this difficulty. An inflation adjustment might not be as valuable as the majority assumes if most plaintiffs are old and not worried about receiving compensation decades from now. There are, of course, strong arguments as to its value. But that disagreement is one that this Court is poorly situated to resolve.

Further, certain details of the settlement that are not discussed in the majority opinion suggest that the settlement may be of greater benefit to future plaintiffs than the majority suggests. The District Court concluded that future plaintiffs receive a "significant value" from the settlement due to variety of its items that benefit future plaintiffs, such as: (1) tolling the statute of limitations so that class members "will no longer be forced to file premature lawsuits or risk their claims being time-barred"; (2) waiver of defenses to liability; (3) payment of claims, if and when members become sick, pursuant to the settlement's compensation standards, which avoids "the uncertainties, long delays and high transaction costs [including attorney's fees] of the tort system"; (4) "some assurance that there will be funds available if and when they get sick," based on the finding that each defendant "has shown an ability to fund the payment of all qualifying claims" under the settlement; and (5) the right to additional compensation if cancer develops (many settlements for plaintiffs with noncancerous conditions bar such additional claims). 157 F.R.D., at 292. For these reasons, and others, the District Court found that the distinction ****2257** between present and future plaintiffs was "illusory." 157 F.R.D., at 317-318.

I do not know whether or not the benefits are more or less valuable than an inflation adjustment. But I can certainly recognize an argument that they are. (To choose one more brief illustration, the majority chastises the settlement for extinguishing loss-of-consortium claims, ante, at 2251, 2252, but ***639** does not note that, as the District Court found, the "defendants' historical [settlement] averages, upon which the compensation values are based, include payments for loss of consortium claims, and, accordingly, the Compensation Schedule is not unfair for this ascribed reason," 157 F.R.D., at 278.) The difficulties inherent in both knowing and understanding the vast number of relevant individual fact-based determinations here counsel heavily in favor of deference to district court decisionmaking in Rule 23 decisions. Or, at the least, making certain that appellate court review has taken place with the correct standard in mind.

Fourth, I am more agnostic than is the majority about the basic fairness of the settlement. Ante, at 2250-2252. The District Court's conclusions rested upon complicated factual findings that are not easily cast aside. It is helpful to consider some of them, such as its determination that the settlement provided "fair compensation ... while reducing the delays and transaction costs endemic to the asbestos litigation process" and that "the proposed class action settlement is superior to other available methods for the fair and efficient resolution of the asbestos-related personal injury claims of class members." 157 F.R.D., at 316 (citation omitted); see also id., at 335 ("The inadequate tort system has demonstrated that the lawyers are well paid for their services but the victims are not receiving speedy and reasonably inexpensive resolution of their claims. Rather, the victims' recoveries are delayed, excessively reduced by transaction costs and relegated to the impersonal group trials and mass consolidations. The sickest of victims often go uncompensated for years while valuable funds go to others who remain unimpaired by their mild asbestos disease. Indeed, [these] unimpaired victims have, in many states, been forced to assert their claims prematurely or risk giving up all rights to future compensation for any future lung cancer or mesothelioma. The plan which this Court approves today will correct that unfair result for the class members and the ... defendants"); ***640** id., at 279, 280 (settlement "will result in less delay for asbestos claimants than that experienced in the present tort system" and will "result in the CCR defendants paying more claims, at a faster rate, than they have ever paid before"); id., at 292; Edley & Weiler, 30 Harv. J. Legis., at 405, 407 (finding that "[t]here are several reasons to believe that this settlement secures important gains for both sides" and that they "firmly endorse the fairness and adequacy of this settlement"). Indeed, the settlement has been endorsed as fair and reasonable by the AFL-CIO (and its Building and Construction Trades Department), which represents a " 'substantial percentage' " of class members, 157 F.R.D., at 325, and which has a role in monitoring implementation of the settlement, id., at 285. I do not intend to pass judgment upon the settlement's fairness, but I do believe that these matters would have to be explored in far greater depth before I could reach a conclusion about fairness. And that task, as I have said, is one for the Court of Appeals.

Finally, I believe it is up to the District Court, rather than this Court, to review the legal sufficiency of notice to members of the class. The District Court found that the plan to provide notice was implemented at a cost of millions of dollars and included hundreds of thousands of individual notices, a wide-ranging television and print campaign, and significant additional efforts by 35 international and national unions to notify their members. 157 F.R.D., at 312-313, 336. Every notice emphasized that an individual did not currently have to be sick to be a

class member. And in the end, the District Court was "confident" that Rule 23 and due process requirements were satisfied because, as a result of this "extensive and expensive notice procedure," "over six million" individuals "received actual notice materials," and "millions more" were reached by the media campaign. Id., at 312, 333, 336. Although the majority, in principle, is reviewing a Court of Appeals' **2258 conclusion, it seems to me that its opinion might call into question the fact-related determinations of the District *641 Court. Ante, at 2252. To the extent that it does so, I disagree, for such findings cannot be so quickly disregarded. And I do not think that our precedents permit this Court to do so. See Reiter, 442 U.S., at 345, 99 S.Ct., at 2334; Yamasaki, 442 U.S., at 703, 99 S.Ct., at 2558-2559.

II

The issues in this case are complicated and difficult. The District Court might have been correct. Or not. Subclasses might be appropriate. Or not. I cannot tell. And I do not believe that this Court should be in the business of trying to make these fact-based determinations. That is a job suited to the district courts in the first instance, and the courts of appeal on review. But there is no reason in this case to believe that the Court of Appeals conducted its prior review with an understanding that the settlement could have constituted a reasonably strong factor in favor of class certification. For this reason, I would provide the courts below with an opportunity to analyze the factual questions involved in certification by vacating the judgment, and remanding the case for further proceedings.

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119 S.Ct. 2295
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(Cite as: 119 S.Ct. 2295)

Esteban ORTIZ, et al., Petitioners,
v.
FIBREBOARD CORPORATION et al.

No. 97-1704.

Supreme Court of the United States

Argued Dec. 8, 1998.

Decided June 23, 1999.

Following global settlement of claims against manufacturer of asbestos- containing products, certification of settlement class action was sought. The United States District Court for the Eastern District of Texas, Robert M. Parker, Circuit Judge, sitting by designation, certified class and approved settlements. Appeals were taken and consolidated, and the Court of Appeals for the Fifth Circuit affirmed, 90 F.3d 963. On petition for writ of certiorari, the United States Supreme Court vacated and remanded for reconsideration in light of Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689. On remand, the Court of Appeals again affirmed, 134 F.3d 668. Certiorari was granted, and the Supreme Court, Justice Souter, held that: (1) issue of propriety of class certification would be addressed before issue of Article III standing; (2) certification of mandatory settlement class on limited fund theory requires showing that fund is limited independently of agreement by parties, and that class include all those with claims unsatisfied at time of settlement, with intraclass conflicts addressed; and (3) class certification was impermissible, as insufficient showing was made that fund was so limited, or to establish inclusiveness of proposed class and equitable treatment of class members.

Reversed and remanded.

Chief Justice Rehnquist filed a concurring opinion in which Justices Scalia and Kennedy joined.

Justice Breyer filed a dissenting opinion in which Justice Stevens joined.

[1] FEDERAL COURTS ⚿30

170Bk30

Ordinarily, Supreme Court, or any other Article III court, must be sure of its own jurisdiction before getting to the merits of action.

[1] FEDERAL COURTS ⚿441
170Bk441
Ordinarily, Supreme Court, or any other Article III court, must be sure of its own jurisdiction before getting to the merits of action.

[2] FEDERAL CIVIL PROCEDURE ⚿103.2
170Ak103.2
Federal court may properly treat issue of statutory standing of plaintiffs to bring suit before addressing issue of Article III standing.

[3] FEDERAL CIVIL PROCEDURE ⚿103.7
170Ak103.7
Standing requirements under rule governing class actions must be interpreted in keeping with Article III constraints on exercise of federal jurisdiction. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[4] FEDERAL COURTS ⚿460.1
170Bk460.1
In reviewing certification of mandatory settlement class in limited fund class action involving claims against manufacturer of asbestos-containing products, Supreme Court would first address issues of propriety of class certification, which pertained to statutory standing and were logically antecedent to concerns relating to standing to bring suit under Article III.

[5] FEDERAL CIVIL PROCEDURE ⚿161
170Ak161
Class actions as recognized today developed as an exception to the formal rigidity of the necessary parties rule in equity, as well as from the bill of peace, which was an equitable device for combining multiple suits. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[6] FEDERAL CIVIL PROCEDURE ⚿201
170Ak201
"Necessary parties rule" in equity mandated that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill, ought to be made parties to the suit, however numerous they may be.
See publication Words and Phrases for other judicial

constructions and definitions.

[7] FEDERAL CIVIL PROCEDURE ⚿161
170Ak161
Drafters of rule governing types of class actions maintainable sought to catalogue in functional terms those recurrent life patterns which call for mass litigation through representative parties. Fed.Rules Civ.Proc.Rule 23(b), 28 U.S.C.A.

[8] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
Rule governing class actions provides for certification of a class whose members have no right to withdraw, when the prosecution of separate actions would create a risk of adjudications which would as a practical matter be dispositive of the interests of nonparties, or substantially impair or impede their ability to protect their interests. Fed.Rules Civ.Proc.Rule 23(b)(1)(B), (c)(2), 28 U.S.C.A.

[9] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
Classic examples of matters in which prosecution of separate actions would create risk of impairment of ability of nonparties to protect their interests, as will potentially warrant certification of class action, may be found in suits brought to reorganize fraternal-benefit societies, actions by shareholders to declare a dividend or otherwise to fix their rights, and actions charging a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of beneficiaries, requiring an accounting or similar procedure to restore the subject of the trust. Fed.Rules Civ.Proc.Rule 23(b)(1)(B), 28 U.S.C.A.

[10] FEDERAL CIVIL PROCEDURE ⚿177.1
170Ak177.1
Class actions which are certified on basis that prosecution of separate actions would create risk of inconsistent or varying adjudications, or impairment of ability of nonparties to protect their interests, do not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right, and for this reason are often referred to as "mandatory class actions." Fed.Rules Civ.Proc.Rule 23(b)(1), 28 U.S.C.A.
See publication Words and Phrases for other judicial constructions and definitions.

[10] FEDERAL CIVIL PROCEDURE ⚿180
170Ak180
Class actions which are certified on basis that prosecution of separate actions would create risk of inconsistent or varying adjudications, or impairment of ability of nonparties to protect their interests, do not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right, and for this reason are often referred to as "mandatory class actions." Fed.Rules Civ.Proc.Rule 23(b)(1), 28 U.S.C.A.
See publication Words and Phrases for other judicial constructions and definitions.

[11] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
Among the traditional varieties of representative suit encompassed by rule allowing class certification on basis that separate actions would create risk of impeding ability of nonparties to protect their interest were those involving the presence of property which called for distribution or management, including a limited fund class action aggregating claims against a fund insufficient to satisfy all claims. Fed.Rules Civ.Proc.Rule 23(b)(1)(B), 28 U.S.C.A.

[12] EXECUTORS AND ADMINISTRATORS ⚿415
162k415
In equity, legatee and creditor bills against the assets of a decedent's estate had to be brought on behalf of all similarly situated claimants where it was clear from the pleadings that the available portion of the estate could not satisfy the aggregate claims against it.

[13] COMPROMISE AND SETTLEMENT ⚿67
89k67
Demonstration that action has characteristics of one in reference to a "fund" with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution, is presumptively necessary, and not merely sufficient, to satisfy limited fund rationale for certification of mandatory settlement class action. Fed.Rules Civ.Proc.Rule 23(b)(1)(B), 28 U.S.C.A.

[13] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
Demonstration that action has characteristics of one in reference to a "fund" with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution, is presumptively necessary, and not merely sufficient, to satisfy limited fund rationale for certification of mandatory settlement class action. Fed.Rules Civ.Proc.Rule 23(b)(1)(B), 28 U.S.C.A.

[14] COMPROMISE AND SETTLEMENT ⚿67
89k67
To extent that a mandatory, limited fund rationale may under some circumstances be applied to a settlement class of tort claimants to allow certification of class action on basis that separate actions would create risk of impeding ability of nonparties to protect their interests, it is essential that fund be shown to be limited independently of agreement of parties, and equally essential that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses. Fed.Rules Civ.Proc.Rule 23(a), (b)(1)(B), 28 U.S.C.A.

[14] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
To extent that a mandatory, limited fund rationale may under some circumstances be applied to a settlement class of tort claimants to allow certification of class action on basis that separate actions would create risk of impeding ability of nonparties to protect their interests, it is essential that fund be shown to be limited independently of agreement of parties, and equally essential that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses. Fed.Rules Civ.Proc.Rule 23(a), (b)(1)(B), 28 U.S.C.A.

[15] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
When rule governing certification of class action on basis that adjudications with respect to individual class members would create risk of impairing or impeding ability of absent class members to protect their interests was devised to cover limited fund actions, object was to stay close to historical model for such limited fund actions. Fed.Rules Civ.Proc.Rule 23(b)(1)(B), 28 U.S.C.A.

[16] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
While all three subdivisions of rule establishing types of class actions maintainable were drafted in general, practical terms, drafters were consciously retrospective with intent to codify pre-Rule categories under subdivision allowing class certification to avoid risk of inconsistent adjudications, or where party opposing class had acted on grounds generally applicable to class, and not forward-looking, as drafters were in anticipating innovations under subdivision permitting class actions where common questions of law and fact predominate. Fed.Rules Civ.Proc.Rule 23(b)(1, 3), 28 U.S.C.A.

[17] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
Drafters of rule governing certification of class actions did not contemplate that the mandatory class action codified in subdivision allowing certification on basis that adjudications with respect to individual class members would create risk of impairing or impeding ability of absent class members to protect their interests would be used to aggregate unliquidated tort claims on a limited fund rationale. Fed.Rules Civ.Proc.Rule 23(b)(1)(B), 28 U.S.C.A.

[18] FEDERAL CIVIL PROCEDURE ⚿161
170Ak161
No reading of rule governing certification of class actions can ignore mandate of Rules Enabling Act that rules of procedure shall not abridge, enlarge, or modify any substantive right. 28 U.S.C.A. § 2072; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[19] JURY ⚿31.2(1)
230k31.2(1)
Certification of a mandatory class, followed by settlement of its action for money damages, implicates the Seventh Amendment jury trial rights of absent class members. U.S.C.A. Const.Amend. 7; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[20] JURY ⚿13(3)
230k13(3)
Class action plaintiffs have a Seventh Amendment right to obtain a jury trial on any legal issues they present. U.S.C.A. Const.Amend. 7; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[21] CONSTITUTIONAL LAW ⚿309(1.5)
92k309(1.5)
Mandatory class actions aggregating damage claims implicate the due process principle of general application that one is not bound by a judgment in personam in a litigation in which he is not designated as a party, or to which he has not been made a party by service of process. U.S.C.A. Const.Amends. 5, 14; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[21] CONSTITUTIONAL LAW ⚿315
92k315
Mandatory class actions aggregating damage claims implicate the due process principle of general application that one is not bound by a judgment in

personam in a litigation in which he is not designated as a party, or to which he has not been made a party by service of process. U.S.C.A. Const.Amends. 5, 14; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[22] CONSTITUTIONAL LAW ⚿315
92k315
Exception to general due process principle that party is not bound by a judgment in personam in a litigation in which he is not designated as a party or as to which he has not been made a party by service of process is recognized when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party, or where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as in bankruptcy or probate; however, burden of justification rests on the exception. U.S.C.A. Const.Amends. 5, 14.

[23] COMPROMISE AND SETTLEMENT ⚿67
89k67
No showing was made that fund consisting of manufacturer's general assets of manufacturer of asbestos-containing products, and insurance assets provided by its policies, was limited except by agreement of parties, as required for certification of mandatory limited fund class action following global settlement of claims against manufacturer to be permissible; no adequate demonstration was made of fund's upper limit, as estimate of manufacturer's then-current sale value may have been inadequate, and instead of undertaking independent evaluation of potential insurance funds, district court simply accepted settlement agreement figure as maximum available amount. Fed.Rules Civ.Proc.Rule 23(b)(1)(B), 28 U.S.C.A.

[23] FEDERAL CIVIL PROCEDURE ⚿181
170Ak181
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[24] COMPROMISE AND SETTLEMENT ⚿67
89k67
When district court certifies a class action for settlement only, moment of certification requires heightened attention to the justifications for binding the class members; this is so because certification of a mandatory settlement class, however provisional technically, effectively concludes the proceeding save for the final fairness hearing, which is no substitute for rigorous adherence to those provisions of class action rule designed to protect absentees. Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[24] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
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[25] COMPROMISE AND SETTLEMENT ⚿67
89k67
Where certification is sought of limited fund class action for purposes of settlement, on basis that adjudications with respect to individual class members would create risk of impairing or impeding ability of absent class members to protect their interests, settling parties must present not only their agreement, but evidence on which the district court may ascertain limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge. Fed.Rules Civ.Proc.Rule 23(b)(1)(B), 28 U.S.C.A.

[25] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
Where certification is sought of limited fund class action for purposes of settlement, on basis that adjudications with respect to individual class members would create risk of impairing or impeding ability of absent class members to protect their interests, settling parties must present not only their agreement, but evidence on which the district court may ascertain limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge. Fed.Rules

Civ.Proc.Rule 23(b)(1)(B), 28 U.S.C.A.

[26] COMPROMISE AND SETTLEMENT ⚿67
89k67
No showing was made of inclusiveness of proposed class following global settlement of claims against manufacturer of asbestos-containing products, or equitable treatment among members of class, as required to allow certification of mandatory limited fund class action incorporating settlement; proposed class definition excluded myriad claimants with causes of action, or foreseeable causes of action, no subclasses were created for holders of present and future claims to alleviate potential conflicts of interest on part of counsel, and class included those exposed to asbestos both before and after year of expiration of insurance policy providing bulk of settlement funds. Fed.Rules Civ.Proc.Rule 23(b)(1)(B), 28 U.S.C.A.

[26] FEDERAL CIVIL PROCEDURE ⚿181
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[27] COMPROMISE AND SETTLEMENT ⚿67
89k67
While equity of treatment of class members in simple sense of pro rata distribution of the limited fund is unattainable in a settlement covering present claims not specifically proven and claims not even due to arise, if at all, until some future time, in order for such a settlement to be sufficiently equitable to allow certification of mandatory limited fund class action, at the least such a settlement must seek equity by providing for procedures to resolve the difficult issues of treating such differently situated claimants with fairness as among themselves. Fed.Rules Civ.Proc.Rule 23(b)(1)(B), 28 U.S.C.A.

[27] FEDERAL CIVIL PROCEDURE ⚿161.1
170Ak161.1
While equity of treatment of class members in simple sense of pro rata distribution of the limited fund is unattainable in a settlement covering present claims not specifically proven and claims not even due to arise, if at all, until some future time, in order for such a settlement to be sufficiently equitable to allow certification of mandatory limited fund class action, at the least such a settlement must seek equity by providing for procedures to resolve the difficult issues of treating such differently situated claimants with fairness as among themselves. Fed.Rules Civ.Proc.Rule 23(b)(1)(B), 28 U.S.C.A.

[28] FEDERAL CIVIL PROCEDURE ⚿176
170Ak176
Class which is divided between holders of present and future claims, with some of the latter involving no physical injury and injury to claimants not yet born, requires division into homogeneous subclasses, with separate representation to eliminate conflicting interests of counsel. Fed.Rules Civ.Proc.Rule 23(c)(4)(B), 28 U.S.C.A.

[29] COMPROMISE AND SETTLEMENT ⚿67
89k67
Class action rule requires protections against inequity and potential inequity at the precertification stage of settlement class action, quite independently of the required determination at postcertification fairness review that any settlement is fair in an overriding sense. Fed.Rules Civ.Proc.Rule 23(a, b, e), 28 U.S.C.A.

[29] FEDERAL CIVIL PROCEDURE ⚿161.1
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Class action rule requires protections against inequity and potential inequity at the precertification stage of settlement class action, quite independently of the required determination at postcertification fairness review that any settlement is fair in an overriding sense. Fed.Rules Civ.Proc.Rule 23(a, b, e), 28 U.S.C.A.

[30] BANKRUPTCY ⚿3032.1
51k3032.1
While there is no inherent conflict between a limited fund class action certified on basis that separate actions would create risk of impeding ability of nonparties to protect their interests, and the Bankruptcy Code, if limited fund certification is allowed in a situation where a company provides only a de minimis contribution to the ultimate settlement fund, the incentives such a resolution would provide to companies facing tort liability to engineer settlements would, in all likelihood, significantly

undermine protections for creditors built into Bankruptcy Code. Fed.Rules Civ.Proc.Rule 23(b)(1)(B), 28 U.S.C.A.

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***2299** Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Respondent Fibreboard Corporation, an asbestos manufacturer, was locked in litigation for decades. Plaintiffs filed a stream of personal injury claims against it, swelling throughout the 1980's and 1990's to thousands of claims for compensatory damages each year. Fibreboard engaged in litigation with its insurers, respondent Continental Casualty Company and respondent Pacific Indemnity Company, over insurance coverage for the personal injury claims. In 1990, a California trial court ruled against Continental and Pacific, and the insurers appealed. At around the same time, Fibreboard approached a group of asbestos plaintiffs' lawyers, offering to discuss a "global settlement" of Fibreboard's asbestos liability. Negotiations at one point led to the settlement of some 45,000 pending claims, and the parties eventually agreed upon $1.535 billion as the key term of a "Global Settlement Agreement." Of this sum, $1.525 billion would come from Continental and Pacific, which had joined the negotiations, while Fibreboard would contribute $10 million, all but $500,000 of it from other insurance proceeds. At plaintiffs' counsels' insistence, Fibreboard and its insurers then reached a backup settlement of the coverage dispute in the "Trilateral Settlement Agreement," under which the insurers agreed to provide Fibreboard with $2 billion to defend against asbestos claimants and pay the winners, should the Global Settlement Agreement fail to win court approval. Subsequently, a group of named plaintiffs filed the present action in Federal District Court, seeking certification for settlement purposes of a mandatory class that comprised three groups--claimants who had not yet sued Fibreboard, those who had dismissed such claims and retained the right to sue in the future, and relatives of class members--but excluded claimants who had actions pending against Fibreboard or who had filed and, for negotiated value, dismissed such claims, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy. The District Court allowed petitioners and other objectors to intervene, held a fairness hearing under Federal Rule of Civil Procedure 23(e), ruled that the threshold Rule 23(a) numerosity, commonality, typicality, and adequacy of representation requirements were met, and certified the class under Rule 23(b)(1)(B). In response to intervenors' objections that the absence of a "limited fund" precluded Rule 23(b)(1)(B) certification, the District Court ruled that both the disputed insurance asset liquidated by the $1.535 billion global settlement, and, alternatively, the sum of the value of Fibreboard plus the value of its insurance coverage, as measured by the insurance funds' settlement value, were relevant "limited funds." The Fifth Circuit affirmed both as to class certification and adequacy of settlement. Agreeing with the District Court's application of Rule 23(a), the Court of Appeals found, inter alia, that there were no conflicts of interest sufficiently serious to undermine the adequacy of class counsel's representation. As to Rule 23(b)(1)(B), the court approved the class certification on a "limited fund" rationale based on the threat to other class members' ability to receive full payment from Fibreboard's limited assets. This Court then decided Amchem Products, Inc. v.

Windsor, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689, vacated the Fifth Circuit's ***2300** judgment, and remanded for further consideration in light of that decision. The Fifth Circuit again affirmed the District Court's judgment on remand.

Held:

1. This Court need not resolve two threshold matters before proceeding to the nub of the case. First, petitioners call the class claims nonjusticiable under Article III, saying that this is a feigned action initiated by Fibreboard to control its future asbestos tort liability, with the vast majority of the exposure-only class members being without injury in fact and hence without standing to sue. While an Article III court ordinarily must be sure of its own jurisdiction before getting to the merits, Steel Co. v. Citizens For a Better Environment, 523 U.S. 83, 88-89, 118 S.Ct. 1003, 140 L.Ed.2d 210, a Rule 23 question should be treated first because class certification issues are "logically antecedent" to Article III concerns, Amchem, supra, at 612, 117 S.Ct. 2231, and pertain to statutory standing, which may properly be treated before Article III standing, see Steel Co., supra, at 92, 118 S.Ct. 1003. Second, although petitioners are correct that the Fifth Circuit on remand fell short in its attention to Amchem in passing on the Rule 23(a) issues, these points are dealt with in the Court's review of the certification on the Fifth Circuit's "limited fund" theory under Rule 23(b)(1)(B). Pp. 2307-2308.

2. Applicants for contested certification of a mandatory settlement class on a limited fund theory under Rule 23(b)(1)(B) must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing the conflicting interests of class members. Pp. 2308-2315.

(a) In drafting Rule 23(b), the Civil Rules Advisory Committee sought to catalogue in functional terms those recurrent life patterns which call for mass litigation through representative parties. Rule 23(b)(1)(B) (read with subdivision (c)(2)) provides for certification of a class whose members have no right to withdraw, when "the prosecution of separate actions ... would create a risk" of "adjudications with respect to individual [class] members ... which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Among the traditional varieties of representative suits encompassed by Rule 23(b)(1)(B) is the limited fund class action. In such a case, equity required absent parties to be represented, joinder being impractical, where individual claims to be satisfied from the one asset would, as a practical matter, prejudice the rights of absent claimants against a fund inadequate to pay them all. Pp. 2308-2310.

(b) The cases forming the limited fund class action's pedigree as understood by Rule 23's drafters have a number of common characteristics, despite the variety of circumstances from which they arose. These characteristics show what the Advisory Committee must have assumed would be at least a sufficient set of conditions to justify binding absent members of a Rule 23(b)(1)(B) class, from which no one has the right to secede. In sum, mandatory class treatment through representative actions on a limited fund theory was justified with reference to a "fund" with a definitely ascertained limit that was inadequate to pay all claims against it, all of which was distributed to satisfy all those with claims based on a common theory of liability, by an equitable, pro rata distribution. Pp. 2311-2312.

(c) There are good reasons to treat the foregoing characteristics as presumptively necessary, and not merely sufficient, to satisfy the limited fund rationale for a mandatory class action. At the least, the burden of justification rests on the proponent of any departure from the traditional norm. Although Rule 23(b)(1)(B)'s text is open to a more lenient limited fund concept, the greater the leniency in departing from the historical model, the greater the likelihood of abuse in ways that are apparent when the limited fund criteria are applied to this case. The prudent course, therefore, is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model. This limiting construction finds support in the Advisory Committee's expressions of understanding, ***2301** which clearly did not contemplate that the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale. The construction also minimizes potential conflict with the Rules Enabling Act, which requires that rules of procedure "not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). See, e.g., Amchem, supra, at 613, 117 S.Ct. 2231. Finally, the Court's construction avoids serious constitutional concerns, including the Seventh Amendment jury trial rights of absent class members, and the due process principle that, with limited exceptions, one is not bound by a

judgment in personam in litigation in which he is not a party, Hansberry v. Lee, 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed. 22. Pp. 2312-2315.

3. The record on which the District Court rested its class certification did not support the essential premises of a mandatory limited fund class action. It did not demonstrate that the fund was limited except by the agreement of the parties, and it affirmatively allowed exclusions from the class and allocations of assets at odds with the concept of limited fund treatment and the Rule 23(a) structural protections explained in Amchem. Pp. 2316-2322.

(a) The certification defect going to the most characteristic feature of a limited fund action was the uncritical adoption by both courts below of figures agreed upon by the parties in defining the fund's limits. In a settlement- only class action such as this, the settling parties must present not only their agreement, but evidence on which the district court may ascertain the fund's limits, with support in findings of fact following a proceeding in which the evidence is subject to challenge. Here, there was no adequate demonstration of the fund's upper limit. The "fund" comprised both Fibreboard's general assets and the insurance provided by the two policies. As to the general assets, the lower courts concluded that Fibreboard had a then- current sale value of $235 million that could be devoted to the limited fund. While that estimate may have been conservative, at least the District Court heard evidence and made an independent finding at some point in the proceedings. The same, however, cannot be said for the value of the disputed insurance. Instead of independently evaluating potential insurance funds, the courts below simply accepted the $2 billion Trilateral Settlement Agreement figure, concluding that where insurance coverage is disputed, it is appropriate to value the insurance asset at a settlement value. Such value may be good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation. No such assumption may be indulged in here, since at least some of the same lawyers representing the class also negotiated the separate settlement of 45,000 pending claims, the full payment of which was contingent on a successful global settlement agreement or the successful resolution of the insurance coverage dispute. Class counsel thus had great incentive to reach any global settlement that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class. See Amchem, supra, at 626-627, 117 S.Ct. 2231. Pp. 2316-2318.

(b) The settlement certification also fell short with respect to the inclusiveness of the class and the fairness of distributions to those within it. The class excludes myriad claimants with causes of action, or foreseeable causes of action, arising from exposure to Fibreboard asbestos. The number of those outside the class who settled with a reservation of rights may be uncertain, but there is no such uncertainty about the significance of the settlement's exclusion of the 45,000 inventory plaintiffs and the plaintiffs in the unsettled present cases, estimated at more than 53,000. A mandatory limited fund settlement class cannot qualify for certification when in the very negotiations aimed at a class settlement, class counsel agree to exclude what may turn out to be as much as a third of the claimants that negotiators thought might eventually be involved, a substantial number of whom class counsel represent. ***2302** The settlement certification is likewise deficient as to the fairness of the fund's distribution among class members. First, a class including holders of present and future claims (some of the latter involving no physical injury and claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel. See Amchem, supra, at 627, 117 S.Ct. 2231. No such procedure was employed here. Second, the class included those exposed to Fibreboard's asbestos products both before and after 1959, the year that saw the expiration of Fibreboard's Continental policy, which provided the bulk of the insurance funds for the settlement. Pre-1959 claimants accordingly had more valuable claims than post-1959 claimants, the consequence being a second instance of disparate interests within the certified class. While at some point there must be an end to reclassification with separate counsel, these two instances of conflict are well within Amchem's structural protection requirement. Pp. 2318-2321.

(c) A third contested feature that departs markedly from the limited fund antecedents is the ultimate provision for a fund smaller than the assets understood by the Fifth Circuit to be available for payment of the mandatory class members' claims. Most notably, Fibreboard was allowed to retain virtually its entire net worth. Given this Court's treatment of the two preceding certification deficiencies, there is no need to decide whether this feature would alone be fatal to

the global settlement. To ignore it entirely, however, would be so misleading that the Court simply identifies the issue it raises, without purporting to resolve it at this time. Fibreboard listed its supposed entire net worth as a component of the total (and allegedly inadequate) assets available for claimants, but subsequently retained all but $500,000 of that equity for itself. It hardly appears that such a regime is the best that can be provided for class members. Whether in a case where a settlement saves transaction costs that would never have gone into a class member's pocket in the absence of settlement, a credit for some of the savings may be recognized as an incentive to settlement is at least a legitimate question, which the Court leaves for another day. Pp. 2321-2322.

134 F.3d 668, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, KENNEDY, THOMAS, and GINSBURG, JJ., joined. REHNQUIST, C.J., filed a concurring opinion, in which SCALIA and KENNEDY, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, J., joined.

Laurence H. Tribe, Cambridge, MA, for petitioners.

Elihu Inselbuch, New York City, for respondents.

For U.S. Supreme Court Briefs See:

1998 WL 464933 (Pet.Brief)

1998 WL 601116 (Resp.Brief)

1998 WL 601118 (Resp.Brief)

1998 WL 727536 (Reply.Brief)

1998 WL 457679 (Amicus.Brief)

1998 WL 464927 (Amicus.Brief)

1998 WL 596788 (Amicus.Brief)

1998 WL 601109 (Amicus.Brief)

1998 WL 601111 (Amicus.Brief)

For Transcript of Oral Argument See:

1998 WL 849388 (U.S.Oral.Arg.)

Justice SOUTER delivered the opinion of the Court.

This case turns on the conditions for certifying a mandatory settlement class on a limited fund theory under Federal Rule of Civil Procedure 23(b)(1)(B). We hold that applicants for contested certification on this rationale must show that the fund is limited by more than the agreement of the parties, and has been allocated to claimants belonging within the class by a process addressing any conflicting interests of class members.

I

Like Amchem Products, Inc. v. Windsor, 521 U.S. 591, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997), this case is a class action prompted by the elephantine mass of asbestos cases, and our discussion in Amchem will suffice to show how this litigation defies customary judicial administration and calls for national legislation. [FN1] In 1967, one of the first actions ***2303** for personal asbestos injury was filed in the United States District Court for the Eastern District of Texas against a group of asbestos manufacturers. App. to Pet. for Cert. 252a. In the 1970's and 1980's, plaintiffs' lawyers throughout the country, particularly in East Texas, honed the litigation of asbestos claims to the point of almost mechanical regularity, improving the forensic identification of diseases caused by asbestos, refining theories of liability, and often settling large inventories of cases. See D. Hensler, W. Felstiner, M. Selvin, & P. Ebener, Asbestos in the Courts: The Challenge of Mass Toxic Torts vii (1985); McGovern, Resolving Mature Mass Tort Litigation, 69 B.U.L.Rev. 659, 660-661 (1989); see also App. to Pet. for Cert. 253a.

FN1. "[This] is a tale of danger known in the 1930s, exposure inflicted upon millions of Americans in the 1940s and 1950s, injuries that began to take their toll in the 1960s, and a flood of lawsuits beginning in the 1970s." On the basis of past and current filing data, and because of a latency period that may last as long as 40 years for some asbestos related diseases, a continuing stream of claims can be expected. The final toll of asbestos related injuries is unknown. Predictions have been made of 200,000 asbestos disease deaths before the year 2000 and as many as 265,000 by the year 2015.
" 'The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow, long

> delays are routine; trials are too long, the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.' " Amchem Products, Inc. v. Windsor, 521 U.S., at 598, 117 S.Ct. 2231 (quoting Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar.1991) (hereinafter Report)). We noted in Amchem that the Judicial Conference Ad Hoc Committee on Asbestos Litigation in 1991 had called for "federal legislation creating a national asbestos dispute-resolution scheme." Ibid. (citing Report 3, 27-35 (Mar.1991)). To date Congress has not responded.

Respondent Fibreboard Corporation was a defendant in the 1967 action. Although it was primarily a timber company, from the 1920's through 1971 the company manufactured a variety of products containing asbestos, mainly for high-temperature industrial applications. As the tide of asbestos litigation rose, Fibreboard found itself litigating on two fronts. On one, plaintiffs were filing a stream of personal injury claims against it, swelling throughout the 1980's and 1990's to thousands of new claims for compensatory damages each year. Id., at 265a; App. 1040a. On the second front, Fibreboard was battling for funds to pay its tort claimants. From May, 1957, through March, 1959, respondent Continental Casualty Company had provided Fibreboard with a comprehensive general liability policy with limits of $1 million per occurrence, $500,000 per claim, and no aggregate limit. Fibreboard also claimed that respondent Pacific Indemnity Company had insured it from 1956 to 1957 under a similar policy. App. to Pet. for Cert. 267a-268a. Beginning in 1979, Fibreboard was locked in coverage litigation with Continental and Pacific in a California state trial court, which in 1990 held Continental and Pacific responsible for indemnification as to any claim by a claimant exposed to Fibreboard asbestos products prior to their policies' respective expiration dates. Id., at 268a-269a. The decree also required the insurers to pay the full cost of defense for each claim covered. Ibid. The insurance companies appealed.

With asbestos case filings continuing unabated, and its secure insurance assets almost depleted, Fibreboard in 1988 began a practice of "structured settlement," paying plaintiffs 40 percent of the settlement figure up front with the balance contingent upon a successful resolution of the coverage dispute. [FN2] By 1991, however, the pace of filings forced Fibreboard to start settling cases entirely with the assignments of its rights against Continental, with no initial payment. To reflect the risk that Continental might prevail in the coverage dispute, these assignment agreements generally carried a figure about twice the nominal amount of earlier settlements. Continental challenged Fibreboard's right to make unilateral assignments, ***2304** but in 1992 a California state court ruled for Fibreboard in that dispute. [FN3]

> FN2. Because Fibreboard's insurance policy with Continental expired in 1959, before the global settlement the settlement value of claims by victims exposed to Fibreboard's asbestos prior to 1959 was much higher than for victims exposed after 1959, where the only right of recovery was against Fibreboard itself. See In re Asbestos Litigation, 90 F.3d 963, 1012-1013 (C.A.5 1996) (SMITH, J., dissenting).

> FN3. Id., at 969, and n. 1 (citing Andrus v. Fibreboard, No. 614747- 3 (Sup.Ct., Alameda Cty. June 1, 1992)). Continental appealed, and, after the Global Settlement Agreement was reached in this case, but before the fairness hearing, see infra, at 2305, a California appellate court reversed. See 90 F.3d, at 969, and n. 1 (citing Fibreboard Corp. v. Continental Casualty Co., No. A059716 (Cal.App., Oct. 19, 1994)). See 90 F.3d, at 969 and n. 1. Continental and Fibreboard had each brought actions seeking to establish (or challenge) the validity of Fibreboard's assignment-settlement program, but only Andrus produced a definitive ruling as opposed to a settlement. See App. to Pet. for Cert. 288a-290a.

Meanwhile, in the aftermath of a 1990 Federal Judicial Center conference on the asbestos litigation crisis, Fibreboard approached a group of leading asbestos plaintiffs' lawyers, offering to discuss a "global settlement" of its asbestos personal-injury liability. Early negotiations bore relatively little fruit, save for the December 1992 settlement by assignment of a significant inventory of pending claims. This settlement brought Fibreboard's deferred settlement obligations to more than $1.2 billion, all contingent upon victory over Continental on the scope of coverage and the validity of the settlement assignments.

In February 1993, after Continental had lost on both issues at the trial level, and thus faced the possibility of practically unbounded liability, it too joined the global settlement negotiations. Because Continental conditioned its part in any settlement on a guarantee of "total peace," ensuring no unknown future

liabilities, talks focused on the feasibility of a mandatory class action, one binding all potential plaintiffs and giving none of them any choice to opt out of the certified class. Negotiations continued throughout the spring and summer of 1993, but the difficulty of settling both actually pending and potential future claims simultaneously led to an agreement in early August to segregate and settle an inventory of some 45,000 pending claims, being substantially all those filed by one of the plaintiffs' firms negotiating the global settlement. The settlement amounts per claim were higher than average, with one-half due on closing and the remainder contingent upon either a global settlement or Fibreboard's success in the coverage litigation. This agreement provided the model for settling inventory claims of other firms.

With the insurance companies' appeal of the consolidated coverage case set to be heard on August 27, the negotiating parties faced a motivating deadline, and about midnight before the argument, in a coffee shop in Tyler, Texas, the negotiators finally agreed upon $1.535 billion as the key term of a "Global Settlement Agreement." $1.525 billion of this sum would come from Continental and Pacific, in the proportion established by the California trial court in the coverage case, while Fibreboard would contribute $10 million, all but $500,000 of it from other insurance proceeds, App. 84a. The negotiators also agreed to identify unsettled present claims against Fibreboard and set aside an as-then unspecified fund to resolve them, anticipating that the bulk of any excess left in that fund would be transferred to class claimants. Ahearn v. Fibreboard Corp., 162 F.R.D. 505, 517 (E.D.Tex.1995). The next day, as a hedge against the possibility that the Global Settlement Agreement might fail, plaintiffs' counsel insisted as a condition of that agreement that Fibreboard and its two insurers settle the coverage dispute by what came to be known as the "Trilateral Settlement Agreement." The two insurers agreed to provide Fibreboard with funds eventually set at $2 billion to defend against asbestos claimants and pay the winners, should the Global Settlement Agreement fail to win approval. Id., at 517, 521; see also App. to Pet. for Cert. 492a. [FN4]

FN4. Two related settlement agreements accompanied the Global and Trilateral Settlement Agreements. The first, negotiated with representatives of Fibreboard's major codefendants, preserved credit rights for codefendant third parties, In re Asbestos Litigation, 90 F.3d 963, 973 (C.A.5 1996); the second provided that final approval of the Global Settlement Agreement would not constitute a "settlement" under the Longshore and Harbor Workers' Compensation Act, 33 U S C. § 933(g), 162 F.R.D., at 521-522. Neither of these agreements is before the Court.

***2305** On September 9, 1993, as agreed, a group of named plaintiffs filed an action in the United States District Court for the Eastern District of Texas, seeking certification for settlement purposes of a mandatory class comprising three groups: all persons with personal injury claims against Fibreboard for asbestos exposure who had not yet brought suit or settled their claims before the previous August 27; those who had dismissed such a claim but retained the right to bring a future action against Fibreboard; and "past, present and future spouses, parents, children, and other relatives" of class members exposed to Fibreboard asbestos. [FN5] The class did not include claimants with actions presently pending against Fibreboard or claimants "who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy." Id., at 534a-535a. The complaint pleaded personal injury claims against Fibreboard, and, as justification for class certification, relied on the shared necessity of ensuring insurance funds sufficient for compensation. Id., at 552a-569a. After Continental and Pacific had obtained leave to intervene as party- defendants, the District Court provisionally granted class certification, enjoined commencement of further separate litigation against Fibreboard by class members, and appointed a guardian ad litem to review the fairness of the settlement to the class members. See In re Asbestos Litigation, 90 F.3d 963, 972 (C.A.5 1996).

FN5 The final judgment regarding class certification in the District Court defined the class as follows:

"(a) All persons (or their legal representatives) who prior to August 27, 1993 were exposed, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), to asbestos or to asbestos-containing products for which Fibreboard may bear legal liability and who have not, before August 27, 1993, (i) filed a lawsuit for any asbestos related personal injury, or damage, or death arising from such exposure in any court against Fibreboard or persons or entities for whose actions or omissions Fibreboard bears legal liability; or (ii) settled a claim for any asbestos-related personal injury, or damage, or death arising from such exposure with

> Fibreboard or with persons or entities for whose actions or omissions Fibreboard bears legal liability;
> "(b) All persons (or their legal representatives) exposed to asbestos or to asbestos-containing products, directly or indirectly (including but not limited to exposure through the exposure of a spouse, household member or any other person), who dismissed an action prior to August 27, 1993 without prejudice against Fibreboard, and who retain the right to sue Fibreboard upon development of a nonmalignant disease process or a malignancy; provided, however, that the Settlement Class does not include persons who filed and, for cash payment or some other negotiated value, dismissed claims against Fibreboard, and whose only retained right is to sue Fibreboard upon development of an asbestos-related malignancy; and
> "(c) All past, present and future spouses, parents, children and other relatives (or their legal representatives) of the class members described in paragraphs (a) and (b) above, except for any such person who has, before August 27, 1993, (i) filed a lawsuit for the asbestos-related personal injury, or damage, or death of a class member described in paragraph (a) or (b) above in any court against Fibreboard (or against entities for whose actions or omissions Fibreboard bears legal liability), or (ii) settled a claim for the asbestos-related personal injury, or damage, or death of a class member described in (a) or (b) above with Fibreboard (or with entities for whose actions or omissions Fibreboard bears legal liability)." App. to Pet. for Cert. 534a-535a.

As finally negotiated, the Global Settlement Agreement provided that in exchange for full releases from class members, Fibreboard, Continental, and Pacific would establish a trust to process and pay class members' asbestos personal injury and death claims. Claimants seeking compensation would be required to try to settle with the trust. If initial settlement attempts failed, claimants would have to proceed to mediation, arbitration, and a mandatory settlement conference. Only after exhausting that process could claimants go to court against the trust, subject to a limit of $500,000 per claim, with punitive damages and prejudgment interest barred. Claims resolved without litigation would be discharged over three years, while judgments would be paid out over a 5- to 10-year period. The Global Settlement Agreement also contained spendthrift provisions to conserve the trust, and provided for paying more serious claims first in the event of a shortfall in any given year. Id., at 973.

After an extensive campaign to give notice of the pending settlement to potential class ***2306** members, the District Court allowed groups of objectors, including petitioners here, to intervene. After an 8-day fairness hearing, the District Court certified the class and approved the settlement as "fair, adequate, and reasonable," under Rule 23(e). Ahearn, 162 F.R.D., at 527. Satisfied that the requirements of Rule 23(a) were met, id., at 523-526, [FN6] the District Court certified the class under Rule 23(b)(1)(B), [FN7] citing the risk that Fibreboard might lose or fare poorly on appeal of the coverage case or lose the assignment-settlement dispute, leaving it without funds to pay all claims. Id., at 526. The "allowance of individual adjudications by class members," the District Court concluded, "would have destroyed the opportunity to compromise the insurance coverage dispute by creating the settlement fund, and would have exposed the class members to the very risks that the settlement addresses." Id., at 527. In response to intervenors' objections that the absence of a "limited fund" precluded certification under Rule 23(b)(1)(B), the District Court ruled that although the subdivision is not so restricted, if it were, this case would qualify. It found both the "disputed insurance asset liquidated by the $1.535 billion Global Settlement," and, alternatively, "the sum of the value of Fibreboard plus the value of its insurance coverage," as measured by the insurance funds' settlement value, to be relevant "limited funds." App. to Pet. for Cert. 491a-492a.

> FN6. "Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical ... of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')." Amchem Products, Inc. v. Windsor, 521 U.S. 591, 613, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

> FN7. Rule 23(b)(1)(B) provides that "[a]n action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of ... (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

On appeal, the Fifth Circuit affirmed both as to class certification and adequacy of settlement. In re Asbestos Litigation, supra. [FN8] Agreeing with the District Court's application of Rule 23(a), the Court of Appeals found that there was commonality in class members' shared interest in securing and equitably distributing maximum possible settlement funds, and that the representative plaintiffs were sufficiently typical both in sharing that interest and in basing their claims on the same legal and remedial theories that absent class members might raise. Id., at 975-976. The Fifth Circuit also thought that there were no conflicts of interest sufficiently serious to undermine the adequacy of class counsel's representation. Id., at 976-982. [FN9] As to Rule 23(b)(1)(B), the Court approved the class certification on a "limited fund" rationale based on the threat to "the ability of other members of the class to receive full payment for their injuries from Fibreboard's limited assets." Ibid. [FN10] The Court of Appeals cited expert testimony that Fibreboard faced enormous potential liabilities and defense costs that would likely equal or exceed the amount of damages paid out, and concluded that even combining Fibreboard's value of some $235 million with the $2 billion provided in the Trilateral Settlement Agreement, the company would be unable ***2307** to pay all valid claims against it within five to nine years. Ibid. Judge Smith dissented, arguing among other things that the majority had skimped on serious due process concerns, had glossed over problems of commonality, typicality, and adequacy of representation, and had ignored a number of justiciability issues. See generally id., at 993-1026. [FN11]

FN8. Continental and Pacific also filed a class action against a defendant class essentially identical to the plaintiff class in the Global Settlement Agreement as well as a class of third parties with asbestos-related claims against Fibreboard, seeking a declaration that the Trilateral Settlement Agreement was fair and reasonable. The District Court certified the class and approved the Trilateral Settlement Agreement, which the Fifth Circuit consolidated with the review of the case below and affirmed. See In re Asbestos Litigation, 90 F.3d, at 974, 991-993. That decision is now final and is not before this Court.

FN9. As the objectors did not challenge the adequacy of representation of class representatives, the Fifth Circuit did not consider the issue. Id., at 976, n. 10. Likewise, no party raised concerns with Rule 23(a)'s numerosity requirement.

FN10. Abandoning the District Court's alternative rationale, the Court of Appeals rested entirely on a limited fund theory.

FN11. The Fifth Circuit denied rehearing en banc, with Judge Smith, joined by five other Circuit Judges, dissenting In re Asbestos Litigation, 101 F.3d 368, 369 (1996).

Shortly thereafter, this Court decided Amchem and proceeded to vacate the Fifth Circuit's judgment and remand for further consideration in light of that decision. 521 U.S. 1114, 117 S.Ct. 2503, 138 L.Ed.2d 1008 (1997). On remand, the Fifth Circuit again affirmed, in a brief per curiam opinion, distinguishing Amchem on the grounds that the instant action proceeded under Rule 23(b)(1)(B) rather than (b)(3), and did not allocate awards according to the nature of the claimant's injury. In re Asbestos Litigation, 134 F.3d 668, 669-670 (1998). Again citing the findings on certification under Rule 23(b)(1)(B), the Fifth Circuit affirmed as "incontestable" the District Court's conclusion that the terms of the subdivision had been met. Id., at 670. The Court of Appeals acknowledged Amchem 's admonition that settlement class actions may not proceed unless the requirements of Rule 23(a) are met, but noted that the District Court had made extensive findings supporting its Rule 23(a) determinations. Ibid. Judge Smith again dissented, reiterating his previous concerns, and argued specifically that the District Court erred in certifying the class under Rule 23(b)(1)(B) on a "limited fund" theory because the only limited fund in the case was a creature of the settlement itself. Id., at 671-674.

We granted certiorari, 524 U.S. ----, 118 S.Ct. 2339, 141 L.Ed.2d 711 (1998), and now reverse.

II

[1][2][3][4] The nub of this case is the certification of the class under Rule 23(b)(1)(B) on a limited fund rationale, but before we reach that issue, there are two threshold matters. First, petitioners call the class claims nonjusticiable under Article III, saying that this is a feigned action initiated by Fibreboard to control its future asbestos tort liability, with the "vast majority" of the "exposure-only" class members being without injury in fact and hence without standing to sue. Brief for Petitioners 44-50. Ordinarily, of course, this or any other Article III court must be sure of its own jurisdiction before getting to the merits. Steel Co. v. Citizens for a Better Environment, 523

U.S. 83, 88-89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). But the class certification issues are, as they were in Amchem, "logically antecedent" to Article III concerns, 521 U.S., at 612, 117 S.Ct. 2231, and themselves pertain to statutory standing, which may properly be treated before Article III standing, see Steel Co., supra, at 92, 118 S.Ct. 1003. Thus the issue about Rule 23 certification should be treated first, "mindful that [the Rule's] requirements must be interpreted in keeping with Article III constraints...." Amchem, supra, at 612-613, 117 S.Ct. 2231.

Petitioners also argue that the Fifth Circuit on remand disregarded Amchem in passing on the Rule 23(a) issues of commonality, typicality, and adequacy of representation. Brief for Petitioners 13-22. We agree that in reinstating its affirmance of the District Court's certification decision, the Fifth Circuit fell short in its attention to Amchem 's explanation of the governing legal standards. Two aspects in particular of the District Court's certification should have received more detailed treatment by the Court of Appeals. First, the District Court's enquiry into both commonality and typicality focused almost entirely on the terms of the settlement. See Ahearn, 162 F.R.D., at 524. [FN12] ***2308** Second, and more significantly, the District Court took no steps at the outset to ensure that the potentially conflicting interests of easily identifiable categories of claimants be protected by provisional certification of subclasses under Rule 23(c)(4), relying instead on its post-hoc findings at the fairness hearing that these subclasses in fact had been adequately represented. As will be seen, however, these points will reappear when we review the certification on the Court of Appeals's "limited fund" theory under Rule 23(b)(1)(B). We accordingly turn directly to that.

> FN12. In Amchem, the Court found that class members' shared exposure to asbestos was insufficient to meet the demanding predominance requirements of Rule 23(b)(3). Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623-624, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) We left open the possibility, however, that such commonality might suffice for the purposes of Rule 23(a). Ibid.

III

A

[5][6][7] Although representative suits have been recognized in various forms since the earliest days of English law, see generally S. Yeazell, From Medieval Group Litigation to the Modern Class Action (1987); see also Marcin, Searching for the Origin of the Class Action, 23 Cath. U.L.Rev. 515, 517-524 (1973), class actions as we recognize them today developed as an exception to the formal rigidity of the necessary parties rule in equity, see Hazard, Gedid, & Sowle, An Historical Analysis of the Binding Effect of Class Suits, 146 U. Pa. L.Rev. 1849, 1859-1860 (1998) (hereinafter Hazard, Gedid, & Sowle), as well as from the bill of peace, an equitable device for combining multiple suits, see Z. Chafee, Some Problems of Equity 161-167, 200-203 (1950). The necessary parties rule in equity mandated that "all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be." West v. Randall, 29 F. Cas. 718, 721 (No. 17,424) (C.C.D.R.I.1820) (Story, J.). But because that rule would at times unfairly deny recovery to the party before the court, equity developed exceptions, among them one to cover situations "where the parties are very numerous, and the court perceives, that it will be almost impossible to bring them all before the court; or where the question is of general interest, and a few may sue for the benefit of the whole; or where the parties form a part of a voluntary association for public or private purposes, and may be fairly supposed to represent the rights and interests of the whole...." Id., at 722; see J. Story, Commentaries on Equity Pleadings § 97 (J. Gould 10th rev. ed. 1892); F. Calvert, A Treatise upon the Law Respecting Parties to Suits in Equity 17- 29 (1837) (hereinafter Calvert, Parties to Suits in Equity). From these roots, modern class action practice emerged in the 1966 revision of Rule 23. In drafting Rule 23(b), the Advisory Committee sought to catalogue in "functional" terms "those recurrent life patterns which call for mass litigation through representative parties." Kaplan, A Prefatory Note, 10 B.C. Ind. & Com. L.Rev. 497 (1969).

[8][9][10] Rule 23(b)(1)(B) speaks from "a vantage point within the class, [from which the Advisory Committee] spied out situations where lawsuits conducted with individual members of the class would have the practical if not technical effect of concluding the interests of the other members as well, or of impairing the ability of the others to protect their own interests." Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L.Rev. 356, 388 (1967) (hereinafter Kaplan, Continuing Work). Thus, the subdivision (read with subdivision (c)(2)) provides for certification of a class whose members have no right to withdraw, when "the prosecution of

separate actions ... would create a risk" of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests." Fed. Rule Civ. Proc. 23(b)(1)(B). [FN13] Classic examples of such a risk of impairment may, for example, be ***2309** found in suits brought to reorganize fraternal-benefit societies, see, e.g., Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921); actions by shareholders to declare a dividend or otherwise to "fix [their] rights," Kaplan, Continuing Work 388; and actions charging "a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class" of beneficiaries, requiring an accounting or similar procedure "to restore the subject of the trust," Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., p. 696 (hereinafter Adv. Comm. Notes). In each of these categories, the shared character of rights claimed or relief awarded entails that any individual adjudication by a class member disposes of, or substantially affects, the interests of absent class members.

FN13. In contrast to class actions brought under subdivision (b)(3), in cases brought under subdivision (b)(1), Rule 23 does not provide for absent class members to receive notice and to exclude themselves from class membership as a matter of right. See 1 H Newberg & A. Conte, Class Actions § 4.01, p. 4-6 (3d ed.1992) (hereinafter Newberg). It is for this reason that such cases are often referred to as "mandatory" class actions.

[11] Among the traditional varieties of representative suit encompassed by Rule 23(b)(1)(B) were those involving "the presence of property which call [ed] for distribution or management," J. Moore & J. Friedman, 2 Federal Practice 2240 (1938) (herein after Moore & Friedman). One recurring type of such suits was the limited fund class action, aggregating "claims ... made by numerous persons against a fund insufficient to satisfy all claims." Adv. Comm. Notes 697; cf. Newberg § 4.09, at 4-33 ("Classic" limited fund class actions "include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit, and others"). [FN14] The Advisory Committee cited Dickinson v. Burnham, 197 F.2d 973(CA2), cert. denied, 344 U.S. 875, 73 S.Ct. 169, 97 L.Ed. 678 (1952), as illustrative of this tradition. In Dickinson, investors hoping to save a failing company had contributed some $600,000, which had been misused until nothing was left but a pool of secret profits on a fraction of the original investment. In a class action, the District Court took charge of this fund, subjecting it to a constructive trust for division among subscribers who demonstrated their claims, in amounts proportional to each class member's percentage of all substantiated claims. 197 F.2d, at 978. [FN15] The Second Circuit approved the class action and the distribution of the entire pool to claimants, noting that "[a]lthough none of the contributors has been paid in full, no one ... now asserts or suggests that they should have full recovery ... as on an ordinary tort liability for conspiracy and defrauding. The court's power of disposition over the fund was therefore absolute and final." Id., at 980. [FN16] As the Advisory Committee recognized ***2310** in describing Dickinson, equity required absent parties to be represented, joinder being impractical, where individual claims to be satisfied from the one asset would, as a practical matter, prejudice the rights of absent claimants against a fund inadequate to pay them all.

FN14. Indeed, Professor Kaplan, reporter to the Advisory Committee's 1966 revision of Rule 23, commented in a letter to another member of the Advisory Committee that the phrase " 'impair or impede the ability of the other members to protect their interests' " is "redolent of claims against a fund." Letter from Benjamin Kaplan to John P Frank, Feb. 7, 1963, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, No. CI-6312- 31, p. 2.

Some fund-related class actions involved claims for the creation or preservation of a specific fund subject to the interests of numerous claimants. See, e g., City & County of San Francisco v. Market Street R. Co., 95 Cal.App.2d 648, 213 P.2d 780 (1950). The rationale in such cases for representative plaintiffs suing on behalf of all similarly situated potential parties was that benefits arising from the action necessarily inured to the class as a whole. Another type of fund case involved the adjudication of the rights of all participants in a fund in which the participants had common rights. See, e.g., Hartford Life Ins. Co. v. Ibs, 237 U S. 662, 35 S.Ct. 692, 59 L.Ed. 1165 (1915); Supreme Council of Royal Arcanum v. Green, 237 U.S. 531, 35 S.Ct. 724, 59 L.Ed. 1089 (1915); Hartford Life Ins. Co. v. Barber, 245 U.S. 146, 38 S.Ct. 54, 62 L.Ed. 208 (1917); see also Smith v. Swormstedt, 16 How. 288, 14 L.Ed. 942

(1853). In such cases, regardless of the size of any individual claimant's stake, the adjudication would determine the operating rules governing the fund for all participants. This category is more analogous in modern practice to class actions seeking structural injunctions and is not at issue in this case.

FN15. The District Court in Dickinson, as was the usual practice in such cases, distributed the limited fund only after notice had been given to all class members, allowing them to come into the suit, prove their claim, and share in the recovery. See 197 F.2d, at 978; see also Adv. Comm. Notes 697 (describing limited fund class actions as involving an "action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund").

FN16. As Dickinson demonstrates, the immediate precursor to the type of limited fund class action invoked in this case was a subset of "hybrid" class actions under the 1938 version of Rule 23. Cf. 1 Newberg § 1.09, at 1-25. The original Rule 23 categorized class actions by "the character of the right sought to be enforced for or against the class," dividing such actions into "(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it; (2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or (3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought." Fed. Rule Civ. Proc. 23(a) (1938 ed., Supp. V). See Moore & Friedman 2240; see also Moore & Cohn, Federal Class Actions, 32 Ill. L.Rev. 307, 317-318 (1937); Moore, Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft, 25 Geo. L.J. 551, 574 (1937).

Equity, of course, recognized the same necessity to bind absent claimants to a limited fund when no formal imposition of a constructive trust was entailed. In Guffanti v. National Surety Co., 196 N.Y. 452, 458, 90 N.E. 174, 176 (1909), for example, the defendant received money to supply steamship tickets and had posted a $15,000 bond as required by state law. He converted to personal use funds collected from more than 150 ticket purchasers, was then adjudged bankrupt, and absconded. One of the defrauded ticket purchasers sued the surety in equity on behalf of himself and all others like him. Over the defendant's objection, the New York Court of Appeals sustained the equitable class suit, citing among other considerations the fact that all recovery had to come from a "limited fund out of which the aggregate recoveries must be sought" that was inadequate to pay all claims, and subject to pro rata distribution. Id., at 458, 90 N.E. 174, 90 N.E., at 176. See Hazard, Gedid, & Sowle 1915 ("[Guffanti] explained that when a debtor's assets were less than the total of the creditors' claims, a binding class action was not only permitted but was required; otherwise some creditors (the parties) would be paid and others (the absentees) would not"). See also Morrison v. Warren 174 Misc. 233, 234, 20 N.Y.S.2d 26, 27 (1940) (suit on behalf of more than 400 beneficiaries of an insurance policy following a fire appropriate where "the amount of the claims ... greatly exceeds the amount of the insurance"); National Surety Co. v. Graves, 211 Ala. 533, 534, 101 So. 190 (1924) (suit against a surety company by stockholders "for the benefit of themselves and all others similarly situate who will join the suit" where it was alleged that individual suits were being filed on surety bonds that "would result in the exhaustion of the penalties of the bonds, leaving many stockholders without remedy").

[12] Ross v. Crary, 1 Paige Ch. 416, 417-418 (N.Y.Ch.1829), presents the concept of the limited fund class action in another incarnation. "[D]ivers suits for general legacies," id., at 417, were brought by various legatees against the executor of a decedent's estate. The Ross court stated that where "there is an allegation of a deficiency of the fund, so that an account of the estate is necessary," the court will "direc[t] an account in one cause only" and "stay the proceedings in the others, leaving all the parties interested in the fund, to come in under the decree." Id., at 417-418. Thus, in equity, legatee and creditor bills against the assets of a decedent's estate had to be brought on behalf of all similarly situated claimants where it was clear from the pleadings that the available portion of the estate could not satisfy the aggregate claims against it. [FN17]

FN17. In early creditors' bills, for example, equity would order a master to call for all creditors to prove their debts, to take account of the entire estate, and to apply the estate in payment of the debts. See 1 J. Story, Commentaries on Equity Jurisprudence §§ 547, 548 (I. Redfield 8th rev. ed. 1861). This decree, with its equitable benefit and incorporation of all creditors was not, however, available when the executor of the estate admitted assets sufficient to cover its debts, because where

assets were not limited, no prejudice to the other creditors would result from the simple payment of the debt to the creditor who brought the bill. See Woodgate v. Field, 2 Hare 211, 213, 67 Eng. Rep. 88, 89 (Ch. 1842) ("The reason for ... the usual form of decree ... has no application where assets are admitted, for the executor thereby makes himself liable to the payment of the debt. In such a case, the other creditors cannot be prejudiced by a decree for payment of the Plaintiff's debt; and the object of the special form of the decree in a creditors' suit fails"); see also Hallett v. Hallett, 2 Paige 15, 21 (N.Y.1829) ("[I]f by the answer of the defendant [in a creditors' or legatees' suit] it appears there will be a deficiency of assets so that all the creditors cannot be paid in full, or that there must be an abatement of the complainant's legacy, the court will make a decree for the general administration of the estate, and a distribution of the same among the several parties entitled thereto, agreeable to equity").

***2311** B

[13][14] The cases forming this pedigree of the limited fund class action as understood by the drafters of Rule 23 have a number of common characteristics, despite the variety of circumstances from which they arose. The points of resemblance are not necessarily the points of contention resolved in the particular cases, but they show what the Advisory Committee must have assumed would be at least a sufficient set of conditions to justify binding absent members of a class under Rule 23(b)(1)(B), from which no one has the right to secede.

The first and most distinctive characteristic is that the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims. The concept driving this type of suit was insufficiency, which alone justified the limit on an early feast to avoid a later famine. See, e.g., Guffanti, supra, at 457, 90 N.E., at 176 ("The total amount of the claims exceeds the penalty of the bond .... A just and equitable payment from the bond would be a distribution pro rata upon the amount of the several embezzlements. Unless in a case like this the amount of the bond is so distributed among the persons having claims which are secured thereby, it must necessarily result in a scramble for precedence in payment, and the amount of the bond may be paid to the favored, or to those first obtaining knowledge of the embezzlements"); Graves, supra, at 534, 101 So., at 190 ("The primary equity of the bill is the adjustment of claims and the equitable apportionment of a fund provided by law, which is insufficient to pay claimants in full"). The equity of the limitation is its necessity.

Second, the whole of the inadequate fund was to be devoted to the overwhelming claims. See, e.g., Dickinson, 197 F.2d, at 979-980 (rejecting a challenge by holder of funds to the court's disposition of the entire fund); see also United States v. Butterworth-Judson Corp., 269 U.S. 504, 513, 46 S.Ct. 179, 70 L.Ed. 380 (1926) ("Here, the fund being less than the debts, the creditors are entitled to have all of it distributed among them according to their rights and priorities"). It went without saying that the defendant or estate or constructive trustee with the inadequate assets had no opportunity to benefit himself or claimants of lower priority by holding back on the amount distributed to the class. The limited fund cases thus ensured that the class as a whole was given the best deal; they did not give a defendant a better deal than seriatim litigation would have produced.

Third, the claimants identified by a common theory of recovery were treated equitably among themselves. The cases assume that the class will comprise everyone who might state a claim on a single or repeated set of facts, invoking a common theory of recovery, to be satisfied from the limited fund as the source of payment. Each of the people represented in Ross, for example, had comparable entitlement as a legatee under the testator's will. Those subject to representation in Dickinson had a common source of claims in the solicitation of funds by parties whose subsequent defalcation left them without their investment, while in Guffanti the individuals represented had each entrusted money for ticket purchases. In these cases the hope of recovery was limited, respectively, by estate assets, the residuum of profits, and the amount of the bond. Once the represented classes were so identified, there was no question of omitting anyone whose claim shared the common theory of liability and would contribute to the calculated shortfall of recovery. See Nashville & Decatur Railroad Co. v. Orr, 18 Wall. 471, 474, 21 L.Ed. 810 (1873) (reciting the "well settled" general rule "that when it appears on the face of the bill that there will be a deficiency in the fund, and that there are other creditors or legatees who are entitled ***2312** to a ratable distribution with the complainants, and who have a common interest with them, such creditors or legatees should be made parties to the bill, or the suit should be brought by the complainants in behalf of themselves and all others standing in a similar

situation"). The plaintiff appeared on behalf of all similarly situated parties, see Calvert, Parties to Suits in Equity 24 ("[I]t is not sufficient that the plaintiff appear on behalf of numerous parties: the rule seems to be, that he must appear on behalf of all who are interested"); thus, the creditors' bill was brought on behalf of all creditors, cf. Leigh v. Thomas, 2 Ves. Sen. 312, 313, 28 Eng. Rep. 201 (Ch. 1751) ("No doubt but a bill may be by a few creditors in behalf of themselves and the rest ... but there is no instance of a bill by three or four to have an account of the estate, without saying they bring it in behalf of themselves and the rest of the creditors"), the constructive trust was asserted on behalf of all victims of the fraud, and the surety suit was brought on behalf of all entitled to a share of the bond. [FN18] Once all similar claims were brought directly or by representation before the court, these antecedents of the mandatory class action presented straightforward models of equitable treatment, with the simple equity of a pro rata distribution providing the required fairness, see 1 Pomeroy Equity Jurisprudence § 407, p. 764 (4th ed. 1918) ("[I]f the fund is not sufficient to discharge all claims upon it in full ... equity will incline to regard all the demands as standing upon an equal footing, and will decree a pro rata distribution or payment"). [FN19]

FN18. Professor Chafee explained, in discussing bills of peace, that where a case presents a limited fund, "it is impossible to make a fair distribution of the fund or limited liability to all members of the multitude except in a single proceeding where the claim of each can be adjudicated with due reference to the claims of the rest. The fund or limited liability is like a mince pie, which can not be satisfactorily divided until the carver counts the number of persons at the table." Bills of Peace with Multiple Parties, 45 Harv. L.Rev. 1297, 1311 (1932).

FN19. As noted above, traditional limited fund class actions typically provided notice to all claimants and the opportunity for those claimants to establish their claims before the actual distribution took place. See, e.g., Dickinson v. Burnham, 197 F.2d 973, 978 (C.A.2 1952); Terry v. President and Directors of the Bank of Cape Fear, 20 F. 777, 782 (C.C W.D.N.C.1884); cf. Johnson v. Waters, 111 U.S. 640, 674, 4 S.Ct. 619, 28 L.Ed. 547 (1884) (in a creditors' bill, "it is the usual and correct course to open a reference in the master's office and to give other creditors, having valid claims against the fund, an opportunity to come in and have the benefit of the decree"). Rule 23, however, specifies no notice requirement for subdivision (b)(1)(B) actions beyond that required by subdivision (e) for settlement purposes. Plaintiffs in this case made an attempt to notify all presently identifiable class members in connection with the fairness hearing, though the adequacy of the effort is disputed. Since satisfaction or not of a notice requirement would not effect the disposition of this case, we express no opinion on the need for notice or the sufficiency of the effort to give it in this case.

In sum, mandatory class treatment through representative actions on a limited fund theory was justified with reference to a "fund" with a definitely ascertained limit, all of which would be distributed to satisfy all those with liquidated claims based on a common theory of liability, by an equitable, pro rata distribution.

C

The Advisory Committee, and presumably the Congress in approving subdivision (b)(1)(B), must have assumed that an action with these characteristics would satisfy the limited fund rationale cognizable under that subdivision. The question remains how far the same characteristics are necessary for limited fund treatment. While we cannot settle all the details of a subdivision (b)(1)(B) limited fund here (and so cannot decide the ultimate question whether settlements of multitudes of related tort actions are amenable to mandatory class treatment), there are good reasons to treat these characteristics as presumptively necessary, and not merely sufficient, to satisfy the limited fund rationale for a mandatory action. At the least, the burden of justification rests on the proponent of any departure from the traditional norm.

[15] It is true, of course, that the text of Rule 23(b)(1)(B) is on its face open to a more lenient limited fund concept, just as it covers more historical antecedents than the limited ***2313** fund. But the greater the leniency in departing from the historical limited fund model, the greater the likelihood of abuse in ways that will be apparent when we apply the limited fund criteria to the case before us. The prudent course, therefore, is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model. As will be seen, this limiting construction finds support in the Advisory Committee's expressions of understanding, minimizes potential conflict with the Rules Enabling Act, and avoids serious constitutional concerns raised by the mandatory class resolution of individual legal claims,

especially where a case seeks to resolve future liability in a settlement-only action.

[16] To begin with, the Advisory Committee looked cautiously at the potential for creativity under Rule 23(b)(1)(B), at least in comparison with Rule 23(b)(3). Although the committee crafted all three subdivisions of the Rule in general, practical terms, without the formalism that had bedeviled the original Rule 23, see Kaplan, Continuing Work 380-386, the Committee was consciously retrospective with intent to codify pre-Rule categories under Rule 23(b)(1), not forward-looking as it was in anticipating innovations under Rule 23(b)(3). Compare Civil Rules Advisory Committee Meeting, Oct. 31-Nov. 2, 1963, Congressional Information Service Records of the U.S. Judicial Conference, Committee on Rules of Practice and Procedure 1935-1988, CI 7104-53, p. 11 (hereinafter Civil Rules Meeting) (comments of Reporter Prof. Benjamin Kaplan) (Rule 23(b)(3) represents "the growing point of the law"); id., at 16 (comments of Committee Member Prof. Albert M. Sacks) (Rule 23(b)(3) is "an evolving area"). Thus, the Committee intended subdivision (b)(1) to capture the " 'standard' " class actions recognized in pre-Rule practice, Kaplan, Continuing Work 394.

[17] Consistent with its backward look under subdivision (b)(1), as commentators have pointed out, it is clear that the Advisory Committee did not contemplate that the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale. See Monaghan, Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members, 98 Colum. L.Rev. 1148, 1164 (1998) ("The 'framers' of Rule 23 did not envision the expansive interpretations of the rule that have emerged.... No draftsmen contemplated that, in mass torts, (b)(1)(B) 'limited fund' classes would emerge as the functional equivalent to bankruptcy by embracing 'funds' created by the litigation itself"); see also Schwarzer, Settlement of Mass Tort Class Actions: Order Out of Chaos, 80 Cornell L.Rev. 837, 840 (1995) ("The original concept of the limited fund class does not readily fit the situation where a large volume of claims might eventually result in judgments that in the aggregate could exceed the assets available to satisfy them"); Marcus, They Can't Do That, Can They? Tort Reform Via Rule 23, 80 Cornell L.Rev. 858, 877 (1995). None of the examples cited in the Advisory Committee Notes or by Professor Kaplan in explaining Rule 23(b)(1)(B) remotely approach what was then described as a "mass accident" case. While the Advisory Committee focused much attention on the amenability of Rule 23(b)(3) to such cases, the Committee's debates are silent about resolving tort claims under a mandatory limited fund rationale under Rule 23(b)(1)(B). [FN20] It is simply implausible that the Advisory Committee, so concerned about the potential difficulties posed by dealing ***2314** with mass tort cases under Rule 23(b)(3), with its provisions for notice and the right to opt out, see Rule 23(c)(2), would have uncritically assumed that mandatory versions of such class actions, lacking such protections, could be certified under Rule 23(b)(1)(B). [FN21] We do not, it is true, decide the ultimate question whether Rule 23(b)(1)(B) may ever be used to aggregate individual tort claims, cf. Ticor Title Ins. Co. v. Brown, 511 U.S. 117, 121, 114 S.Ct. 1359, 128 L.Ed.2d 33 (1994) (per curiam). But we do recognize that the Committee would have thought such an application of the Rule surprising, and take this as a good reason to limit any surprise by presuming that the Rule's historical antecedents identify requirements.

FN20. To the extent that members of the Advisory Committee explicitly considered cases resembling the current mass tort limited fund class action, they did so in the context of the debate about bringing "mass accident" class actions under Rule 23(b)(3). There was much concern on the Advisory Committee about the degree to which subdivision (b)(3), which the Committee was drafting to replace the old spurious class action category, would be applied to "mass accident" cases. Compare, e g., Civil Rules Meeting 9, 14, with, e.g., id., at 13, 44-45. See also id., at 51. As a compromise, the Advisory Committee Notes state that a " 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." Adv. Comm. Notes 697. See also Kaplan, Continuing Work 393.

FN21. The Advisory Committee noted, moreover, that "[w]here the class- action character of the lawsuit is based solely on the existence of a 'limited fund,' the judgment, while extending to all claims of class members against the fund, has ordinarily left unaffected the personal claims of nonappearing members against the debtor." Adv. Comm. Notes 698. Cf. Bone, Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation, 70 B.U.L.Rev. 213, 282 (1990) (historically suits involving individual claims in the absence of a common fund did not automatically

> bind class members, instead providing a mechanism for notice and the opportunity to join the suit). This recognition underscores doubt that the Advisory Committee would have intended liberality in allowing such a circumscribed tradition to be transmogrified by operation of Rule 23(b)(1)(B) into a mechanism for resolving the claims of individuals not only against the fund, but also against an individual tortfeasor.

[18] The Rules Enabling Act underscores the need for caution. As we said in Amchem, no reading of the Rule can ignore the Act's mandate that "rules of procedure 'shall not abridge, enlarge or modify any substantive right,' " Amchem, 521 U.S., at 613, 117 S.Ct. 2231 (quoting 28 U.S.C. § 2072(b)); cf. Guaranty Trust Co. v. York, 326 U.S. 99, 105, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945) ("In giving federal courts 'cognizance' of equity suits in cases of diversity jurisdiction, Congress never gave, nor did the federal courts ever claim, the power to deny substantive rights created by State law or to create substantive rights denied by State law"). Petitioners argue that the Act has been violated here, asserting that the Global Settlement Agreement's priorities of claims and compromise of full recovery abrogated the state law that must govern this diversity action under 28 U.S.C. § 1652. See Brief for Petitioners 31-36. Although we need not grapple with the difficult choice-of- law and substantive state-law questions raised by petitioners' assertion, we do need to recognize the tension between the limited fund class action's pro rata distribution in equity and the rights of individual tort victims at law. Even if we assume that some such tension is acceptable under the Rules Enabling Act, it is best kept within tolerable limits by keeping limited fund practice under Rule 23(b)(1)(B) close to the practice preceding its adoption.

[19][20] Finally, if we needed further counsel against adventurous application of Rule 23(b)(1)(B), the Rules Enabling Act and the general doctrine of constitutional avoidance would jointly sound a warning of the serious constitutional concerns that come with any attempt to aggregate individual tort claims on a limited fund rationale. First, the certification of a mandatory class followed by settlement of its action for money damages obviously implicates the Seventh Amendment jury trial rights of absent class members. [FN22] We noted in Ross v. Bernhard, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), that since the merger of law and equity in 1938, it has become settled among the lower courts that "class action plaintiffs may obtain a jury trial on any legal issues they present." Id., at 541, 90 S.Ct. 733. By its nature, however, a mandatory settlement-only class action with legal issues and future claimants compromises their Seventh Amendment rights without their consent.

> FN22. The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.. ."

[21][22] Second, and no less important, mandatory class actions aggregating damage claims implicate the due process "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he ***2315** is not designated as a party or to which he has not been made a party by service of process," Hansberry v. Lee, 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed. 22 (1940), it being "our 'deep-rooted historic tradition that everyone should have his own day in court,' " Martin v. Wilks, 490 U.S. 755, 762, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989) (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)); see Richards v. Jefferson County, 517 U.S. 793, 798-799, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996). Although " '[w]e have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,' " or "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate," Martin, supra, at 762, n. 2, 109 S.Ct. 2180 (citations omitted), the burden of justification rests on the exception.

The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damage claims gathered in a mandatory class. Unlike Rule 23(b)(3) class members, objectors to the collectivism of a mandatory subdivision (b)(1)(B) action have no inherent right to abstain. The legal rights of absent class members (which in a class like this one would include claimants who by definition may be unidentifiable when the class is certified) are resolved regardless either of their consent, or, in a class with objectors, their express wish to the contrary. [FN23] And in settlement-only class actions the procedural protections built into the Rule to protect the rights of absent class members during litigation are never invoked in an adversarial setting, see Amchem, supra, at 620, 117 S.Ct. 2231.

FN23. It is no answer in this case that the settlement agreement provided for a limited, back-end "opt out" in the form of a right on the part of class members eventually to take their case to court if dissatisfied with the amount provided by the trust. The "opt out" in this case requires claimants to exhaust a variety of alternative dispute mechanisms, to bring suit against the trust, and not against Fibreboard, and it limits damages to $500,000, to be paid out in installments over 5 to 10 years, see supra, at 2305, despite multimillion-dollar jury verdicts sometimes reached in asbestos suits, In re Asbestos Litigation, 90 F.3d 963, 1006, n. 30 (C.A.5 1996) (Smith, J., dissenting). Indeed, on approximately a dozen occasions, Fibreboard had settled for more than $500,000. See App. to Pet. for Cert. 373a

In related circumstances, we raised the flag on this issue of due process more than a decade ago in Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). Shutts was a state class action for small sums of interest on royalty payments suspended on the authority of a federal regulation. Id., at 800, 105 S.Ct. 2965. After certification of the class, the named plaintiffs notified each member by first-class mail of the right to opt out of the lawsuit. Out of a class of 33,000, some 3,400 exercised that right, and another 1,500 were excluded because their notices could not be delivered. Id., at 801, 105 S.Ct. 2965. After losing at trial, the defendant, Phillips Petroleum, argued that the state court had no jurisdiction over claims of out-of-state plaintiffs without their affirmative consent. We said no and held that out-of-state plaintiffs could not invoke the same due process limits on personal jurisdiction that out-of-state defendants had under International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), and its progeny. 472 U.S., at 806-808, 105 S.Ct. 2965. But we also saw that before an absent class member's right of action was extinguishable due process required that the member "receive notice plus an opportunity to be heard and participate in the litigation," and we said that "at a minimum ... an absent plaintiff [must] be provided with an opportunity to remove himself from the class." Id., at 812, 105 S.Ct. 2965. [FN24]

FN24. We also reiterated the constitutional requirement articulated in Hansberry v. Lee, 311 U.S 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940), that "the named plaintiff at all times adequately represent the interests of the absent class members." Phillips Petroleum Co. v. Shutts, 472 U.S., at 812, 105 S.Ct. 2965 (citing Hansberry, supra, at 42-43, 45, 61 S.Ct. 115). In Shutts, as an important caveat to our holding, we made clear that we were only examining the procedural protections attendant on binding out-of-state class members whose claims were "wholly or predominately for money judgments," 472 U.S., at 811, n. 3, 105 S.Ct. 2965.

***2316** IV

The record on which the District Court rested its certification of the class for the purpose of the global settlement did not support the essential premises of mandatory limited fund actions. It failed to demonstrate that the fund was limited except by the agreement of the parties, and it showed exclusions from the class and allocations of assets at odds with the concept of limited fund treatment and the structural protections of Rule 23(a) explained in Amchem.

A

[23][24][25] The defect of certification going to the most characteristic feature of a limited fund action was the uncritical adoption by both the District Court and the Court of Appeals of figures [FN25] agreed upon by the parties in defining the limits of the fund and demonstrating its inadequacy. [FN26] When a district court, as here, certifies for class action settlement only, the moment of certification requires "heightene[d] attention," Amchem, 521 U.S., at 620, 117 S.Ct. 2231, to the justifications for binding the class members. This is so because certification of a mandatory settlement class, however provisional technically, effectively concludes the proceeding save for the final fairness hearing. And, as we held in Amchem, a fairness hearing under Rule 23(e) is no substitute for rigorous adherence to those provisions of the Rule "designed to protect absentees," ibid., among them subdivision (b)(1)(B). [FN27] Thus, in an action such as this the settling parties must present not only their agreement, but evidence on which the district court may ascertain the limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge, see In re Bendectin Products Liability Litigation, 749 F.2d 300, 306 (C.A.6 1984) ("[T]he district court, as a matter of law, must have a fact-finding inquiry on this question and allow the opponents of class certification to present evidence that a limited fund does not exist"); see also In re Temple, 851 F.2d 1269, 1272 (C.A.11 1988) ("Without a finding as to the net worth of the defendant, it is difficult to see how the fact of a

limited fund could have been established given that all of [the defendant's] assets are potentially available to suitors"); In re Dennis Greenman Securities Litigation, 829 F.2d 1539, 1546 (C.A.11 1987) (discussing factual findings necessary for certification of a limited fund class action).

FN25. The plural reflects the fact that the insurers agreed to provide $1.525 billion under the Global Settlement Agreement and $2 billion under the Trilateral Settlement Agreement.

FN26. The federal courts have differed somewhat in articulating the standard to evaluate whether, in fact, a fund is limited, in cases involving mass torts. Compare, e.g., In re Northern Dist. of California, Dalkon Shield IUD Products Liability Litigation, 693 F.2d 847, 852 (C.A.9 1982), cert. denied sub nom. A.H. Robins Co., Inc. v. Abed et al., 459 U.S. 1171, 103 S.Ct. 817, 74 L Ed.2d 1015 (1983) (class proponents must demonstrate that allowing the adjudication of individual claims will inescapably compromise the claims of absent class members), with, e.g , In re "Agent Orange" Product Liability Litigation, 100 F.R.D. 718, 726 (E.D.N.Y.1983), aff'd. 818 F 2d 145 (C.A.2 1987), cert. denied sub nom. Fraticelli v. Dow Chemical Co., 484 U.S. 1004, 108 S.Ct. 695, 98 L.Ed.2d 648 (1988) (requiring only a "substantial probability--that is less than a preponderance but more than a mere possibility--that if damages are awarded, the claims of earlier litigants would exhaust the defendants' assets"). Cf. In re Bendectin Products Liability Litigation, 749 F.2d 300, 306 (C.A.6 1984). Because under either formulation, the class certification in this case cannot stand, it would be premature to decide the appropriate standard at this time.

FN27. See Issacharoff, Class Action Conflicts, 30 U.C.D.L.Rev 805, 822 (1997) ("[I]n the context of a mandatory settlement class, the individual class member is presented with what purports to be a binding fait accompli, with the only recourse a likely futile objection at the fairness hearing required by Rule 23(e)")

We have already alluded to the difficulties facing limited fund treatment of huge numbers of actions for unliquidated damages arising from mass torts, the first such hurdle being a computation of the total claims. It is simply not a matter of adding up the liquidated amounts, as in the models of limited fund actions. Although we might assume arguendo that prior judicial experience with asbestos claims would allow a court to make a sufficiently reliable determination of the probable total, the District Court here apparently thought otherwise, concluding that ***2317** "there is no way to predict Fibreboard's future asbestos liability with any certainty." 162 F.R.D., at 528. Nothing turns on this conclusion, however, since there was no adequate demonstration of the second element required for limited fund treatment, the upper limit of the fund itself, without which no showing of insufficiency is possible.

The "fund" in this case comprised both the general assets of Fibreboard and the insurance assets provided by the two policies, see 90 F.3d, at 982 (describing fund as Fibreboard's entire equity and $2 billion in insurance assets under the Trilateral Settlement Agreement). As to Fibreboard's assets exclusive of the contested insurance, the District Court and the Fifth Circuit concluded that Fibreboard had a then-current sale value of $235 million that could be devoted to the limited fund. While that estimate may have been conservative, [FN28] at least the District Court heard evidence and made an independent finding at some point in the proceedings. The same, however, cannot be said for the value of the disputed insurance.

FN28. The District Court based the $235 million figure on evidence provided by an investment banker regarding what a "financially prudent buyer" would pay to acquire Fibreboard free of its personal injury asbestos liabilities, less transaction costs. App. to Pet. for Cert. 377a, 492a. In 1997, however, Fibreboard was acquired for about $515 million, plus $85 million of assumed debt. See In re Asbestos Litigation, 134 F.3d 668, 674 (C.A.5 1998) (Smith, J., dissenting); see also Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L.Rev. 1343, 1402 (1995) (noting the surge in Fibreboard's stock price following the settlement below).

The insurance assets would obviously be "limited" in the traditional sense if the total of demonstrable claims would render the insurers insolvent, or if the policies provided aggregate limits falling short of that total; calculation might be difficult, but the way to demonstrate the limit would be clear. Neither possibility is presented in this case, however. Instead, any limit of the insurance asset here had to be a product of potentially unlimited policy coverage discounted by the risk that Fibreboard would ultimately lose the coverage dispute litigation. This sense of limit as a value discounted by risk is of course a step removed from the historical model, but even on the assumption that it would suffice for limited fund treatment, there was no adequate finding

of fact to support its application here. Instead of undertaking an independent evaluation of potential insurance funds, the District Court (and, later, the Court of Appeals), simply accepted the $2 billion Trilateral Settlement Agreement figure as representing the maximum amount the insurance companies could be required to pay tort victims, concluding that "[w]here insurance coverage is disputed, it is appropriate to value the insurance asset at a settlement value." See App. to Pet. for Cert. 492a. [FN29]

> FN29. In describing possible limited funds in this case, the District Court discounted the $2 billion Trilateral Settlement Agreement figure by the amount necessary to resolve present claims included neither in the inventory settlements nor the global class claims and other items, yielding a figure equal to the $1.535 billion available under the Global Settlement Agreement App. to Pet. for Cert 492a The Court of Appeals, by contrast, assumed that the full $2 billion represented by the Trilateral Settlement Agreement would be available to class claims. In re Asbestos Litigation, 90 F 3d 963, 982 (C.A.5 1996). The Court of Appeals provided no explanation for using the higher figure in light of the District Court's conclusion that only $1.535 billion of the $2 billion Trilateral Settlement Agreement figure would actually be available to the class. Either way, the figure represented only the amount the insurance companies agreed to pay, and not an independent evaluation of the limits of their payment obligations.

Settlement value is not always acceptable, however. One may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation. But no such assumption may be indulged in this case, or probably in any class action settlement with the potential for gigantic fees. [FN30] In this case, certainly, any assumption ***2318** that plaintiffs' counsel could be of a mind to do their simple best in bargaining for the benefit of the settlement class is patently at odds with the fact that at least some of the same lawyers representing plaintiffs and the class had also negotiated the separate settlement of 45,000 pending claims, 90 F.3d, at 969-970, 971, the full payment of which was contingent on a successful global settlement agreement or the successful resolution of the insurance coverage dispute (either by litigation or by agreement, as eventually occurred in the Trilateral Settlement Agreement), id., at 971, n. 3; App. 119a-120a. Class counsel thus had great incentive to reach any agreement in the global settlement negotiations that they thought might survive a Rule 23(e) fairness hearing, rather than the best possible arrangement for the substantially unidentified global settlement class. Cf. Cramton, Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction, 80 Cornell L.Rev. 811, 832 (1995) ("[S]ide settlements suggest that class counsel has been laboring under an impermissible conflict of interest and that it may have preferred the interests of current clients to those of the future claimants in the settlement class"). The resulting incentive to favor the known plaintiffs in the earlier settlement was, indeed, an egregious example of the conflict noted in Amchem resulting from divergent interests of the presently injured and future claimants. See 521 U.S, at 626-627, 117 S.Ct. 2231 (discussing adequacy of named representatives under Rule 23(a)(4)).

> FN30. In a strictly rational world, plaintiffs' counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel's grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.

We do not, of course, know exactly what an independent valuation of the limit of the insurance assets would have shown. It might have revealed that even on the assumption that Fibreboard's coverage claim was sound, there would be insufficient assets to pay claims, considered with reference to their probable timing; if Fibreboard's own assets would not have been enough to pay the insurance shortfall plus any claims in excess of policy limits, the projected insolvency of the insurers and Fibreboard would have indicated a truly limited fund. (Nothing in the record, however, suggests that this would have been a supportable finding.) Or an independent valuation might have revealed assets of insufficient value to pay all projected claims if the assets were discounted by the prospects that the insurers would win the coverage cases. Or the Court's independent valuation might have shown, discount or no discount, the probability of enough assets to pay all projected claims, precluding certification of any mandatory class on a limited fund rationale. Throughout this litigation the courts have accepted the assumption that the third possibility was out of the question, and they may have been right. But objecting and unidentified class members alike are entitled to have the issue settled by specific evidentiary findings independent of

the agreement of defendants and conflicted class counsel.

B

[26] The explanation of need for independent determination of the fund has necessarily anticipated our application of the requirement of equity among members of the class. There are two issues, the inclusiveness of the class and the fairness of distributions to those within it. On each, this certification for settlement fell short.

The definition of the class excludes myriad claimants with causes of action, or foreseeable causes of action, arising from exposure to Fibreboard asbestos. While the class includes those with present claims never filed, present claims withdrawn without prejudice, and future claimants, it fails to include those who had previously settled with Fibreboard while retaining the right to sue again "upon development of an asbestos related malignancy," plaintiffs with claims pending against Fibreboard at the time of the initial announcement of the Global Settlement Agreement, and the plaintiffs in the "inventory" claims settled as a supposedly necessary step in reaching the global settlement, see 90 F.3d, at 971. The number of those outside the class who settled with a reservation of rights may be uncertain, but there is no such uncertainty about the significance of the settlement's exclusion of the 45,000 inventory plaintiffs and the plaintiffs in the unsettled present cases, estimated by the Guardian Ad Litem at more than 53,000 as of August 27, 1993, see App. in No. 95-40635(CA5), 6 Record, ***2319** Tab 55, p. 72 (Report of the Guardian Ad Litem). It is a fair question how far a natural class may be depleted by prior dispositions of claims and still qualify as a mandatory limited fund class, but there can be no question that such a mandatory settlement class will not qualify when in the very negotiations aimed at a class settlement, class counsel agree to exclude what could turn out to be as much as a third of the claimants that negotiators thought might eventually be involved, a substantial number of whom class counsel represent, see App. to Pet. for Cert. 321a (noting that the parties negotiating the global settlement agreed to use a negotiating benchmark of 186,000 future claims against Fibreboard).

Might such class exclusions be forgiven if it were shown that the class members with present claims and the outsiders ended up with comparable benefits? The question is academic here. On the record before us, we cannot speculate on how the unsettled claims would fare if the Global Settlement were approved, or under the Trilateral Settlement. As for the settled inventory claims, their plaintiffs appeared to have obtained better terms than the class members. They received an immediate payment of 50 percent of a settlement higher than the historical average, and would get the remainder if the global settlement were sustained (or the coverage litigation resolved, as it turned out to be by the Trilateral Settlement Agreement); the class members, by contrast, would be assured of a 3-year payout for claims settled, whereas the unsettled faced a prospect of mediation followed by arbitration as prior conditions of instituting suit, which would even then be subject to a recovery limit, a slower payout and the limitations of the trust's spendthrift protection. See supra, at 2309. Finally, as discussed below, even ostensible parity between settling nonclass plaintiffs and class members would be insufficient to overcome the failure to provide the structural protection of independent representation as for subclasses with conflicting interests.

[27] On the second element of equity within the class, the fairness of the distribution of the fund among class members, the settlement certification is likewise deficient. Fair treatment in the older cases was characteristically assured by straightforward pro rata distribution of the limited fund. See supra, at 2321. While equity in such a simple sense is unattainable in a settlement covering present claims not specifically proven and claims not even due to arise, if at all, until some future time, at the least such a settlement must seek equity by providing for procedures to resolve the difficult issues of treating such differently situated claimants with fairness as among themselves.

[28] First, it is obvious after Amchem that a class divided between holders of present and future claims (some of the latter involving no physical injury and to claimants not yet born) requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel. See Amchem, 521 U.S., at 627, 117 S.Ct. 2231 (class settlements must provide "structural assurance of fair and adequate representation for the diverse groups and individuals affected"); cf. 5 J. Moore, T. Chorvat, D. Feinberg, R. Marmer, & J. Solovy, Moore's Federal Practice § 23.25[5][e], p. 23-149 (3d ed.1998) (an attorney who represents another class against the same defendant may not serve as class counsel). [FN31] As we said in Amchem, "for the ***2320** currently injured, the critical goal is generous immediate payments," but

"[t]hat goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation- protected fund for the future." Amchem, supra, at 626, 117 S.Ct. 2231. No such procedure was employed here, and the conflict was as contrary to the equitable obligation entailed by the limited fund rationale as it was to the requirements of structural protection applicable to all class actions under Rule 23(a)(4).

> FN31. This adequacy of representation concern parallels the enquiry required at the threshold under Rule 23(a)(4), but as we indicated in Amchem, the same concerns that drive the threshold findings under Rule 23(a) may also influence the propriety of the certification decision under the subdivisions of Rule 23(b) See Amchem, 521 U.S., at 623, n. 18, 117 S.Ct. 2231.
>
> In Amchem, we concentrated on the adequacy of named plaintiffs, but we recognized that the adequacy of representation enquiry is also concerned with the "competency and conflicts of class counsel." Id., at 626, n. 20, 117 S.Ct. 2231 (citing General Telephone Co. of Southwest v. Falcon, 457 U S. 147, 157, n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)); see also 5 Moore's Federal Practice § 23.25[3][a] (adequacy of representation concerns named plaintiff and class counsel). In this case, of course, the named representatives were not even "named [until] after the agreement in principle was reached," App. to Pet. for Cert. 483a; and they then relied on class counsel in subsequent settlement negotiations, ibid.

Second, the class included those exposed to Fibreboard's asbestos products both before and after 1959. The date is significant, for that year saw the expiration of Fibreboard's insurance policy with Continental, the one which provided the bulk of the insurance funds for the settlement. Pre-1959 claimants accordingly had more valuable claims than post-1959 claimants, see 90 F.3d, at 1012-1013 (SMITH, J., dissenting), the consequence being a second instance of disparate interests within the certified class. While at some point there must be an end to reclassification with separate counsel, these two instances of conflict are well within the requirement of structural protection recognized in Amchem.

It is no answer to say, as the Fifth Circuit said on remand, that these conflicts may be ignored because the settlement makes no disparate allocation of resources as between the conflicting classes. See 134 F.3d, at 669- 670. The settlement decides that the claims of the immediately injured deserve no provisions more favorable than the more speculative claims of those projected to have future injuries, and that liability subject to indemnification is no different from liability with no indemnification. The very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that those with immediate injuries or claims of indemnified liability would have chosen.

[29] Nor does it answer the settlement's failures to provide structural protections in the service of equity to argue that the certified class members' common interest in securing contested insurance funds for the payment of claims was so weighty as to diminish the deficiencies beneath recognition here. See Brief for Respondent Class Representatives Ahearn, et al. 31 (discussing this issue in the context of the Rule 23(a)(4) adequacy of representation requirement); id., at 35-36 (citing, e.g., In re "Agent Orange" Product Liability Litigation, 996 F.2d 1425, 1435-1436 (C.A.2 1993); In re "Agent Orange" Product Liability Litigation, 800 F.2d 14, 18- 19 (C.A.2 1986)). This argument is simply a variation of the position put forward by the proponents of the settlement in Amchem, who tried to discount the comparable failure in that case to provide separate representatives for subclasses with conflicting interests, see Brief for Petitioners in Amchem Products, Inc. v. Windsor, O.T.1996, No. 96-270, p. 48 (arguing that "achieving a global settlement" was "an overriding concern that all plaintiffs [held] in common"); see also id., at 42 (arguing that the requirement of Rule 23(b)(3) that there be predominance of common questions of law or fact had been met by shared interest in "the fairness of the settlement"). The current position is just as unavailing as its predecessor in Amchem. There we gave the argument no weight, see 521 U.S., at 625-628, 117 S.Ct. 2231, observing that "[t]he benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration," but the determination whether "proposed classes are sufficiently cohesive to warrant adjudication" must focus on "questions that preexist any settlement," id., at 622-623, 117 S.Ct. 2231. [FN32] Here, just as in the earlier case, the proponents of the settlement are trying to rewrite Rule 23; each ignores the fact that Rule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity at the pre-certification stage, quite independently of the required determination at postcertification fairness review under subdivision (e) that any settlement is fair

in an overriding sense. A fairness hearing under subdivision (e) can no more swallow the preceding ***2321** protective requirements of Rule 23 in a subdivision (b)(1)(B) action than in one under subdivision (b)(3). [FN33]

FN32. We made this observation in the context of Rule 23(b)(3)'s predominance enquiry, see Amchem, 521 U.S., at 622-623, 117 S.Ct. 2231, and noted that no " 'limited fund' capable of supporting class treatment under Rule 23(b)(1)(B)" was involved, id., at 623, n. 19, 117 S.Ct. 2231.

FN33. As a variation of the argument that class members' common interest in securing the insurance settlement overrode any internal conflicts, respondents put forth an alternative rationale for sustaining the certification in this case under Rule 23(b)(1)(B). They assert that "failure by the class to file and maintain a class action to resolve the coverage disputes on a unitary basis--allowing class members instead to prosecute their claims separately--would have put class members to the 'significant risk[s]' that Fibreboard would lose its claimed insurance as a result of the coverage disputes," and that "any separate action by any class member could have itself resulted in an adjudication that the insurers owed no coverage to Fibreboard...." Brief for Respondents Continental et al. 25 (quoting Rule 23(b)(1)(B)). Whatever its merits, this rationale for certification is foreclosed by the class conflicts, rehearsed above, that tainted the negotiation of the global settlement, and that at this point cannot be undone. Thus, whether a mandatory class could now be certified without the excluded inventory plaintiffs (whose settlements would appear to be final), or with properly represented subclasses, is an issue we need not address.

C

A third contested feature of this settlement certification that departs markedly from the limited fund antecedents is the ultimate provision for a fund smaller than the assets understood by the Court of Appeals to be available for payment of the mandatory class members' claims; most notably, Fibreboard was allowed to retain virtually its entire net worth. Given our treatment of the two preceding deficiencies of the certification, there is of course no need to decide whether this feature of the agreement would alone be fatal to the Global Settlement Agreement. To ignore it entirely, however, would be so misleading that we have decided simply to identify the issue it raises, without purporting to resolve it at this time.

[30] Fibreboard listed its supposed entire net worth as a component of the total (and allegedly inadequate) assets available for claimants, but subsequently retained all but $500,000 of that equity for itself. [FN34] On the face of it, the arrangement seems irreconcilable with the justification of necessity in denying any opportunity for withdrawal of class members whose jury trial rights will be compromised, whose damages will be capped, and whose payments will be delayed. With Fibreboard retaining nearly all its net worth, it hardly appears that such a regime is the best that can be provided for class members. Given the nature of a limited fund and the need to apply its criteria at the certification stage, it is not enough for a District Court to say that it "need not ensure that a defendant designate a particular source of its assets to satisfy the class' claims; [but only that] the amount recovered by the class [be] fair." 162 F.R.D., at 527.

FN34. We need not decide here how close to insolvency a limited fund defendant must be brought as a condition of class certification. While there is no inherent conflict between a limited fund class action under Rule 23(b)(1)(B) and the Bankruptcy Code, cf., e.g., In re Drexel Burnham Lambert Group, Inc., 960 F 2d 285, 292 (C.A.2 1992), it is worth noting that if limited fund certification is allowed in a situation where a company provides only a de minimis contribution to the ultimate settlement fund, the incentives such a resolution would provide to companies facing tort liability to engineer settlements similar to the one negotiated in this case would, in all likelihood, significantly undermine the protections for creditors built into the Bankruptcy Code. We note further that Congress in the Bankruptcy Reform Act of 1994, Pub.L. 103-394 § 111(a), amended the Bankruptcy Code to enable a debtor in a Chapter 11 reorganization in certain circumstances to establish a trust toward which the debtor may channel future asbestos-related liability, see 11 U.S.C. §§ 524(g), (h).

The District Court in this case seems to have had a further point in mind, however. One great advantage of class action treatment of mass tort cases is the opportunity to save the enormous transaction costs of piecemeal litigation, an advantage to which the settlement's proponents have referred in this case. [FN35] Although the District Court made no ***2322** specific finding about the transaction cost saving likely from this class settlement, estimating the amount in the "hundreds of millions," id., at 529, it did conclude that the amount would exceed Fibreboard's net worth as the Court valued it, ibid. (Fibreboard's net worth

of $235 million "is considerably less than the likely savings in defense costs under the Global Settlement"). If a settlement thus saves transaction costs that would never have gone into a class member's pocket in the absence of settlement, may a credit for some of the savings be recognized in a mandatory class action as an incentive to settlement? It is at least a legitimate question, which we leave for another day.

> FN35. Some courts certifying limited fund class actions have focused on the advantages such suits have in reducing transaction costs when compared to piecemeal litigation. See, e.g., In re Drexel Burnham Lambert Group, Inc., supra, at 292 (certifying mandatory class in part because "some members of the putative class might attempt to maintain costly individual actions in the hope and, perhaps, the belief that their claims are more meritorious than the claims of other class members," and thus warranting mandatory class certification "to prevent claimants with such motivations from unfairly diminishing the eventual recovery of other class members"). Although the transaction costs Fibreboard faced prior to settlement were at times significant, see Ahearn, 162 F.R.D., at 509; see also App. to Pet. for Cert. 282a (Fibreboard's annual asbestos litigation defense costs ran, at times, as high as twice the total face value of settlements reached), given the exigencies of Fibreboard's contingent insurance asset, this case does not present an instance in which limited fund certification can be justified on the ground that such settlement necessarily provided funds equal to, or greater than, what might have been recovered through individual litigation factoring out transaction costs.

V

Our decision rests on a different basis from the ground of Justice BREYER's dissent, just as there was a difference in approach between majority and dissenters in Amchem. The nub of our position is that we are bound to follow Rule 23 as we understood it upon its adoption, and that we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act. Although, as the dissent notes, post, at 2331, the revised text adopted in 1966 was understood (somewhat cautiously) to authorize the courts to provide for class treatment of mass tort litigation, it was also the Court's understanding that the Rule's growing edge for that purpose would be the opt- out class authorized by subdivision (b)(3), not the mandatory class under subdivision (b)(1)(B), see supra, at 2313. While we have not ruled out the possibility under the present Rule of a mandatory class to deal with mass tort litigation on a limited fund rationale, we are not free to dispense with the safeguards that have protected mandatory class members under that theory traditionally.

Apart from its effect on the requirements of subdivision (a) as explained and held binding in Amchem, the dissent would move the standards for mandatory actions in the direction of opt-out class requirements by according weight to this "unusual limited fund['s] ... witching hour," post, at 2319, in exercising discretion over class certification. It is on this belief (that we should sustain the allowances made by the District Court in consideration of the exigencies of this settlement proceeding) that the dissent addresses each of the criteria for limited fund treatment (demonstrably insufficient fund, intraclass equity, and dedication of the entire fund, see post, at 2327-2332).

As to the calculation of the fund, the dissent believes an independent valuation by the District Court may be dispensed with here in favor of the figure agreed upon by the settling parties. The dissent discounts the conflicts on the part of class counsel who negotiated the Global Settlement Agreement by arguing that the "relevant " settlement negotiation, and hence the relevant benchmark for judging the actual value of the insurance amount, was the negotiation between Fibreboard and the insurers that produced the Trilateral Settlement Agreement. See post, at ----. This argument, however, minimizes two facts: (1) that Fibreboard and the insurers made this separate, backup agreement only at the insistence of class counsel as a condition for reaching the Global Settlement Agreement; (2) even more important, that "[t]he Insurers were ... adamant that they would not agree to pay any more in the context of a backup agreement than in a global agreement," a principle "Fibreboard acceded to" on the day the Global Settlement Agreement was announced "as the price of permitting an agreement to be reached with respect to a global settlement," Ahearn, 162 F.R.D., at 516. Under these circumstances the reliability of the Trilateral Settlement Agreement's figure is inadequate as an independent benchmark that might excuse the ***2323** want of any independent judicial determination that the Global Settlement Agreement's fund was the maximum possible. In any event, the dissent says, it is not crucial whether a $30 claim has to settle for $15 or $20. But it is crucial. Conflict-free counsel, as required by Rule 23(a) and Amchem, might have negotiated a $20 figure, and a limited fund rationale

for mandatory class treatment of a settlement-only action requires assurance that claimants are receiving the maximum fund, not a potentially significant fraction less.

With respect to the requirement of intraclass equity, the dissent argues that conflicts both within this certified class and between the class as certified and those excluded from it may be mitigated because separate counsel were simply not to be had in the short time that a settlement agreement was possible before the argument (or likely decision) in the coverage case. But this is to say that when the clock is about to strike midnight, a court considering class certification may lower the structural requirements of Rule 23(a) as declared in Amchem, and the parallel equity requirements necessary to justify mandatory class treatment on a limited fund theory.

Finally, the dissent would excuse Fibreboard's retention of virtually all its net worth, and the loss to members of the certified class of some 13 percent of the fund putatively available to them, on the ground that the settlement made more money available than any other effort would likely have done. But even if we could be certain that this evaluation were true, this is to reargue Amchem: the settlement's fairness under Rule 23(e) does not dispense with the requirements of Rule 23(a) and (b).

We believe that if an allowance for exigency can make a substantial difference in the level of Rule 23 scrutiny, the economic temptations at work on counsel in class actions will guarantee enough exigencies to take the law back before Amchem and unsettle the line between mandatory class actions under subdivision (b)(1)(B) and opt-out actions under subdivision (b)(3).

VI

In sum, the applicability of Rule 23(b)(1)(B) to a fund and plan purporting to liquidate actual and potential tort claims is subject to question, and its purported application in this case was in any event improper. The Advisory Committee did not envision mandatory class actions in cases like this one, and both the Rules Enabling Act and the policy of avoiding serious constitutional issues counsel against leniency in recognizing mandatory limited fund actions in circumstances markedly different from the traditional paradigm. Assuming arguendo that a mandatory, limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be essential that the fund be shown to be limited independently of the agreement of the parties to the action, and equally essential under Rule 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses. In this case, the limit of the fund was determined by treating the settlement agreement as dispositive, an error magnified by the representation of class members by counsel also representing excluded plaintiffs, whose settlements would be funded fully upon settlement of the class action on any terms that could survive final fairness review. Those separate settlements, together with other exclusions from the claimant class, precluded adequate structural protection by subclass treatment, which was not even afforded to the conflicting elements within the class as certified.

The judgment of the Court of Appeals, accordingly, is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Chief Justice REHNQUIST, with whom Justice SCALIA and Justice KENNEDY join, concurring.

Justice BREYER's dissenting opinion highlights in graphic detail the massive impact of asbestos-related claims on the federal courts. Post, at 2324-2325. Were I devising ***2324** a system for handling these claims on a clean slate, I would agree entirely with that dissent, which in turn approves the near-heroic efforts of the District Court in this case to make the best of a bad situation. Under the present regime, transactional costs will surely consume more and more of a relatively static amount of money to pay these claims.

But we are not free to devise an ideal system for adjudicating these claims. Unless and until the Federal Rules of Civil Procedure are revised, the Court's opinion correctly states the existing law, and I join it. But the "elephantine mass of asbestos cases," ante, at 2302, cries out for a legislative solution.

Justice BREYER, with whom Justice STEVENS joins, dissenting.

This case involves a settlement of an estimated 186,000 potential future asbestos claims against a single company, Fibreboard, for approximately $1.535 billion. The District Court, in approving the settlement, made 446 factual findings, on the basis of

which it concluded that the settlement was equitable, that the potential claimants had been well represented, and that the distinctions drawn among different categories of claimants were reasonable. 162 F.R.D. 505 (1995); App. to Pet. for Cert. 248a-468a. The Court of Appeals, dividing 2 to 1, held that the settlement was lawful. 134 F.3d 668 (C.A.5 1998). I would not set aside the Court of Appeals' judgment as the majority does. Accordingly, I dissent.

I

A

Four special background circumstances underlie this settlement and help to explain the reasonableness and consequent lawfulness of the relevant District Court determinations. First, as the majority points out, the settlement comprises part of an "elephantine mass of asbestos cases," which "defies customary judicial administration." Ante, at 2302. An estimated 13 to 21 million workers have been exposed to asbestos. See Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation 6-7 (Mar.1991) (hereinafter Judicial Conference Report). Eight years ago the Judicial Conference spoke of the mass of related cases having "reached critical dimensions," threatening "a disaster of major proportions." Id., at 2. In the Eastern District of Texas, for example, one out of every three civil cases filed in 1990 was an asbestos case. See id., at 8. In the past decade nearly 80,000 new federal asbestos cases have been filed; more than 10,000 new federal asbestos cases were filed last year. See U.S. District Courts Civil Cases Commenced by Nature of Suit, Administrative Office of the Courts Statistics (Table C2-A) (Dec. 31, 1994-1998) (hereinafter AO Statistics).

The Judicial Conference found that asbestos cases on average take almost twice as long as other lawsuits to resolve. See Judicial Conference Report 10-11. Judge Parker, the experienced trial judge who approved this settlement, noted in one 3,000-member asbestos class action over which he presided that 448 of the original class members had died while the litigation was pending. Cimino v. Raymark Industries, Inc., 751 F.Supp. 649, 651 (E.D.Tex.1990). And yet, Judge Parker went on to state, if the district court could close "thirty cases a month, it would [still] take six and one-half years to try these cases and [due to new filings] there would be pending over 5,000 untouched cases" at the end of that time. Id., at 652. His subsequent efforts to accelerate final decision or settlement through the use of sample cases produced a highly complex trial (133 trial days, more than 500 witnesses, half a million pages of documents) that eventually closed only about 160 cases because efforts to extrapolate from the sample proved fruitless. See Cimino v. Raymark Industries, Inc., 151 F.3d 297, 335 (C.A.5 1998). The consequence is not only delay but also attorney's fees and other "transaction costs" that are unusually high, to the point where, of each dollar that asbestos defendants pay, those costs consume an estimated 61 cents, with only 39 cents going to victims. See Judicial Conference Report 13.

***2325** Second, an individual asbestos case is a tort case, of a kind that courts, not legislatures, ordinarily will resolve. It is the number of these cases, not their nature, that creates the special judicial problem. The judiciary cannot treat the problem as entirely one of legislative failure, as if it were caused, say, by a poorly drafted statute. Thus, when "calls for national legislation" go unanswered, ante, at 2302, judges can and should search aggressively for ways, within the framework of existing law, to avoid delay and expense so great as to bring about a massive denial of justice.

Third, in that search the district courts may take advantage of experience that appellate courts do not have. Judge Parker, for example, has written of "a disparity of appreciation for the magnitude of the problem," growing out of the difference between the trial courts' "daily involvement with asbestos litigation" and the appellate courts' "limited" exposure to such litigation in infrequent appeals. Cimino, 751 F.Supp., at 651.

Fourth, the alternative to class-action settlement is not a fair opportunity for each potential plaintiff to have his or her own day in court. Unusually high litigation costs, unusually long delays, and limitations upon the total amount of resources available for payment, together mean that most potential plaintiffs may not have a realistic alternative. And Federal Rule of Civil Procedure 23 was designed to address situations in which the historical model of individual actions would not, for practical reasons, work. See generally Advisory Committee's Notes on Fed. Rule Civ. Proc. 23, 28 U.S.C.App., p. 696 (discussing, in relation to Rule 23(b)(1)(B), instances in which individual judgments, "while not technically concluding the other members, might do so as a practical matter").

For these reasons, I cannot easily find a legal answer to the problems this case raises by referring, as does the majority, to "our 'deep-rooted historic tradition

that everyone should have his own day in court.' " Ante, at 2315 (citation omitted). Instead, in these circumstances, I believe our Court should allow a district court full authority to exercise every bit of discretionary power that the law provides. See generally Califano v. Yamasaki, 442 U.S. 682, 703, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) ("[M]ost issues arising under Rule 23 ... [are] committed in the first instance to the discretion of the district court"); Reiter v. Sonotone Corp., 442 U.S. 330, 345, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979) (district courts have "broad power and discretion ... with respect to matters involving the certification" of class actions). And, in doing so, the Court should prove extremely reluctant to overturn a fact-specific or circumstance-specific exercise of that discretion, where a court of appeals has found it lawful. Cf. Universal Camera Corp. v. NLRB, 340 U.S. 474, 490-491, 71 S.Ct. 456, 95 L.Ed. 456 (1951) (Supreme Court will rarely overturn appellate court review of agency fact-finding). This cautionary principle of review leads me to an ultimate conclusion different from that of the majority.

B

The case before us involves a class of individuals (and their families) exposed to asbestos manufactured by Fibreboard who, for the most part, had not yet sued or settled with Fibreboard as of August 1993. The negotiating parties estimated that Fibreboard faced approximately 186,000 of these future claims. See App. to Pet. for Cert. 321a; cf. AO Statistics, Table C2-A (total number of all civil cases filed in federal district courts in 1998 was 252,994). Although the District Court was unable to give a precise figure, see App. to Pet. for Cert. 356a-357a, there is no doubt that a realistic assessment of the value of these claims far exceeds Fibreboard's total net worth.

But, as of 1993, one potentially short-lived additional asset promised potential claimants a greater recovery. That asset consisted of two insurance policies, one issued by Continental Casualty, the other by Pacific Indemnity. If the policies were valid (i.e., if they covered most of the relevant claims), they were worth several billion dollars; but if they were invalid, this asset was worth nothing. At that time, a separate case brought by Fibreboard against the insurance companies in California state court seemed likely to ***2326** resolve the value of the policies in the near future. That separate litigation had a settlement value for the insurance companies. At the time the parties were negotiating, prior to the California court's decision, the insurance policies were worth, as the majority puts it, the value of "unlimited policy coverage" (i.e., perhaps the insurance companies' entire net worth) "discounted by the risk that Fibreboard would ultimately lose the coverage dispute litigation." Ante, at 2317.

The insurance companies offered to settle with both Fibreboard and those persons with claims against Fibreboard (who might have tried to sue the insurance companies directly). The settlement negotiations came to a head in August 1993, just as a California state appeals court was poised to decide the validity of the insurance policies. This fact meant speed was important, for the California court could well decide that the policies were worth nothing. It also meant that it was important to certify a non opt-out class of Fibreboard plaintiffs. If the class that entered into the settlement were an opt-out class, then members of that class could wait to see what the California court did. If the California court found the policies valid (hence worth many billions of dollars), they would opt out of the class and sue for everything they could get; if the California court found the policies invalid (and worth nothing), they would stick with the settlement. The insurance companies would gain little from that kind of settlement, and they would not agree to it. See In re Asbestos Litigation, 90 F.3d 963, 970 (C.A.5 1996).

After eight days of hearings, the District Court found that the insurance policies plus Fibreboard's net worth amounted to a "limited fund," valued at $1.77 billion (the amount the insurance companies were willing to contribute to the settlement plus Fibreboard's value). See App. to Pet. for Cert. 492a. The court entered detailed factual findings. See generally 162 F.R.D., at 518-519. It certified a "non opt-out" class. And the court approved the parties' Global Settlement Agreement. The Global Settlement Agreement allows those exposed to asbestos (and their families) to assert their Fibreboard claims against a fund that it creates. It does not limit recoveries for particular types of claims, but allows for individual determinations of damages based on all historically relevant individual factors and circumstances. See 90 F.3d, at 976. It contains spendthrift provisions designed to limit the total payouts for any particular year, and a requirement that the claimants with the most serious injuries be paid first in any year in which there is a shortfall. It also permits an individual who wishes to retain his right to bring an ordinary action in court to opt out of the arrangement (albeit after

mediation and nonbinding arbitration), but sets a ceiling of $500,000 upon the recovery obtained by any person who does so. See generally 162 F.R.D., at 518-519.

The question here is whether the court's certification of the class under Rule 23(b)(1)(B) violates the law. The majority seems to limit its holding (though not its discussion) to that question, and so I limit the focus of my dissent to the Rule 23(b)(1)(B) issues as well.

II

The District Court certified a class consisting primarily of individuals (and their families) who had been exposed to Fibreboard's asbestos but who had not yet made claims. See ante, at 2305, and n. 5. It did so under the authority of Federal Rule of Civil Procedure 23(b)(1)(B), which, by analogy to pre-Rules "limited fund" cases, permits certification of a non opt-out class where

> "the prosecution of separate actions by or against individual members of the class would create a risk of ... adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."

The majority thinks this class could not be certified under Rule 23(b)(1)(B). I, on the contrary, think it could.

The case falls within the Rule's language as long as there was a significant "risk" that the total assets available to satisfy the claims of the class members would fall well below ***2327** the likely total value of those claims, for in such circumstances the money would go to those claimants who brought their actions first, thereby "substantially impair[ing]" the "ability" of later claimants "to protect their interests." And the District Court found there was indeed such a "risk." 162 F.R.D., at 526.

Conceptually speaking, that "risk" was no different from the risk inherent in a classic pre-Rules "limited fund" case. Suppose a broker agrees to invest the funds of 10 individuals who each give the broker $100. The broker misuses the money, and the customers sue. (1) Suppose their claims total $1,000, but the broker's total assets amount to $100. (2) Suppose the same broker has no assets left, but he does have an insurance policy worth $100. (3) Suppose the broker has both $100 in assets and a $100 insurance policy.

The first two cases are classic limited fund cases. See ante, at 2309 (citing, e.g., Dickinson v. Burnham, 197 F.2d 973 (C.A.2 1952), cert. denied, 344 U.S. 875, 73 S.Ct. 169, 97 L.Ed. 678 (1952), an investors' suit for the return of misused funds); ante, at 2310 (citing, e.g., Morrison v. Warren, 174 Misc. 233, 234, 20 N.Y.S.2d 26, 27 (1940), a suit to distribute insurance proceeds to third party beneficiaries). The third case simply combines the first two, and that third case is the case before us.

Of course the value of the insurance policies in our case is not as precise as the $100 in my example, nor was it certain at the time of settlement. But that uncertainty makes no difference. It was certain that the insurance policies' value was limited. And that limitation was created by the likelihood of an independent judicial determination of the meaning of words in the policy, in respect to which the merits or value of the underlying tort claims against Fibreboard were beside the point.

Nor does it matter that the value of the insurance policies in our case might have fluctuated over time. Long before the Federal Rules of Civil Procedure, courts permitted actions by one group of insurance policy holders to bind all policy holders, even where the group proceeded against an insurance- company-administered fund that fluctuated over time. SeeHartford Life Ins. Co. v. Ibs, 237 U.S. 662, 672, 35 S.Ct. 692, 59 L.Ed. 1165 (1915) (life insurance fund which, like the fund before us, was administered through court- ordered rules that bound all policy holders).

Neither does it matter that the insurance policies might be worth much more money if the California court decided the coverage dispute in Fibreboard's favor. A trust worth, say, $1 million (faced with $2 million in claims) is a limited fund, despite the possibility that a company whose stock it holds might strike oil and send the value of the trust skyrocketing. Limitation is a matter of present value, which takes appropriate account of such future possibilities.

I need not pursue the conceptual matter further, however, for the majority apparently concedes the conceptual point that a fund's limit may equal its "value discounted by risk." Ante, at 2317. But the majority sets forth three additional conditions, which it says are "sufficient ... to justify binding absent members of a class under Rule 23(b)(1)(B), from

which no one has the right to secede." Ante, at 2311. Those three conditions are:

> Condition One: That "the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximum, demonstrate the inadequacy of the fund to pay all the claims." Ibid.; Part IV-A, ante.
>
> Condition Two: That "the claimants identified by a common theory of recovery were treated equitably among themselves." Ante, at 2311; Part IV-B, ante.
>
> Condition Three: That "the whole of the inadequate fund was to be devoted to the overwhelming claims." Ante, at 2311; Part IV-C, ante.

I shall discuss each condition in turn.

A

In my view, the first condition is substantially satisfied. No one doubts that the "totals of the aggregated" claims well exceed the value of the assets in the "fund available ***2328** for satisfying them," at least if the fund totaled about what the District Court said it did, namely, $1.77 billion at most. The District Court said that the limited fund equaled in value "the sum of the value of Fibreboard plus the value of its insurance coverage," or $235 million plus $1.535 billion. App. to Pet. for Cert. 492a. The Court of Appeals upheld the finding. 90 F.3d, at 982. And the finding is adequately supported.

The District Court found that the insurance policies were not worth substantially more than $1.535 billion in part because there was a "significant risk" that the insurance policies would soon turn out to be worth nothing at all. 162 F.R.D., at 526. The court wrote that "Fibreboard might lose" its coverage, i.e., that it might lose "on one or more issues in the [California] Coverage Case, or that Fibreboard might lose its insurance coverage as a result of its assignment settlement program." Ibid.

Two California insurance law experts, a Yale professor and a former state court of appeals judge, testified that there was a good chance that Fibreboard would lose all or a significant part of its insurance coverage once the California appellate courts decided the matter. 90 F.3d, at 974. And that conclusion is not surprising. The Continental policy (for which Fibreboard had paid $10,000 per year) carried limits of $500,000 "per-person" and $1 million "per-occurrence," had been in effect only between May 1957 and March 1959, and arguably denied Fibreboard the right to settle tort cases as it had been doing. See App. to Pet. for Cert. 267a. The Pacific policy was said (no one could find a copy) to carry a $500,000 per-claim limit, and had been in effect only for one year, from 1956-57. See ibid. To win significantly in respect to either of the two policies, Fibreboard had to show that the policies fully covered a person exposed to asbestos long before the policy year (say, in 1948) even if the disease did not appear until much later (say, in 2002). It also had to explain away the $1 million per occurrence limit in the Continental policy, despite policy language defining "one occurrence" as " '[a]ll ... exposure to substantially the same general conditions existing at or emanating from each premises location.' " Brief for Respondents Continental Casualty et al. 5. And Fibreboard had to show that its tort-suit settlement practice was consistent with the policy.

The settlement value of previous cases also indicated that the insurance policies were of limited value. Fibreboard's "no-cash" settlements (which required a settling plaintiff to obtain recovery from the insurance companies) were twice as high on average as were its comparable 40% cash settlements. App. to Pet. for Cert. 231a. That difference, suggesting a 50% discount for 40% cash, in turn suggests that settling parties estimated the odds of recovering on the insurance policies as worse than 2 to 1 against.

The District Court arrived at the present value of the policies ($1.535 billion) by looking to a different settlement, the settlement arrived at in the insurance coverage case itself as a result of bargaining between Fibreboard and the insurance companies. See id., at 492a. That settlement, embodied in the Trilateral Agreement, created a backup fund by taking from the insurance companies $1.535 billion (plus other money used to satisfy claims not here at issue) and simply setting it aside to use for the payment of claims brought against Fibreboard in the ordinary course by members of this class (in the event that the federal courts ultimately failed to approve the Global Settlement Agreement).

The Fifth Circuit approved this method of determining the value of the insurance policies. See 90 F.3d, at 982 (discussing value of Trilateral Agreement plus value of Fibreboard). And the majority itself sees nothing wrong with that method in principle. The majority concedes that one

> "may take a settlement amount as good evidence of the maximum available if one can assume that parties of equal knowledge and negotiating skill agreed upon the figure through arms-length

bargaining, unhindered by any considerations tugging against the interests of the parties ostensibly represented in the negotiation." Ante, at 2317.

The majority rejects the District Court's valuation for a different reason. It says that the settlement negotiation that led to the ***2329** valuation was not necessarily a fair one. The majority says it cannot make the necessary "arms-length bargaining" assumption because "[c]lass counsel " had a "great incentive to reach any agreement" in light of the fact that "some of the same lawyers ... had also negotiated the separate settlement of 45,000" pending cases, which was partially contingent upon a global settlement or other favorable resolution of the insurance dispute. Id., at 2317-2318 (emphasis added).

The District Court and Court of Appeals, however, did accept the relevant "arms-length" assumption, with good reason. The relevant bargaining (i.e., the bargaining that led to the Trilateral Agreement that set the policies' value) was not between the plaintiffs' class counsel and the insurance companies; it was between Fibreboardand the insurance companies. And there is no reason to believe that that bargaining, engaged in to settle the California coverage dispute, was not "arms-length." That bargaining did not lead to a settlement that would release Fibreboard from potential tort liability. Rather, it led to a potential backup settlement that did not release Fibreboard from anything. It created a fund of insurance money, which, once exhausted, would have left Fibreboard totally exposed to tort claims. Consequently, Fibreboard had every incentive to squeeze as much money as possible out of the insurance companies, thereby creating as large a fund as possible in order to diminish the likelihood that it would eventually have to rely upon its own net worth to satisfy future asbestos plaintiffs.

Nor are petitioners correct when they argue that the insurance companies' participation in setting the value of the insurance policies created a fund that is limited "only in the sense that ... every settlement is limited." Brief for Petitioners 28. As the District Court found, the fund was limited by the value of the insurance policies (along with Fibreboard's own limited net worth), and that limitation arose out of the independent likelihood that the California courts would find the policies valueless. App. to Pet. for Cert. 492a. That is why the District Court said that certification in this case does not determine whether

"mandatory class certification is appropriate in the typical case where a class action is settled with a defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute." 162 F.R.D., at 527.

The court added that, in the ordinary case: "If the settlement failed, ... the defendant would retain the settlement funds (or the insurance coverage), and there might not be the 'impair[ment]' to class members' 'ability to protect their interests' required for mandatory class certification." Ibid. In this case, however, if settlement failed, coverage "may well disappear ... with the result that Class members could not then secure their due through litigation." Ibid.

I recognize that one could reasonably argue about whether the total value of the insurance policies (plus the value of Fibreboard) is $1.535 billion, $1.77 billion, $2.2 billion, or some other roughly similar number. But that kind of argument, in this case, is like arguing about whether a trust fund, facing $30,000 in claims, is worth $15,000 or $20,000 (e.g., do we count Aunt Agatha's share as part of the fund?), or whether a ship, subject to claims that, by any count, exceed its value, is worth a little more or a little less (e.g., does the coal in the hold count as fuel, which is part of the ship's value, or as cargo, which is not?). A perfect valuation, requiring lengthy study by independent experts, is not feasible in the context of such an unusual limited fund, one that comes accompanied with its own witching hour. Within weeks after the parties' settlement agreement, the insurance policies might well have disappeared, leaving most potential plaintiffs with little more than empty claims. The ship was about to sink, the trust fund to evaporate; time was important. Under these circumstances, I would accept the valuation findings made by the District Court and affirmed by the Court of Appeals as legally sufficient. See supra, at 2325.

B

I similarly believe that the second condition is satisfied. The "claimants ... were treated equitably among themselves." Ante, ***2330** at 2311. The District Court found equitable treatment, and the Court of Appeals affirmed. But a majority of this Court now finds significant inequities arising out of class counsel's "egregious" conflict of interest, the settlement's substantive terms, and the District Court's failure to create subclasses. See ante, at 2318-2320. But nothing I can find in the Court's opinion, nor in the objectors' briefs, convinces me that the District Court's findings on these matters were clearly erroneous, or that the Court of Appeals

went seriously astray in affirming them.

The District Court made 76 separate findings of fact, for example, in respect to potential conflicts of interest. App. to Pet. for Cert. 392a-430a. Of course, class counsel consisted of individual attorneys who represented other asbestos claimants, including many other Fibreboard claimants outside the certified class. Since Fibreboard had been settling cases contingent upon resolution of the insurance dispute for several years, any attorney who had been involved in previous litigation against Fibreboard was likely to suffer from a similar "conflict." So whom should the District Court have appointed to negotiate a settlement that had to be reached soon, if ever? Should it have appointed attorneys unfamiliar with Fibreboard and the history of its asbestos litigation? Where was the District Court to find those competent, knowledgeable, conflict-free attorneys? The District Court said they did not exist. Finding of Fact ¶ 372 says there is "no credible evidence of the existence of other 'conflict-free' counsel who were qualified to negotiate" a settlement within the necessary time. Id., at 428a. Finding of Fact ¶ 317 adds that the District Court viewed it as "crucial ... to appoint asbestos attorneys who were experienced, knowledgeable, skilled and credible in view of the extremely short window of opportunity to negotiate a global settlement, and the very high risk to future claimants presented by the Coverage Case appeal." Id., at 401a. Where is the clear error?

The majority emphasizes the fact that, by settling the claims of a class that consisted, for the most part, of persons who had not yet asserted claims against Fibreboard, counsel assured the availability of funds to pay other clients who had already asserted those claims. Ante, at 2318. The decision to split the latter "inventory" claims from the former "class" claims, however, reflected the suggestion, not of class counsel, but of a judge, Circuit Judge Patrick Higginbotham, who had become involved in efforts to produce a timely settlement. Judge Higginbotham thought that negotiations had broken down because the combined class was "too complex." App. to Pet. for Cert. 316a-317a; see also id., at 397a. He thought "inventory" claim settlements could be used as benchmarks to determine future class claim values, id., at 316a-317a, and that is just what happened. Although the majority is concerned that "inventory" plaintiffs "appeared to have obtained better terms than the class members," ante, at 2319, Finding of Fact ¶ 329 says that class counsel

"used the higher-than-average [inventory plaintiff settlement values] ... to achieve a global settlement for future claimants at similarly high values, effectively arguing they could not possibly accept less for a class of future claimants than they had just negotiated for their present clients." App. to Pet. for Cert. 407a.

In addition, more than 150 findings of fact, made after an 8-day hearing, support the District Court's finding that overall the settlement is "fair, adequate, and reasonable." See id., at 500a-501a. And, of course, Finding of Fact ¶ 318 says that appointing other attorneys--i.e., those who had no inventory clients--would have " 'jeopardiz[ed] any effort at serious negotiations' " and "resulted in a less favorable settlement" for the class, or perhaps no settlement followed by no insurance policy either. Id., at 402a.

The Fifth Circuit found that "[t]he record amply supports" these District Court findings. 90 F.3d, at 978. Does the majority mean to set them aside? If not, does it mean to set forth a rigid principle of law, such as the principle that asbestos lawyers with clients outside a class, who will potentially benefit from a class settlement, can never represent a class in settlement negotiations? And does that principle apply no matter how unusual the circumstances, or no matter how necessary that representation might be? ***2331** Why should there be such a rule of law? If there is not an absolute rule, however, I do not see how this Court can hold that the case before us is not that unusual situation.

Consider next the claim that "equity" required more subclasses. Ante, at 2319-2320. To determine the "right" number of subclasses, a district court must weigh the advantages and disadvantages of bringing more lawyers into the case. The majority concedes as much when it says "at some point there must be an end to reclassification with separate counsel." Ante, at 2320. The District Court said that if there had "been as many separate attorneys" as the objectors wanted, "there is a significant possibility that a global settlement would not have been reached before the Coverage Case was resolved by the California Court of Appeal." App. to Pet. for Cert. 428a. Finding of Fact & ¶ 346 lists the shared common interests among subclasses that argue for single representation, including "avoiding the potentially disastrous results of a loss ... in the Coverage Case," "maximizing the total settlement contribution," "reducing transactions costs and delays," "minimizing ... attorney's fees," and "adopting" equitable claims payment "procedures." Id., at 415a. Surely the District Court

was within its discretion to conclude that "the point" to which the majority alludes was reached in this case.

I need not go into further detail here. Findings of Fact ¶¶ 347-354 explain why the alleged conflict between pre- and post-1959 claimants is not significant. Id., at 415a-418a (noting that "the decision as to how to divide the settlement among class members" did not take place until after the Trilateral Agreement was agreed to, at which point money was available equally to both pre- and post-1959 claimants). Findings of Fact ¶¶ 355-363 explain why the alleged conflict between claimants with, and those without, current illnesses is not significant. Id., at 419a-422a (explaining why "the interest of the two subgroups at issue here coincide to a far greater extent than they diverge"). The Fifth Circuit found that the District Court "did not abuse its discretion in finding that the class was adequately represented and that subclasses were not required." 90 F.3d, at 982. This Court should not overturn these highly circumstance-specific judgments.

C

The majority's third condition raises a more difficult question. It says that the "whole of the inadequate fund" must be "devoted to the overwhelming claims." Ante, at 2311 (emphasis added). Fibreboard's own assets, in theory, were available to pay tort claims, yet they were not included in the global settlement fund. Is that fact fatal?

I find the answer to this question in the majority's own explanation. It says that the third condition helps to guarantee that those who held the

> "inadequate assets had no opportunity to benefit [themselves] or claimants of lower priority by holding back on the amount distributed to the class. The limited fund cases thus ensured that the class as a whole was given the best deal; they did not give a defendant a better deal than seriatim litigation would have produced." Ante, at 2311.

That explanation suggests to me that Rule 23(b)(1)(B) permits a slight relaxation of this absolute requirement, where its basic purpose is met, i.e., where there is no doubt that "the class as a whole was given the best deal," and where there is good reason for allowing the third condition's substantial, rather than its literal, satisfaction.

Rule 23 itself does not require modern courts to trace every contour of ancient case law with literal exactness. Benjamin Kaplan, reporter to the Advisory Committee on Civil Rules that drafted the 1966 revisions, upon whom the majority properly relies for explanation, see, e.g., ante, at 2308, 2313, wrote of Rule 23:

> "The reform of Rule 23 was intended to shake the law of class actions free of abstract categories ... and to rebuild the law on functional lines responsive to those recurrent life patterns which call for mass litigation through representative parties. ... And whereas the old Rule had paid virtually no attention to the practical administration of class actions, the revised Rule dwelt long on this matter--not, to be ***2332** sure, by prescribing detailed procedures, but by confirming the courts' broad powers and inviting judicial initiative." A Prefatory Note, 10 B.C. Ind. & Com. L.Rev. 497 (1969).

The majority itself recognizes the possibility of providing incentives to enter into settlements that reduce costs by granting a "credit" for cost savings by relaxing the whole-of-the-assets requirement, at least where most of the savings would go to the claimants. Ante, at 2322.

There is no doubt in this case that the settlement made far more money available to satisfy asbestos claims than was likely to occur in its absence. And the District Court found that administering the fund would involve transaction costs of only 15%. App. to Pet. for Cert. 362a. A comparison of that 15% figure with the 61% transaction costs figure applicable to asbestos cases in general suggests hundreds of millions of dollars in savings--an amount greater than Fibreboard's net worth. And, of course, not only is it better for the injured plaintiffs, it is far better for Fibreboard, its employees, its creditors, and the communities where it is located for Fibreboard to remain a working enterprise, rather than slowly forcing it into bankruptcy while most of its money is spent on asbestos lawyers and expert witnesses. I would consequently find substantial compliance with the majority's third condition.

Because I believe that all three of the majority's conditions are satisfied, and because I see no fatal conceptual difficulty, I would uphold the determination, made by the District Court and affirmed by the Court of Appeals, that the insurance policies (along with Fibreboard's net value) amount to a classic limited fund, within the scope of Rule 23(b)(1)(B).

III

Petitioners raise additional issues, which the majority

does not reach. I believe that respondents would likely prevail were the Court to reach those issues. That is why I dissent. But, as the Court does not reach those issues, I need not decide the questions definitively.

In some instances, my belief that respondents would likely prevail reflects my reluctance to second-guess a court of appeals that has affirmed a district court's fact- and circumstance-specific findings. See supra, at 2325; cf. Amchem Products, Inc. v. Windsor, 521 U.S. 591, 629-630, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (BREYER, J., concurring in part and dissenting in part). That reluctance applies to those of petitioners' further claims that, in effect, attack the District Court's conclusions related to: (1) the finding under Rule 23(a)(2) that there are "questions of law and fact common to the class," see App. to Pet. for Cert. 480a; see generally Amchem, supra, at 634-636, 117 S.Ct. 2231 (BREYER, J., concurring in part and dissenting in part); (2) the finding under Rule 23(a)(3) that claims of the representative parties are "typical" of the claims of the class, see App. to Pet. for Cert. 480a-481a; (3) the adequacy of "notice" to class members pursuant to Rule 23(e) and the Due Process Clause, see id., at 511a; see generally Amchem, supra, at 640-641, 117 S.Ct. 2231 (BREYER, J., concurring in part and dissenting in part); and (4) the standing-related requirement that each class member have a good-faith basis under state law for claiming damages for some form of injury-in-fact (even if only for fear of cancer or medical monitoring), see App. to Pet. for Cert. 252a; cf., e.g., Coover v. Painless Parker, Dentist, 105 Cal.App. 110, 286 P. 1048 (1930).

In other instances, my belief reflects my conclusion that class certification here rests upon the presence of what is close to a traditional limited fund. And I doubt that petitioners' additional arguments that certification violates, for example, the Rules Enabling Act, the Bankruptcy Act, the Seventh Amendment, and the Due Process Clause, are aimed at or would prevail against a traditional limited fund (e.g., "trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit," ante, at 2309 (internal quotation marks and citations omitted)). Cf. In re Asbestos Litigation, 90 F.3d, at 986 (noting that Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985), involved a class certified ***2333** under the equivalent of Rule 23(b)(3), not a limited fund case under Rule 23(b)(1)(B)). Regardless, I need not decide these latter issues definitively now, and I leave them for another day. With that caveat, I respectfully dissent.

END OF DOCUMENT

VI

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

101 West Lombard Street
Baltimore, Maryland 21201

Chambers of
PAUL V. NIEMEYER
United States Circuit Judge

(410) 962-4210
Fax (410) 962-2277

February 24, 2000

Mr. John K. Rabiej
Chief, Rules Committee Support Office
Administrative Office of the
United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear John:

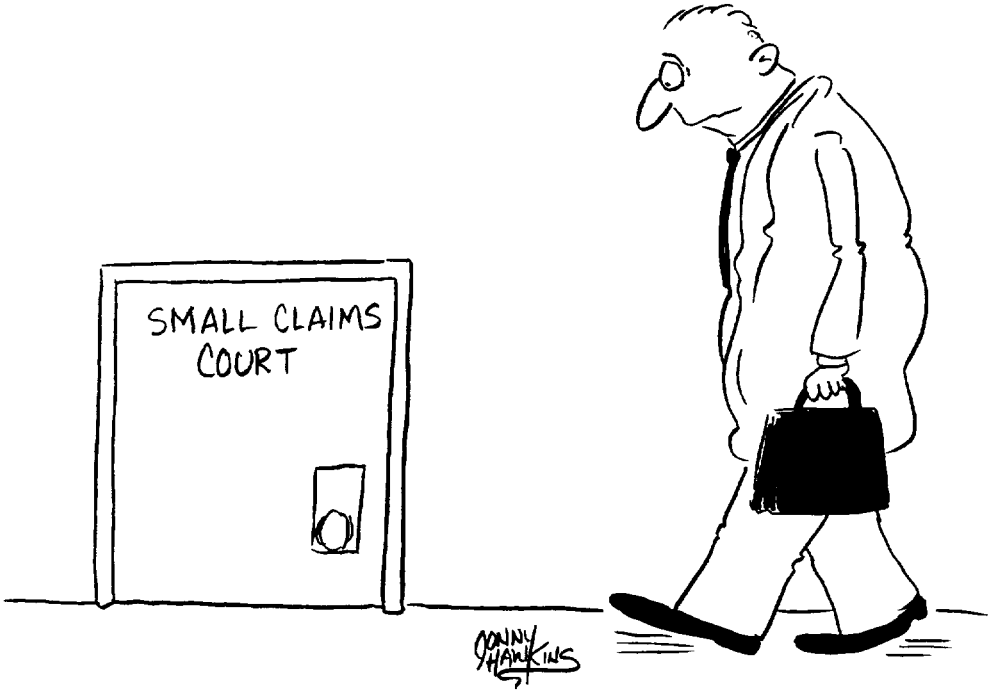
I think this should be included with the simplified procedure materials circulated for our April meeting.

Sincerely,

Paul V. Niemeyer

Enc.

| *Last* **Laugh** |



VII

ORAL PRESENTATION

VII

ORAL PRESENTATION

VIII

Agenda Docketing Memorandum

April 2000

Only a few agenda items have appeared in the mail over the last several months. They are summarized below, with suggestions for disposition.

Rule 5: California State Practice 99-CV-11: This suggestion complains of a California practice that requires that service of post-summons papers be made by a nonparty. The Subcommittee recommends that it be removed from the agenda as a topic outside Advisory Committee responsibilities.

Rule 8: Pro se Prisoner Forms: 99-CV-F: It is difficult to untangle this proposal. It seems to be that forms should be created for prisoner pro-se litigants, so that they do not lose valid claims for inability to plead. The Committee has continued to defer action on the suggestion that a special set of rules be adopted for pro se litigation. This proposal raises issues that will naturally be considered if a pro se rule project is undertaken. The Subcommittee recommends that this specific item be removed from the agenda.

Rule 23(e): 99-CV-H: This proposal from the Public Citizen Litigation Group deals with disclosure of side-settlement "deals" when a class action is settled. It has been referred to the Rule 23 Subcommittee.

Rules 30(b), 45: 99-CV-J: Rule 30(b)(2) requires that a notice of deposition inform all other parties of the means of recording a deposition. It does not require notice to a nonparty deponent of the means of recording, and the Rule 45 subpoena provisions do not require such notice. Rule 30(b)(3), somewhat strangely, provides that if any other party plans an alternative method of recording, notice must be given to the deponent as well as to other parties. A deponent may well benefit from notice of the means of recording; in some cases a deponent might wish to arrange an alternate means of recording. The notice might well be provided in the subpoena, since there probably are good reasons for requiring that only the subpoena be served on a nonparty deponent. The Subcommittee recommends that this matter be referred to the Discovery Subcommittee.

Rule 77: 99-CV-I: D.N.H. Local Rule 77.3(a) provides that the clerk's office will not date stamp and return copies of filings. Filing may be confirmed by using the court's computer access systems. The proponent urges that this local rule is unfair to prisoner litigants who lack access to computers, and asks that the local rule be amended to require that copies be stamped and returned. There may be a real problem here, but the local rule does not appear to be inconsistent with Civil Rule 77. Action could be taken only by creating new provisions that regulate these matters. The pace of technology in the clerk's offices, and in society, continues to be rapid. The Subcommittee recommends that this matter be referred to the Technology Subcommittee.

Rule 82: 99-CV-G: 28 U.S.C. § 1393, regulating venue among divisions within a single district, was repealed in 1988. The last sentence of Civil Rule 82 provides: "An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391-93." The Subcommittee recommends that Rule 82 be amended to conform to the repeal of § 1393 as a consent matter.

Docket Priority for "our elders": 99-CV-11: This suggestion would establish "trial setting priority for old folks." 28 U.S.C. § 1657 provides that in most circumstances, "each court of the United States shall determine the order in which civil actions are heard and determined." The Judicial Conference is authorized to modify these local rules "in order to establish consistency among the judicial circuits." The Subcommittee recommends that this proposal be removed from the agenda.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

March 8, 2000
Via Federal Express Mail

MEMORANDUM TO CIVIL RULES COMMITTEE

SUBJECT: *Consent Calendar*

In accordance with our established procedures, I have attached four new proposals that the Agenda Subcommittee recommends should be removed from the committee's agenda. In addition, the subcommittee recommends that two other items be referred to the Class Action and Discovery Subcommittees, respectively, and that a technical conforming amendment to Rule 82 be adopted. A copy of Professor Cooper's summary of the items is included for your information.

Please advise my office no later than March 24, 2000, if you would like to move any of the proposals for discussion at the committee's meeting on April 10-11, 2000. If no requests are made to discuss the proposals, the recommendations of the Agenda Subcommittee will be adopted without any further action.

Thank you.

John K. Rabiej

Attachments

J. MICHAEL SCHAEFER*
JOSEPH E. PAGE**

SCHAEFER & ASSOCIATES
Law Offices

99-CV-11
2000-CV-A

January 19, 2000

Secretary, Committee on Rules of Practice & Procedure
Administrative Office of the U.S. Courts
WASHINGTON, D.C. 20544

copy: Daniel F. Polsenberg, Esq. fax 385-9447
State Bar of Nevada

At a seminar this date on changes in the federal rules, conducted by Judge Philip Pro and two Magistrate Judges, the audience was invited to send you comments for changes in the federal rules! Here is my input:

1. It pains me that California mandates that service of post-summons-service pleadings, like motinns, notices, etc. must be done by a non-party; I applaud the federal and Nevada rules that permit anybody to make such service, and sign certificate of such service. I know this isn't the decision of your office, but if you ever have an opportunity to confer with the California Bar's liason on rules changes, please share with them the concern of many sole practicioners that the 'nonparty' requirement for California's CCP 1013a, is a royal pain in the rear, and many of applaud the federal Rule 5 as reflecting common sense. I do a lot of pro per for family interest

2. The new rules permitting fax tranmission of such post-summons-service pleadings are concerned that there be some limitation. I have had 50 pages faxes dumped into my machine, creating a burden to deal with unattached bulk paper and dissipating a tonor supply. The rule requires consent of adverse counsel, but consent for letter-exchanges and brief pleadings, is deemed unfettered wide-open consent. If I were writing the rules, I'd require that any pleading exceeding 10 pages requires the specific consent of the recipient.

3. Calif. CCP 1987(b), having written notice to a party to appear be the same as service of a subpoena, makes a lot of sense. In federal actions wherein I am a party, I am frankly irritated at being bothered by process servers hunting

*ADMITTED NV. & CA.
**ADMITTED AS PATENT AGENT ONLY, ALL JURISDICTIONS

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FAX (702) 792-6721

me down to serve a subpoena to appear, as if I would not appear as a plaintiff or a defendant???? Not only is this an imposition on parties to litigation, to be subpoenaed, when they all plan to appear anyway, it serves only to create "make work" services and costs for the other side. I must ask that the Committee give serious consideration to adopting a version of CCP 1987(b) into our federal rules.

4. Iaam not aware that we provide trial setting priority for Old Folks. California does, see attached CCP 36. Out of respect for our elders, we should speed up justice. And the legislative intent that produced CCP 36 in the California legislature, should be grounds for the Congress similarly evaluating our aging society and how well they are served by the judicial system.

Very truly,

Mike Schaefer

J.MICHAEL SCHAEFER
Public Interest Attorney

cc: Honorable Philip M. Pro
US DISTRICT JUDGE

Enclosures: CCP 1987
CCP 36

1929, c. 110, p. 197, § 1; . § 2, operative Jan. 1, 1958; 2.)

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duces tecum, but who is not required to personally attend a deposition away from his or her place of business, shall be those prescribed in Section 1563 of the Evidence Code. *(Added by Stats.1961, c. 1386, p. 3159, § 1. Amended by Stats.1986, c. 603, § 4.)*

§ 1987. Subpoena; notice to produce party or agent; method of service; production of books and documents

(a) Except as provided in Sections 68097.1 to 68097.8, inclusive, of the Government Code, the service of a subpoena is made by delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to the witness at the same time, if demanded by him or her, the fees to which he or she is entitled for travel to and from the place designated, and one day's attendance there. The service shall be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. The service may be made by any person. When service is to be made on a minor, service shall be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot be located with reasonable diligence, then service shall be made on any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed, and on the minor if the minor is 12 years of age or older.

(b) In the case of the production of a party to the record of any civil action or proceeding or of a person for whose immediate benefit an action or proceeding is prosecuted or defended or of anyone who is an officer, director, or managing agent of any such party or person, the service of a subpoena upon any such witness is not required if written notice requesting the witness to attend before a court, or at a trial of an issue therein, with the time and place thereof, is served upon the attorney of that party or person. The notice shall be served at least 10 days before the time required for attendance unless the court prescribes a shorter time. If entitled thereto, the witness, upon demand, shall be paid witness fees and mileage before being required to

testify. The giving of the notice shall have the same effect as service of a subpoena on the witness, and the parties shall have such rights and the court may make such orders, including the imposition of sanctions, as in the case of a subpoena for attendance before the court.

(c) If the notice specified in subdivision (b) is served at least 20 days before the time required for attendance, or within such shorter time as the court may order, it may include a request that the party or person bring with him or her books, documents or other things. The notice shall state the exact materials or things desired and that the party or person has them in his or her possession or under his or her control. Within five days thereafter, or such other period as the court may allow, the party or person of whom the request is made may serve * * * written objections to the request or any part thereof, with a statement of grounds. Thereafter, upon noticed motion of the requesting party, accompanied by a showing of good cause and of materiality of the items to the issues, the court may order production of items to which objection was made, unless the objecting party or person establishes good cause for nonproduction or production under limitations or conditions. The procedure of this subdivision is alternative to the procedure provided by Sections 1985 and 1987.5 in the cases herein provided for, and no subpoena duces tecum shall be required.

Subject to this subdivision, the notice herein provided shall have the same effect as is provided in subdivision (b) as to a notice for attendance of that party or person. *(Enacted 1872. Amended by Stats.1963, c. 1485, p. 3049, § 3; Stats.1968, c. 933, p. 1783, § 1; Stats.1969, c. 311, p. 678, § 1; Stats.1969, c. 1034, p. 2013, § 1.5; Stats. 1981, c. 184, p. 1105, § 2; Stats.1986, c. 605, § 2; Stats.1989, c. 1416, § 28.)*

Cross References

Administrative adjudication, service of subpoenas by agency, see Government Code § 11510.
Concealment of witness, see Code of Civil Procedure § 1988.
Copy of supporting affidavit required to be served with subpoena, see Code of Civil Procedure § 1987.5.
Criminal proceedings, service in, see Penal Code § 1328.
Legislator's privilege, see Const. Art. 4, § 14.
Process servers, compensation, see Code of Civil Procedure § 1033.5.
Processors of farm products, see Food and Agricultural Code § 55782.
Produce dealers, see Food and Agricultural Code § 56472.
Service of legislative subpoena, see Government Code § 9403.
Sheriff, duty to serve process, see Government Code § 26608.
Sheriff's fee for service, see Government Code § 26743.

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Cross References

New trials, restricted applicability of article governing, see Code of Civil Procedure § 655.

§ 35. Election matters; precedence

Proceedings in cases involving the registration or denial of registration of voters, the certification or denial of certification of candidates, the certification or denial of certification of ballot measures, and election contests shall be placed on the calendar in the order of their date of filing and shall be given precedence. *(Added by Stats.1971, c. 980, p. 1893, § 1.)*

§ 36. Motion for preference; party of age 70; party under age 14; medical reasons; interest of justice; time of trial

(a) A party to a civil * * * action who * * * is over the age of 70 years * * * may petition the court * * * for a preference, which the court shall grant if the court makes all of the following findings:

(1) The party * * * has a substantial interest in the action as a whole.

(2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.

(b) A civil action to recover damages for wrongful death or personal injury shall be entitled to preference upon the motion of any party to the action who is under the age of 14 years unless the court finds that the party does not have a substantial interest in the case as a whole. A civil action subject to subdivision (a) shall be given preference over a case subject to this subdivision.

(c) Unless the court otherwise orders, notice of a motion for preference shall be served with the memorandum to set or the at-issue memorandum by the party serving the memorandum, or 10 days after such service by any other party; or thereafter during the pendency of the action upon the application of a party who reaches the age of 70 years.

(d) In its discretion, the court may also grant a motion for preference served with the memorandum to set or the at-issue memorandum and accompanied by clear and convincing medical documentation which concludes that one of the parties suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months, and which satisfies the court that the interests of justice will be served by granting the preference.

(e) Notwithstanding [illegible]

party or a party's attorney, or upc cause stated in the record. * * * shall be for no more than 15 days than one * * * continuance for pl be granted to any party.

(g) Upon the granting of a m pursuant to subdivision (b), a part upon a health provider's alleged gence, as defined in Section 364, date not sooner than six months an months from the date that the *(Added by Stats.1979, c. 151, p. 34 Stats.1981, c. 215, § 1; Stats.1988, 1989, c. 913, § 1; Stats.1990, c. 4*

§ 36.5. Motion for preference; aff

An affidavit submitted in suppc preference under subdivision (a) o signed by the attorney for the party based upon information and belie diagnosis and prognosis of any par not admissible for any purpose othe preference under subdivision (a) of *by Stats.1990, c. 1232 (A.B.3820), § 1*

§ 37. Preference; action for dama felony; time

(a) A civil action shall be entitle the action is one in which the damages * * * which were alleged t by the defendant during the comn offense for which the defendant h convicted.

(b) The court shall endeavor to t 120 days of the grant of prefer *Stats.1982, c. 514, p. 2297, § 1. Ame c. 938, § 1, eff. Sept. 20, 1983.)*

CHAPTER 2. COURT OF IM [HEADING REPEAL

§ 38. Repealed by Code Am.1880, Stats.1933, c. 743, p. 1835, § 61

CHAPTER 2.5. THE JU COUNCIL [REPEAL

§§ 39 to 39.6 Repealed by Stats.19

RECEIVED 8/3/99

99-CV-F

Peter G. McCabe , Secretary

Committe On Rules Of Practice Procedure

Administrative Office of the United States Courts

Washington , D.C. 20544

Ely, Iyass Suliman PL/Ph.D

196-374

P.O. Box 5500

Chillicothe , Ohio 45601

Sir:

A suggestion for savings to the Courts. The incarcerated inmate has numeroues comolaints. There are money motions he is allowed to file , these have been proven to be ineffectual and friviloues in nature. To prevent this repitioues occurrance the , Federal Advisory Committe , On Criminal Rules And The Advisory Committee on Civil Rules can create a Extradionary Writ format that covers each issue. The format will give the inmate access to the Courts with the definition of his complaint spelled out by , the Mandamus Extradinary Writ explaining its a Judicial , Civil , or Academia comolaint. The Judicial is to mean Criminal in the nature of complaint , or Civil with Academia having the meaning.

The motion should read as the following motion is construed and contrnucted! The motion for the Courts allows inmates access. Motion and complaint is defined with Constitutional purnose for lawful act to occurr when the Petitioner is violated of the laws of the Constitution.

Iyass Suliman

072799

e/E.Ph.D

Copies:

1 Birth Certificate

2 Collegiate Transcripts

1 Letter of Verification

Iyass Suliman#47206 I.C.S.

I.C.S. Scranton , P.A. 18515

(717)342-7701

Graduate 12 / 11 / 87

Student Number 16412091

Program Number 0805103

Enrollment Date 070386

Ely

Peter [illegible] Coabe

Secretary, Office

On Rules of Practice

and Procedure

[illegible]shington, D.C.

2 0544

Elly

196-374

P.O. Box 5500

Chillicothe, Ohio

45601

Dear Sir:

I am instructed by the Jurist of Case No. C2-94-643 to proceed in the Claims Courts of the State of Ohio. I have proceeded by 97-10766 and Case No. 97-1 0634, each Judge upheld the Clerk s' decision & Each case was appealed to the 10th Appellate District, Appeals Court, Frankl in County, Ohio, Columbus, Ohio. The Case No. 97-10766 was assigned Case No.99AP809, 99AP697 was assigned to Case No. 99Ap 697 of Case No. 97-10634. The rulings aren't in a reentrance to Federal District Court, 6th District Western, Columbus, Ohio. I request the method (knowledge) of refiling upon orders of the District Court Judges. The ruling had no time specification and all other forms in The Federal Rules and Procedure are in motions of a specified time. The Federal Ruling is indicated by the Case No..

Sincerely,

Elly 196-374

Elly 196-374

e /E

072 599

Peter G. McCabe , Secretary

Committe On Rules Of Practice Procedure

Administrative Office of the United States Courts

Washington , D.C. 20544

Ely, Iyass Suliman PL/Ph.D

196-374

P.O. Box 5500

Chillicothe , Ohio 45601

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Student Number 16412091

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Enrollment Date 070386

Ely

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99-CV-6

November 3, 1999

The Honorable Peter G. McCabe
Secretary
Advisory Committee on Civil Rules
Thurgood Marshall Federal Judicial Building
One Columbus Circle, N.E.
Washington, D.C. 20544-0001

Dear Mr. McCabe:

Would you kindly bring to the attention of the Advisory Committee on Civil Rules the possibility of amending the last sentence of rule 82 to read, "An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§1391-92." The last sentence of rule 82 now refers to "§§ 1391-93."

Congress repealed section 1393 in 1988. It has not seen fit to include any general venue provision in section 1393 since then, and it is unlikely that it will do so given the rewriting of the venue provisions in 1990. In short, amending rule 82 to conform to the current layout of the Judicial Code is now justified.

Respectfully,

Charles D. Cole, Jr.

CDC/lh

PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009-1001

(202) 588-1000

99-CV- H

November 23, 1999

Hon. Anthony J. Scirica
Chair, Standing Committee on Rules
of Practice and Procedure
United States Courthouse
601 Market Street
Philadelphia PA 19106

Hon. Paul V. Niemeyer
Chair, Advisory Committee on Civil Rules
United States Courthouse
101 West Lombard Street
Baltimore, MD 21201

Re: Proposed Amendment to Rule 23(e) Concerning Disclosure and Approval of Side-Settlements

Dear Judges Scirica and Niemeyer:

I am writing to you in your respective capacities as Chairs of the Standing Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules to request consideration of an amendment to Fed. R. Civ. P. 23. Originally, I sent this proposal to Judge Edward Becker because of a prior discussion we had had on the topic. He in turn suggested that I send the material to you because of your Committee roles.

Attached to this letter is a suggested amendment to Rule 23(e), which would require that all "side-settlements," including their attorney's fee components, be

disclosed and approved by the district court. The effect of such a change would be generally to prevent settling class counsel and settling defendants from "buying out" objectors on terms different from those offered to the class as a whole. The proposal would apply to all settlements whether they were struck while the case was before the district court or pending on appeal. The remainder of this letter sets forth examples of the problems addressed by the Rule change and the need for such a change.

I.

In our experience, the practice of paying objectors to go away, without disclosure and approval, has become commonplace. Although we are aware of many such cases, consider the following four examples in large nationwide cases:

> **1.** After announcement of the *General Motor Pick-up* class action coupon settlement in the federal MDL proceeding, counsel for GM contacted plaintiffs' counsel in a competing class action pending in state court. GM counsel was aware that this plaintiffs' counsel's clients would likely be objectors to the MDL settlement. GM counsel suggested that objecting plaintiffs' counsel might file an amended complaint that would allow removal of the state court class action to federal court, presumably so that it could be consolidated with the MDL proceedings. GM counsel further suggested that thereafter the settling parties might arrange payment of objecting counsel's fees — but not one penny of additional relief for counsel's clients or for the class as a whole — in exchange for dropping his clients' objections. Our understanding is that the plaintiffs' counsel did not accept the offer.
>
> **2.** In the *AcroMed* bone screw "limited fund" settlement, *In re Orthopedic Bone Screw Prod. Liab. Litig.*, 176 F.R.D. 158 (E.D. Pa. 1997), the district court's approval was very much in doubt. For one thing, the settling parties' assertions as to the value of the fund likely understated its

true value by several fold. The settlement, moreover, released concededly solvent non-parties, against whom a large number of class members had significant claims. Finally, the settlement suffered from all the problems later condemned by the Supreme Court in *Ortiz v. Fibreboard.*

At least three groups of objectors — one that had taken an appeal and two others that were contemplating an appeal — were simply paid significant sums of money to drop their objections, *i.e.*, they received a different and better deal than the other absent class members. The *non*-objecting class members' recoveries were limited by the class action settlement, which the district court approved on a express finding that there was a "limited fund" and that the defendant had nothing more to give. This "buy out" took place in complete secrecy, without disclosure to the court or the class members.

3. In another "limited fund" personal-injury settlement approved earlier this year, now pending on appeal in a federal circuit court, certain objectors now appear to be seeking a settlement that would involve cash payments without any disclosure or approval by the court, in exchange for dismissal of their appeals. The participants to the settlement recognize that this route is probably the only way to obtain a final judgment, and thus a lucrative private settlement, because the class settlement appears doomed by *Ortiz*.

4. Finally, in the *John Hancock* insurance fraud settlement, we represented a class member challenging what appeared to be a substantial cash payment to objectors and their counsel to drop their appeal on the merits, without any disclosure to the plaintiff class members, who received a decidedly different (and probably far less lucrative) deal. The First Circuit rejected our client's challenge, leaving no doubt that, in its view, secret side-settlements were permissible even if the settling class members were able to use an appeal as leverage to exact a better deal than the deal provided the rest of the class. *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999).

In each of these proposed or consummated side-deals, despite the Rule 23(e) requirements that class settlements be scrutinized openly and that the court approve all

parts of them, the settling parties and objectors proceeded secretly. Indeed, in the *John Hancock* case, even after we got wind of the deal, the settling parties refused disclosure of these side-deals on the ground that only an *overall* class settlement, not settlement of the individual claims of members of the settlement class, are subject to Rule 23(e). And, since the First Circuit agreed with that analysis, we believe that the best approach now is to amend the Rule, although we may litigate the issue elsewhere if the circumstances warrant it.

In our view, the structure and purpose of Rule 23 demand that side-settlements be disclosed and approved by the district court. Whether one characterizes these side payments as "bribes" by the settling parties or "extortion" by objectors, or some combination of the two, something should be done to put an end to this conduct for at least four reasons.

First, permitting unregulated side-agreements subverts the Rule's structure regarding class membership. The Rule expressly permits only one method of exclusion from the class — opting out in (b)(3) class actions. An opt-out must be exercised individually, and because it does not give a class member the ability to defeat the class action, it does not empower the class member to "hold up" an entire settlement. In short, it perverts the Rule to allow objectors, in effect, a "super opt out" that provides them enormous leverage to game the class action process for their own personal gain.

Second, allowing side-deals to go unchecked runs headlong into one of the chief purposes of the class action and of the Rule 23(e) approval requirement — to assure that similarly-situated class members are treated alike. In this regard, a district court considering whether to approve a side-deal should ask this basic question: "Is there a good reason that this one group of class members should get a different [usually better] deal from all the other class members?" Because the courts already conduct something akin to this inquiry when they decide whether additional payments should be made to class representatives, this question is not foreign to the class action process. And the district courts in *Georgine* and *Ortiz* asked essentially the same question when they considered whether the side-deals for class counsel's individual clients were appropriate in light of the decidedly different class settlement. Generally speaking, we believe that it will be quite difficult for settling individual class members to justify disparate treatment, and thus the amendment we propose is likely to drastically curtail, if not eliminate, these side-deals.

Third, we are concerned not only about the existence of unfair side-deals, but in *who* obtains them — lawyers and their clients who know how to game the system. The class action often serves as the means for ordinary citizens, without individual representation, to achieve justice. It is intolerable for the mass of *pro se* litigants (*i.e.*, the absent class members, whether or not they object) to get one deal, while a small

group of objectors with lawyers who understand the dynamics of the current system get another (presumably better) deal.

Finally, a Rule 23(e) disclosure-and-approval requirement will improve the Rule 23 objections process. This process is critical in helping to assure the fairness of class action settlements and in shaping the law on topics ranging from class certification, to opt-out rights, to the intended breadth of Rule 23(b)(1)(B), etc. We believe that more must be done by the courts and the rulemakers to facilitate the objectors' role under Rule 23(e). *See* Wolfman & Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 70 N.Y.U. L. Rev. 439 (1996) (suggesting Rule changes to improve fairness hearing procedures and to accommodate needs of objectors). Our proposal to require approval of side-settlements will improve the overall Rule 23(e) process, which is intended to assure that the courts approve the good, and reject the bad, by weeding out objections with little merit, and encouraging serious objections that may give the court pause or lead to meaningful amendments to a proposed settlement. In this regard, we note that attorneys for objecting class members whose work benefits the class as a whole should be entitled to a court-approved fee. *See generally Duhaime v. John Hancock Mut. Life Ins. Co.*, 2 F. Supp.2d 175 (D. Mass. 1998).

II.

Our proposal also would formalize the current requirement that courts approve all attorney's fees and costs in class actions. Although courts almost always approve fees and costs, in recent years settling class counsel have argued that, when fees and costs are agreed to as part of a settlement, particularly when structured to appear to be separate from the relief accorded to the plaintiff class, they should be given little or no scrutiny. *See, e.g., In re General Motors*, 33 F.3d 768, 819-20 (3d Cir. 1995) (discussing and rejecting this approach); *Zucker v. Occidental Petroleum Corp.*, 1999 U.S. App. Lexis 25824 (9th Cir. Oct. 19, 1999) (same).

Moreover, the proposed amendment would require disclosure and approval of all fee-sharing arrangements among counsel. The Second Circuit requires as much, *see In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 216, 225 (2d Cir. 1987), but the Sixth Circuit has rejected disclosure except in limited circumstances. *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780-81 & n.3 (6th Cir. 1996); *see also* Adv. Comm. Notes to Fed. R. Civ. P. 54(d)(2) (court has discretion to demand disclosure, noting that one court's local rules requires disclosure). At an October 1998 class action conference of judges, academic, and practitioners sponsored by NYU law school, a prominent plaintiffs' class action lawyer candidly acknowledged that counsel fees are sometimes deliberately inflated so that he (as lead counsel) has sufficient funds to pay attorneys that are, in his view, undeserving hangers-on. We have watched this occur ourselves, and challenged

the practice in *Bowling*, *supra*, because it operates to the potential detriment of class members. Without full scrutiny of fee sharing arrangements, it is more difficult to determine whether fees are bloated by payments to lawyers whose contribution does not warrant their allocated share. Thus, secrecy increases the likelihood that some of the money that the defendant was willing to give up goes to undeserving lawyers, rather than their clients. Disclosure and approval are the most direct and appropriate antidotes to this problem.

Moreover, we agree with Judge Weinstein that disclosure and approval of fee-sharing arrangements is important, almost for its own sake, to maintain the integrity of the class action device:

> Because class attorneys have special fiduciary obligations to the class, and because the court has a responsibility to protect the rights of the class, the class and the court have a right to know about any agreements among counsel for allocating fees payable from a class recovery. In view of the lack of a personal relationship between most class members and the attorneys representing them it is essential that this information be available through the court. Class actions are public or quasi-public in nature. Rule 23 of the Federal Rules of Civil Procedure serves in many respects as a "sunshine" law in its requirements of notice to the class and public hearings. The public and press must have full access to information about this kind of fee-sharing arrangement so that an opportunity is afforded for comment and objection.

In re Agent Orange Prod. Liab. Litig., 611 F. Supp. 1452, 1462-63 (E.D.N.Y. 1985). Simply put, in ordinary bi-polar litigation, we would not tolerate a situation where the

client does not know which of her lawyers are getting paid and how much. *See* Model Rules of Prof. Resp. 1.5(b) & (e). In class actions, there is even more reason to require a full accounting and, of course, court approval.

* * *

Thank you for your time and consideration.

Sincerely,

Brian Wolfman

cc: Hon. Edward R. Becker
Mr. Peter G. McCabe

PROPOSED AMENDED RULE 23(e)
(new language italicized)

(e) Dismissal or Compromise.

(1) **In general.** A class action shall not be dismissed or compromised without the approval of the court, *including all payments for attorney's fees and costs and the allocation thereof among counsel.* Notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(2) ***Individual resolution.*** *Any proposed dismissal or compromise of the claims of an individual named or unnamed member of the class who has not been excluded from the class under subdivision (c)(2), including any proposal concerning payment of attorney's fees or costs of such member, shall be filed with the court and served upon any class member who has entered an appearance. No such dismissal or compromise shall be consummated without approval by the court. Such dismissal or compromise shall be subject to approval of the court at any time during the pendency of the action, including when it is pending before the court of appeals or the Supreme Court of the United States.*

John Edward., Schomaker
[Reg. No. 07790-052]
FCI Ray Brook
[P.O. Box 905-B]
Old Ray Brook Road
Ray Brook, New York

99-CV-I

November 25, 1999

Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, District of Columbia

Dear Secretary:

I am writing to you with suggestions and recommendations with regards to a Local Rule in the District of New Hampshire, L.R. 77.3(a), which states:

> (a) Confirmation of Filings. The clerk's office will not date stamp and return copies of filings. Parties may confirm the filing of documents by using the court's computer access systems.

To understand the problem that I desire you to help me to resolve, you need to know something of my situation. I am a federal inmate, indigent, and I am forbidden access to a computer. My family is computer incompetent, and my friends are unable to help me. I have absolutely no recourse to confirm that my documents have been properly filed, ... and on occasion they have not been.

This rule effectively denies me access to the court and the effective administration of justice. I recommend that this rule be amended by striking the word "not" in the first sentence.

I appreciate your assistance in this very important matter. I look forward to hearing from you very soon concerning this issue, which amounts to a violation of constitutionally secured rights. Thank You !!!

Respectfully Presented
"without prejudice"
UCC § 1-207

John Edward., Schomaker

Et Juris
Integare
Ingenuitas

cc:On File

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

December 13, 1999

MEMORANDUM TO TECHNOLOGY SUBCOMMITTEE

SUBJECT: *Electronic Filing*

For your information, I am attaching a suggestion from a prisoner that would require the clerk's office to date stamp and return papers filed with the court. Under a local rule of the District Court of New Hampshire, the clerk is relieved of this responsibility and litigants "confirm the filing of documents by using the court's computer access system." The prisoner says that he has no access to appropriate computers, which makes the filing of time-sensitive documents in his case difficult. The suggestion has been sent to the Agenda Subcommittee for its consideration.

Judge Carroll recently sent to you an 11th Circuit opinion on a related matter that highlighted a possible problem litigants and counsel face in relying on the PACER system (electronic-docket system) to check for entry of a court's final order. For your convenience, I am attaching a copy of the opinion.

John K. Rabiej

Attachments

cc: Honorable Anthony J. Scirica (with attach.)
Gene W. Lafitte, Esquire (with attach.)
Professor Daniel R. Coquillette (with attach.)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA
POST OFFICE BOX 430
MONTGOMERY, ALABAMA 36101-0430
john_carroll@ca11.uscourts.gov

JOHN L. CARROLL
Chief United States Magistrate Judge

TELEPHONE (334) 223-7540

October 7, 1999

Honorable Richard H. Kyle
United States District Judge
764 Warren E. Burger Federal Building
316 North Robert Street
St. Paul, MN 55101

Professor Edward H. Cooper
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Mr. Andrew M. Scherffius
400 Colony Square, Suite 1018
1201 Peachtree Street, NE
Atlanta, GA 30361

Dear Gentlepersons:

I am writing this letter to those of you that are on the Technology Subcommittee. The Eleventh Circuit has just issued an interesting opinion which concerns some of the problems that we will face as we try to develop rules to respond to the electronic filing age.

I hope you are all well.

Sincerely,

John L. Carroll
Chief United States Magistrate Judge

JLC/mdd
Enc.
c: Honorable Paul V. Niemeyer
Mr. John K. Rabiej

Wilbert E. HOLLINS,
Petitioner-Appellant,
v.
DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

No. 98-5777
Non-Argument Calendar.

United States Court of Appeals,
Eleventh Circuit.

Oct. 5, 1999.

Richard C. Klugh, Asst. Federal Public Defender, Kathleen M. Williams, Federal Public Defender, Miami, FL, for Petitioner-Appellant.

Appeal from the United States District Court for the Southern District of Florida.

Before EDMONDSON, DUBINA and CARNES, Circuit Judges.

PER CURIAM:

*1 Petitioner Wilbert Hollins appeals the district court's denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. We noted a jurisdictional issue with respect to the timeliness of Hollins' appeal, which was filed more than 14 months after the entry of the district court's final order. Hollins contends that the district court's order denying his habeas petition never reached him or his counsel. He further contends that although that order was entered on the court's official docket, the entry was not reflected in the version of the docket that appeared on the PACER system, an electronic system that allows litigants remote computer access to court records, which Hollins monitored regularly for news of his case. As a result, Hollins argues, he could not file a timely appeal of the denial of his habeas petition. We conclude that in view of the unique circumstances of this case-- Hollins' officially invited reliance on the PACER system's version of the docket in this case, which failed to show the entry of the final order--we have jurisdiction over this appeal despite its late filing date.

I. BACKGROUND

Hollins was convicted of kidnaping in 1991 in a Florida state court, and is presently a state prisoner. On March 20, 1992, Hollins petitioned the district court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. That petition was initially denied by the district court, but this Court remanded for consideration of whether Hollins' 1991 state sentence had been improperly enhanced on the basis of certain 1984 convictions. On remand, the district court adopted the magistrate judge's recommendation that Hollins' petition be denied, and directed the clerk to close the case. That final order, dated July 26, 1997, was entered on the official docket record for this case on August 1, 1997.

The problem in this case arises from the reliance by Hollins' counsel on the Southern District of Florida's electronic docket system for notice of the district court's decision denying his petition. The Southern

District of Florida, like many federal courts, offers public access to docket information through the Public Access to Court Electronic Records system ("PACER"). PACER subscribers may use computers to retrieve electronic case information and court dockets. See PACER (Public Access to Court Electronic Records) (July 23, 1999) <http://www.netside.net/usdcfls/pacer/pacer.html>. PACER subscribers may access the system in one of three ways: by dialing in to the court computer by modem, by using a computer terminal at the offices of the district court, or by accessing PACER through the Internet.

Hollins' counsel asserts that he did not receive a mailed copy of the district court's order denying Hollins' habeas petition. Moreover, he asserts that he regularly checked the case docket on the PACER system, but it did not show the entry of the final order on the docket. He was therefore unaware of the order until he spoke to a member of the court staff on October 5, 1998, more than 14 months after the order had been entered and well after the 30-day deadline for a timely appeal of the order, see Fed. R.App. P. 4(a)(1)(A).

*2 Upon discovering that the district court had already entered the final order denying Hollins' petition, Hollins' counsel promptly filed a motion requesting the district court to direct the clerk to enter the final order of dismissal on the docket, but this time reflecting an effective date after October 15, 1998. While that motion was pending, Hollins filed this appeal from the final order. We noted a jurisdictional question concerning the timeliness of the appeal, [FN1] and invited the parties to respond. Hollins did; the Department of Corrections did not. Having raised the issue of jurisdiction sua sponte, we decide it in the first instance.

II. ANALYSIS

It is undisputed that Hollins' appeal was filed more than 14 months after the district court's final order had been entered, and thus well past the deadline for filing an appeal. See Fed. R.App. P. 4(a)(1)(A) (notice of appeal in a civil case must be filed within 30 days after entry of judgment or order appealed from). Ordinarily, that fact would be fatal to Hollins' appeal, because "the timely filing of a notice of appeal is 'mandatory and jurisdictional.' " Advanced Estimating System, Inc. v. Riney, 77 F.3d 1322, 1323 (11th Cir.1996) (quoting Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1982)). The question we face in this unusual case, however, is whether that requirement is altered by Hollins' counsel's reliance on the PACER system's version of the docket sheet, which failed to show the district court's entry of the final order.

Despite the strict jurisdictional requirements for the timely filing of appeals, we have recognized a limited exception known as the "unique circumstances" doctrine. That doctrine provides that an appellant may:

> ... maintain an otherwise untimely appeal in unique circumstances in which the appellant reasonably and in good faith relied upon judicial action that indicated to the appellant that his assertion of his right to appeal would be timely, so

long as the judicial action occurred prior to the expiration of the official time period such that the appellant could have given timely notice had he not been lulled into inactivity.

Willis v. Newsome, 747 F.2d 605, 606 (11th Cir.1984). See also Thompson v. INS, 375 U.S. 384, 387, 84 S.Ct. 397, 398-99, 11 L.Ed.2d 404 (1964). The Supreme Court has more recently limited the application of the "unique circumstances" doctrine set out in Thompson to "situations 'where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done.' Osterneck v. Ernst & Whinney, 489 U.S. 169, 179, 109 S.Ct. 987, 993, 103 L.Ed.2d 146 (1989)." Fluor Constructors, Inc. v. Reich, 111 F.3d 94, 96 (11th Cir.1997). But despite the Supreme Court's shaky support for the doctrine, thus far it has not chosen to reject it, so "the 'unique circumstances' exception apparently continues to exist." Pinion v. Dow Chem., U.S.A., 928 F.2d 1522, 1529 (11th Cir.1991).

*3 As we noted above, our own Circuit has articulated a "lenient formulation of the 'unique circumstances' exception," Pinion, 928 F.2d at 1531, which provides that any "judicial action" prior to the expiration of the relevant time period for appeal that could have " 'lulled [the appellant] into inactivity' " may permit our exercise of the doctrine. Pinion, 928 F.2d at 1531 (quoting Butler v. Coral Volkswagen, Inc., 804 F.2d 612, 617 (11th Cir.1986) (quoting Willis, 747 F.2d at 606)). Thus, our concern here is whether Hollins' reliance on the PACER system's docket entries constituted a "[r]easonable reliance," Pinion, 928 F.2d at 1532, on a "specific assurance by a judicial officer," Osterneck, 489 U.S. at 179, 109 S.Ct. at 993, which created a sufficiently unique set of circumstances to justify the exercise of our equitable power to excuse the untimely filing of Hollins' appeal.

We think it did. Providing electronic access to court calendars, dockets and other essential information is a project of long standing in the federal courts. Services such as the PACER system, while still somewhat experimental, "continue to receive strong endorsements and have generated ever increasing demand ... both from within the legal community and from other interested parties." Directory of Electronic Public Access Services to Automated Information in the United States Federal Courts (revised May 1, 1999) <http://www.uscourts.gov/PubAccess.html>. By allowing parties and their counsel to monitor the progress of their cases (and, in some jurisdictions, to file pleadings and other material) without traveling to court and placing demands upon the time of court personnel, systems such as PACER ease costs for both parties and the courts. But that and other benefits of such systems will arise only if parties actually can rely on electronically available court information. In this context, we conclude it was not unreasonable for Hollins counsel to rely on the PACER docket.

We must therefore next consider whether the apparent failure of court personnel to enter the final order on the PACER system's version of the docket constituted "judicial action" sufficient to permit the invocation of

the unique circumstances doctrine. See Willis, 747 F.2d at 606 (requiring reliance upon "judicial action"); Osterneck, 489 U.S. at 179, 109 S.Ct. at 993 (requiring "specific assurance by a judicial officer" that an action which would postpone the deadline for filing an appeal has been properly performed). We then consider whether Hollins' reasonable reliance on the failure to enter the final order on the PACER system's version of the docket sheet lulled him into inactivity in this case, justifying our use of the unique circumstances doctrine.

*4 We think both of these requirements were met in this case. Though the facts are atypical, we think Hollins has shown a reliance upon "specific assurances by a judicial officer" in performing an action--namely, his regular monitoring of the docket record on the PACER system--that effectively postponed his filing of an appeal. See Osterneck, 489 U.S. at 179, 109 S.Ct. at 993. This is clearly not the usual case, in which a party delays filing an appeal, despite his actual knowledge that a final order has been entered, on the basis of an assurance by the district court. Instead, the district court's ongoing failure to enter the final order on the PACER system's version of the docket sheet, coupled with the official invitation for litigants and attorneys to rely upon the system, led Hollins' counsel reasonably to believe the district court had not yet issued a final order in the case. Along with that omission must be considered the fact that the Southern District of Florida's own Internet home page promises that the PACER system will provide access to "official electronic case information and court dockets." PACER (Public Access to Court Electronic Records) <http://www.netside.net/usdcfls/pacer/pacer.html> (July 23, 1999) (emphasis added). Taken together, the facts were enough to bring Hollins within the purview of the unique circumstances doctrine. See, e.g., Willis, 747 F.2d at 606 (appellant was lulled into failure to arrange for alternative method of filing or move for extension of time to file by clerk's assurance that, according to local custom, his notice of appeal would be stamped as timely if mailed by a certain date).

We recognize that a number of circuits have concluded that a clerk's assurances alone, as opposed to a judge's specific assurances, will be inadequate to permit the use of the unique circumstances doctrine. See, e.g., Moore v. South Carolina Labor Bd., 100 F.3d 162, 164 (D.C.Cir.1996) (limiting unique circumstances doctrine to "written court orders or oral rulings made in the course of a hearing," and rejecting its use where statements were made by clerk's office staff); Ctr. for Nuclear Responsibility v. NRC, 781 F.2d 935, 941 n. 11 (D.C.Cir.1986) (collecting cases). See also United States v. Heller, 957 F.2d 26, 29 (1st Cir.1992) (arguing that Supreme Court's reference to a "judicial officer" in Osterneck, 489 U.S. at 178, 109 S.Ct. at 993, refers only to judges and not employees in the clerk's office).

We are bound, however, by our prior precedent, which has decided that the unique circumstances doctrine may apply where the appellant is lulled by assurances from the clerk's office instead of the district court itself. See Willis, 747 F.2d at 606; see

also Schwartz v. Pridy, 94 F.3d 453, 456 (8th Cir.1996) ("Schwartz relied in good faith on the clerk of court's erroneous refusal to accept his timely notice of appeal and on the clerk's erroneous representation that his premature notice of appeal was sufficient."); Prudential-Bache Sec., Inc. v. Fitch, 966 F.2d 981, 983, 985 (5th Cir.1992) (unique circumstances doctrine applied where party received clerk's notice of district court's order reflecting an inaccurate entry date). Thus, the fact that the error in the PACER system's version of the docket may be attributable to the clerk's office and not the district court itself does not exclude the application of the unique circumstances doctrine in this case.

*5 As for whether Hollins' counsel was lulled into inactivity in the particular circumstances of this case, he asserts that he frequently checked the case docket on the PACER system from June 1997 to November 1998, and that the electronic record of the docket did not reflect the entry of the district court's final order at any point during that period. As we noted above, Hollins points out that the Southern District of Florida's Internet home page states that the PACER system provides access to the "official" court docket record.

Hollins has also submitted printouts of the PACER system's version of the docket sheet in this case to support his assertion. Although the PACER versions of the docket sheet provided by Hollins indicate that the docket sheet was last updated on August 1, 1997--the date the final order was entered on the official docket--the PACER version has no entry reflecting the district court's final order. Instead, the final entry on the PACER version of the docket sheet is dated June 25, 1997. It is true that the PACER docket sheet contains the word "CLOSED" near the top of the record and elsewhere within it, but the word bears no clear relation to any entry on the docket sheet. To be sure, in some circumstances the state of the electronic record might require a party to make further inquiry with the clerk's office as to the status of his case, and thus a party could not reasonably rely upon it. But this is not such a case.

In sum, we conclude that the unique circumstances of this case require us to exercise our equitable power to excuse Hollins' untimely filing of this appeal. He reasonably relied on the PACER system's version of the docket sheet in this case, which he checked regularly, and which did not show the district court's entry of a final order.

III. CONCLUSION

This appeal MAY PROCEED.

FN1. The district court subsequently granted Hollins' motion to a limited (and, for Hollins' purposes, unhelpful) extent by directing the clerk to ensure that the docket sheet available on the PACER system's version of the docket now reflects the original date the district court's dismissal was entered on the official docket sheet.

END OF DOCUMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

101 West Lombard Street
Baltimore, Maryland 21201

Chambers of
PAUL V. NIEMEYER
United States Circuit Judge

(410) 962-4210
Fax (410) 962-2277

December 17, 1999

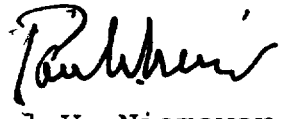
Honorable Janice M. Stewart
United States Magistrate Judge
1027 United States Courthouse
1000 S.W. Third Avenue
Portland, Oregon 97204

Dear Judge Stewart:

Thank you for your December 8 letter pointing out the difficulty you had with Federal Rule of Civil Procedure 30(b). I am taking the liberty of referring this to our discovery subcommittee for their recommendation.

With kindest regards.

Sincerely,



Paul V. Niemeyer

cc: Honorable David F. Levi (w/enc.)
Professor Edward H. Cooper (w/enc.)
Professor Richard L. Marcus (w/enc.)
Mr. John K. Rabiej (w/enc.)

Chambers of
JANICE M. STEWART
United States Magistrate Judge

United States District Court
DISTRICT OF OREGON
1027 United States Courthouse
1000 S.W. Third Avenue
Portland, Oregon 97204-2902

99-CV-J

December 8, 1999

Hon. Paul V. Niemeyer
Fourth Circuit Court of Appeals
910 United States Courthouse
101 West Lombard St.
Baltimore, MD 21201

Re: Advisory Committee on Civil Rules

Dear Judge Niemeyer:

I am writing to you in your capacity as the Chair of the Advisory Committee on Civil Rules. Based on a recent discovery dispute, I have encountered an inconsistency within FRCP 30 and between FRCP 30 and 45 that should be addressed. Attached is a copy of the letter from counsel describing the dispute that occurred when a third party witness appeared for his deposition pursuant to subpoena and learned for the first time that his deposition would be videotaped.

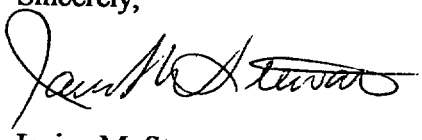
In a nutshell, the problem is as follows. Currently, FRCP 30(b) requires that a party desiring to take a deposition provide a notice "to every other party to the action" specifying, among other things, "the method by which the testimony shall be recorded." However, a third party witness who is subpoenaed to appear for a deposition pursuant to FRCP 45 is not a "party to the action" and therefore does not receive the FRCP 30 notice. FRCP 45 says nothing about notice as to the method of taking a deposition. As a result, no rule requires that the third party witness receive notice in advance of the method designated for taking his/her deposition by the party desiring to take the deposition.

Yet FRCP 30 (b)(3) requires that any other party who did not send the FRCP 30 notice "may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition" but only "[w]ith prior notice to the deponent." A deponent will receive this notice, but not the original notice from the person taking the deposition. This seems illogical, but that is what FRCP 30 says.

This problem could be cured by either revising FRCP 30 (b)(1) to require a party desiring to take a deposition to give notice to the deponent, as well as to the other parties. Alternatively, FRCP 45 could be revised to require a statement as to the method for taking the deposition.

If you feel that it is appropriate, please bring this matter to the attention of your committee. If this matter should be referred elsewhere, please let me know. Thank you.

Sincerely,



Janice M. Stewart
United States Magistrate Judge

cc: Steven N. Sherr, Esq.
Jill S. Gelineau, Esq.

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October 5, 1999

VIA FACSIMILE (503) 326-8010

Hon. Magistrate Judge Janice Stewart
United States District Court
District of Oregon - Portland Division
1000 S.W. 3rd Street. Suite 740
Portland, Oregon 97204

Re: Allen T. Gilliland Trust, et al. v. Hellman & Friedman Capital Partners II (No. Dist. Cal. Case No. C-97-3543-MJJ)

Dear Magistrate Judge Stewart:

We are counsel to Plaintiffs Allen T. Gilliland Trust, et al. in the above-captioned action pending in the Northern District of California. We seek your assistance in resolving a dispute that arose this morning at the deposition of third-party witness William Hart, which is being conducted today in Portland, Oregon pursuant to subpoena. The deposition notice properly stated that the deposition would be recorded by videotape. Mr. Hart, on the advice of counsel, refuses to proceed with the deposition because the subpoena that was served on him does not mention videotape. As explained below, Rules 30 and 45 of the Federal Rules of Civil Procedure require only that the intent to videotape be included in the notice that is served on the parties. There is no requirement that an intent to videotape be included in a third-party subpoena and there is also no requirement that the notice of deposition be served on the witness.

By way of background, Plaintiffs were minority shareholders in MobileMedia Corporation ("MobileMedia") and defendants are controlling shareholders, officers and public accountants for MobileMedia. The Complaint alleges that a Rescission Offer registered with the Securities Exchange Commission contained false and misleading statements about MobileMedia's financial position and business and that, as a result,

Plaintiffs made the decision to hold MobileMedia stock and were damaged when the truth about MobileMedia was revealed. MobileMedia filed for Chapter 11 bankruptcy protection in January 1997 and, as a result was not named as a defendant in this action.

In 1996, before filing for bankruptcy, MobileMedia retained the deponent William Hart to review the company's operations and financial affairs in an effort to turn the company around. As a result, Plaintiffs believe Mr. Hart has critical information about MobileMedia that was not divulged to Plaintiffs at the time they made their investment decisions.

Because Mr. Hart resides outside California, Plaintiffs believe that they will be unable to compel his attendance at trial in San Francisco. Accordingly, Plaintiffs desire to record Mr. Hart's deposition with audio/visual tape as permitted under Rule 30(b)(2). A proper notice, indicating that this deposition would be recorded by videotape, was served on all parties and a subpoena was issued out of the Western District of Washington, where Mr. Hart resides. Copies of the subpoena and notice of deposition are attached for the Court's review. At the request of Mr. Hart and his counsel, the deposition is proceeding at his counsel's office in Portland, Oregon. Mr. Hart's counsel is Jill Jelincau of Schwabe Williamson & Wyatt.

This morning, on the advice of his counsel, Mr. Hart refused to answer any questions at his deposition on the grounds that he had not been advised in advance that his deposition would be videotaped. This is an invalid objection. Rule 45 of the Federal Rules of Civil Procedure, which governs the subpoenaing and taking of depositions from third parties, contains no requirement that the third-party be notified of the method of recording.

Mr. Hart's counsel, instead, appears to be relying on a misreading of Rule 30 of the Federal Rules. While Rule 30 requires a party noticing a deposition to notify "every other party to the action" of the method of taking deposition, there is no requirement that the party noticing the deposition give such notice to the deponent. F.R.C.P. 30(b)(1) & (2).[1] Accordingly, under the Federal Rules, Mr. Hart has no basis to object to video recording of his deposition.

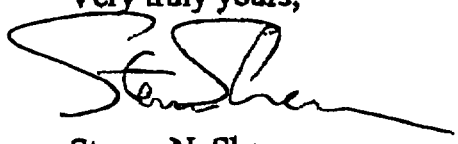
---

[1] On the other hand, had a party, other than Plaintiffs, sought to record the deposition by means other than what was stated in Plaintiffs' original notice, then that party would have been required to notify the deponent. F.R.C.P. 30(b)(3). This provision does not, however, impose a requirement that Plaintiffs notify the deponent of the method of recording.

This matter requires urgent attention because out-of-town counsel for plaintiffs and defendants have traveled from California and Michigan to attend this deposition and are currently still in the offices of the witness's counsel in Portland in the hopes that this matter can be promptly heard by the Court. Among other scheduling restraints, discovery cutoff is October 15, 1999. Accordingly, we request an urgent telephone conference pursuant to Local Rule 16.2(c). Plaintiffs are represented at the deposition by Gregory L. Curtner, Esq. of Miller, Canfield, Paddock, and Stone. Defendants are represented by Douglas M. Schwab of Heller Ehrman White & McAuliffe and Ragesh K. Tangri of Keker & Van Nest. As noted, counsel for the witness is Jill Jelineau of Schwabe Williamson & Wyatt. Counsel have been advised of plaintiffs' efforts to have this matter heard on an expedited basis. Please contact me at (415) 677-3402 and my office will be happy to arrange the conference call.

Thank you for your attention to this matter.

Very truly yours,



Steven N. Sherr

SNS/skl
Enclosures
cc: Jill Jelineau, Esq.
Douglas M. Schwab, Esq.
Ragesh K. Tangri, Esq.
WD 100599/1-1307001/782793/v1

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Attorneys for Plaintiffs
ALLEN T. GILLILAND TRUST, ET AL.

HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ALLEN T. GILLILAND TRUST, et al., Plaintiffs, v. HELLMAN & FRIEDMAN CAPITAL PARTNERS II, L.P., et al., Defendants.	No. C-97-3543-MJJ Action Filed: September 26, 1997 NOTICE OF TAKING VIDEOTAPED DEPOSITION OF WILLIAM HART

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that, pursuant to Rule 30 of the Federal Rules of Civil Procedure, Plaintiffs will take the deposition of William C. Hart on October 5, 1999 at 9:00 a.m. at the Westin Portland located at 750 SW Adler Street, Portland, Oregon 97204. Said deposition will be taken under oath and will be conducted before a certified shorthand reporter authorized to administer oaths, will be recorded stenographically and on videotape and will continue from day to day until completed, unless otherwise stipulated. The reporter will make the transcript of the deposition available concurrently by use of Live Notes.

DATED: September 22, 1999.

MICHAEL J. BAKER
STEVEN N. SHERR
MARK A. SHEFT
LISA A. TURBIS
TYLER J. FULLER
HOWARD, RICE, NEMEROVSKI, CANADY, FALK & RABKIN
A Professional Corporation

By: _____
STEVEN N. SHERR

Attorneys for Plaintiffs ALLEN T. GILLILAND TRUST, et al.

HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN

HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN

PROOF OF SERVICE

I, Sherry Longley, declare:

I am a resident of the State of California and over the age of eighteen years; and not a party to the within action; my business address is Three Embarcadero Center, 7th Floor, San Francisco, California 94111-4065. On September 22, 1999, I served the foregoing document(s) described as:

NOTICE OF TAKING VIDEOTAPED DEPOSITION OF WILLIAM HART

☒ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

☒ by causing personal delivery by messenger of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

Please see attached Service List

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on September 22, 1999.

Sherry Longley

Sherry Longley

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WD 092299/1-1307001/82/779169/v1

HOWARD RICE NEMEROVSKI CANADY FALK & RABKIN

AO 88 (Rev. 1/94) Subpoena in a Civil Case

Issued by the

UNITED STATES DISTRICT COURT

Western DISTRICT OF Washington

ALLEN T. GILLILAND TRUST, et al.

V.

HELLMAN & FRIEDMAN CAPITAL PARTNERS II L.P., et al.

SUBPOENA IN A CIVIL CASE

CASE NUMBER: USDC Northern District of California No. C-97-3543-MJJ

TO: WILLIAM C. HART
5406 NE 59th Circle
Vancouver, Washington 98661

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
The Westin Portland 750 SW Alder Street, Portland, Oregon	10/5/99 9:00 a.m.

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

See Attachment A

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
	9/21/99

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Steven N. Sherr, Esq. (415) 434-1600
Attorneys for Plaintiff
HOWARD, RICE, NEMEROVSKI, CANADY, FALK & RABKIN
3 Embarcadero Center, 7th Flr. San Francisco CA 94111

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on Reverse)

IX

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

March 28, 2000

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Entry of Judgment*

I am attaching material prepared by Professor Cooper regarding entry of judgment. I am also attaching material prepared by Professor Schiltz for the April 13-14, 2000 Appellate Rules Committee meeting, which include a discussion of the Appellate Rules Committee's efforts to amend Rule 4(a)(7) of the Federal Rules of Appellate Procedure.

Mark D. Shapiro

Attachments

Rule 54(a) "Judgment" Definition

Rule 54(a), in words unchanged since 1938, begins: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." It has become a source of disquiet because Rule 58 requires that every "judgment" be "set forth on a separate document," and provides that "[a] judgment is effective only when so set forth and entered as provided in Rule 79(a)." Appellate Rule 4, in turn, calibrates appeal time by the entry of judgment. Time and again, failure to enter judgment on a separate document has meant that appeal time has not begun to run. Widespread failure to honor the simple direction of Rule 58 has planted an uncounted but large number of "time bombs" — old and even ancient judgments that remain appealable. A package of amendments to Civil Rules 54 [not the subdivision (a) definition] and 58, and Appellate Rule 4(a)(7), is being proposed to address these problems. The inquiry has raised the further question whether it would be wise to change or delete the Rule 54(a) definition of judgment. The tentative answer suggested here is that change is desirable, but will not be wise until there is a much better understanding of the possible ramifications of Rule 54(a). This conservative suggestion draws strong support from the fact that none of the theoretical problems seem to have materialized.

Uncertain Definition

There are some curiosities and potential ambiguities in the simple Rule 54(a) definition.

Does "a decree and any order from which an appeal lies" include — if there is such a thing — a "decree" that cannot be appealed?

Does "includes a decree and any order from which an appeal lies" exclude every order from which an appeal does not lie? This one, at least, has drawn some judicial attention. In Minits v. Educational Testing Serv., 3d Cir.1996, 99 F.3d 1253, 1259, the plaintiff moved after the action was remanded to state court for attorney fees incurred to defeat the removal. Acting on the assumption that because 28 U.S.C. § 1447(d) states that a remand order "is not reviewable on appeal or otherwise" the order is not one from which an appeal lies, the court concluded that the remand order was nonetheless a "judgment" that triggered the Rule 54(d)(2)(B) 14-day period for an attorney-fee motion. "[W]e do not read 'includes' in Rule 54(a) as in all cases limiting a judgment to an appealable order." And no less a duo than Justice Frankfurter, joined by Justice Harlan, said this in dissenting from the decision in U.S. v. F. & M. Schaefer Brewing Co., 1958, 356 U.S. 227, 239:

> The Rules nowhere define with mechanical exactitude the meaning of the term "judgment." Rule 54(a), however, in stating that a judgment includes "a decree and any order from which an appeal lies," emphasizes that a judgment is not confined to judicial actions so described, but includes any act of the court that performs the function of a judgment in bringing litigation to its final determination.

The question whether "includes" works to exclude all other examples arises frequently. The better view is that it is "illustrative, not exclusive," but this view often runs afoul of the familiar (and often mischievous) maxims inclusio unius, noscitur a sociis, and ejusdem generis. See Garner, Dictionary of Modern Legal Usage 2d, 1995, pp. 431-432. Whatever the drafters may have intended, the meaning today is unclear. Something turns on this point, or may, because of the pervasive appearance of "judgment" throughout the Civil Rules.

Inappropriate Breadth

The nature and number of the orders from which an appeal lies have grown remarkably since 1938. The most important example for present purposes is the "collateral order" doctrine that has grown out of the decision in Cohen v. Beneficial Industrial Loan Corporation, 1949, 337 U.S. 541. Under the rules as they now stand, every district-court order that is appealable under collateral-order theory is, by virtue of Rule 54(a), a judgment, and under Rule 58 is not effective until it has been entered on a separate document. That cannot be, however, and there is no indication that any court takes seriously this literal meaning of the rules. Neither district courts nor parties should be forced to struggle with the question whether a court of appeals might, should an appeal be attempted, conclude that a particular order is in fact appealable under the elastic collateral-order theory. Two examples illustrate the point. Collateral-order theory occasionally is invoked to support appeal from denial of a privilege asserted in discovery proceedings: is no such order effective until entered on a separate document? And collateral-order theory is invoked with astonishing frequency to support appeal from interlocutory orders that deny official immunity, but on terms that have generated appalling confusion: must a district court, for example, enter on a separate document denial of an immunity motion for summary judgment when denial rests on a proposition of law, but not when it rests on a determination that immunity will turn on disputed fact issues? If courts were actually heeding the combined meaning of Rules 54(a) and 58 in these settings, emergency action would be demanded. Common sense prevails so universally, however, that there is no apparent need to amend the rules on this account.

A quite different problem arises from an apparent tension between Rules 54(a), 58, and 65(d). Rule 65(d) requires that every order granting an injunction and every restraining order set forth the reasons for its issuance, be specific in terms, and describe in reasonable detail the acts restrained. Orders granting injunctions are appealable; orders granting restraining orders often are not appealable, but at times are appealable. When appealable, these orders are judgments that must be entered on a separate document that does not set forth the reasons for issuance. But it cannot be that a preliminary injunction, for example, is not appealable until the district court remembers this task, and (a desirable concomitant of being not appealable) has no effect. The separate document requirement may make sense as to a permanent injunction that is intended to be the final disposition of an action, but serves no obvious purpose with respect to orders granting an interlocutory injunction or temporary restraining order. Once again, however, this possible problem seems not to be real.

A truly absurd possibility would be to include 28 U.S.C. § 1292(b) permissive appeals (or Rule 23(f) permissive appeals) in the Rule 54(a) definition. A great many orders may be eligible for certification for interlocutory-appeal-by-permission, particularly on a usefully flexible approach to the confining categories of § 1292(b). It cannot be that the mere potential requires entry on a separate document and defeats any effect until entry on a separate document occurs. Section 1292(b) certification should be the turning point, and the certification should not itself require an additional and separate document.

Defining a Pervasive Term

The word "judgment" appears frequently throughout the Civil Rules, in places both expected and unexpected. It would be remarkable if the Rule 54(a) definition made sense for all of these uses. The no doubt incomplete list offered in the next paragraph will be followed by a few illustrative questions.

"Judgment" appears most often standing alone, but also in combination with such well-known terms as "judgment as a matter of law," "judgment by default," and "summary judgment." All of these uses are included in this list, without addressing the question whether the Rule 54(a) definition purports to reach "judgment" as part of these familiar phrases (remembering that for more than 50 years after Rule 54(a) was adopted, one of the relevant phrases was not "judgment as a matter of law" but "judgment notwithstanding the verdict"). See Rules 4(a), 5(a), 8(a)(3), 9(e), 12(c) & (d), 13(a) & (i), 14(c), 15(b), 16(c)(14), 18(b), 19(b), 20(a), 41(a), 23(c)(2) & (3), 23(d), 26(a)(1)(D), 27(b), 37(b)(2)(c), 49(a) & (b), 50(throughout), 52(throughout), 54(throughout), 55(judgment by default, and judgment, throughout), 56(summary judgment), 57(declaratory judgment), 58, 59(every subdivision), 60(throughout), 61, 62(throughout), 64, 67, 68, 69(throughout), 70, 71A(i) & (j), 73(c), 77(c) & (d), and 79(throughout). And see Admiralty Rules B(2), C(3), C(5), E(2)(b), and E(5)(b).

Rule 9(e) illustrates the way in which the Rule 54(a) definition simply does not fit with the use of "judgment." Rule 9(e) speaks to pleading "a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer." There is no reason to limit Rule 9(e) by looking to whether "an appeal lies" from the various dispositions it enumerates. (Of course this poor fit is resolved if Rule 54(a) merely illustrates, without limiting, the meanings of "judgment.")

Other rules suggest curious questions that probably have little meaning. Rule 68, for example, establishes an "offer of judgment" procedure. Can an offer be made only in a form that will result in an appealable order — and if so, must it be immediately appealable? Can the actual "judgment" that is compared to the offer be only an [immediately?] appealable order? A potential complication, now moot, is illustrated by then-Justice Rehnquist's dissent in Delta Air Lines, Inc. v. August, 1981, 450 U.S. 346, 370-371. The court ruled that Rule 68 does not apply when the defendant offers a judgment and the plaintiff then loses at trial, because the plaintiff has not "obtained" a judgment. Justice Rehnquist, quoting Rule 54(a), argued that "[u]nquestionably, respondent 'obtained' an 'order from which an appeal lies' when the District Court entered its judgment in this case." A different curiosity, almost certainly without consequence, appears in Rule 69(b). This rule provides that the "final judgment" against a revenue officer is to be satisfied in the manner prescribed by enumerated statutes. There is good reason to refer to the "final" judgment in this setting, a reason that relates to execution rather than appealability. It is hard to imagine any complication arising from the Rule 54(a) definition.

Several rules suggest possible real difficulties that can be avoided by concluding that the Rule 54(a) definition includes but does not exclude. Rule 52(c) provides for judgment on partial findings in an action tried without a jury. Judgment may be entered with respect to "an issue," as supported by findings of fact and conclusions of law. The "judgment" may not dispose of any claim at all, and

not be eligible for entry as a final judgment under Rule 54(b). The function is equivalent to a partial judgment as a matter of law, a phrase that (somewhat confusingly) appears in Rule 52(c). "Judgment" here clearly does not mean what Rule 54(a) says it means.

Rule 54(b) corrects a potential difficulty. Absent an express direction for entry of final judgment "as to one or more but fewer than all of the claims or parties," "any order or other form of decision, however adjudicated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties * * * is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." This makes it clear that the 10-day time limits in Rules 52, 54(d)(2)(B), and 59 do not begin to run, even though an order as to part of the case may be appealable outside of Rule 54(b) and thus is a "judgment."

Rule 56(c) is conceptually similar to Rule 52(c). "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone * * *." This order ordinarily is not appealable, and cannot be made appealable under Rule 54(b). Again, judgment in Rule 56(c) means something different than the Rule 54(a) definition.

Rule 62(c) presents a puzzling question that seems to turn more on Rule 58 than Rule 54(a). It provides for district-court action "when an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction." An appeal clearly lies from an interlocutory order denying an injunction; Rule 62(c) seems to characterize the order as a "judgment" in the way that Rule 54(a) defines it to be. By double force, then, the district court's power to grant an injunction pending appeal from the denial seems to turn on whether the denial has been entered on a separate document. Or, at the least, the order denying an injunction is not "effective" — whatever that might mean — until entered on a separate document.

Rule 62(f) provides for a stay of execution when a "judgment" is a lien on the property of the judgment debtor. May it be that under state law — expressly invoked by Rule 62(f) — an order from which an appeal does not lie operates as a lien? If not a judgment, can the court stay execution outside the terms of Rule 62(f) — or is this a captious question because appeal is always available under "hardship appeal" theory (Forgay v. Conrad) if the lien is capable of "execution"? Rule 70 presents similar questions in providing that a judgment commanding a "specific act" may be enforced by directing a person appointed by the court to do the act or by a "vesting" "judgment."

Similar questions surely lurk elsewhere in the Civil Rules, and — assuming the Rule 54(a) definition carries forward — the Admiralty Rules. The point is that the definition clearly is too broad with respect to some appealable orders, and probably is too narrow if it excludes from the category of judgments every order that is not appealable.

Rule 54(a) Uses

The Rule 54(a) definition does have its uses. Although a movement is afoot to redefine the "entry" of judgment, it is still a judgment that is being entered. The time periods and stay of execution focused upon in draft Rule 58(b) turn on the definition, and the effect seems to be desirable. An example is provided by Castro Cty. v. Crespin, D.C.Cir.1996, 101 F.3d 121, 127-128, ruling that an order dismissing without prejudice and with the right to reopen on application to the clerk was not a "judgment," and did not trigger the Rule 54(d)(2)(B) time to move for attorney fees.

A similar but more convoluted use appears in Brown v. Local 58, Internat. Bhd. of Elect. Workers, 6th Cir.1996, 76 F.3d 762, reasoning that a judgment that is appealable when entered ceases to be appealable when a timely Rule 59(e) motion is made, so that the time to move for attorney fees begins to run on disposition of the Rule 59(e) motion. (This ruling actually opens an interesting question that might deserve exploration one day. Rule 59(b) requires "any motion for a new trial" to be served no later than 10 days after entry of judgment. Rule 59(e) imposes the same requirement on "any motion to alter or amend a judgment." There is no provision, akin to Appellate Rule 4(a)(3), for "multiple motions" — if one party files a motion to alter or amend on the 10th day, for example, must another party who would not file a motion unless someone else does also file on the 10th day? The theory that the entry of what was a "judgment" at the time of entry ceases to be entry of a "judgment" because appeal does not lie until the timely motion is disposed of suggests that other parties are relieved of the time limit until the first timely motion is decided. Then a new time period begins even if the first motion is denied and the original entry of judgment, having lost its character, once again becomes an entry of judgment. This theory does not seem very sensible. The sensible outcome may include these points: (1) all motions addressed to the original judgment must be filed within 10 days of the first entry. This will avoid the prolonged delay that could result from suspending the time for other motions as soon as one timely, appeal-suspending motion is made. Or — to do something that would require an explicit amendment — a rule could allow additional motions within X days after the first motion is filed (served?). (2) A motion addressed only to an order granting relief from the original judgment must be filed within 10 days from entry of the order granting relief [which would not require a separate document under proposed Rule 58(a)(1)]. (3) a motion for attorney fees is given special treatment because usually there will be little point in addressing attorney fees until the trial court has resolved all challenges to the judgment. Whatever the best outcome, reasoning from the Rule 54(a) definition is not much help.)

Another use of Rule 54(a) may be to bolster the conclusion that a collateral-order appeal must be taken within Appellate Rule 4 appeal time as measured from entry [with or without a separate document] of the order. See U.S. v. Moats, 5th Cir.1992, 961 F.2d 1198, 1203 & n. 4. It seems better, however, to rely on the language of Rule 4 itself, which sets the time for appeal "after the judgment or order appealed from is entered." Rule 4 is not directly reached by Rule 54(a), and applies to an appealable "order" as well as a "judgment." Reliance on Rule 4 also may ease the way to the further conclusion that although the time to appeal a collateral order runs from entry of the order, the order remains reviewable on appeal from a final judgment if no earlier appeal was taken.

A still more extended use of Rule 54(a) has occurred in applying the "relitigation exception" that allows a federal court to enjoin state proceedings "to protect or effectuate its judgments." Courts have concluded that an order qualifies as a "judgment" for this purpose if it is appealable as a collateral order or under the interlocutory injunction appeal provisions of 28 U.S.C. § 1292(a)(1), drawing inspiration from Rule 54(a). See National Basketball Assn. v. Minnesota Professional Basketball, Ltd. Partnership, 8th Cir.1995, 56 F.3d 866, 871-872, ruling that a federal court may enjoin state proceedings that interfere with a federal preliminary injunction; Baker v. Gotz, D.Del.1976, 415 F.Supp. 1243, 1249, 1250, ruling that a federal court may enjoin state proceedings that conflict with a federal ruling, which could have been appealed as a collateral order, that state law did not allow sequestration.

Deletion of the Rule 54(a) definition might unsettle some of these questions. It would be particularly important to consider substitutes in Rules 50, 52, 54(d)(2)(B), 59, 60, and 62. There might well be other settings that would become unsettled, to no real purpose.

Interim Conclusion

For the moment, too much is unknown about the possible effects to justify deletion of the Rule 54(a) definition of "judgment." It seems better to put the matter aside until some identifiable problem justifies further work.

Rule 54. Judgments; Costs

* * *

(d) Costs; Attorneys' Fees.

* * *

(2) *Attorneys' Fees.*

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed ~~and served~~ no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a)~~, and a judgment shall be set forth in a separate document as provided in Rule 58~~.

* * *

Committee Note

Subdivision (d)(2)(C) is amended to delete the requirement that judgment on a motion for attorney fees be set forth in a separate document. This change complements the amendment of Rule 58(a)(1), which deletes the separate document requirement for an order disposing of a motion for attorney fees under Rule 54. These changes are made to support amendment of Rule 4 of the Federal Rules of Appellate Procedure. It continues to be important that a district court make clear its meaning when it intends an order to be the final disposition of a motion for attorney fees.

The requirement in subdivision (d)(2)(B) that a motion for attorney fees be not only filed but also served no later than 14 days after entry of judgment is changed to require filing only, to establish a parallel with Rules 50, 52, and 59. Service continues to be required under Rule 5(a).

Reporter's Note

This approach keeps things simple. But a price is paid. When Rule 54(d)(2) was added in 1993, the Committee Note explained that a "separate judgment [sic for document]" is required "since such awards are subject to review in [sic for appeal to] the court of appeals." At the same time, Rule 58 was amended to allow a district court to order that a motion for attorney fees "have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59," so long as the court acts "before a notice of appeal has been filed and has become effective." The theory is that a district court should be able to delay an appeal from the judgment on the merits until attorney fee questions have been resolved, so as to support a single appeal in which both merits and fee issues can be resolved. In some ways, the best sense to be made of this scheme would be to adopt for the Civil Rules the approach of Appellate Rule 4(a)(4)(A)(iii). Rule 4 tolls appeal time if the district court has acted under Rule 58 to extend the time to appeal in order to dispose of an attorney-fee motion. When that happens, action on the attorney-fee motion is most like action on the other post-judgment motions — there already is a judgment, and the order disposing of the motion least needs a separate document. If the judgment on the merits has been appealed, or if appeal time has lapsed without an appeal, the attorney-fee motion stands alone, and will be reviewed only if there is a separate appeal. A separate document requirement might be more useful then. Rule 58(a)(1) could provide that a separate document is not required to enter an order disposing of a motion for attorney fees under Rule 54 <u>if the district court has extended the time to appeal under Rule 58(c)(2)</u>. That would be a neat fit. But the difficulties encountered with the present simple requirement for a separate document suggest that anything "neat" is a bad idea.

Rule 58. Entry of Judgment

(a) Entry.

(1) Every judgment and every amended judgment must be entered on a separate document, but entry on a separate document is not required to enter an order disposing of a motion:

(A) for judgment under Rule 50(b),

(B) to amend or make additional findings of fact under Rule 52(b),

(C) for attorney fees under Rule 54 ~~if the district court extends the time to appeal under Rule 58(c)(2)~~,

(D) for a new trial, or to alter or amend the judgment, under Rule 59, or

(E) for relief under Rule 60 ~~if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered~~.

(2) Subject to the provisions of Rule 54(b):

(A) the clerk must, without awaiting direction by the court, promptly prepare, sign, and enter the judgment upon:

(i) a general jury verdict, or

(ii) a decision by the court that awards only a sum certain or costs or that denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, upon:

(i) a special verdict or a general verdict accompanied by interrogatories, or

(ii) a decision by the court granting [other relief]{relief not described in Rule 58(a)(2)(A) or Rule 58(a)(2)(B)(i)}.

(b) Time of Entry. Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62 when:

(1) it is entered in the civil docket under Rule 79(a), and

(2) if entry on a separate document is required by Rule 58(a)(1), on the earlier of these events:

(A) entry on a separate document [under Rule 58(a)(1)], or

(B) expiration of 60 days from entry in the civil docket [under Rule 79(a)].

(c) Cost or fee awards.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a timely motion for attorney fees is made under Rule 54(d)(2) the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59.

(d) Request Entry. Any party may request the entry of judgment on a separate document as required by Rule 58(a)(1).

Committee Note

Rule 58 has provided that a judgment is effective only when set forth on a separate document and entered as provided in Rule 79(a). This simple requirement has been ignored in many cases. The result of failure to enter judgment is that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins to run. The time to appeal under Appellate Rule 4(a) also does not begin to run. There have been few visible problems with respect to Rule 50, 52, 54(d)(2)(B), 59, or 60 motions, but there have been many and horridly confused problems under Appellate Rule 4(a). These amendments are designed to work in conjunction with Appellate Rule 4(a) to ensure that appeal time does not linger on indefinitely, and to maintain the integration of the time periods set for Rules 50, 52, 54(d)(2)(B), 59, and 60 with Appellate Rule 4(a).

Rule 58(a) preserves the core of the present separate document requirement, both for the initial judgment and for any amended judgment. No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that recites the terms of the judgment without offering additional explanation or citation of authority. Forms 31 and 32 provide examples.

Rule 58(a) is amended, however, to address a problem that arises under Appellate Rule 4(a). Some courts treat such orders as those that deny a motion for new trial as a "judgment," so that appeal time does not start to run until the order is entered on a separate document. Without attempting to address the question whether such orders are appealable, and thus judgments as defined by Rule 54(a), the amendment provides that entry on a separate document is not required for an order disposing of the motions listed in Appellate Rule 4(a). The enumeration of motions drawn from the Appellate Rule 4(a) list is generalized by omitting details that are important for appeal time purposes but that would unnecessarily complicate the separate document requirement. As one example, it is not required that any of the enumerated motions be timely.

Rule 58(b) discards the attempt to define the time when a judgment becomes "effective." Taken in conjunction with the Rule 54(a) definition of a judgment to include "any order from which an appeal lies," the former Rule 58 definition of effectiveness could cause strange difficulties in implementing pretrial orders that are appealable under interlocutory appeal provisions or under expansive theories of finality. Rule 58(b) replaces the definition of effectiveness with a new provision aimed directly at the time for making post-trial and post-judgment motions. If judgment is promptly entered on a separate document, as should be done, the new definition will not change the effect of Rule 58. But in the cases in which court and clerk fail to comply with this simple requirement, the motion time periods set by Rules 50, 52, 59, and 60 begin to run after expiration of 60 days from entry of the judgment on the civil docket as required by Rule 79(a).

A companion amendment of Appellate Rule 4(a)(7) integrates these changes with the time to appeal.

Rule 58(b) also defines entry of judgment for purposes of Rule 62. There is no reason to believe that the Rule 62(a) stay of execution and enforcement has encountered any of the difficulties that have emerged with respect to appeal time. It seems better, however, to have a single effective date for motions, appeal, and enforcement.

This Rule 58(b) amendment defines "time of entry" only for purposes of Rules 50, 52, 59, 60, and 62. This limit reflects the problems that have arisen with respect to appeal time periods, and the belief that Rule 62 should be coordinated with Rules 50, 52, 59, and 60. In this form, the amendment does not resolve all of the perplexities that arise from the literal interplay of Rule 54(a) with Rule 58. In theory, the separate document requirement continues to apply, for example, to an interlocutory order that is appealable as a final decision under collateral-order doctrine. Appealability under collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document — there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals. Appeal time should start to run when the collateral order is entered without regard to entry on a separate document and without awaiting expiration of the 60 days provided by Rule 58(b)(2). Drastic surgery on Rules 54(a) and 58 would be required to address this and related issues, however, and it is better to leave this conundrum to the pragmatic disregard that seems its present fate. The present amendments do not seem to make matters worse, apart from one false appearance. If a pretrial order is entered on a separate document that meets the requirements of Rule 58(b), the time to move for reconsideration seems to begin to run, perhaps years before final judgment. And even if there is no separate document, the time to move for reconsideration seems to begin after expiration of 60 days from entry on the civil docket. This apparent problem is resolved by Rule 54(b), which expressly permits revision of all orders not made final under Rule 54(b) "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

New Rule 58(d) replaces the provision that attorneys shall not submit forms of judgment except on direction of the court. This provision was added to Rule 58 to avoid the delays that were frequently encountered by the former practice of directing the attorneys for the prevailing party to prepare a form of judgment, and also to avoid the occasionally inept drafting that resulted from attorney-prepared judgments. See 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2786. The express direction in Rule 58(a)(2) for prompt action by the clerk, and by the court if court action is required, addresses this concern. The new provision allowing any party to move for entry of judgment on a separate document will protect all needs for prompt commencement of the periods for motions, appeals, and execution or other enforcement.

Reporter's Note

The Appellate Rules Advisory Committee and its reporter, Professor Patrick Schiltz, have expended great energy on the appeal-time problems generated by the separate-document requirement. They have discovered that it is difficult to address these problems by amending the Appellate Rules alone. This redrafted version of Rule 58 is designed to be part of a package with

an Appellate Rule 4(a) amendment. Because the Appellate Rules Committee has worked so diligently, we hope to rely on their work to support a recommendation for publication in August, 2000.

The most important question is whether there is a problem that must be addressed. The Appellate Rules Committee is persuaded that there is a real problem, and that the problem may become much worse in the future. The staggering number of reported separate-document cases studied by Professor Schiltz — some 500 — is convincing evidence of the problem. There is ground to believe that the only reason the problem is not worse is because so many lawyers, court clerks, and judges remain ignorant of the separate document requirement or believe that no one complies with it.

One approach to the difficulties associated with the separate-document requirement would be to abandon the requirement. The requirement was adopted in 1963 to provide a clear signal that appeal time has started to run. Professor Schiltz is uncertain whether a clear signal is really needed. He also doubts whether any real success will meet efforts to educate bench and bar about the ease of complying with this simple requirement. The proposed amendment maintains the separate document requirement in the hope that if the most pressing problems are addressed, some good still may flow from it.

Assuming that the separate-document requirement should be maintained, several questions remain.

The most important question is whether we should take on Rule 54(a). Rule 54(a) defines a judgment to include "any order from which an appeal lies." Rule 54(a) is the source of much theoretical mischief. Without further change of Rule 58(b), it means that an order granting a TRO or preliminary or permanent injunction must be entered twice: once in compliance with Rule 65(d), "set[ting] forth the reasons for its issuance," and again in compliance with Rule 58(b) by a separate document that does not set forth the reasons for its issuance. [My one-judge survey found that Judge Rosenthal scrupulously enters a separate Rule 58 judgment. Professor Schiltz's work suggests that this splendid example is not universally followed.] Rule 54(a) also means, in theory, that a separate document is required for any order that can be appealed under collateral-order theory, "hardship finality [Forgay v. Conrad]," or "pragmatic finality." It is tempting to delete the Rule 54(a) definition. A glancing look through treatise treatment does not suggest any function served by the definition. The original Committee Note says only that the second sentence — the one that follows the definition sentence — derives from Equity Rule 71. The difficulty is that much work would be required to penetrate these obscurities. Perhaps the definition of judgment for purposes of the Civil Rules does serve a function. Although literal application of the definition through Rule 58 could create great confusion, that does not seem to have been a problem. The best course, if we go ahead with amending Rule 58, may be to ask for comment on Rule 54(a) without proposing any amendment.

Rule 58(a) might be drafted in fewer words by incorporating Appellate Rule 4(a), e.g.: "(1) Every judgment and every amended judgment must be entered on a separate document, except that no order disposing of a motion listed in Rule 4(a)(4) of the Federal Rules of Appellate Procedure need be so entered." There are some difficulties with this approach. One is the problem of cross-

reference: a lawyer reading the Civil Rules may not always have the Appellate Rules at hand, and ongoing revisions of Appellate Rule 4 might not be considered from the Civil Rules perspective. Another difficulty is the complication that would arise from exempting only orders on timely motions, orders on Rule 54 motions for attorney fees only if appeal time is extended, or orders on Rule 60 motions only if made within 10 days. The Reporter's Note to Rule 54 provides an illustration of the choice. There is some reason to want a separate document when the underlying motion does not toll appeal time, since any review of the order deciding the motion must be by an appeal separate from any appeal from the judgment on the merits. But courts that have proved unable to comply with the simple separate-document requirement of current Rule 58 will surely make a worse mess of a rule that would, for example, require a separate document if the motion was denied because untimely.]

[It might be urged that Rule 60 motions are different because appeal lies from an order denying the motion, although the appeal does not extend to review of the original judgment. The snag is that Appellate Rule 4(a)(4) allows a Rule 60 motion to suspend time only if the motion is made in the same 10-day period allowed for motions under Rules 50, 52, and 59. This provision was added to reflect another horrid slipshod practice resulting from the confused belief of many lawyers that a Rule 60 motion should be used for relief properly sought under Rule 59(e). Courts struggled for years with the need to decide whether a motion captioned under Rule 60 should be treated as "really" a Rule 59 motion for the purpose of suspending appeal time if the motion was filed within the time permitted for a Rule 59 motion. The effect of Rule 4(a)(4)(vi) is to treat the 10-day Rule 60 motion as a Rule 59(e) motion. That works for appeal time purposes. If we make the distinction for the Rule 58(a)(1)(E) separate document requirement, however, the result seems foredoomed. Vague but unrefreshed recollection of the Rule 58 provision will lead some courts to enter separate documents on deciding a 10-day Rule 60 motion, while others will fail to enter separate documents on deciding a later-made Rule 60 motion. Nonetheless, it may be that we should restore the 10-day provision, shown as overstruck in lines 13 to 16, deleting the reference to Rule 6(a). That would mean that a separate document must be entered in disposing of a Rule 60 motion, but only if the motion was made more than 10 days after entry of judgment (remembering that entry of judgment may occur not by a separate document but by the lapse of 60 days from entry on the civil docket, see Rule 58(b)(2)(B), lines 40-41). The advantage would be to provide the clear signal for appeal time that the separate document provides, subject to the provision that starts appeal time at 60 days after entry on the civil docket when a separate document is required but is not entered. The value of a clear signal is considerably diminished in the Rule 60 context, however, because the appeal brings up only the denial of Rule 60 relief and review is for abuse of discretion. A lawyer who relies on the separate document requirement in this setting without reading the rule carefully has not lost much.]

Another temptation is to limit the separate document requirement to truly "final" judgments. The simplest drafting approach would be to introduce Rule 58(a)(1): "Every *final* judgment and every amended *final* judgment must be entered on a separate document * * *." The Committee Note would point out that the "final judgment" term is used in the traditional sense of a judgment that concludes the litigation, with nothing further to be done unless it be to execute a judgment for a party demanding relief. The question of appealability as a "final decision" under 28 U.S.C. § 1291 is distinct. All of that looks quite nice; it would solve the problem that Rule 54(a) creates for appeals

under § 1292(a) and for collateral-order appeals. But if there is confusion about the separate document requirement now — or willful disregard of it — the confusion that this approach would likely cause could be truly spectacular. The alternative of attempting a Rule 58-specific definition of "final judgment" makes even a happy drafter blanch.

MEMORANDUM

DATE: February 25, 2000

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 98-02

In January, Judge Garwood recommended to the Standing Committee that our package of proposed amendments be approved for publication. The Standing Committee readily approved all of our proposed amendments, save one. It will come as absolutely no surprise to any of you that the one exception was the proposed amendment to Rule 4(a)(7) (which is becoming the rulemaking equivalent of *Jarndyce v. Jarndyce*).

After a great deal of discussion about Rule 4(a)(7), it became apparent that the "cap" that our proposed amendment attempted to impose had a serious loophole, which I will describe in a moment. It also became apparent that the problems that our proposed amendment attempted to solve could be addressed more effectively if the Appellate Rules Committee and Civil Rules Committee worked together to propose complementary amendments to their respective sets of rules. The Standing Committee directed Judge Garwood and me to work with Judge Niemeyer (the Chair of the Civil Rules Committee) and Professor Cooper (the Committee's Reporter) to try to draft amendments to both FRCP 58 and Rule 4(a)(7) for presentation to our respective committees in April.

Judge Garwood, Judge Niemeyer, Professor Cooper, and I have worked diligently to try to slay this dragon. After exchanging many memos and drafts of amendments, we think that we've finally come up with a reasonably effective solution. Attached you will find a proposed

amendment to FRCP 58 that will be considered by the Civil Rules Committee at its April meeting, and a proposed amendment to Rule 4(a)(7) that Judge Garwood will ask you to consider at our April meeting. The Civil Rules Committee will meet on April 10 and 11, while we will meet on April 13 and 14. Judge Garwood and I plan to attend the meeting of the Civil Rules Committee.

The Standing Committee's Concerns

As you may recall, all of the circuits save the First now hold that when a judgment is required to be set forth on a separate document but is not, the time to appeal the judgment never begins to run. This creates what we have referred to as the "time bomb" problem: Thousands of long dormant cases could be resurrected tomorrow because judgment was never entered on a separate document, and thus the time to appeal never began to run.

We had proposed to amend Rule 4(a)(7) to impose a cap on the time that a party could wait to appeal a judgment that should have been entered on a separate document but was not. Specifically, our amendment provided that such a judgment would be treated as entered for purposes of Rule 4(a)(7) — notwithstanding anything to the contrary in the FRCP — 150 days after the judgment was entered in the civil docket. On the 150th day, the time to appeal the judgment would begin to run, even if the judgment was one that otherwise had to be set forth on a separate document under FRCP 58, and even if the judgment had not been so set forth.

Obviously, then, our proposed amendment would have "decoupled" the running of the time to bring post-judgment motions from the running of the time to appeal. At present, both the time to bring post-judgment motions under the FRCP and the time to bring appeals under FRAP begin to run at the same time — when judgement is entered on a separate document. But under our proposed amendment, if a judgment was supposed to be set forth on a separate document but

was not, the time to bring *post-judgment motions* would never begin to run under the FRCP, while the time to *appeal* would begin to run on the 150th day under FRAP.

The Standing Committee was uncomfortable with this decoupling. Members pointed out that it would create a substantial loophole in our 150 day cap:

The problem is that, under current Rule 4(a)(4)(A), the "timely" filing of certain post-judgment motions tolls the time to appeal, and, according to the rule, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Because the timeliness of post-judgment motions would be measured under the FRCP (not FRAP), and because the time to bring a post-judgment motion would not begin to run under the FRCP until the judgment was *actually* set forth on a separate document, a timely post-judgment motion could be filed under the FRCP long after the time to appeal the underlying judgment had theoretically expired under our amended Rule 4(a)(7). Such a post-judgment motion would "revive" the time to appeal, and thus defeat the cap.

We could close this loophole by amending Rule 4(a)(4)(A) along the following lines:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure no later than 10 days after the judgment is entered, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

	(iii)	for attorney's fees under Rule 54 if the motion is filed no later than 14 days after the judgment is entered and if the district court extends the time to appeal under Rule 58;
	(iv)	to alter or amend the judgment under Rule 59;
	(v)	for a new trial under Rule 59; or
	(vi)	for relief under Rule 60 ~~if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered~~.

Even under this approach, though, a loophole would remain: If the judgment was not actually set forth on a separate document, the potential appellant could not appeal *that judgment* after 180 days (or after 210 days in a case in which the government was a party). However, the litigant could bring a post-judgment motion (because the time to bring post-judgment motions would still be governed by the FRCP, which would still require actual entry on a separate document to start the time running). Moreover, in circuits in which the denials of such motions were appealable, the litigant could then appeal *the denial of his or her post-judgment motion.*

Something else bothered the Standing Committee. You will recall that one of the other problems that we were trying to address was the four-way circuit split over whether orders that dispose of post-judgment motions have to be entered on separate documents. We proposed amending Rule 4(a)(7) to make clear that FRAP simply incorporates the separate document requirement as it exists in the FRCP, and does not impose a separate document requirement of its own. Our amendment still would have left the law a mess. Whether an order disposing of a post-judgment motion would have to be entered on a separate document under FRCP 58 (and thus under Rule 4(a)(7)) would depend upon whether the order was appealable, and the circuits would remain all over the map on the issue of the appealability of such orders. The Standing

Committee felt that it would be much better to provide either that *all* such orders or *no* such orders need to be set forth on a separate document. However, such a solution would require an amendment to the FRCP.

The Proposed Amendments

We hope that the attached amendments to FRCP 58 and Rule 4(a)(7) accomplish the goals of our original amendment and meet the concerns of the Standing Committee. Very briefly, the amendments do the following:

1. New Rule 4(a)(7)(A) makes it clear that FRAP does not impose a separate document requirement of its own. Thus, nothing in *FRAP* will be read to require that an order disposing of a post-judgment motion — or anything else — be entered on a separate document; the matter is left entirely to the FRCP.

2. New FRCP 58(a)(1), like current FRCP 58, provides that every "judgment" must be entered on a separate document. However, new FRCP 58(a)(1) creates an important exception: It expressly provides that no order disposing of any of the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A) needs to be entered on a separate document. This wipes out the four-way circuit split on the question and creates national uniformity.

3. New FRCP 58(b) provides that a judgment is entered when it is entered in the civil docket, unless new FRCP 58(a)(1) requires the judgment to be set forth on a separate document, in which case the judgment will not be treated as entered until it is so set forth *or* until 60 days have passed after its entry in the civil docket, whichever comes first. In other words, if a judgment is supposed to be entered on a separate document but is not, the judgment will be treated as entered on the 60th day after entry in the civil docket, and the time to bring post-

judgment motions will begin to run. Thus, new FRCP 58(b) imposes a cap on the time to bring post-judgment motions.

4. New Rule 4(a)(7)(A) provides simply that a judgment is entered for purposes of Rule 4(a) when it is entered for purposes of FRCP 58(b). Thus, the time to appeal will continue to be coupled with the time to bring post-judgment motions, and the 60 day cap will apply to both. That takes care of the time bomb problem.

5. New Rule 4(a)(7)(B) is identical to our original proposal. It codifies *Mallis*, it provides that an appellant can waive the separate document requirement over the objection of the appellee, and it rejects the *Townsend* rule. No one on the Standing Committee expressed any reservations about new Rule 4(a)(7)(B).

At this point, we are hopeful that the Civil Rules Committee will approve the attached amendment to FRCP 58. If it does, we will consider the attached amendment to Rule 4(a)(7). If it does not, we will revert to our prior proposed amendment to Rule 4(a)(7), and we will consider the proposed amendment to Rule 4(a)(4)(A) that is set forth above (along with a proposed Committee Note that I will draft after the Civil Rules Committee's meeting and distribute to you when we meet in April).

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a) when it is entered ~~in compliance with~~ for purposes of Rules 58(b) ~~and 79(a)~~ of the Federal Rules of Civil Procedure.

(B) The failure to enter a judgment or order on a separate document when required by Rule 58(a)(1) of the Federal Rules of Civil Procedure does not invalidate an appeal from that judgment or order.

Committee Note

Subdivision (a)(7). Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with the requirement in Fed. R. Civ. P. 58 that, to be "effective," a judgment must be set forth on a separate document. Rule 4(a)(7) and Fed. R. Civ. P. 58 have been amended to resolve those splits.

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be entered on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is treated as "entered." This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure ("FRCP")) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former "camp" disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter "camp" disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. Under amended Rule 4(a)(7), a judgment or order is entered for purposes of Rule 4(a) when that judgment or order is entered for purposes of Fed. R. Civ. P. 58(b). Thus, if a judgment or order is not entered for purposes of Fed. R. Civ. P. 58(b) until it is set forth on a separate document, that judgment or order is also

not entered for purposes of Rule 4(a) until it is so set forth. Similarly, if a judgment or order is entered for purposes of Fed. R. Civ. P. 58(b) even though not set forth on a separate document, that judgment or order is also entered for purposes of Rule 4(a).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A) do not have to be entered on separate documents. *See* Fed. R. Civ. P. 58(a)(1). Rather, such orders are entered for purposes of Fed. R. Civ. P. 58 — and therefore for purposes of Rule 4(a) — when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). *See* Fed. R. Civ. P. 58(b).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be entered on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order ever begin to run? According to every circuit except the First Circuit, the answer is "no." The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order entered on a separate document three months after the judgment or order is entered in the civil docket. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. *See, e.g., United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds* 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Fed. R. Civ. P. 58 has been amended to impose such a cap. Under amended Fed. R. Civ. P. 58(b) — and therefore under amended Rule 4(a)(7) — a judgment or order is treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not entered until it is so set forth or until the expiration of 60 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal a judgment or order that should have been set forth on a separate document but was not.

3. The third circuit split — this split addressed only by the amendment to Rule 4(a)(7) — concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been entered on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Thus, the parties can choose to appeal without waiting for the order to be entered on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request entry of judgment on a separate document, and appeal a second time. *See, e.g., Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir. 1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g., Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive entry of a judgment or order on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without awaiting entry of the judgment or order on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

[It should be noted that the time frame within which an appellant must decide whether to waive the separate document requirement has been dramatically shortened by amended Fed. R. Civ. P. 58. Under former Fed. R. Civ. P. 58, the time to bring post-judgment motions or to appeal a judgment did not begin to run if the judgment was not entered on a separate document. Thus, the appellant could, in theory, waive the separate document requirement and appeal many years after the judgment was entered in the civil docket. Under amended Fed. R. Civ. P. 58, a judgment that is supposed to be set forth on a separate document but is not will nevertheless be considered entered — and the time to bring post-judgment motions and to appeal will nevertheless begin to run — 60 days after the judgment is entered in the civil docket. Thus, the separate document requirement is essentially waived by operation of Fed. R. Civ. P. 58 on the 60th day after entry of the judgment in the civil docket.]

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been entered on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to enter the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move for entry of judgment on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g., Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been entered on a separate document but was not. *See, e.g.*, *Haynes*, 158 F.3d at 1330-31; *Pack*, 130 F.3d at 1073; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

The Committee agrees with the majority of courts that have rejected the *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

Rule 54. Judgments; Costs

* * *

(d) Costs; Attorneys' Fees.

* * *

(2) *Attorneys' Fees.*

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed ~~and served~~ no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a)~~, and a judgment shall be set forth in a separate document as provided in Rule 58~~.

* * *

Committee Note

Subdivision (d)(2)(C) is amended to delete the requirement that judgment on a motion for attorney fees be set forth in a separate document. This change complements the amendment of Rule 58(a)(1), which deletes the separate document requirement for an order disposing of a motion for attorney fees under Rule 54. These changes are made to support amendment of Rule 4 of the Federal Rules of Appellate Procedure. It continues to be important that a district court make clear its meaning when it intends an order to be the final disposition of a motion for attorney fees.

The requirement in subdivision (d)(2)(B) that a motion for attorney fees be not only filed but also served no later than 14 days after entry of judgment is changed to require filing only, to establish a parallel with Rules 50, 52, and 59. Service continues to be required under Rule 5(a).

Reporter's Note

This approach keeps things simple. But a price is paid. When Rule 54(d)(2) was added in 1993, the Committee Note explained that a "separate judgment [sic for document]" is required "since such awards are subject to review in [sic for appeal to] the court of appeals." At the same time, Rule 58 was amended to allow a district court to order that a motion for attorney fees "have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59," so long as the court acts "before a notice of appeal has been filed and has become effective." The theory is that a district court should be able to delay an appeal from the judgment on the merits until attorney fee questions have been resolved, so as to support a single appeal in which both merits and fee issues can be resolved. In some ways, the best sense to be made of this scheme would be to adopt for the Civil Rules the approach of Appellate Rule 4(a)(4)(A)(iii). Rule 4 tolls appeal time if the district court has acted under Rule 58 to extend the time to appeal in order to dispose of an attorney-fee motion. When that happens, action on the attorney-fee motion is most like action on the other post-judgment motions – there already is a judgment, and the order disposing of the motion least needs a separate document. If the judgment on the merits has been appealed, or if appeal time has lapsed without an appeal, the attorney-fee motion stands alone, and will be reviewed only if there is a separate appeal. A separate document requirement might be more useful then. Rule 58(a)(1) could provide that a separate document is not required to enter an order disposing of a motion for attorney fees under Rule 54 <u>if the district court has extended the time to appeal under Rule 58(c)(2)</u>. That would be a neat fit.

But the difficulties encountered with the present simple requirement for a separate document suggest that anything "neat" is a bad idea.

Rule 58. Entry of Judgment

(a) Entry.

(1) Every judgment and every amended judgment must be entered on a separate document, but entry on a separate document is not required to enter an order disposing of a motion:

(A) for judgment under Rule 50(b),

(B) to amend or make additional findings of fact under Rule 52(b),

(C) for attorney fees under Rule 54 ~~if the district court extends the time to appeal under Rule 58(c)(2)~~,

(D) for a new trial, or to alter or amend the judgment, under Rule 59, or

(E) for relief under Rule 60 ~~if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered~~.

(2) Subject to the provisions of Rule 54(b):

(A) the clerk must, without awaiting direction by the court, promptly prepare, sign, and enter the judgment upon:

(i) a general jury verdict, or

(ii) a decision by the court that awards only a sum certain or costs or that denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, upon:

(i) a special verdict or a general verdict accompanied by interrogatories, or

(ii) a decision by the court granting [other relief]{relief not described in Rule 58(a)(2)(A) or Rule 58(a)(2)(B)(i)}.

(b) Time of Entry. Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62 when:

(1) it is entered in the civil docket under Rule 79(a), and

(2) if entry on a separate document is required by Rule

58(a)(1), on the earlier of these events:

(A) entry on a separate document [under Rule 58(a)(1)], or

(B) expiration of 60 days from entry in the civil docket [under Rule 79(a)].

(c) Cost or fee awards.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a timely motion for attorney fees is made under Rule 54(d)(2) the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59.

(d) Request Entry. Any party may request the entry of judgment on a separate document as required by Rule 58(a)(1).

Committee Note

Rule 58 has provided that a judgment is effective only when set forth on a separate document and entered as provided in Rule 79(a). This simple requirement has been ignored in many cases. The result of failure to enter judgment is that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins to run. The time to appeal under Appellate Rule 4(a) also does not begin to run. There have been few visible problems with respect to Rule 50, 52, 54(d)(2)(B), 59, or 60 motions, but there have been many and horridly confused problems under Appellate Rule 4(a). These amendments are designed to work in conjunction with Appellate Rule 4(a) to ensure that appeal time does not linger on indefinitely, and to maintain the integration of the time periods set for Rules 50, 52, 54(d)(2)(B), 59, and 60 with Appellate Rule 4(a).

Rule 58(a) preserves the core of the present separate document requirement, both for the initial judgment and for any amended judgment. No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that recites the terms of the judgment without offering additional explanation or citation of authority. Forms 31 and 32 provide examples.

Rule 58(a) is amended, however, to address a problem that arises under Appellate Rule 4(a). Some courts treat such orders as those that deny a motion for new trial as a "judgment," so that

appeal time does not start to run until the order is entered on a separate document. Without attempting to address the question whether such orders are appealable, and thus judgments as defined by Rule 54(a), the amendment provides that entry on a separate document is not required for an order disposing of the motions listed in Appellate Rule 4(a). The enumeration of motions drawn from the Appellate Rule 4(a) list is generalized by omitting details that are important for appeal time purposes but that would unnecessarily complicate the separate document requirement. As one example, it is not required that any of the enumerated motions be timely.

Rule 58(b) discards the attempt to define the time when a judgment becomes "effective." Taken in conjunction with the Rule 54(a) definition of a judgment to include "any order from which an appeal lies," the former Rule 58 definition of effectiveness could cause strange difficulties in implementing pretrial orders that are appealable under interlocutory appeal provisions or under expansive theories of finality. Rule 58(b) replaces the definition of effectiveness with a new provision aimed directly at the time for making post-trial and post-judgment motions. If judgment is promptly entered on a separate document, as should be done, the new definition will not change the effect of Rule 58. But in the cases in which court and clerk fail to comply with this simple requirement, the motion time periods set by Rules 50, 52, 59, and 60 begin to run after expiration of 60 days from entry of the judgment on the civil docket as required by Rule 79(a).

A companion amendment of Appellate Rule 4(a)(7) integrates these changes with the time to appeal.

Rule 58(b) also defines entry of judgment for purposes of Rule 62. There is no reason to believe that the Rule 62(a) stay of execution and enforcement has encountered any of the difficulties that have emerged with respect to appeal time. It seems better, however, to have a single effective date for motions, appeal, and enforcement.

This Rule 58(b) amendment defines "time of entry" only for purposes of Rules 50, 52, 59, 60, and 62. This limit reflects the problems that have arisen with respect to appeal time periods, and the belief that Rule 62 should be coordinated with Rules 50, 52, 59, and 60. In this form, the amendment does not resolve all of the perplexities that arise from the literal interplay of Rule 54(a) with Rule 58. In theory, the separate document requirement continues to apply, for example, to an interlocutory order that is appealable as a final decision under collateral-order doctrine. Appealability under collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document – there is little reason to force trial judges to

speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals. Appeal time should start to run when the collateral order is entered without regard to entry on a separate document and without awaiting expiration of the 60 days provided by Rule 58(b)(2). Drastic surgery on Rules 54(a) and 58 would be required to address this and related issues, however, and it is better to leave this conundrum to the pragmatic disregard that seems its present fate. The present amendments do not seem to make matters worse, apart from one false appearance. If a pretrial order is entered on a separate document that meets the requirements of Rule 58(b), the time to move for reconsideration seems to begin to run, perhaps years before final judgment. And even if there is no separate document, the time to move for reconsideration seems to begin after expiration of 60 days from entry on the civil docket. This apparent problem is resolved by Rule 54(b), which expressly permits revision of all orders not made final under Rule 54(b) "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

New Rule 58(d) replaces the provision that attorneys shall not submit forms of judgment except on direction of the court. This provision was added to Rule 58 to avoid the delays that were frequently encountered by the former practice of directing the attorneys for the prevailing party to prepare a form of judgment, and also to avoid the occasionally inept drafting that resulted from attorney-prepared judgments. See 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2786. The express direction in Rule 58(a)(2) for prompt action by the clerk, and by the court if court action is required, addresses this concern. The new provision allowing any party to move for entry of judgment on a separate document will protect all needs for prompt commencement of the periods for motions, appeals, and execution or other enforcement.

Reporter's Note

The Appellate Rules Advisory Committee and its reporter, Professor Patrick Schiltz, have expended great energy on the appeal-time problems generated by the separate-document requirement. They have discovered that it is difficult to address these problems by amending the Appellate Rules alone. This redrafted version of Rule 58 is designed to be part of a package with an Appellate Rule 4(a) amendment. Because the Appellate Rules Committee has worked so diligently, we hope to rely on their work to support a recommendation for publication in August, 2000.

The most important question is whether there is a problem that must be addressed. The Appellate Rules Committee is persuaded that

there is a real problem, and that the problem may become much worse in the future. The staggering number of reported separate-document cases studied by Professor Schiltz – some 500 – is convincing evidence of the problem. There is ground to believe that the only reason the problem is not worse is because so many lawyers, court clerks, and judges remain ignorant of the separate document requirement or believe that no one complies with it.

One approach to the difficulties associated with the separate-document requirement would be to abandon the requirement. The requirement was adopted in 1963 to provide a clear signal that appeal time has started to run. Professor Schiltz is uncertain whether a clear signal is really needed. He also doubts whether any real success will meet efforts to educate bench and bar about the ease of complying with this simple requirement. The proposed amendment maintains the separate document requirement in the hope that if the most pressing problems are addressed, some good still may flow from it.

Assuming that the separate-document requirement should be maintained, several questions remain.

The most important question is whether we should take on Rule 54(a). Rule 54(a) defines a judgment to include "any order from which an appeal lies." Rule 54(a) is the source of much theoretical mischief. Without further change of Rule 58(b), it means that an order granting a TRO or preliminary or permanent injunction must be entered twice: once in compliance with Rule 65(d), "set[ting] forth the reasons for its issuance," and again in compliance with Rule 58(b) by a separate document that does not set forth the reasons for its issuance. [My one-judge survey found that Judge Rosenthal scrupulously enters a separate Rule 58 judgment. Professor Schiltz's work suggests that this splendid example is not universally followed.] Rule 54(a) also means, in theory, that a separate document is required for any order that can be appealed under collateral-order theory, "hardship finality [Forgay v. Conrad]," or "pragmatic finality." It is tempting to delete the Rule 54(a) definition. A glancing look through treatise treatment does not suggest any function served by the definition. The original Committee Note says only that the second sentence – the one that follows the definition sentence – derives from Equity Rule 71. The difficulty is that much work would be required to penetrate these obscurities. Perhaps the definition of judgment for purposes of the Civil Rules does serve a function. Although literal application of the definition through Rule 58 could create great confusion, that does not seem to have been a problem. The best course, if we go ahead with amending Rule 58, may be to ask for comment on Rule 54(a) without proposing any amendment.

Rule 58(a) might be drafted in fewer words by incorporating

Appellate Rule 4(a), e.g.: "(1) Every judgment and every amended judgment must be entered on a separate document, except that no order disposing of a motion listed in Rule 4(a)(4) of the Federal Rules of Appellate Procedure need be so entered." There are some difficulties with this approach. One is the problem of cross-reference: a lawyer reading the Civil Rules may not always have the Appellate Rules at hand, and ongoing revisions of Appellate Rule 4 might not be considered from the Civil Rules perspective. Another difficulty is the complication that would arise from exempting only orders on timely motions, orders on Rule 54 motions for attorney fees only if appeal time is extended, or orders on Rule 60 motions only if made within 10 days. The Reporter's Note to Rule 54 provides an illustration of the choice. There is some reason to want a separate document when the underlying motion does not toll appeal time, since any review of the order deciding the motion must be by an appeal separate from any appeal from the judgment on the merits. But courts that have proved unable to comply with the simple separate-document requirement of current Rule 58 will surely make a worse mess of a rule that would, for example, require a separate document if the motion was denied because untimely.]

[It might be urged that Rule 60 motions are different because appeal lies from an order denying the motion, although the appeal does not extend to review of the original judgment. The snag is that Appellate Rule 4(a)(4) allows a Rule 60 motion to suspend time only if the motion is made in the same 10-day period allowed for motions under Rules 50, 52, and 59. This provision was added to reflect another horrid slipshod practice resulting from the confused belief of many lawyers that a Rule 60 motion should be used for relief properly sought under Rule 59(e). Courts struggled for years with the need to decide whether a motion captioned under Rule 60 should be treated as "really" a Rule 59 motion for the purpose of suspending appeal time if the motion was filed within the time permitted for a Rule 59 motion. The effect of Rule 4(a)(4)(vi) is to treat the 10-day Rule 60 motion as a Rule 59(e) motion. That works for appeal time purposes. If we make the distinction for the Rule 58(a)(1)(E) separate document requirement, however, the result seems foredoomed. Vague but unrefreshed recollection of the Rule 58 provision will lead some courts to enter separate documents on deciding a 10-day Rule 60 motion, while others will fail to enter separate documents on deciding a later-made Rule 60 motion. Nonetheless, it may be that we should restore the 10-day provision, shown as overstruck in lines 13 to 16, deleting the reference to Rule 6(a). That would mean that a separate document must be entered in disposing of a Rule 60 motion, but only if the motion was made more than 10 days after entry of judgment (remembering that entry of judgment may occur not by a separate document but by the lapse of 60 days from entry on the

civil docket, see Rule 58(b)(2)(B), lines 40-41). The advantage would be to provide the clear signal for appeal time that the separate document provides, subject to the provision that starts appeal time at 60 days after entry on the civil docket when a separate document is required but is not entered. The value of a clear signal is considerably diminished in the Rule 60 context, however, because the appeal brings up only the denial of Rule 60 relief and review is for abuse of discretion. A lawyer who relies on the separate document requirement in this setting without reading the rule carefully has not lost much.]

Another temptation is to limit the separate document requirement to truly "final" judgments. The simplest drafting approach would be to introduce Rule 58(a)(1): "Every *final* judgment and every amended *final* judgment must be entered on a separate document * * *." The Committee Note would point out that the "final judgment" term is used in the traditional sense of a judgment that concludes the litigation, with nothing further to be done unless it be to execute a judgment for a party demanding relief. The question of appealability as a "final decision" under 28 U.S.C. § 1291 is distinct. All of that looks quite nice; it would solve the problem that Rule 54(a) creates for appeals under § 1292(a) and for collateral-order appeals. But if there is confusion about the separate document requirement now — or willful disregard of it — the confusion that this approach would likely cause could be truly spectacular. The alternative of attempting a Rule 58-specific definition of "final judgment" makes even a happy drafter blanch.

Rule 54(a) "Judgment" Definition

Rule 54(a), in words unchanged since 1938, begins: "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." It has become a source of disquiet because Rule 58 requires that every "judgment" be "set forth on a separate document," and provides that "[a] judgment is effective only when so set forth and entered as provided in Rule 79(a)." Appellate Rule 4, in turn, calibrates appeal time by the entry of judgment. Time and again, failure to enter judgment on a separate document has meant that appeal time has not begun to run. Widespread failure to honor the simple direction of Rule 58 has planted an uncounted but large number of "time bombs" – old and even ancient judgments that remain appealable. A package of amendments to Civil Rules 54 [not the subdivision (a) definition] and 58, and Appellate Rule 4(a)(7), is being proposed to address these problems. The inquiry has raised the further question whether it would be wise to change or delete the Rule 54(a) definition of judgment. The tentative answer suggested here is that change is desirable, but will not be wise until there is a much better understanding of the possible ramifications of Rule 54(a). This conservative suggestion draws strong support from the fact that none of the theoretical problems seem to have materialized.

Uncertain Definition

There are some curiosities and potential ambiguities in the simple Rule 54(a) definition.

Does "a decree and any order from which an appeal lies" include – if there is such a thing – a "decree" that cannot be appealed?

Does "includes a decree and any order from which an appeal lies" exclude every order from which an appeal does not lie? This one, at least, has drawn some judicial attention. In Minits v. Educational Testing Serv., 3d Cir.1996, 99 F.3d 1253, 1259, the plaintiff moved after the action was remanded to state court for attorney fees incurred to defeat the removal. Acting on the assumption that because 28 U.S.C. § 1447(d) states that a remand order "is not reviewable on appeal or otherwise" the order is not one from which an appeal lies, the court concluded that the remand order was nonetheless a "judgment" that triggered the Rule 54(d)(2)(B) 14-day period for an attorney-fee motion. "[W]e do not read 'includes' in Rule 54(a) as in all cases limiting a judgment to an appealable order." And no less a duo than Justice Frankfurter, joined by Justice Harlan, said this in dissenting from the decision in U.S. v. F. & M. Schaefer Brewing Co., 1958, 356 U.S. 227, 239:

> The Rules nowhere define with mechanical exactitude the meaning of the term "judgment." Rule 54(a), however, in stating that a judgment includes "a decree and any order

from which an appeal lies," emphasizes that a judgment is not confined to judicial actions so described, but includes any act of the court that performs the function

of a judgment in bringing litigation to its final determination.

The question whether "includes" works to exclude all other examples arises frequently. The better view is that it is "illustrative, not exclusive," but this view often runs afoul of the familiar (and often mischievous) maxims inclusio unius, noscitur a sociis, and ejusdem generis. See Garner, Dictionary of Modern Legal Usage 2d, 1995, pp. 431-432. Whatever the drafters may have intended, the meaning today is unclear. Something turns on this point, or may, because of the pervasive appearance of "judgment" throughout the Civil Rules.

Inappropriate Breadth

The nature and number of the orders from which an appeal lies have grown remarkably since 1938. The most important example for present purposes is the "collateral order" doctrine that has grown out of the decision in Cohen v. Beneficial Industrial Loan Corporation, 1949, 337 U.S. 541. Under the rules as they now stand, every district-court order that is appealable under collateral-order theory is, by virtue of Rule 54(a), a judgment, and under Rule 58 is not effective until it has been entered on a separate document. That cannot be, however, and there is no indication that any court takes seriously this literal meaning of the rules. Neither district courts nor parties should be forced to struggle with the question whether a court of appeals might, should an appeal be attempted, conclude that a particular order is in fact appealable under the elastic collateral-order theory. Two examples illustrate the point. Collateral-order theory occasionally is invoked to support appeal from denial of a privilege asserted in discovery proceedings: is no such order effective until entered on a separate document? And collateral-order theory is invoked with astonishing frequency to support appeal from interlocutory orders that deny official immunity, but on terms that have generated appalling confusion: must a district court, for example, enter on a separate document denial of an immunity motion for summary judgment when denial rests on a proposition of law, but not when it rests on a determination that immunity will turn on disputed fact issues? If courts were actually heeding the combined meaning of Rules 54(a) and 58 in these settings, emergency action would be demanded. Common sense prevails so universally, however, that there is no apparent need to amend the rules on this account.

A quite different problem arises from an apparent tension between Rules 54(a), 58, and 65(d). Rule 65(d) requires that every order granting an injunction and every restraining order set forth

the reasons for its issuance, be specific in terms, and describe in reasonable detail the acts restrained. Orders granting injunctions are appealable; orders granting restraining orders often are not appealable, but at times are appealable. When appealable, these orders are judgments that must be entered on a separate document that does not set forth the reasons for issuance. But it cannot be that a preliminary injunction, for example, is not appealable until the district court remembers this task, and (a desirable concomitant of being not appealable) has no effect. The separate document requirement may make sense as to a permanent injunction that is intended to be the final disposition of an action, but serves no obvious purpose with respect to orders granting an interlocutory injunction or temporary restraining order. Once again, however, this possible problem seems not to be real.

A truly absurd possibility would be to include 28 U.S.C. § 1292(b) permissive appeals (or Rule 23(f) permissive appeals) in the Rule 54(a) definition. A great many orders may be eligible for certification for interlocutory-appeal-by-permission, particularly on a usefully flexible approach to the confining categories of § 1292(b). It cannot be that the mere potential requires entry on a separate document and defeats any effect until entry on a separate document occurs. Section 1292(b) certification should be the turning point, and the certification should not itself require an additional and separate document.

Defining a Pervasive Term

The word "judgment" appears frequently throughout the Civil Rules, in places both expected and unexpected. It would be remarkable if the Rule 54(a) definition made sense for all of these uses. The no doubt incomplete list offered in the next paragraph will be followed by a few illustrative questions.

"Judgment" appears most often standing alone, but also in combination with such well-known terms as "judgment as a matter of law," "judgment by default," and "summary judgment." All of these uses are included in this list, without addressing the question whether the Rule 54(a) definition purports to reach "judgment" as part of these familiar phrases (remembering that for more than 50 years after Rule 54(a) was adopted, one of the relevant phrases was not "judgment as a matter of law" but "judgment notwithstanding the verdict"). See Rules 4(a), 5(a), 8(a)(3), 9(e), 12(c) & (d), 13(a) & (i), 14(c), 15(b), 16(c)(14), 18(b), 19(b), 20(a), 41(a), 23(c)(2) & (3), 23(d), 26(a)(1)(D), 27(b), 37(b)(2)(c), 49(a) & (b), 50(throughout), 52(throughout), 54(throughout), 55(judgment by default, and judgment, throughout), 56(summary judgment), 57(declaratory judgment), 58, 59(every subdivision), 60(throughout), 61, 62(throughout), 64, 67, 68, 69(throughout), 70, 71A(i) & (j), 73(c), 77(c) & (d), and 79(throughout). And see

Admiralty Rules B(2), C(3), C(5), E(2)(b), and E(5)(b).

Rule 9(e) illustrates the way in which the Rule 54(a) definition simply does not fit with the use of "judgment." Rule 9(e) speaks to pleading "a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer." There is no reason to limit Rule 9(e) by looking to whether "an appeal lies" from the various dispositions it enumerates. (Of course this poor fit is resolved if Rule 54(a) merely illustrates, without limiting, the meanings of "judgment.")

Other rules suggest curious questions that probably have little meaning. Rule 68, for example, establishes an "offer of judgment" procedure. Can an offer be made only in a form that will result in an appealable order – and if so, must it be immediately appealable? Can the actual "judgment" that is compared to the offer be only an [immediately?] appealable order? A potential complication, now moot, is illustrated by then-Justice Rehnquist's dissent in Delta Air Lines, Inc. v. August, 1981, 450 U.S. 346, 370-371. The court ruled that Rule 68 does not apply when the defendant offers a judgment and the plaintiff then loses at trial, because the plaintiff has not "obtained" a judgment. Justice Rehnquist, quoting Rule 54(a), argued that "[u]nquestionably, respondent 'obtained' an 'order from which an appeal lies' when the District Court entered its judgment in this case." A different curiosity, almost certainly without consequence, appears in Rule 69(b). This rule provides that the "final judgment" against a revenue officer is to be satisfied in the manner prescribed by enumerated statutes. There is good reason to refer to the "final" judgment in this setting, a reason that relates to execution rather than appealability. It is hard to imagine any complication arising from the Rule 54(a) definition.

Several rules suggest possible real difficulties that can be avoided by concluding that the Rule 54(a) definition includes but does not exclude. Rule 52(c) provides for judgment on partial findings in an action tried without a jury. Judgment may be entered with respect to "an issue," as supported by findings of fact and conclusions of law. The "judgment" may not dispose of any claim at all, and not be eligible for entry as a final judgment under Rule 54(b). The function is equivalent to a partial judgment as a matter of law, a phrase that (somewhat confusingly) appears in Rule 52(c). "Judgment" here clearly does not mean what Rule 54(a) says it means.

Rule 54(b) corrects a potential difficulty. Absent an express direction for entry of final judgment "as to one or more but fewer than all of the claims or parties," "any order or other form of decision, however adjudicated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties

* * * is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." This makes it clear that the 10-day time limits in Rules 52, 54(d)(2)(B), and 59 do not begin to run, even though an order as to part of the case may be appealable outside of Rule 54(b) and thus is a "judgment."

Rule 56(c) is conceptually similar to Rule 52(c). "A summary judgment, interlocutory in character, may be rendered on the issue of liability alone * * *." This order ordinarily is not appealable, and cannot be made appealable under Rule 54(b). Again, judgment in Rule 56(c) means something different than the Rule 54(a) definition.

Rule 62(c) presents a puzzling question that seems to turn more on Rule 58 than Rule 54(a). It provides for district-court action "when an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction." An appeal clearly lies from an interlocutory order denying an injunction; Rule 62(c) seems to characterize the order as a "judgment" in the way that Rule 54(a) defines it to be. By double force, then, the district court's power to grant an injunction pending appeal from the denial seems to turn on whether the denial has been entered on a separate document. Or, at the least, the order denying an injunction is not "effective" — whatever that might mean — until entered on a separate document.

Rule 62(f) provides for a stay of execution when a "judgment" is a lien on the property of the judgment debtor. May it be that under state law — expressly invoked by Rule 62(f) — an order from which an appeal does not lie operates as a lien? If not a judgment, can the court stay execution outside the terms of Rule 62(f) — or is this a captious question because appeal is always available under "hardship appeal" theory (Forgay v. Conrad) if the lien is capable of "execution"? Rule 70 presents similar questions in providing that a judgment commanding a "specific act" may be enforced by directing a person appointed by the court to do the act or by a "vesting" "judgment."

Similar questions surely lurk elsewhere in the Civil Rules, and — assuming the Rule 54(a) definition carries forward — the Admiralty Rules. The point is that the definition clearly is too broad with respect to some appealable orders, and probably is too narrow if it excludes from the category of judgments every order that is not appealable.

Rule 54(a) Uses

The Rule 54(a) definition does have its uses. Although a movement is afoot to redefine the "entry" of judgment, it is still a judgment that is being entered. The time periods and stay of

execution focused upon in draft Rule 58(b) turn on the definition, and the effect seems to be desirable. An example is provided by Castro Cty. v. Crespin, D.C.Cir.1996, 101 F.3d 121, 127-128, ruling that an order dismissing without prejudice and with the right to reopen on application to the clerk was not a "judgment," and did not trigger the Rule 54(d)(2)(B) time to move for attorney fees. A similar but more convoluted use appears in Brown v. Local 58, Internat. Bhd. of Elect. Workers, 6th Cir.1996, 76 F.3d 762, reasoning that a judgment that is appealable when entered ceases to be appealable when a timely Rule 59(e) motion is made, so that the time to move for attorney fees begins to run on disposition of the Rule 59(e) motion. (This ruling actually opens an interesting question that might deserve exploration one day. Rule 59(b) requires "any motion for a new trial" to be served no later than 10 days after entry of judgment. Rule 59(e) imposes the same requirement on "any motion to alter or amend a judgment." There is no provision, akin to Appellate Rule 4(a)(3), for "multiple motions" – if one party files a motion to alter or amend on the 10th day, for example, must another party who would not file a motion unless someone else does also file on the 10th day? The theory that the entry of what was a "judgment" at the time of entry ceases to be entry of a "judgment" because appeal does not lie until the timely motion is disposed of suggests that other parties are relieved of the time limit until the first timely motion is decided. Then a new time period begins even if the first motion is denied and the original entry of judgment, having lost its character, once again becomes an entry of judgment. This theory does not seem very sensible. The sensible outcome may include these points: (1) all motions addressed to the original judgment must be filed within 10 days of the first entry. This will avoid the prolonged delay that could result from suspending the time for other motions as soon as one timely, appeal-suspending motion is made. Or – to do something that would require an explicit amendment – a rule could allow additional motions within X days after the first motion is filed (served?). (2) A motion addressed only to an order granting relief from the original judgment must be filed within 10 days from entry of the order granting relief [which would not require a separate document under proposed Rule 58(a)(1)]. (3) a motion for attorney fees is given special treatment because usually there will be little point in addressing attorney fees until the trial court has resolved all challenges to the judgment. Whatever the best outcome, reasoning from the Rule 54(a) definition is not much help.)

Another use of Rule 54(a) may be to bolster the conclusion that a collateral-order appeal must be taken within Appellate Rule 4 appeal time as measured from entry [with or without a separate document] of the order. See U.S. v. Moats, 5th Cir.1992, 961 F.2d

1198, 1203 & n. 4. It seems better, however, to rely on the language of Rule 4 itself, which sets the time for appeal "after the judgment or order appealed from is entered." Rule 4 is not directly reached by Rule 54(a), and applies to an appealable "order" as well as a "judgment." Reliance on Rule 4 also may ease the way to the further conclusion that although the time to appeal a collateral order runs from entry of the order, the order remains reviewable on appeal from a final judgment if no earlier appeal was taken.

A still more extended use of Rule 54(a) has occurred in applying the "relitigation exception" that allows a federal court to enjoin state proceedings "to protect or effectuate its judgments." Courts have concluded that an order qualifies as a "judgment" for this purpose if it is appealable as a collateral order or under the interlocutory injunction appeal provisions of 28 U.S.C. § 1292(a)(1), drawing inspiration from Rule 54(a). See National Basketball Assn. v. Minnesota Professional Basketball, Ltd. Partnership, 8th Cir.1995, 56 F.3d 866, 871-872, ruling that a federal court may enjoin state proceedings that interfere with a federal preliminary injunction; Baker v. Gotz, D.Del.1976, 415 F.Supp. 1243, 1249, 1250, ruling that a federal court may enjoin state proceedings that conflict with a federal ruling, which could have been appealed as a collateral order, that state law did not allow sequestration.

Deletion of the Rule 54(a) definition might unsettle some of these questions. It would be particularly important to consider substitutes in Rules 50, 52, 54(d)(2)(B), 59, 60, and 62. There might well be other settings that would become unsettled, to no real purpose.

Interim Conclusion

For the moment, too much is unknown about the possible effects to justify deletion of the Rule 54(a) definition of "judgment." It seems better to put the matter aside until some identifiable problem justifies further work.

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March 28, 2000

MEMORANDUM TO ADVISORY COMMITTEE ON CIVIL RULES

SUBJECT: *Financial Disclosure*

I am attaching the most recent drafts of new Civil Rule 7.1 and material prepared for the April 13-14, 2000 Appellate Rules Committee, which include several options addressing the financial disclosure issue. A letter from Judge Amon, chair of the Committee on Codes of Conduct, to Judge Scirica voicing reservations with some of the proposed options is also attached. Finally, I am attaching a copy of the Federal Judicial Center's report on local rules governing disclosure of financial information. The report summarizes the content of the rules. On pages 52-56, the report discusses the results of a follow-up questionnaire sent to the courts on the usefulness of their financial disclosure local rules.

Mark D. Shapiro

Attachment

Financial Disclosure Drafts

Introduction

The question of financial disclosure has come to the several advisory committees from the Standing Committee. The Appellate Rules have, in Rule 26.1, the only present national rule on disclosure. Most of the circuits also have local rules that supplement the requirements of Rule 26.1. Disclosure requirements in the district courts are established by practice or local rule. The local circuit and district rules differ substantially among themselves. Substantial concern has arisen from two well-publicized newspaper accounts of situations in which federal judges failed to recognize investment conflicts that should have led to recusal. The Standing Committee hopes to respond to these pressures by publishing for comment a uniform disclosure rule that would apply to civil and criminal proceedings in the district courts, and to all proceedings in the courts of appeals. The uniform rule may also provide the template for a Bankruptcy Rule, but there are special problems that most likely will require development of special provisions that distinguish the Bankruptcy Rule from the uniform rule.

Two central needs must be recognized. The first is to get information from the parties to all actions. The second is to bring this information home to each judge who acts in a case. Although a national rule can direct that the clerk provide the information to each judge — and such a direction is included in the choices that follow — this problem is an internal administrative problem to be handled primarily within each court. The central focus of a national rule will be the need to get information from the parties. It is not entirely clear that even this subject should be addressed by a Rule of Appellate, Bankruptcy, Civil, or Criminal Procedure. The subject seems within the scope of the Enabling Act, however, and Appellate Rule 26.1 has already set an example.

If there is to be a national rule that requires some measure of uniform disclosure, the extent of the disclosure must be chosen. No one believes that a national rule can require disclosure of all the information that might be relevant to a recusal decision. Nor does anyone claim to know what reduced level of disclosure would reach the most common and important grounds for recusal. It is generally agreed that Appellate Rule 26.1 disclosure will cover a major fraction of the circumstances that actually call for disclosure, but no one can say whether the proportion is 60%, 90%, or some more reassuring number. Few have suggested that a national rule should require disclosure about the attorneys who appear in a case; the focus commonly is on parties, excluding even amici curiae. (An addition might be made in the criminal rules to require disclosure of any corporation that may benefit from a restitution award.) As to parties, the focus commonly is on financial information, not on personal information. Appellate Rule 26.1 narrows this focus still further, addressing only parties that are nongovernmental corporations, and requiring information only about "parent corporations and * * * any publicly held company that owns 10% or more of" the corporation's stock.

Appellate Rule 26.1 is about as narrow a financial disclosure rule as could be drafted. When a somewhat broader form of Rule 26.1 was adopted in 1989, the Committee Note recognized the rule

represented "minimum disclosure requirements" and observed that a court of appeals could "require additional information * * * by local rule." Although many local circuit rules do require additional information, there is no common pattern. Some require only modest additional disclosures; some require a great deal of additional information. These rules, and local district rules, are described in the Federal Judicial Center materials that accompany the present drafts.

Drafting Alternatives

So many questions remain to be resolved that it has not seemed prudent to present a single draft for consideration. The only common element among all of the succeeding drafts is that each is described as Civil Rule 7.1. This location within the Rules is not inevitable, but seems better than the alternatives. A disclosure rule should be placed among the early rules because it addresses a requirement that must be met at the beginning of every action. Disclosure is not really a matter of pleading, so it seems better to place the rule before Rule 8. It seems to fit better with Part III than with the provisions for commencement, summons, service, and time (Rules 3 through 6) in Part II. It would be uncouth to begin Part III with a "Rule 6.1," and the choice of renumbering present Rule 7 as Rule 7.1 seems unattractive because for many years lawyers would have to remember which Rule 7 they were searching. And that is the easy question.

Many drafts are attached. They reflect the course of discussions over a period of several months, but still do not cover all plausible combinations of the views that have been expressed. They are presented to provoke broad inquiry. In many ways this remains a mix-and-match presentation of rule provisions and Committee Note paragraphs that can be reassembled in many new alternatives. One of the drafts, however, is presented twice — first at the end of this Note, and then again as part of the full set. This draft adapts to district-court circumstances the disclosure provisions of Appellate Rule 26.1, but also recognizes the authority of the Judicial Conference to require more detailed disclosures by adopting a disclosure form. This approach has commanded increasing support as the review process has matured. The draft rule is presented with only one of the three alternative Committee Note drafts that are appended in the full set. This draft, "Version 3," embodies the diplomatic approach to explaining — and avoiding — some of the stickier issues.

The first alternative is the simplest. It adapts Appellate Rule 26.1 to the district courts, following as near as may be the style of Rule 26.1. The time-for-filing provision is, of necessity, different from the provision in Rule 26.1. The number of copies is reduced because most actions in most courts will be assigned to only one judge. A supplemental filing is required whenever there is a change in the facts requiring disclosure.

The second alternative is much the same as the first, but adds an explicit requirement that a nongovernmental corporate party file the information required by local rule. (The local rule question will be noted below — it cuts across all of these drafts.)

The third alternative delegates the entire problem to the Judicial Conference by requiring a disclosure form approved by the Judicial Conference. This alternative is drafted broadly to reach all parties, not merely a "nongovernmental corporate party," and could reach information in addition to financial information.

The fourth alternative delegates the entire problem to local rules. It is not likely to command any significant support, but is provided as an illustration of that possible extreme.

The fifth alternative is the one that has commanded the greatest support in preliminary discussions in some of the advisory committees and among the reporters and committee chairs. This alternative requires disclosure of the information now required by Appellate Rule 26.1 and in addition authorizes development of a disclosure form by the Judicial Conference. There is no requirement that the Judicial Conference actually adopt a form. Instead, the way is left open for Judicial Conference action at any time that the Conference believes there is sufficient experience and need to justify adding to the Rule 26.1 requirements. This approach effectively recognizes that the Enabling Act process is not well suited to development or continuing revision of disclosure rules. A good disclosure can be developed only from close acquaintance with several things. The substance of disqualification rules must be known with intimate familiarity. The actual nature of the problems that arise with any frequency in practice must be equally well known. The practical ability of parties themselves to provide information must be accounted for. All of this knowledge lies outside the Enabling Act Committees, and is most likely to be found in the Committee on Codes of Conduct. In addition, the administrative capacities of the courts to bring together the information provided by the parties with the information relevant to each individual judge must be understood. As courts continue to develop electronic filing capacities, it may become ever more practical to require more of the information that we might like to have now but cannot reasonably expect to match up with meaningful recusal profiles for individual judges. The Administrative Office probably is better equipped than any committee to understand the evolution of district-court electronic information-matching capabilities.

The "Rule 26.1 with Judicial Conference Form" is set out with three separate Committee Notes. The first Note says nothing about local rules. The second Note suggests, following the lead of the Advisory Committee that gave us Appellate Rule 26.1, that some courts may wish to supplement Rule 7.1 with additional information, continuing or developing the practices now established by many local rules. This Note is designed to quiet fears that already have been expressed by several judges who know of this project and who fear that the bare-bones disclosures of Rule 26.1 may leave them subject to embarrassing failures to recuse for lack of information. It also is designed to quiet the fears of some that a Judicial Conference form might be developed with improvident haste, leading to requirements that are not easily met by the parties nor readily acted upon by the courts. The third Note is the most tactful. It is framed with an eye to persuading doubters that it is desirable to hold open the possibility of developing a more detailed disclosure form.

The final page is no more than a brief illustration of the style that might be used in a rule that cuts free from the style of Appellate Rule 26.1. The draft expressly excludes bankruptcy proceedings, requires a "null" report, substitutes "corporations that directly or indirectly control" for "parent corporations," substitutes any publicly held "entity" for "company" that owns 10% or more of a party's stock, and does not [yet] include the Judicial Conference form. This draft reflects various incidental suggestions that have been made. It should be addressed only if any of these points seem important.

A few more words on the local rules question may prove helpful. There has been little support for an approach that would forbid any local disclosure requirements, whether by local rule or otherwise, so long as the only operating national requirement is Appellate Rule 26.1. Preemption seems feasible only when the national requirements extend further, either because a national form has been developed or because more detailed national rules have been developed. The alternatives seem to be to say nothing about local rules, or to recognize the inevitability — or perhaps even the desirability — of local rules for the time being. This choice has provoked mixed reactions. Many participants in the Enabling Act process are concerned about the proliferation of local rules, a concern recently expressed by the American Bar Association, and are loath to do anything that encourages still more local rulemaking. Others, however, believe that the Appellate Rules Advisory Committee got it right in 1989 — so long as the national rule requires only minimal disclosure, it is desirable to encourage local rules on this subject with the hope that developing experience with different approaches will establish the foundation for a better national rule. The variety of approaches reflected in the following models reflects this tension.

Rule 26.1 with Judicial Conference Form and Diplomatic Note

Rule 26.1 Combined with Judicial Conference Form

7.1 Disclosure Form

(a) Required Form. A party to [that appears in] an action or proceeding in a district court must file two copies of a form that:

(1) if it is a nongovernmental corporation,

(A) identifies all its parent corporations and also identifies any publicly held company that owns 10% or more of its stock, or

(B) states that there is nothing to report under Rule 7(a)(1)(A); and

(2) provides all additional information required by the Judicial Conference of the United States.

(b) Time for Filing. A party must file the Rule 7.1(a) form with its first appearance, pleading, petition, motion, response, or other request addressed to the court. A supplemental statement must be filed promptly upon any change in the circumstances that Rule 7.1(a) requires the party to identify.

(c) Form Delivered to Judge. The clerk must deliver a copy of the Rule 7.1(a) form to each judge assigned to the action or proceeding.

Committee Note {Version 3}

Rule 7.1 is drawn from Rule 26.1 of the Federal Rules of Appellate Procedure, with changes to adapt to the circumstances of district courts that dictate different provisions for the time of filing, number of copies, and the like. The information required by Rule 7.1(a)(1) reflects the "financial interest" standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges. This information will support properly informed disqualification decisions in situations that call for automatic disqualification under Canon 3C(1)(c). It does not cover all of the circumstances that may call for discretionary disqualification under the financial interest standard, and does not deal at all with other circumstances that may call for disqualification.

Although the disclosures required by Rule 7.1(a)(1) may seem limited, they are calculated to reach the vast majority of circumstances that are likely to call for disqualification on the basis of information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of vast volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a)(1).

Despite the difficulty of framing more detailed disclosure requirements, developing experience with divergent disclosure practices and with improving technology may provide the foundations for exacting additional requirements. The Judicial Conference, supported by the committees that work regularly with the Codes of Judicial Conduct and by the Administrative Office, is in the best position to develop any such additional requirements and to keep them adjusted to new information. Rule 7.1(a)(2) authorizes adoption of additional disclosure requirements by the Judicial Conference, to be embodied in a uniform form that can be used by all courts.

Rule 26.1 Adapted

Rule 7.1. Corporate Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to an action or proceeding in a district [bankruptcy] court ~~of appeals~~ must file two copies of a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of its ~~the party's~~ stock.

(b) Time for Filing. A party must file the Rule 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court ~~the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents.~~ A supplemental statement must be filed promptly upon any change in the circumstances that Rule 7.1(a) requires the party to identify.

~~**(c) Number of Copies.** If the statement is filed before the principal brief, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.~~

Committee Note

This rule is adapted from Appellate Rule 26.1. When Rule 26.1 was added in 1989, the Committee Note explained that the rule "represents minimum disclosure requirements," and observed that a court of appeals could "require additional information * * * by local rule." Rule 26.1 was amended in 1998 to delete the former requirement that a corporate party disclose also its "subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." The Committee Note to the 1998 amendment expressed the belief that such disclosure is unnecessary, although required by several circuit rules. The disclosures required by new Rule 7.1 are, as with the Appellate Rule 26.1 model, minimal. Districts remain free to adopt local rules that require additional disclosures by corporate parties, by other parties, or by attorneys.

Reporter's Comment

There has been substantial interest in reconsidering the 1998 amendment of Appellate Rule 26.1. Several district judges want disclosure at least as to a party's subsidiaries, and perhaps also affiliates. That change is easily made without undertaking the responsibility of a full-blown inquiry into the "ideal" disclosure rule.

Rule 26.1 With Local Rules Expressly Authorized

Rule 7.1. Disclosure

(a) ~~Who Must File~~ Required Statement. Any nongovernmental corporate party to an action or proceeding in a district [bankruptcy] court ~~of appeals~~ must file two copies of a statement that:

(1) identifies~~ying~~ all its parent corporations,

(2) ~~and~~ lists~~ing~~ any publicly held company that owns 10% or more of its ~~the party's~~ stock, and

(3) makes any additional disclosures required by a local [district] rule.

(b) Time for Filing. A party must file the Rule 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court ~~the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents~~. A supplemental statement must be filed promptly upon any change in the circumstances that Rule 7.1(a) requires the party to identify.

Committee Note

This rule is adapted from Appellate Rule 26.1. When Rule 26.1 was added in 1989, the Committee Note explained that the rule "represents minimum disclosure requirements," and observed that a court of appeals could "require additional information * * * by local rule." Most of the courts of appeals have adopted local circuit rules that require additional disclosures. See [FJC study.] Because it seems likely that many judges will wish to have additional disclosure, Rule 7.1 expressly authorizes adoption of local district rules that require additional disclosure. It is expected that a Model Local Rule will be prepared to provide some assistance in formulating local rules and to establish some level of uniformity that will reduce the burden that local rules will impose on the substantial number of corporate parties that engage in litigation in more than one district.

Reporter's Comment

Although this draft follows the request for a rule that combines the "adapted Rule 26.1" approach with explicit local rule authority, thought should be given to a more open-ended approach to the local-rule option. Rule 26.1, as this draft, is limited "any nongovernmental corporate party." Local rules are likely to reach noncorporate parties. Joint ventures and limited partnerships are perhaps the most likely examples.

There may be a temptation to expand the Committee Note by suggesting additional disclosures that might be required by local rules. It seems better to leave these suggestions to the Model Rule. The process of drafting a model rule can be flexible and will not leave the permanent tracks that a Committee Note invariably leaves.

Administrative Form Alternative

Rule 7.1. [Financial] Disclosure

(a) [Financial] Disclosure. Each party that appears in a civil action [or proceeding] must file with the [district] court a [financial] disclosure form approved by the Judicial Conference of the United States unless the action [or proceeding] is in a category of actions excused from filing by the Judicial Conference.

(b) Time for filing. A [financial] disclosure form required under Rule 7.1(a) must be filed at the time of the party's earliest filing or appearance in the action [or proceeding]. A supplemental form must be filed whenever there is any change in the information to be disclosed.

[Alternative (b) Time for filing. A [financial] disclosure form required under Rule 7.1(a) must be filed with the party's first appearance, pleading, petition, motion, response, or other request addressed to the court.]

Committee Note

Rule 7.1 is new. It is designed to establish a uniform national standard of financial disclosure, replacing the quite variable disclosure requirements now exacted by formal and informal practices in the many districts.

The Judicial Conference, working on the advice of relevant committees and the Administrative Office of the United States Courts, will be able to adapt disclosure requirements to developing experience with the need for disclosure and to emerging technological capabilities. It will not be possible to require complete disclosure of every possible bit of information that might bear on disqualification of a judge. It will be important, however, to exact as much information as seems feasible in relation to all common bases for disqualification. Developing technology should make it easier for litigants to provide information, and for a court to compare litigants' information with individual disqualification profiles for each of the court's judges. The first screening, based on information provided by the plaintiff or petitioner, might be accomplished automatically as part of a random assignment process.

Rule 7.1 requires "each party" to file a disclosure form. In adopting forms, the Judicial Conference will determine the contents of the required disclosures. It seems likely that many parties, and particularly individual parties, will not have any information that falls within the required categories. The Rule 7.1(a) requirement is satisfied by filing a form that indicates that there is

nothing to disclose as to any of the required categories.

The Judicial Conference is authorized to excuse categories of actions or proceedings from the filing requirement. The categories may be drawn in terms that focus directly on the nature of the proceeding, such as a petition for habeas corpus. Or the categories may be drawn in terms of parties, such as actions that involve only natural persons or an action brought by a pro se litigant.

Reporter's Notes

Should the requirement extend beyond the parties to include attorneys? How about amici curiae?

By addressing only parties that appear, this draft does nothing about the defaulting defendant. That could be a real problem. But doing something about defaulting defendants would be very difficult — do we even want to try to force a defaulter to file a disclosure? If yes, why not also a formal statement of default?

This does not catch disclosure of nonfinancial information if we include the bracketed "financial."

Local Rule Alternative

Rule 7.1. Disclosure

(a) Disclosure. Each party that appears in a civil action or proceeding must file with the court a disclosure statement on the form required by local rule unless the action or proceeding is in a category excused from filing by the local rule.

(b) Time for filing. The disclosure form required under Rule 7.1(a) must be filed at the time of the party's earliest filing or appearance in the action or proceeding. A supplemental form must be filed whenever there is any change in the information to be disclosed.

Committee Note

The number of cases that come before an individual judge in any year is high, and may grow still further. The numbers of parties and others involved in these cases is higher still. Often the judge may be called upon to act in an essentially ministerial role, entering orders or attending to case management in ways that do not focus attention on the facts that might call for recusal. It is important to secure from the parties the best recusal information possible, and to find methods to compare the parties' information quickly and accurately with information about the individual judge. As important as these goals are, they remain difficult to attain. It is not possible to gather all information that might bear on recusal, either from judge or litigants. The compromises that will shape a good working system have proved elusive.

The difficulty of the task suggests that for the time being it is better to experiment with local district rules than to attempt to frame a uniform national disclosure system. It is intended that every court act promptly to adopt a local rule. An effort will be made to provide a model local rule for consideration by the district courts, but it is expected that some courts will fashion different rules, adapted in part to differences in local circumstances. Over time experience with these rules may provide a foundation to develop national disclosure standards for uniform application in all federal courts.

Catalogues of local district rules and circuit rules have been prepared by the Federal Judicial Center. See _____. These rules illustrate the many different approaches that have been taken in defining who must file disclosure information and what information must be provided. Disclosure may be limited to some category of parties, such as nongovernmental corporations, or it may be extended to all parties and such nonparties as attorneys or amici curiae. The information required may be as narrow as identification of a corporate party's parents or as broad as information about attorneys who have participated in advising about matters connected to the litigation but who are not

appearing in the litigation.

Rule 7.1 does establish a uniform time for filing, designed to be as early as possible for each person who files. The prospect that a judge may be required to act in a case at the outset makes it important to have the information available for matching within the court's system from the very commencement of the action.

Rule 26.1 Combined with Judicial Conference Form

7.1 Disclosure Form

(a) Required Form. A party to [that appears in] an action or proceeding in a district court must file two copies of a form that:

(1) if it is a nongovernmental corporation,

(A) identifies all its parent corporations and also identifies any publicly held company that owns 10% or more of its stock, or

(B) states that there is nothing to report under Rule 7(a)(1)(A); and

(2) provides all additional information required by the Judicial Conference of the United States.

(b) Time for Filing. A party must file the Rule 7.1(a) form with its first appearance, pleading, petition, motion, response, or other request addressed to the court. A supplemental statement must be filed promptly upon any change in the circumstances that Rule 7.1(a) requires the party to identify.

(c) Form Delivered to Judge. The clerk must deliver a copy of the Rule 7.1(a) form to each judge assigned to the action or proceeding.

Committee Note {Version 1}

[An early draft included this paragraph, which gives explicit alternatives on the question whether the national rule is meant to supersede local rules: Rule 7.1 is new. It is designed to establish a uniform national standard of financial disclosure, [replacing][supplementing] the quite variable disclosure requirements now exacted by formal and informal practices in many districts.]

Rule 7.1(a)(1) adopts the minimum disclosure requirement now embodied in Appellate Rule 26.1. Space for providing this information will be included in the form developed by the Judicial Conference of the United States. In addition, the Judicial Conference — working on the advice of relevant committees and the Administrative Office of the United States Courts — will prescribe additional disclosures in developing the form. The Judicial Conference will be able to adapt

disclosure requirements to developing experience with the need for disclosure and with emerging technological capabilities. There is little reason to expect that it will be possible to require complete disclosure of every possible bit of information that might bear on disqualification of a judge. It will be important, however, to exact as much information as seems feasible in relation to all common bases for disqualification. Developing technology should make it easier for litigants to provide information and for a court to match the information with individual disqualification profiles for each of the court's judges. The first screening, based on information provided by the plaintiff or petitioner, might be accomplished automatically as part of a random assignment process. Even when technology is fully developed, it will remain important that the court clerk transmit the disclosure form to any judge called upon to perform any function in the case.

Rule 7.1 requires every party to file a disclosure form. In adopting forms, the Judicial Conference will determine the contents of the required disclosures. It seems likely that many parties, and particularly individual parties, will not have any information that falls within the required categories. The Rule 7.1(a) requirement is satisfied by filing a form that indicates that there is nothing to disclose as to any of the required categories.

[(Possible additions, gently referring to local rules): (1) Local district or circuit rules may require disclosures in addition to those required by Rule 7.1 unless the Judicial Conference adopts a form that [expressly] preempts additional disclosures. (2) Local district or circuit rules may not excuse the filing required by Rule 7.1. (3) Local district or circuit rules may exact disclosures in addition to those required by Rule 7.1. The information required by Rule 7.1(a), however, accounts for the vast majority of circumstances that occasion recusals for financial interest. The Judicial Conference is in the best position to determine whether additional information should be required. If the Judicial Conference does not adopt additional requirements, or adopts specific additional requirements, its judgment should be given great weight in determining whether to adopt or adhere to a local rule that imposes additional requirements. Eccentric local requirements may impose unnecessary burdens on courts and parties alike.]

Reporter's Notes

The bracketed alternative at the beginning of Rule 7.1(a) is designed to flag the question whether disclosure should be required as to a party who defaults. It may be better not to undertake a clear answer to this difficult question; referring vaguely to "a party to an action or proceeding" may be the better course.

The subdivision (b) time-for-filing provision is simply one of the several versions provided in these drafts. Mix-or-match is easy.

This draft does not include the provision found in some drafts that allows the Judicial Conference to excuse filing in designated categories of actions or proceedings. If we believe the power to exempt is desirable, the power could be stated in the rule. It also would be possible to state

in the Committee Note that the form can include directions identifying cases that do not require filing, but that might not provide sufficient guidance to court clerks.

There has not been much interest in filing by attorneys or amici curiae. The rule could easily be changed to include them if that seems desirable.

The subdivision (c) provision may not be necessary — it simply says something that might go without saying. But as computer systems develop there may be a temptation to rely on electronic matching of disclosure information with individual recusal profiles. How well this might work will depend in part on the extent of the information in the disclosure form. It may be better to emphasize the need to give each judge the opportunity to review every disclosure form.

Committee Note {Version 2}

Rule 7.1(a)(1) adopts the minimum disclosure requirement now embodied in Appellate Rule 26.1. When Rule 26.1 was added in 1989, the Committee Note explained that the rule "represents minimum disclosure requirements," and observed that a court of appeals could "require additional information * * * by local rule." Rule 26.1 was amended in 1998 to delete the former requirement that a corporate party disclose also its "subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." The Committee Note to the 1998 amendment expressed the belief that such disclosure is unnecessary, although required by several circuit rules.

Most of the circuit courts of appeals have reacted to Appellate Rule 26.1 by adopting local rules that require additional disclosures. Many district courts also have adopted local rules that require disclosure of more information than Rule 26.1 exacts. The proliferation of local rules has meant that there is no uniform national practice, even among the courts of appeals with the benefit of Appellate Rule 26.1. Parties that appear in different courts must bear the burden of understanding local requirements and gathering the information required to comply. Yet adoption of these local rules suggests that additional disclosures may be useful or even important.

It has proved difficult to learn the lessons of experience that would provide a secure foundation for additional uniform national disclosure requirements. More information is not always better than less information. A rule requiring elaborate disclosures could impose undue burdens on parties that have elaborate financial and other connections without providing any useful help to individual judges who must attempt to digest the information to support informed recusal decisions. There is some risk that a welter of confusing information about matters that might support a discretionary recusal decision will lead to a worrisome number of unnecessary recusals. The Appellate Rule 26.1 model seems as good as can be managed on the basis of present knowledge.

There is room to hope that better national disclosure standards can be developed in the future. Experience with different local requirements may help point the way. Evaluation of this experience is better undertaken by the Judicial Conference, with the help of committees that deal with judicial conduct and court administration, than by the Rules Enabling Act committees. The Judicial

Conference can determine when, if ever, the time has come to adopt disclosure requirements that go beyond Rule 7.1(a)(1), and embody any new requirements in a form that can be adjusted to continuing developments. There is little reason to expect that it ever will be possible to require complete disclosure of every possible bit of information that might bear on disqualification of a judge. But it will be important to exact as much information as seems feasible in relation to all common bases for disqualification. The Judicial Conference also can take account of developing technology that should make it easier for litigants to provide information and for a court to match the information with individual disqualification profiles for each of the court's judges. The first screening, based on information provided by the plaintiff or petitioner, might be accomplished automatically as part of a random assignment process. Even when technology is fully developed, it will remain important that the court clerk transmit the disclosure form to any judge called upon to perform any function in the case.

Rule 7.1 requires every nongovernmental corporate party to file a disclosure form. If the Judicial Conference adopts a national form that applies to other parties, they too must file a form. It seems likely that many parties — and particularly individual parties, if a Judicial Conference form is adopted that reaches them — will not have any information that falls within the required categories. The Rule 7.1(a) requirement is satisfied by filing a form that indicates that there is nothing to disclose as to any of the required categories.

Committee Note {Version 3}

Rule 7.1 is drawn from Rule 26.1 of the Federal Rules of Appellate Procedure, with changes to adapt to the circumstances of district courts that dictate different provisions for the time of filing, number of copies, and the like. The information required by Rule 7.1(a)(1) reflects the "financial interest" standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges. This information will support properly informed disqualification decisions in situations that call for automatic disqualification under Canon 3C(1)(c). It does not cover all of the circumstances that may call for discretionary disqualification under the financial interest standard, and does not deal at all with other circumstances that may call for disqualification.

Although the disclosures required by Rule 7.1(a)(1) may seem limited, they are calculated to reach the vast majority of circumstances that are likely to call for disqualification on the basis of information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of vast volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a)(1).

Despite the difficulty of framing more detailed disclosure requirements, developing experience with divergent disclosure practices and with improving technology may provide the

foundations for exacting additional requirements. The Judicial Conference, supported by the committees that work regularly with the Codes of Judicial Conduct and by the Administrative Office, is in the best position to develop any such additional requirements and to keep them adjusted to new information. Rule 7.1(a)(2) authorizes adoption of additional disclosure requirements by the Judicial Conference, to be embodied in a uniform form that can be used by all courts.

Bolder Departures from 26.1 Drafting

(a) Required Form. A nongovernmental corporate party to any action or proceeding that is not a bankruptcy proceeding must file two copies of a form that:

(1) identifies (A) all corporations that directly or indirectly control it and (B) any publicly held entity that owns 10% or more of its stock, or

(2) states that there is nothing to report under Rule 7.1(a)(1).

(b) Time for Filing; Supplemental Form. A [nongovernmental corporate] party must file the Rule 7.1(a) form with its first appearance, pleading, petition, motion, response, or other request addressed to the court, and must file two copies of a supplemental form promptly upon any change in the information disclosed by any earlier form.

Option 1: Supplementation Only

Rule 26.1. Corporate Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

(b) Time for Filing. A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under this Rule 26.1(a) changes.

(c) Number of Copies. If the statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental corporate disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held company acquires 10% or more of a party's stock after the party has filed its corporate disclosure statement, the party should file a supplemental statement identifying that publicly held company.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental corporate disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

Option 2: Supplementation and Judicial Conference Form

Rule 26.1. ~~Corporate~~ Disclosure Statement

(a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations, ~~and~~ listing any publicly held company that owns 10% or more of the party's stock, and providing any additional information that the Judicial Conference of the United States requires to be disclosed. Any other party to a proceeding in a court of appeals must file a statement providing any information that the Judicial Conference of the United States requires to be disclosed.

(b) Time for Filing. A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under this Rule 26.1(a) changes.

(c) Number of Copies. If the statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

Committee Note

Subdivision (a). Rule 26.1(a) presently requires nongovernmental corporate parties to file a "corporate disclosure statement." In that statement, a nongovernmental corporate party is required to identify all of its parent corporations and all publicly held companies that own 10% or more of its stock. The corporate disclosure statement is intended to assist judges in determining whether they must recuse themselves by reason of "a financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c) (1972).

Rule 26.1 does not require the disclosure of all information that could conceivably be relevant to a judge who is trying to decide whether he or she has a "financial interest" in a case. However, using the Rules Enabling Act process to formulate more detailed financial disclosure requirements would be difficult. The Advisory Committees responsible for drafting the rules of

practice and procedure do not have intimate knowledge of the Code of Judicial Conduct, periodic interpretations of the Code, or the ongoing experiences of judges, clerks, and parties under the Code. Moreover, the Advisory Committees cannot respond quickly as rapidly advancing technology changes the way that the Code is administered.

Rule 26.1(a) has been amended to authorize the Judicial Conference, with the assistance of the Administrative Office and others who have expertise in judicial conduct and court administration, to promulgate more detailed financial disclosure requirements, if and when the Judicial Conference decides that such requirements are advisable.

Subdivision (b). Rule 26.1(b) has been amended to require parties to file supplemental disclosure statements whenever there is a change in the information that Rule 26.1(a) requires the parties to disclose. For example, if a publicly held company acquires 10% or more of a party's stock after the party has filed its disclosure statement, the party should file a supplemental statement identifying that publicly held company.

Subdivision (c). Rule 26.1(c) has been amended to provide that a party who is required to file a supplemental disclosure statement must file an original and 3 copies, unless a local rule or an order entered in a particular case provides otherwise.

LEONIDAS RALPH MECHAM
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ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

March 8, 2000
Via Fax

MEMORANDUM TO RULES COMMITTEE CHAIRS

SUBJECT: *Financial Disclosure*

Judge Scirica asked me to send to you a copy of his January 11, 2000, letter to Judge Carol Amon, chair of the Committee on Codes of Conduct. Judge Amon referred to parts of the letter in her committee's March 8 response, which was sent to you directly by her committee.

John K. Rabiej

Attachment

cc: Honorable Anthony J. Scirica (without attach.)
Reporters, Rules Committees (with attach. and copy of March 8 response)

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

January 11, 2000

Honorable Carol Bagley Amon
United States District Court
United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Amon:

Thank you again for taking the time last Friday to provide the Committee on Rules of Practice and Procedure with your input on the financial disclosure issue. Your insights were most helpful to the Committee. Attached is a first draft of the proposed disclosure rule (including Committee and Reporter's Notes) that we discussed with you.

The Standing Rules Committee agreed in principle with the approach of this draft rule, which will now be considered by the Advisory Committees on Appellate, Civil, and Criminal Rules at their meetings in April 2000. Although the Advisory Committee on Bankruptcy Rules will consider a parallel approach, it recognizes that pursuing a similar rule in the bankruptcy context raises many difficulties, given the sheer number of parties and interests that may be involved.

As to the specific disclosure form to be required, it seems to us that the Codes of Conduct Committee would best be able to devise the appropriate document, assisted by the Administrative Office. We also thought that implementation should not await the lengthy process of rule-making, but could be accomplished under direction of the Judicial Conference. The Judicial Conference could urge adoption of a national form long before a national rule could become effective, and might even find authority to direct adoption. Given the nature of the subject matter, we thought your Committee might properly play the lead role on this front. We would assist in any way you deem appropriate.

As we discussed, there remains the issue whether district and appellate courts would be allowed to supplement national disclosure requirements via local rule. In reviewing the report of the Federal Judicial Center, Informing Judicial Recusal Decisions: Party Disclosure of Financial Interests Information, we were struck by the

current variance in disclosure rules among several district and circuit courts. The local rules issue touches deeply-rooted sensitivities. It seems to us premature to attempt to resolve the local rules question before a form is developed. If it proves possible to develop a form which commands a consensus, preemption may be wise. If the choices made in developing the form prove difficult, it may be better to allow variation in local rules, at least initially. Accordingly, we believe that the local rules matter is best taken up after a proposed disclosure form is circulated for review.

I look forward to hearing from you after your Codes of Conduct Committee meeting.

Sincerely,

Anthony J. Scirica

Attach.
cc: Marilyn J. Holmes

Rule 26.1 Combined with Judicial Conference Form

7.1 Disclosure Form

(a) Required Form. A party to [that appears in] an action or proceeding in a district court must file two copies of a form that:

(1) identifies all parent corporations of a nongovernmental corporate party and also identifies any publicly held company that owns 10% or more of the nongovernmental corporate party's stock; and

(2) provides all additional information required by the Judicial Conference of the United States.

(b) Time for Filing. A party must file the Rule 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court. A supplemental statement must be filed promptly upon any change in the circumstances that Rule 7.1(a) requires the party to identify.

Committee Note

Rule 7.1(a)(1) adopts the minimum disclosure requirement now embodied in Appellate Rule 26.1. Space for providing this information will be included in the form developed by the Judicial Conference of the United States. In addition, the Judicial Conference – working on the advice of relevant committees and the Administrative Office of the United States Courts – will prescribe additional disclosures in developing the form. The Judicial Conference will be able to adapt disclosure requirements to developing experience with the need for disclosure and with emerging technological capabilities. There is little reason to expect that it will be possible to require complete disclosure of every possible bit of information that might bear on disqualification of a judge. It will be important, however, to exact as much information as seems feasible in relation to all common bases for disqualification. Developing technology should make it easier for litigants to provide information and for a court to match the information with individual disqualification profiles for each of the court's judges. The first screening, based on

information provided by the plaintiff or petitioner, might be accomplished automatically as part of a random assignment process. Even when technology is fully developed, it will remain important that the court clerk transmit the disclosure form to any judge called upon to perform any function in the case.

Rule 7.1 requires every party to file a disclosure form. In adopting forms, the Judicial Conference will determine the contents of the required disclosures. It seems likely that many parties, and particularly individual parties, will not have any information that falls within the required categories. The Rule 7.1(a) requirement is satisfied by filing a form that indicates that there is nothing to disclose as to any of the required categories.

Reporter's Notes

The bracketed alternative at the beginning of Rule 7.1(a) is designed to flag the question whether disclosure should be required as to a party who defaults. It may be better not to undertake a clear answer to this difficult question; referring vaguely to "a party to an action or proceeding" may be the better course.

The subdivision (b) provision is simply one of the several versions provided in these drafts. Mix-or-match is easy.

This draft does not include the provision found in some drafts that allows the Judicial Conference to excuse filing in designated categories of actions or proceedings. If we believe the power to exempt is desirable, the power could be stated in the rule. It also would be possible to state in the Committee Note that the form can include directions identifying cases that do not require filing, but that might not provide sufficient guidance to court clerks.

There has not been much interest in filing by attorneys or amici curiae. The rule could easily be changed to include them if that seems desirable.

COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
UNITED STATES DISTRICT COURT
225 CADMAN PLAZA EAST
BROOKLYN, N.Y. 11201

JUDGE WILLIAM H. BARBOUR, JR.
JUDGE PETER W. BOWIE
JUDGE MARY BECK BRISCOE
JUDGE WILLIAM C. BRYSON
JUDGE GERALD B. COHN
JUDGE JOSEPH A. DICLERICO
JUDGE J.L. EDMONDSON
JUDGE JAMES H. JARVIS
JUDGE STEPHEN N. LIMBAUGH
JUDGE DANIEL A. MANION
JUDGE THOMAS N. O'NEILL, JR.
JUDGE WILLIAM L. OSTEEN
JUDGE JUDITH W. ROGERS
JUDGE MARY M. SCHROEDER

JUDGE CAROL BAGLEY AMON
CHAIRMAN

TELEPHONE
(718) 260-2410

MARILYN J. HOLMES
COUNSEL
(202) 502-1100

March 8, 2000

Honorable Anthony J. Scirica
Chair, Committee on Rules of Practice
and Procedure of the Judicial Conference
of the United States
22614 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Dear Judge Scirica:

I am writing to report to you on the Codes of Conduct Committee's discussion of the corporate disclosure reporting provisions under consideration by the Committee on Rules of Practice and Procedure. At our meeting January 13 to 15, the Committee generally endorsed the views I provided to you in my letter of December 29, 1999. My letter had commented on the three proposals then under consideration by the Rules Committees. Following receipt of your letter of January 11, the Codes of Conduct Committee focused on the single revised draft proposal, labeled Rule 7.1, which was developed at the January meeting of the standing Rules Committee.

The Codes of Conduct Committee's report to the March 2000 Judicial Conference contains a summary of the committee's views, which I enclose for your information (Enclosure A). I have set forth below more detailed information about the committee's views. We have attempted to identify all of the issues that we believe need to be addressed. To more fully convey our views, I enclose some tentative language that reflects approaches we believe would be usefully adopted. Were time constraints less pressing, we would have attempted to provide you with more fully developed proposals. We actively solicit a continuing exchange of views to refine and enhance these proposals.

Content of the corporate disclosure requirement.

The Codes Committee recommends that the proposed corporate disclosure rule be patterned substantially after Rule 26.1 of the Federal Rules of Appellate Procedure, with the addition of an updating provision requiring the parties to supplement their disclosures upon a change in the information disclosed. Draft Rule 7.1 contains these essential elements in sections 7.1(a)(1) and 7.1(b).

We note that the language of the proposed draft may be read to suggest that the parties must file disclosures identifying not only their own corporate parents, but the corporate parents of other parties as well. We assume it was not your intention to impose on plaintiffs the burden of identifying the corporate parents of all defendants, and vice versa. Information of this nature may be difficult for others to obtain, rendering the resulting disclosures of doubtful accuracy. We recommend rephrasing the disclosure requirement to clarify that parties must identify only their own corporate parents.

We understand that the advisory rules committees are considering adding disclosure requirements to the civil, criminal and bankruptcy rules. We support adoption of rules for all three types of proceedings. Some variations will be necessary in these differing rules. I enclose for your review some tentative proposals for provisions to be added to the civil, criminal and bankruptcy rules. See Enclosures B, C, and D. Some special considerations relating to the proposed bankruptcy rule are discussed below.

The draft committee notes following proposed Rule 7.1 indicate that the parties should file a negative report. The Codes of Conduct Committee endorses this provision but recommends that it be incorporated into the text of the rule.

We also commend to you for consideration an issue that may be useful to include in the commentary to each rule. That is, the commentary should indicate that the disclosure requirement does not compel identification of all entities whose participation in a matter might disqualify the judge due to the judge's financial interest. As a practical matter, it is simply impossible to guarantee this result. We believe the disclosures will identify most such entities and will be of great value. However, judges must remain vigilant to other possible disqualifying situations not covered by the disclosure requirement.

The bankruptcy rule disclosure requirement.

A bankruptcy corporate disclosure requirement presents special challenges because of the number of participating creditors in many bankruptcy proceedings and the difficulty of determining which creditors and other participants should be considered parties for these purposes and at what point their party status should trigger the disclosure requirement. Bankruptcy judges are subject to the statutory and Code of Conduct recusal provisions, which

require judges to disqualify themselves when they have a financial interest in a party. This Committee's advice for these purposes is as follows:

> For purposes of recusal decisions in bankruptcy proceedings, the following are deemed to be parties: the debtor, all members of a creditors committee, and all active participants in the proceeding; but merely being a scheduled creditor, or voting on a reorganization plan, does not suffice to constitute an entity a "party." Bankruptcy judges are expected to keep informed as to their investments in firms which are active participants in the proceeding, but ordinarily need not familiarize themselves with the scheduled creditors.

Compendium of Selected Opinions § 3.1-6[5](a) (1999).

The enclosed draft bankruptcy rule includes language addressing two issues I want to highlight: the identity of parties required to file disclosures (subsection (a)) and the events that trigger this obligation (subsection (b)). As to the identity of parties, we incorporated language drawn from our previous advice, set out above. In addition, we made a preliminary effort in the draft to address the treatment of active participants in contested matters, whose presence in a case may disqualify the judge. We did so by including within the definition of party for these purposes three specific groups of participants: those participants actively involved in litigation arising from opposition to (i) a petition for relief from the automatic stay, (ii) an objection to a proof of claim, or (iii) a motion for avoidance of a lien. Please note that this definition will not capture the entire universe of active litigants in contested matters whose participation in a case may be disqualifying. We see no obvious way to do so without appearing to include participants who do no more than file a proof of claim or request relief from an automatic stay, where the relief is uncontested. If your Committee is likewise unable to devise a universal approach that is appropriately limited, we suggest extending the disclosure requirement to defined groups, as we have done. This approach will reach many if not most disqualifying situations, and it does have the virtue of clearly defining the parties obligated to file a disclosure form.

As to the triggering event for bankruptcy parties, we added language indicating that designation as a member of a creditors committee is a triggering event. We also added a specific provision for filings by active litigants in contested matters. The triggering event here is filing of an opposition; participants that file an opposition must make the disclosure form simultaneously, while other participants in the contested matter (i.e., those adverse to the opposition filer) must file the disclosure form promptly after the opposition is filed.

We did not add anything to subsection (b) to exclude filing of proofs of claims, petitions for relief from the automatic stay, or similar routine filings from the triggering events. Participants who make such filings – but play no greater role in the proceeding –

should not be required to make the disclosures required by the proposed rule, because they do not fit the definition of party in subsection (a). We believe this is clear from the format of the enclosed proposed rule but commend the issue to you for consideration.

We also note an issue that may be appropriate for inclusion in the commentary to the bankruptcy rule. In our view, a judge's financial interest in a creditor that is actively litigating a contested matter may not disqualify the judge from the entire bankruptcy proceeding but only from the contested matter. Judges should be encouraged to examine the disclosures made pursuant to this rule to determine the extent to which disqualification is necessary.

Use of a disclosure form.

Draft Rule 7.1(a)(2) requires the parties to use a disclosure form. This requirement has two apparent purposes: to ensure national uniformity of the disclosures and to permit the Judicial Conference to expand the information to be disclosed outside of the formal (and lengthy) rulemaking process.

The Codes of Conduct Committee supports the first of these goals. We believe it would be useful to develop a national disclosure form for use in all federal courts and we enclose a draft for your consideration (Enclosure E). Indeed, if we omitted references to the proposed rules, such a form could be distributed to the courts even before adoption of any national rules in order to encourage the courts to begin seeking corporate parentage disclosures from the parties. The Codes of Conduct Committee tentatively agreed to contact chief district and bankruptcy judges in each circuit to provide them with the corporate disclosure form, should our committees agree to this approach. In our view, use of a uniform disclosure form could be mandatory or voluntary. Of course, if use of the form is to be mandatory, the rule should so indicate and should also either incorporate the form or advise parties and their counsel where it can be obtained.

As to the second aspect of the disclosure form – a requirement that parties disclose whatever additional information is mandated on the form – we believe it is unnecessary and recommend against including it. On several occasions our Committee has examined the scope of information to be disclosed under Fed. R. App. R. 26.1 and corresponding local rules. The Federal Judicial Center examined this same question in their recent studies on court disclosure requirements. Neither our examination nor the FJC studies identified any additional information necessary for judges to determine when they are automatically disqualified due to a financial interest in a party, beyond the information about corporate parents and 10% owners already addressed in Rule 26.1 and proposed Rule 7.1. (I refer below to other disclosures that might assist judges in making certain recusal determinations, but they differ from the question of corporate parentage).

In our view, the additional flexibility that is the hallmark of this provision is simply not needed. We surmise that there may be some risk that use of this unconventional approach would affect Congressional approval of these provisions.

Local rule variations.

We share your observation that there has been a striking proliferation of local rules on this subject. In our assessment, much of the information requested in these rules is not needed for judges to determine whether they must recuse due to a financial interest in a party. The draft committee notes following proposed Rule 7.1 seem to reflect the view that additional disclosures may be needed, and this may be read as encouraging courts to adopt local rules expanding the information required to be disclosed. For the reasons discussed above, the Codes of Conduct Committee believes that courts should be discouraged from adopting broadened local disclosure requirements. However, we defer to your expertise on the question of preemption of local rules.

Other issues.

In considering the issue of corporate parents, our Committee noted other areas in which disclosures might be useful to judges in determining their recusal obligations. These include the identity of corporate criminal victims who may be entitled to restitution (the Committee advises judges to recuse if they own stock in a criminal victim that may be entitled to restitution) and the composition of partnerships, joint vennures, and other unincorporated associations, which may be composed of corporations in which a judge owns stock. The disclosure requirements under consideration do not address all possible recusal scenarios that may arise. This is, in our assessment, an appropriate way to proceed. We recommend adoption of a straightforward rule addressing the most serious and substantial problems with due recognition of the fact that the rule does not and cannot cover all potential recusal concerns.

I hope the foregoing observations and our enclosed drafts are of assistance to the standing and advisory Rules Committees. Please let me know if you would like to discuss any of these issues.

For the Committee,

Carol Bagley Amon

Carol Bagley Amon
Chairman

cc: Honorable Will L. Garwood
Honorable Adrian G. Duplantier
Honorable Paul V. Niemeyer
Honorable W. Eugene Davis
John K. Rabiej

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON CODES OF CONDUCT

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Codes of Conduct met from January 13 to 15, 2000. All members were present. The Administrative Office was represented by Marilyn J. Holmes, Associate General Counsel, and Barbara Denham, Staff Assistant. Ms. Jody George of the Federal Judicial Center's Judicial Education Division also attended a portion of the meeting.

JUDGES' RECUSAL OBLIGATIONS

The Committee on Codes of Conduct reviewed a number of initiatives to assist judges in meeting their recusal obligations, continuing efforts begun in previous years.

Recent Efforts

The Committee received a report summarizing the following recent accomplishments. In September 1999, the Administrative Office released conflicts screening software for use in district and bankruptcy courts using the ICMS database system. The Director of the Administrative Office sent a memorandum to all judges announcing the software's availability and established a web site on the judiciary's J-Net containing extensive information about the software and permitting courts to download it directly. Over 40 district and bankruptcy courts

check for conflicts themselves. The Chairman appointed a subcommittee to consult with Administrative Office staff on the development of the CM/ECF conflicts screening function.

Corporate Disclosure Requirements

Last year, the Codes of Conduct Committee asked the Committee on Rules of Practice and Procedure to consider amending the federal rules to require parties in district and bankruptcy courts to identify their corporate parents, much as Fed. R. App. P. 26.1 now requires in the courts of appeals. Judge Scirica, Chair of the standing Rules Committee, provided the Codes of Conduct Committee with progress reports on the Rules Committees' consideration of this subject and requested further guidance.

In December 1999, the standing Rules Committee requested the Codes Committee's views on several alternative disclosure provisions under consideration. Judge Amon provided her initial views on behalf of the Codes Committee. She expressed a preference for a narrowly tailored rule, patterned after Fed. R. App. P. 26.1 and incorporating a provision requiring the parties to update information that changes. The Codes Committee subsequently endorsed Judge Amon's initial response.

At the Codes Committee meeting, members focused on the Rules Committee's request for comments on another alternative under consideration. This alternative would require the parties to disclose the information required by Fed. R. App. P. 26.1 and any additional information required by the Judicial Conference pursuant to a disclosure form, which would be developed with the assistance of the Codes Committee. The Codes Committee discussed this option and agreed that it would be useful to develop a national disclosure form for use in the federal courts. However, the Committee was unable to identify additional information, disclosure of which might be useful for purposes of financial interest recusal determinations.

A report of the Federal Judicial Center prepared for the Rules Committee confirmed this assessment, in the view of the Codes Committee. The FJC report examined several local rules requiring more extensive disclosures and determined that the information was requested by courts for asserted prophylactic reasons although it did not appear to be necessary for financial interest recusal purposes. The Committee recommended that courts be discouraged from mandating broadened local disclosure requirements.

The Codes Committee agreed to draft a model disclosure form and provide it, with additional comments, to the Rules Committee for review at the advisory committees' spring 2000 meetings. The Codes Committee also agreed to examine further the possibly differing imperatives for corporate disclosure in civil, criminal, and bankruptcy proceedings and to continue reviewing these issues with the Rules Committee.

Financial Disclosure

The Codes Committee received a report on recent developments pertaining to release of judges' financial disclosure reports, including the Financial Disclosure Committee's recent denial of reports to a news organization that had expressed the intention of publishing the reports on the Internet. Although financial disclosure reports are widely assumed in the media to be useful in assessing judges' conflicts of interest, the Committee expressed the view that much of the information required on the reports is irrelevant to recusal determinations. The Committee also noted its continuing concern that judges are burdened with tracking their financial interests in two separate environments: for disclosure reporting and for recusal purposes. It was generally agreed that, should legislation be proposed as a result of these developments, the Codes Committee should consider recommending legislative revisions pertaining to recusal.

Enclosure B – Civil Rule Language

DRAFT – March 3, 2000

Federal Rules of Civil Procedure

____. Disclosure Form.

(a) **Required Form.** In a civil proceeding, any nongovernmental corporate party must file two copies of a form identifying all its parent companies or stating that it has no parent companies. For purposes of this rule, a parent company means a publicly held corporation that controls the party (directly or through others) or owns 10% or more of the party's stock.

(b) **Time for filing.** A party must file the disclosure form with its first appearance, pleading, petition, motion, response, or other request addressed to the court. A party must promptly file two copies of a supplemental disclosure form upon any change in the information required by Rule ____ .

Enclosure C - Bankruptcy Rule Language

DRAFT - March 3, 2000

Federal Rules of Bankruptcy Procedure

_____. Disclosure Form.

(a) **Required Form.** In a bankruptcy proceeding, any nongovernmental corporate party must file two copies of a form identifying all its parent companies or stating that it has no parent companies. For purposes of this rule, a party means the debtor, a member of a creditors committee, a party to an adversary proceeding, and a participant actively involved in litigation arising from opposition to (i) a petition for relief from the automatic stay, (ii) an objection to a proof of claim, or (iii) a motion for avoidance of a lien; and a parent company means a publicly held corporation that controls the party (directly or through others) or owns 10% or more of the party's stock.

(b) **Time for filing.** A party must file the disclosure form with its first appearance, designation as a member of the creditors committee, pleading, petition, motion, response, or other request addressed to the court; in the case of a participant actively involved in litigation arising from opposition to a petition, objection, or motion described in subsection (a), the participant must file the disclosure form with the opposition or promptly thereafter. A party must promptly file two copies of a supplemental disclosure form upon any change in the information required by Rule ____ .

Enclosure D – Criminal Rule Language

DRAFT - March 3, 2000

Federal Rules of Criminal Procedure

_____. **Disclosure Form.**

(a) **Required Form.** In a criminal proceeding, any nongovernmental corporate defendant must file two copies of a form identifying all its parent companies or stating that it has no parent companies. For purposes of this rule, a parent company means a publicly held corporation that controls the party (directly or through others) or owns 10% or more of the party's stock.

(b) **Time for filing.** The defendant must file the disclosure form at arraignment. The defendant must promptly file two copies of a supplemental disclosure form upon any change in the information required by Rule ____ .

Enclosure E – Disclosure Form

DRAFT – March 3, 2000

Form 36. Corporate Disclosure Under Rule ___

[Caption and names of parties]

This form is to be filed only by nongovernmental corporate parties. Check the appropriate box:

[__] The filing party, a nongovernmental corporation, identifies the following parent companies:

[Here list the names and addresses of each publicly held corporation that controls the filing party (directly or through others) or owns 10% or more of the party's stock.]

_____ _____
_____ _____
_____ _____
_____ _____
_____ _____
_____ _____

[__] The filing party has no parent companies.

Signed: _____
Filing Party's Representative

Address: _____

Informing Judicial Recusal Decisions: Party Disclosure of Financial Interests Information

Report to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States

Project Director
Carol Krafka

Project Team
Marie Leary, Naomi Medvin, and Joe Cecil

FEDERAL JUDICIAL CENTER
1999

CONTENTS

Executive Summary

Federal Rule of Appellate Procedure 26.1 is intended to assist appellate judges in identifying financial conflicts of interest for recusal purposes. This rule requires non-governmental corporate parties to file a statement identifying parent corporations and companies owning 10 percent or more of the party's stock.

No corresponding national rule governs the proceedings in the federal district and bankruptcy courts. In the absence of a national rule, a number of district and bankruptcy courts have enacted local rules on financial disclosure. Most local rules go beyond the disclosure requirements of FRAP 26.1—either by expanding the range of parties required to file information, or by requiring additional information from parties, or both. More than half of the courts of appeals have likewise expanded on the disclosure requirements of FRAP 26.1, by enacting supplemental local rules.

The local rules vary widely, and we detect no consensus approach. Drafters of any proposed disclosure rule may find it useful, though, to address the following questions raised by local rule variations:

- What parties should be subject to the disclosure requirements?
  - Should specific party types be exempt (e.g., amici curiae, intervenors)?
  - Should parties to specific categories of actions or proceedings (such as habeas corpus petitions) be exempt?
- What types of cases should be covered by disclosure requirements?
  - Should disclosure requirements cover civil cases only?
  - If criminal and/or bankruptcy cases are covered by disclosure, is the relevant "interests" information different from what is required in a civil case?
- What information should parties file?
  - Should disclosure be limited to identification of parent corporations and companies owning 10 percent or more of a party's stock?
  - Should disclosure include identification of subsidiaries? Affiliates? Will the rule define "affiliate"? If so, how?
  - Should disclosure extend to other specified legal entities? What are they?
  - Should disclosure extend to entities with a "general" interest in the outcome of litigation?
  - Should parties identify attorneys and law firms representing them?
- When must information be filed?
- How many copies of the disclosure statement must be filed?
- Should a negative report be required from parties with nothing to disclose?
- Should the parties have an affirmative obligation to update disclosure?
- Should sanctions for the failure to file disclosure be stated?
  - What sanctions will the court impose?
  - When will the party be delinquent in filing?
  - How will notice be handled?
- Should the format of the disclosure statement be specified in the rule?

Introduction

Federal Rule of Appellate Procedure 26.1 provides for disclosure of financial information from corporate parties in the courts of appeals. The purpose of the rule is to assist appellate judges in identifying if they have financial conflicts of interest for recusal purposes. There is no corresponding national rule governing civil, criminal, and bankruptcy proceedings in the district and bankruptcy courts.

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is evaluating whether a national rule requiring financial interests disclosure in district and bankruptcy courts is necessary, and if so, how the rule should be structured. To inform its work, the Committee asked the Federal Judicial Center to study the practices and variations in methods used in appellate, district, and bankruptcy courts where financial information from parties is currently being filed. The study includes the courts of appeals, because many of them have local rules on disclosure that supplement the requirements set forth in FRAP 26.1.

We searched published and electronic database collections, and surveyed the clerk of court in each of the courts of appeals, district courts, and bankruptcy courts to compile local rules and other court-fashioned financial disclosure procedures. We analyzed key dimensions of the rules and procedures, and we organized the information into summary tables. The bulk of the report is made up of these tables.

In addition to the tables, the report contains information from district court personnel on the usefulness of disclosure rules in effect. To learn whether local filing requirements meet the needs of the individual district courts, and to learn about the efficacy of FRAP 26.1 filing requirements, we wrote to chief judges in district courts where financial disclosure is routine. In district courts where filing requirements are more extensive than those of FRAP 26.1, we asked whether judges found the additional information useful in detecting conflicts of interest and whether the judges were aware of instances in which limiting disclosure to FRAP 26.1 requirements would have failed to signal a conflict of interest. In district courts with filing requirements equivalent to FRAP 26.1, we asked whether the judges found the local rule sufficient to identify conflicts of interest and whether the information provided under the local rule had ever failed to signal a conflict of interest. We also conducted a brief case study of a court that adopted and then repealed a local rule on financial disclosure, after it found that the rule created more problems than it addressed. This report summarizes our findings.[1]

The report has five parts. Part I reproduces FRAP 26.1 for reference. Part II analyzes local rules on the disclosure of financial information in the courts of appeals and summarizes rule provisions in comparative tables. Part III offers corresponding information on local rules and other mandates in the district courts. Part III additionally describes district court views on the utility of the local rules in effect and provides a synopsis of one court's unsatisfactory experience with its local rule on disclosure. Part IV covers local rules found in the bankruptcy courts and rules applicable to bankruptcy appellate panels. Part V offers conclusions and a recapitulation of the main findings of the study.

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[1] Much of the material included in the report was provided in preliminary form to members of the Advisory Committees on Appellate, Bankruptcy, Civil and Criminal Rules for their respective Fall 1999 meetings. The preliminary materials were supplemented and reorganized for this report.

Part I. Federal Rule of Appellate Procedure 26.1

FRAP 26.1 requires non-governmental corporate parties to identify their parents and major stockholders. The rule reads as follows:

> Rule 26.1 Corporate Disclosure Statement
>
> (a) Who must file. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations and listing any publicly held company that owns 10 percent or more of the party's stock.
>
> (b) Time for Filing. A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents.
>
> (c) Number of copies. If the statement is filed before the principal brief, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

FRAP 26.1 was added to the federal rules in 1989 to assist judges in making a determination of whether they have any interests in any of a party's related corporate entities that would disqualify the judges from hearing the appeal. Until recently, FRAP 26.1 required corporate parties to identify, in addition to parent corporations, all subsidiaries and affiliates of the party with shares issued to the public. Amendments that took effect in December 1998 deleted the requirement for identifying subsidiaries and affiliates, and added the requirement that corporate parties list publicly held companies owning 10 percent or more of the party's stock.[2] FRAP 29(c) indicates that a brief filed by a corporate amicus curiae must include a disclosure statement conforming to these requirements.

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[2] The portion of the Advisory Committee Note accompanying the 1998 amendments to FRAP 26.1 that explains substantive changes is reproduced below:

"Subdivision (a). The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. Although several circuit rules require identification of such entities, the Committee believes that such disclosure is unnecessary.

"A disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Given that purpose, disclosure of entities that would not be adversely affected by a decision in the case is unnecessary.

"Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. The rule requires disclosure of all of a party's parent corporations, meaning grandparent and great-grandparent corporations as well. For example, if a party is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

The amendment, however, adds a requirement that the party lists all its stockholders that are publicly held companies owning 10 percent or more of the stock of the party. A judgement against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party have an interest in the outcome of the litigation. A judge owning stock in a corporate party ordinarily recuses himself or herself. The new requirement takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10 percent or more of the stock in the

Part II. Analysis of Financial Disclosure Filing Requirements in the Courts of Appeals

FRAP 26.1 represents minimum disclosure requirements. When the rule was added to the Federal Rules of Practice and Procedure in 1989, the accompanying Advisory Committee Note stated "If a Court of Appeals wishes to require additional information, a court is free to do so by local rule." Ten of the thirteen courts of appeals currently require additional information, and the mechanism for doing so is through local rule provisions.[3] Table 1 identifies the ten courts of appeals and their respective local rules below.

Table 1. U.S. Circuit Courts of Appeals Expanding the Requirements of FRAP 26.1

Court	Local Rule	Rule Title
Third Circuit	LR 26.1.1	Disclosure of Corporate Affiliations and Financial Interest
Fourth Circuit	LR 26.1	Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation
Fifth Circuit	LR 28.2.1	Certificate of Interested Parties
Sixth Circuit	LR 26.1	Corporate Disclosure Statement
Seventh Circuit	LR 26.1	Disclosure Statement
Ninth Circuit	LR 21-3	Certificate of Interested Persons
Tenth Circuit	LR 46.1(c)	Certification of Interested Parties
Eleventh Circuit	LR 26.1-1, 2, 3	Certificate of Interested Persons and Corporate Disclosure Statement
D.C. Circuit	LR 26.1	Disclosure Statement
Federal Circuit	LR 26.1; LR 47.4	Corporate Disclosure Statement, Certificate of Interest

Analysis of the Rules

The local rules in the courts of appeals differ from one another and from the national rule on several dimensions, the most significant being: (1) who must file the information and (2) what type of information is required. These dimensions determine the scope of the additional information sought.

Who must file

FRAP 26.1 requires only non-governmental corporate parties to file financial information. Each of the courts listed in Table 1 has extended the range of parties required to file.

party, the judge may have sufficient interest in the litigation to require recusal. The 10 percent threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock. This requirement is modeled on the Seventh Circuit's disclosure requirement.

[3] Three courts of appeals do not require additional information. The First and Second circuits have no relevant local rule. The Eighth Circuit has a local rule titled L.R.26.1.A., Corporate Disclosure Statement, which modifies the timing of the filing of the disclosure statement, but does not require additional information from parties.

The Ninth Circuit and District of Columbia Circuit have the least expanded range. The former requires petitioners for writs of mandamus, prohibition, and other extraordinary writs to adhere to FRAP 26.1; the latter requires filings from every party that is "a corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding." Several courts with otherwise expansive rules exempt governmental parties from filing (Fourth, Fifth, Sixth, Seventh, and Federal circuits).[4] Two courts limit disclosure in criminal cases to corporate defendants only (Fourth and Sixth circuits).

The Tenth and Eleventh circuits impose disclosure on the widest range of litigants. The Tenth Circuit requires information from all parties. The Eleventh Circuit requires information from all "appellants, appellees, intervenors and amicus curiae, including governmental parties."

The Third Circuit has a two-tiered set of filing requirements. The court requires all parties to determine whether public corporations with a financial interest in the outcome of litigation exist, and if so, to identify the corporations. For corporate parties and parties to an appeal in a bankruptcy case, there are then additional disclosure requirements specific to case type.

Type of Information

FRAP 26.1 requires corporate parties to identify parent corporations and publicly held companies owning 10 percent or more of the party's stock. The Seventh, Ninth, and Federal circuits have expanded filing requirements by imposing disclosure on parties that FRAP 26.1 does not reach, but these courts do not otherwise require additional information.[5]

The other seven courts vary as to the additional information parties must disclose. The scope of departure from FRAP 26.1 information requirements is quite broad in some courts of appeals. The differences from court to court are also considerable.

The District of Columbia Circuit represents a comparatively modest departure from FRAP 26.1. This court requires parties (which are corporations, associations, joint ventures, partnerships, syndicates or similar entities) to disclose their general nature and, if they are unincorporated entities with no ownership interests, to disclose the names of any members that have issued shares or debt securities to the public.

Broader disclosure is in effect in other courts. The additional information essentially involves having a party identify one or both of the following:

(1) publicly owned entities with a specific *financial connection* to the party;

(2) entities with a more general *financial interest* in the outcome of the litigation.

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[4] In the Federal Circuit, the exemption is limited to the US government. The Fourth Circuit exempts the US government, but state and local governments are exempt only when the opposing party is proceeding without counsel. The Seventh Circuit requires disclosure if a governmental party is represented by a private attorney.

[5] The Seventh Circuit procedure does, however, demand a listing of law firms appearing for the party or amicus in the case on appeal, or involved in proceedings in the district court or before an administrative agency.

In practice, the distinction between *connection* and *interest* is often blurred. The blurring results from requirements for *financial interest* information that depend on an awareness of the *financial connections* between entities.

The Third, Fourth, and Sixth circuits require *financial connections* information. Corporate parties in the Third and Sixth circuits respond to disclosure demands by listing publicly owned corporate affiliates. Parties in the Fourth Circuit respond by listing publicly held corporations with direct financial interests in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance or indemnity agreement. Where disclosure applies to public corporations, parties in the Fourth Circuit must list similarly situated master limited partnerships, real estate investment trusts, and other legal entities whose shares are publicly held or traded. Trade associations in the Fourth Circuit must identify all members of the association, their parent corporations, and any publicly held companies that own 10 percent or more of a member's stock. The Fourth Circuit's requirement for financial connections information is conditioned on the disclosed entities' financial interests in the outcome of litigation.

The Third, Fourth, and Sixth circuits require *financial interests* information in addition to *financial connections* information. The Fifth, Tenth, and Eleventh circuits likewise require *financial interests* information. The Third Circuit requires parties to identify "every publicly owned corporation...that has a financial interest in the outcome of the litigation and the nature of that interest." The Fifth, Tenth, and Eleventh circuits require parties to identify persons, associations (or associations of persons), firms, partnerships, and corporations with an interest in the outcome of litigation. The list of entities further includes guarantors, insurers, affiliates and other financially interested legal entities in the Fifth and Tenth circuits, and subsidiaries, conglomerates, trial judges, and attorneys interested in the outcome in the Eleventh Circuit. The Sixth Circuit requires parties to list publicly held corporations and affiliates which have a substantial interest in the outcome of the litigation that is aligned with the interests of the party by reason of insurance, a franchise agreement, or an indemnity agreement.

The Fourth Circuit, as earlier noted, requires parties to identify entities with a direct *financial interest* in the outcome of litigation by reason of specific *financial connection* to the party. The rule in this circuit demonstrates how intertwined can be entities' financial interests and connections to the parties.

Additional disclosure provisions appear in some local rules. The Third, Fourth, and Sixth circuits require parties to specify the "nature of the interest" of entities with an interest in the outcome of the litigation. The Fifth, Seventh and Federal circuits require parties to identify past and/or present attorneys and law firms representing a party to a proceeding. The Eleventh Circuit requires government disclosure of victims in criminal appeals and disclosure of specific information related to bankruptcy appeals (the name of the debtor, the members of the creditor's committee, any entity which is an active participant in the proceedings, and other entities whose stock or equity value may be substantially affected by the outcome of the proceedings).

Financial Disclosure Requirements in the Courts of Appeals

To frame the variations in financial disclosure rules used in circuit courts of appeals, we analyzed key dimensions of the rules and organized the information into summary tables.

The tables permit analysis of individual rule departures from FRAP 26.1, and also permit intercircuit comparison of local rules. The following dimensions are listed:

(1) the types of parties required to file financial interests information, beyond the requirement for non-governmental corporate parties to file (Extension of the FRAP 26.1 Requirements on Who must file);
(2) the type of information required, beyond the requirements for identifying corporate party parents and listing publicly held companies owning 10 percent or more of the corporate party's stock (Extension of the FRAP 26.1 Requirements for Disclosure of Financial Interest Information);
(3) the time for filing the information (Time of initial filing);
(4) the existence of any requirement for parties with nothing to disclose to submit a negative report so stating (Negative report);
(5) the form of the disclosure (Disclosure form);
(6) the number of copies required to be filed (Number of copies);
(7) the applicability of the rule to various case types and proceedings (Scope of applicability);
(8) the existence of a stated duty for parties to update disclosed information (Obligation to update); and
(9) additional relevant information (Note).

Notes on table entries:

(a) Where a local rule refers to "counsel for the parties" or uses a similar phrase to identify who must file disclosure, we have substituted "parties" for the sake of brevity (see Extension of the FRAP 26.1 Requirements on Who must file).
(b) We use the phrase "identification of (e.g., parent companies, subsidiaries, and affiliates)" to summarize the type of information required of parties (see Extension of the FRAP 26.1 Requirements for Disclosure of Financial Interest Information). Local rules may use more precise phrasing; counsel may be required, for example, to "certify" a list of the names of interested parties.
(c) Some courts require identification of law firms, partners, etc., which currently or previously represented the party in the issue before the court. These requirements are noted in the tables even though they are not directly related to the report (see entries titled Extension of the FRAP 26.1 Requirements for Disclosure of Financial Interest Information and Note).

U.S. Court of Appeals for the Third Circuit

Local Rule 26.1.1, Disclosure of Corporate Affiliations and Financial Interest

Extension of the FRAP 26.1 requirements on who must file
Every party to an appeal, unless the party has nothing to report

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
From all parties (unless the party has nothing to report): identification of every publicly owned corporation not a party to the appeal that has a financial interest in the outcome of the litigation and the nature of that interest (financial interests information);

If the party is a corporation: identification of every publicly owned corporation not named in the appeal with which the party is affiliated (financial connections information);

If the appeal is from a bankruptcy case, the debtor or trustee of the bankruptcy estate or, if the debtor or trustee is not a party, the appellant, must additionally identify (1) the debtor, if not named in the caption, (2) the members of the creditors' committees or the top 20 unsecured creditors, and (3) any entity not named in the caption which is an active participant in the proceeding

Time of initial filing
Financial interests information: with the FRAP 26.1 disclosure statement

Financial connections information: promptly after the notice of appeal is filed

Bankruptcy appeals supplemental information: a list is to be provided "promptly" to the clerk

Negative report
Financial interests information: a negative report should *not* be filed

Financial connections information: a negative report is required

Disclosure form
Financial interests information: should be provided on the FRAP 26.1 disclosure statement

Financial connections information: should be filed on a form provided by the clerk; detail of the form is not prescribed by rule

Number of copies
The local rule is silent.

Scope of applicability
Civil, bankruptcy, and criminal cases

Obligation to update
The local rule is silent.

Note
Local Rule 26.1.2, Notice of Possible Judicial Disqualification, requires appellant to notify the Clerk if any judge of the Court participated at any stage of the case, in the trial court or in related state court proceedings. If appellant fails to notify the Clerk, the appellee is responsible for doing so.

U.S. Court of Appeals for the Fourth Circuit

Local Rule 26.1, Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Extension of the FRAP 26.1 requirements on who must file
All parties to a civil or bankruptcy case, and all corporate defendants in a criminal case; the rule does not apply to the United States, or to state or local government in cases where the opposing party is proceeding without counsel, or to parties proceeding in forma pauperis

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
Identification of any publicly held corporation, whether or not a party to the litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement (Rule 26.1(b)(2)); identification of similarly situated master limited partnerships, real estate investment trusts, or other legal entities that have issued public shares (Rule 26.1(b)(3)); identification by a trade association of association members, their parent corporations, and any publicly held companies that own 10 percent or more of a member's stock (Rule 26.1(b)(1))

Time of initial filing
Within 10 days of receiving the notice of docketing and the disclosure form; if earlier pleadings are submitted to the Court, the disclosure shall be filed at that time

Negative report
Required

Disclosure form
Form A. Disclosure of Corporate Affiliations and Other Entities With a Direct Financial Interest in Litigation

Number of copies
One (see directions to Form A)

Scope of applicability
Civil, bankruptcy, and criminal cases

Obligation to update
Stated

Note
Form A provides for the disclosure of information prescribed in the local rule, *and additionally,* instructs parties to state the nature of each named entity's financial interests

U.S. Court of Appeals for the Fifth Circuit

Local Rule 28.2.1, Certificate of Interested Persons

Extension of the FRAP 26.1 requirements on who must file
All non-governmental parties, including unrepresented parties.

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
Identification of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities financially interested in the outcome of the litigation; if a large group of persons or firms can be specified by a generic description, individual listing is not required; identification of the opposing law firms and/or counsel in the case; counsel is obliged to disclose known information on all sides of the case, not merely for the represented party.

Time of initial filing
The local rule is silent.

Negative report
The local rule is silent.

Disclosure form
Certificate of Interested Persons; the form is prescribed in the local rule.

Number of copies
The local rule is silent.

Scope of applicability
Not explicitly specified, although the rule is intended to be broad in scope.

Obligation to update
The local rule is silent.

U.S. Court of Appeals for the Sixth Circuit

Local Rule 26.1, Corporate Disclosure Statement

Extension of the FRAP 26.1 requirements on who must file
All parties and amici curiae to a civil case or bankruptcy case, agency review proceeding, or original proceeding, and all corporate defendants in a criminal case, *unless* the party is the United States or an agency thereof, or is a state government or an agency or political subdivision thereof.

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
From a corporate party or corporate amicus curiae that is a subsidiary or affiliate of any publicly owned corporation not named in the appeal: identification of the publicly owned parent corporation or affiliate, and the nature of the corporate relationship (a corporation is deemed an affiliate of a publicly owned corporation for purposes of the rule if it controls, is controlled by, or is under common control with a publicly owned corporation).

From parties and amicus curiae generally: identification of any publicly owned corporation or its affiliate, not a party or an amicus to the appeal, which has a substantial financial interest in the outcome of the litigation that is aligned with the financial interest of the party or amicus by reason of insurance, a franchise agreement, or indemnity agreement, and additionally, identification of the nature of the substantial financial interest held by the corporation or its affiliate.

Time of initial filing
Whichever occurs first among possibilities that include the filing of a brief, motion, response, petition, or answer.

Negative report
Required, except of individual criminal defendants.

Disclosure form
Form 6 CA-1, Disclosure of Corporate Affiliations and Financial Interest, is provided by the clerk.

Number of copies
The local rule is silent.

Scope of applicability
Civil cases, bankruptcy cases, criminal cases, agency review cases, and original proceedings.

Obligation to update
The local rule is silent.

U.S. Court of Appeals for the Seventh Circuit

Local Rule 26.1, Disclosure Statement

Extension of the FRAP 26.1 requirements on who must file
All non-governmental parties or amicus curiae and every private attorney representing a governmental party.

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
Identification of the names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or who are expected to appear.

Time of initial filing
With the principal brief or upon filing a motion, response, petition, or answer in the court, whichever occurs first.

Negative report
The Disclosure Statement form directs counsel to indicate when requested information is not applicable (but use of the form is not mandatory and the local rule is silent on whether a negative report is required).

Disclosure form
A form titled Disclosure Statement is available and its use is encouraged.

Number of copies
The local rule is silent.

Scope of applicability
The local rule is silent.

Obligation to update
The Disclosure Statement form advises that "(t)he attorney furnishing the statement must file an amended statement to reflect any material changes in the required information"; use of the form is encouraged but not required by the court.

U.S. Court of Appeals for the Ninth Circuit

Local Rule 21-3, Certificate of Interested Persons

The rule reads: "Petitions for writs of mandamus or prohibition, and for other extraordinary writs, shall include the corporate disclosure statement required by FRAP 26.1 and the statement of related cases required by Circuit Rule 28-2.6."

U.S. Court of Appeals for the Tenth Circuit

Local Rule 46.1(c), Certification of Interested Parties

Extension of the FRAP 26.1 Requirements on Who must file
All parties.

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
Identification of all persons, associations, firms, partnerships, corporations, guarantors, insurers, affiliates, and other legal entities that are financially interested in the outcome of the litigation; additionally, identification of attorneys not entering an appearance if they have appeared for any party in a proceeding where review is sought, or in related proceedings that preceded the original action pursued in the court; if a large group of persons or firms can be specified by a generic description, an individual listing is unnecessary.

Time of initial filing
Filed with each entry of appearance (entry of appearance must be filed within ten days of the filing of an appeal or other proceeding).

Negative report
Required.

Disclosure form
Appendix A, Form 2. Entry of Appearance and Certificate of Interested Parties.

Number of copies
The original and three copies (specified in the instructions for Form 2).

Scope of applicability
Not explicitly specified, but court staff indicated in private communication that the rule applies to all case types and proceedings.

Obligation to update
Stated.

U.S. Court of Appeals for the Eleventh Circuit

Certificate of Interested Persons and Corporate Disclosure Statement Local Rule 26.1-1, Contents; Local Rule 26.1-2, Time for Filing; Local Rule 26.1-3, Format

Extension of the FRAP 26.1 requirements on who must file
Appellants, appellees, intervenors and amicus curiae, including governmental parties.

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
Identification of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10 percent or more of the party's stock, and other identifiable legal entities related to a party; in criminal or criminal-related appeals, identification of the victim(s); in a bankruptcy appeal, identification of the debtor, the members of the creditor's committee, any entity which is an active participant in the proceedings, and other entities whose stock or equity value may be substantially affected by the outcome of the proceedings.

Time of initial filing
Included within the principal brief filed by any party and included within any petition, answer, motion or response filed by an party (except for unopposed motions for procedural orders described in Local Rule 27-1(c)).

Negative report
The local rule is silent.

Disclosure form
The format of the Certificate of Interested Persons and Corporate Disclosure Statement, which is an alphabetical list of persons and entities, is described with particularity in Local Rule 26.1-3.

Number of copies
The local rule is silent.

Scope of applicability
Criminal and bankruptcy cases (these case types receive specific mention in the rule); applicability is inferred for civil cases, agency review, and original proceedings.

Obligation to update
The local rule is silent.

Note
Local Rule 26.1-2 states: "The clerk is not authorized to submit to the court any brief (except the reply brief of an appellant or cross-appellant), petition, answer, motion or response which does not contain the certificate, but may receive and retain the papers pending supplementation of the papers with the required certificate." The court's internal operating procedures manual states that the court will not act on any papers requiring the disclosure form, including emergency filings, until the form is filed, except to prevent injustice.

U.S. Court of Appeals for the District of Columbia Circuit

Circuit Rule 26.1, Disclosure Statement

Extension of the FRAP 26.1 requirements on who must file
Every party that is a corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding

Extension of the FRAP 26.1 requirements for disclosure of financial interest information
Identification of the general nature and purpose of the entity (party) insofar as relevant to the litigation; if the entity (party) is an unincorporated entity whose members have no ownership interests, the disclosure statement must list the names of the members of the entity that have issued shares or debt securities to the public.

No identification of members of a trade association or professional association is required.

Time of initial filing
As specified in FRAP 26.1, or within seven days of service of the docketing statement or granting of an intervention motion (if the party is a respondent, appellee, or intervenor) (Circuit Rule 12(f) and Circuit Rule 15(c)(6)), or as otherwise ordered by the court.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
All proceedings.

Obligation to update
The local rule is silent.

Note
The rule defines "parent companies" for FRAP 26.1 disclosure purposes as including all companies controlling the specified entity directly, or indirectly through intermediaries.

The rule defines a "trade association" as a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.

U.S. Court of Appeals for the Federal Circuit

Local Rule 26.1, Corporate Disclosure Statement
Local Rule 47.4, Certificate of Interest
Federal Circuit Rule 26.1 directs parties to provide FRAP 26.1 information in the Certificate of Interest required by Federal Circuit Rule 47.4. Federal Circuit Rule 47.4 prescribes the entries in the table below.

Extension of the FRAP 26.1 Requirements on Who must file
All parties, intervenors, and amicus curiae other than the United States.

Extension of the FRAP 26.1 Requirements for Disclosure of Financial Interest Information
The local rule is silent.

Time of initial filing
Filed with the entry of appearance, and also filed with any motion, petition, or response, and in each principal brief and brief amicus curiae (L.R. 47.4).

Negative report
Required.

Disclosure form
Appendix of Federal Circuit Forms, Form 6. Certificate of Interest.

Number of copies
The local rule is silent.

Scope of applicability
Applicability is inferred for civil cases and agency review proceedings; the court has no jurisdiction over criminal or bankruptcy matters.

Obligation to update
Stated; party must file an amended certificate within seven days of the change.

Note
The requirements of FRAP 26.1 are satisfied by filing a certificate of interest under Federal Circuit Rule 47.4.

Local Rule 47.4 requires identification of law firms and partners and associates who have appeared for the party in the lower tribunal or who are expected to appear for the party in a circuit proceeding; the rule requires additional information as well, but the specifics are not relevant to this inquiry.

Part III. Analysis of Financial Disclosure Filing Requirements in the District Courts

No national counterpart to FRAP 26.1 exists for the federal district and bankruptcy courts. Through standard legal research methods and a national survey of all district clerk's offices, we identified twenty-five federal district courts which have some type of filing requirement. Twenty district courts have a local rule on point, and in five other district courts, either the court or individual judges within the court have fashioned alternative procedures for obtaining financial interests information from parties.[6] We identified, in addition, two district courts with local rules in the proposal stage, and a district court that enacted, and recently repealed, a local rule on disclosure. Table 2 identifies the twenty-eight district courts with relevant rules or procedures revealed by our search; the listing is alphabetical by state.

This part of the report analyzes local rules and other directives relating to disclosure of financial information in the district courts. There are four sections. The first discusses some of the variations in local rules and practices. The second summarizes the results in comparative tables. The third reports on a limited inquiry we made into chief judge impressions of the need for expanded disclosure requirements. The fourth provides information on the experience of the District of Kansas, which implemented and then repealed a local rule on disclosure of financial interests information.

Table 2. U.S. District Courts Requiring Party Disclosure of Financial Interests Information

Court	Local Rule or Directive	Rule Title or Explanation of Directive
S.D. Ala.	LR 3.2	Disclosure Statement
E.D.Ark.	other directives	Some judges require pending acquisitions and mergers information from parties in their scheduling order. One judge directs counsel to check a list of his financial holdings placed on file with the clerk's office; counsel must alert the judge to possible financial conflicts of interest.
C.D. Cal.	LCvR 4.6	Certification as to Interested Parties
	Ch.VI Rule 2.2	Local Bankruptcy Rules, Filing the Notice of Appeal
	Ch.VI. Rule 6.1	Local Bankruptcy Rules, Withdrawal of Reference from the Bankruptcy Court
D.D.C.	LCvR 26.1	Disclosure of Corporate Affiliations and Financial Interests

[6] The number of courts with filing requirements may change before this report is issued, as staff in several district courts reported that their court is considering adoption of a relevant local rule. Indeed, we learned that one court adopted a local rule a few months after the clerk informed us that the court had no rule, and we located another new local rule (included in the tables) as this report went to press.

We completed our search for local rules in database collections in June 1999. We surveyed clerks of courts in all district and bankruptcy courts in July, asking them to check the search results for accuracy. Responses came to us over a period of several months. With follow-up mailings, all but seven district courts and six bankruptcy courts responded to the request for information by November.

M.D.Fla.	orders	One judge requires disclosure by standing order; another requires disclosure through use of orders and case management tools.
N.D. Ga.	LCvR 3.3	Certificate of Interested Parties
S.D.Ga.	LCvR 3.2	Disqualification of Judges Local Rules for the Administration of Criminal Cases
N.D. Ill.	GenR 2.23	Notification as to Affiliates
S.D. Ill.	LR 11.1.b	Disclosure of Interested Parties/Affiliates
C.D. Ill.	GenR 11.3	Certificate of Interest
D. Kan.	*repealed* LR 3.2; orders; public access to lists of financial holdings	LR 3.2, Required Certification of Interested Parties, has been repealed. Some judges continue to collect financial interests information from parties; some judges instruct counsel to check a list of financial holdings placed on file with the clerk and notify them if there is a potential financial conflict of interest.
D.Me.	LCvR 83.7 LBankR 1002-1(b)(3)	Corporate Disclosure Statement Disclosure Statement
D.Md.	LCvR 103.3	Disclosure of Affiliations and Financial Interest
E.D.Mi.	L.R. 83.4	Disclosure of Corporate Affiliations and Financial Interest
N.D. Miss.[a]	*proposed* L.R. 3.1(D)	Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation
S.D.Miss.[a]	*proposed* L.R. 3.1(D)	Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation
E.D. Mo.	LR 2.09	Disclosure of Corporation Interests
W.D. Mo.	LCvR 3.1	Disclosure of Corporation Interests
D. Nev.	LR 10-6	Certificate as to Interested Parties
D.N.H.	LCvR 3.6(a)(4)	Appearances
E.D.N.Y.[a]	LCvR 1.9	Disclosure of Interested Parties
S.D.N.Y.[a]	LCvR 1.9	Disclosure of Interested Parties
W.D. Pa.	LR 3.2	Disclosure Statement
D.S.C.	LR 26.01; 26.03(I); 26.04; 26.06(J); 26.07	General Provisions Governing Discovery; Duty of Disclosure
S.D. Tex.	pretrial order	Individual judges mandate financial disclosure using a standing order served on parties during the initial pretrial and scheduling conference.
D. Vt.	general order	General Order No. 45, In Re: Disclosure of Corporate Interests
E.D. Wis.	LR 5.05	Certificate of Interest
W.D.Wis.	operating procedure	Private parties that are businesses, companies, or corporations are expected to disclose financial interests information on a form provided by the clerk; there is no local rule or court-wide standing order in effect to compel disclosure.

[a] The district courts listed from the same state operate under uniform local rules provisions.

Analysis of the Rules

Most of the district courts appearing in Table 2 have broader filing requirements than the current requirements of FRAP 26.1. Not surprisingly, a number of them have disclosure provisions modeled on the precursor requirements of FRAP 26.1, which required identification of affiliates and subsidiaries that are not wholly owned (e.g., D.Me., W.D.Mo, D.N.H., D.Vt.).

The 1998 amendment eliminating the need to identify subsidiaries and affiliates is too recent to have had widespread impact as a model in the district courts. Nonetheless, the current version of FRAP 26.1 has been the model for a few recently enacted district court local rules. Two courts have filing requirements equivalent to the current FRAP 26.1 requirements (C.D.Ill. and E.D.Wis.).[7] One court has filing requirements incorporating elements from both the current and precusor versions of FRAP 26.1 (E.D.Mo.). Our search also revealed that one court arguably has filing requirements that are narrower than FRAP 26.1 (W.D.Pa.).[8]

Variations in rules and procedures are as plentiful among the district courts as they are among the circuit courts of appeals. The rules differ from each other and from FRAP 26.1 on a number of dimensions, the most significant being: (1) who must file the information; (2) the types of cases subject to the rule; and (3) what type of information is required. We highlight some of the differences on these dimensions, including in the discussion not only active, but also proposed and repealed rules.[9]

Who must file

Among the district court local rules, there is considerable variation in who must disclose information. At one end of the range is the narrow requirement borrowed from FRAP 26.1 obliging "non-governmental corporate parties" to file disclosure statements (e.g., D. Me., E.D. Mo., W.D. Mo., D. Vt.). The requirement expands only slightly to encompass "corporate parties and corporate intervenors" in another court (D.D.C.).

The type of party required to file disclosure statements is more widely drawn in other courts. Several apply the requirement to other parties with an obvious business connection (e.g., N.D.Ill., where a party that is an affiliate of a public company is required to file information; W.D.Pa., with filing requirements for any "corporation, association, joint

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[7] The Central District of Illinois and Eastern District of Wisconsin local rules conform with FRAP 26.1, except that they require disclosure from amicus curiae in addition to corporate parties.

[8] FRAP 26.1 requires disclosure of any publicly held company that holds 10 percent or more of the party's stock. The disclosure mandated by Local Rule 3.2 in the Western District of Pennsylvania is limited to a publicly held company which is an "affiliate" of the party, where "affiliate" is defined as "a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity." One of the court's judges has pointed out that unless a 10 percent ownership would be a controlling interest, disclosure would not be mandated under the local rule, making the requirements less broad than those of FRAP 26.1.

[9] Some courts have the same rule provisions. Citations made in this report to the rule in the Northern District of Mississippi or the Eastern District of New York incorporate by reference the complementary court with uniform local rules (S.D.Miss. and S.D.N.Y, respectively). Citation to the local rule in the Western District of Pennsylvania incorporates by reference the rule in the Southern District of Alabama, which is identical. The local rule in the Central District of Illinois is identical to the rule in the Eastern District of Wisconsin, except for minor word changes.

venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding"; and D.S.C., with filing requirements for "any party (plaintiff or defendant) that is either a publicly owned entity, or is a partner, parent, subsidiary or affiliate of a publicly owned entity"). In two courts, filing is required of parties completing the pretrial phase of litigation, without regard to whether the party is a business (E.D.Ark., S.D.Tex.).

The broadest filing requirements compel early disclosure in civil cases from "all parties" (e.g., C.D.Cal., D.Kan., N.D.Miss.), "all non-governmental parties and amicus curiae unless the party is a pro se litigant" (C.D. Ill.), and "all private non-governmental parties" (e.g., N.D. Ga., S.D. Ill., E.D.N.Y). Broad filing requirements are more common than narrow filing requirements.

In a few instances, courts have specified particular exemptions or inclusions in the party types expected to disclose information. Three courts exempt individuals filing habeas corpus (D.Nev., D.S.C., S.D.Tex.). Two courts exempt pro se litigants (C.D.Ill, D.S.C.). Other courts exempt parties in bankruptcy proceedings (D.S.C.) or parties filing bankruptcy appeals (S.D.Tex.). The District of South Carolina and the Southern District of Texas list additional parties exempt from filing.

Amicus curiae parties are specifically noted as *inclusions* in a few of the courts' requirements to file (S.D.Ala., C.D.Ill., W.D.Pa., E.D.Wis.).

Types of Cases

Some district courts limit the disclosure to civil litigants only. Some require disclosure in criminal cases, from either corporate defendants or the government. Bankruptcy proceedings are explicitly covered by the disclosure requirement in some of the district courts. Applicability of disclosure requirements to bankruptcy proceedings in other district courts is ambiguous. The local rules in a few of the district courts note applicability to special case categories involving agency review and maritime proceedings.

Types of Information

The scope of information that parties are required to disclose varies greatly among the district courts. Essentially, however, each court requires parties to identify one or both of the following: (1) entities having specific *financial connections* with the party and (2) entities with a *financial interest* in the outcome of the litigation (and, additionally, the nature of the interest). These categories are not mutually exclusive and, as we noted in the discussion of the appellate court local rules, the distinction is blurred in practice.

Information on financial connections typically involves a listing of parent corporations, subsidiaries not wholly owned, and affiliates that are publicly held (e.g., D.Me., E.D.Mi., W.D.Mo., D.N.H., D.Vt.). A few courts specify what is meant by the term "affiliate" (e.g., N.D.Ill., E.D.Mi., W.D.Pa.). Typically, a corporation is considered an affiliate of a publicly owned corporation if it controls, is controlled by, or is under common control with the publicly owned corporation. Other financial connections information can include identification of entities such as similarly situated master limited partnerships, real estate investment trusts, joint ventures, and syndicates (N.D.Miss.).

Information on financial interests involves either listing entities with "a substantial financial interest", or simply "an interest" in the outcome of the litigation. Many courts il-

lustrate the kind of entities that may have financial interests in the case. These lists include subgroups of entities such as associations of persons, firms, partnerships and corporations, unincorporated associations, and officers, directors, or trustees of parties. Some local rules also provide for the identification of insurers (e.g., C.D.Cal., D.Kan., D.Md., E.D.Mi.).

One local rule simply requires parties to identify all public corporations with a financial interest in the outcome of the case (S.D.Ill.). Another shows the crossover of *financial connections* and *financial interests* information by requiring a list of persons, associations of persons, firms, partnerships, or corporations having a financial or other interest which could be substantially affected by the outcome of the case, specifically to include all subsidiaries, conglomerates, affiliates, and parent corporations, and any other identifiable legal entity related to a party (N.D.Ga.).

In addition to requiring information on financial connections and interests, local rules in the Northern District of Georgia and the Eastern District of Wisconsin require parties to identify attorneys and law firms representing them in the proceeding. The Eastern District of Missouri has incorporated elements from both the current and precursor versions of FRAP 26.1 by requiring corporate parties to report both publicly held companies owning 10 percent or more of the party's stock and subsidiaries not wholly owned.

The two judges in the Middle District of Florida who use individual forms for collecting disclosure information require parties in criminal matter to identify victims of the conduct alleged in the indictment, if the victims might be entitled to restitution. A similar provision appears in the local rule for the Eleventh Circuit Court of Appeals.

Financial Disclosure Requirements in the District Courts

We have organized the district court local rules and other procedures into tables in alphabetical order by state. The tables summarize the following information:

(1) the types of parties required to file (Who must file);
(2) the type of information required (Required information);
(3) the time for filing the information (Time of initial filing);
(4) the existence of a requirement that parties with nothing to disclose submit a negative report (Negative report);
(5) the form of the disclosure (Disclosure form);
(6) the number of copies required to be filed (Number of copies);
(7) the applicability of the rule to various case types and proceedings (Scope of applicability);
(8) the existence of a stated duty for parties to update disclosed information (Obligation to update); and
(9) additional relevant information (Note).

Notes on table entries:

(a) Where a local rule refers to "counsel for the parties" or uses a similar phrase to identify who must file disclosure, we have substituted "parties" for the sake of brevity (see Who must file).
(b) We use the phrase "identification of [e.g., parent companies, subsidiaries, and affiliates]" to summarize the type of information required of parties (see Required

information). Local rules may use more precise phrasing; counsel may be required, for example, to "certify" a list of the names of interested parties.

(c) Some courts require identification of law firms, partners, etc., that currently or previously represented the party in the issue before the court. These requirements are noted in the tables even though they are not directly related to the report (see .Required information).

U.S. District Court for the Southern District of Alabama

Local Rule 3.2, Disclosure Statement

Who must file
A corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding.

Required information
Identification of all parent companies, subsidiaries, and affiliates that have issued shares or debt securities to the public, where: (1) "affiliate" means a person that directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity, (2) "parent" means an affiliate controlling such entity directly, or indirectly through intermediaries, and (3) "subsidiary" means an affiliate controlled by such entity directly or indirectly through one or more intermediaries.

Identification of the represented entity's general nature and purpose; if the entity is unincorporated, identification of any members of the entity that have issued shares or debt securities to the public.

No listing is required, however, of the names of members of a trade association or professional association, where "trade association" is defined as a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.

Time of initial filing
At the time of the filing of the initial pleading or other court paper on behalf of the party, or as otherwise ordered by the court; if an emergency or other situation makes filing the disclosure statement impossible or impracticable, the statement shall be filed within seven days of the date of the original filing, or such other time as the court may direct.

Negative report
Disclosure Statement, but not the local rule, indicates that a negative report should be filed.

Disclosure form
Disclosure Statement Pursuant to Local Rule 3.2, located in Appendix A of the local rules.

Number of copies
The local rule is silent.

Scope of applicability
All proceedings.

Obligation to update
Stated.

Note
LR 3.2 of S.D. Ala. is identical to LR 3.2 of W.D. Pa.

U.S. District Court for the Eastern District of Arkansas

The court has no local rule on party disclosure of financial interests information. Several judges require publicly traded corporate parties to advise the court of pending acquisitions and actual mergers. The directive is issued with the scheduling order for trial.

One judge, however, uses the Scheduling Order to issue a different directive. This judge instructs counsel to check a list of financial holdings that he has placed on file with the clerk's office. Counsel is responsible for alerting the judge to possible financial conflicts of interest.

U.S. District Court for the Central District of California

Local Civil Rule 4.6, Certification as to Interested Parties
Rule 2.2 of Ch.VI, Local Bankruptcy Rules, Filing the Notice of Appeal
Rule 6.1 of Ch.VI, Local Bankruptcy Rules, Withdrawal of Reference from the Bankruptcy Court

Local Civil Rule 4.6

Who must file
All parties.

Required information
Identification of all persons, association of persons, firms, partnerships and corporations (including parent corporations) which have a direct, pecuniary interest in the outcome of the case, including any insurance carrier which may be liable in whole or in part (directly or indirectly) for a judgment that may be entered in the action or for the cost of defense.

Time of initial filing
Party's first appearance.

Negative report
The local rule is silent.

Disclosure form
Notice of Interested Parties; (form prescribed in the local rule).

Number of copies
Original and two copies.

Scope of applicability
All civil actions and proceedings in the district court (by Local Rule 1.1) or matters of a civil nature (by Local Rule 1.3(c)).

Obligation to update
The local rule is silent.

Rule 2.2 of Chapter VI (applies to bankruptcy appeals taken to the district court)

Who must file
Parties appealing to the district court from the bankruptcy court.

Required information
Identification of interested parties (to be provided to the bankruptcy court clerk).

Time of initial filing
At the time the notice of appeal is filed.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy appeals to the district court.

Obligation to update
The local rule is silent.

Rule 6.1 of Chapter VI (applies to pending bankruptcy cases and proceedings where a motion has been made to withdraw reference from the bankruptcy court to the district court)

Who must file
Parties moving to withdraw reference of matters pending in the bankruptcy court and parties opposing such a motion.

Required information
Identification of interested parties (to be provided to the district court clerk and to the presiding bankruptcy judge).

Time of initial filing
With the motion to withdraw or with reply papers in opposition.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Pending bankruptcy cases and proceedings.

Obligation to update
The local rule is silent.

U.S. District Court for the District of Columbia

Local Civil Rule 26.1Disclosure of Corporate Affiliations and Financial Interests

Who must file
Corporate parties and corporate intervenors.

Required information
Identification of any parent, subsidiary or affiliate of the party or intervenor which has any outstanding securities in the hands of the public.

Time of initial filing
At the time the party's first pleading is filed.

Negative report
The local rule is silent.

Disclosure form
Form prescribed in the local rule.

Number of copies
The local rule is silent.

Scope of applicability
Civil, agency, and criminal cases (General Rule 109); all other proceedings in the district court (General Rule 101(a)) (including, by inference, bankruptcy cases and other proceedings in the district court).

Obligation to update
Stated.

U.S. District Court for the Middle District of Florida

One Middle District of Florida judge requires disclosure of financial interest information by standing order.

Who must file
Civil: all non-government corporate parties; criminal: the government.

Required information
Civil: identification of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public.

Criminal: identification of victims of the conduct alleged in the Indictment who are entitled to restitution; and for any non-government corporate victims, identification of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public.

Time of initial filing
Within eleven days of the date of the Standing Order

Negative report
The order is silent.

Disclosure form
The order is silent.

Number of copies
The order is silent.

Scope of applicability
Civil and criminal cases.

Obligation to update
Stated.

A second Middle District of Florida judge obtains disclosure of financial interest information through use of several case management tools. These include a Case Management Report (civil cases), Order Requiring [the] Government to File a Certificate of Interested Parties (criminal cases) and [Order titled] Notice to Counsel or Any Pro Se Party to Review and to Certify Compliance (bankruptcy cases).

Who must file
Civil: parties

Criminal: the government; bankruptcy: parties, including pro se parties.

Required information
Civil: identification of all attorneys, persons, associations of persons, firms, partnerships and corporations, including subsidiaries, conglomerates, affiliates, parent corporations, and other identifiable legal entities related to a party, or as to which such party has a controlling interest, that have an interest in the outcome of the case.

Criminal: identification of all persons, associations of persons, firms, partnerships, corporations, including subsidiaries, conglomerates, affiliates, and parent corporations and other identifiable legal entities related to each Defendant, or over which Defendant exercises a controlling interest and who or which may have a financial or monetary interest in the outcome of the case or whose stock or equity value may be substantially affected by the outcome of the case proceedings; identification of known victims, including those to whom restitution may be owed.

Bankruptcy: identification of any person, associations of persons, attorneys, firms, partnerships, corporations, or entities whose stock or equity value may be substantially affected by the outcome of the proceedings, including subsidiaries, conglomerates, affiliates, parent corporations and other identifiable legal entities related to a party.

Time of initial filing
Criminal and bankruptcy: within thirty days of the date of the order.

Negative report
The judge's case management report and orders are silent on this issue.

Disclosure form
The judge's case management report and orders are silent on this issue.

Number of copies
The judge's case management report and orders are silent on this issue.

Scope of applicability
Civil, criminal, and bankruptcy cases.

Obligation to update
Stated.

U.S. District Court for the Northern District of Georgia

Civil Local Rule 3.3, Certificate of Interested Persons

Who must file
All private (non-governmental) parties.

Required information
Identification of persons, associations of persons, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case (the listing shall specifically include all subsidiaries, conglomerates, affiliates, and parent corporations, and any other identifiable legal entity related to a party); identification of each person serving as a lawyer in the proceedings.

Time of initial filing
Within fifteen days after the first pleading is filed by any defendant or defendants.

Negative report
The local rule is silent.

Disclosure form
Certificate of Interested Persons; form of the certificate prescribed in the local rule.

Number of copies
The local rule is silent.

Scope of applicability
Civil cases.

Obligation to update
Stated.

Note
Counsel for all cases submit joint-certification; if the government is a party, however, certification is submitted only by the private party or parties; in cases of default, the moving party shall submit the required information before seeking any court action on the case.

U.S. District Court for the Southern District of Georgia

Civil Local Rule 3.2, Disqualification of Judges
Local Rules for the Administration of Criminal Cases

Who must file
All private (non-government) parties, both plaintiffs and defendants.

Required information
Identification of all parties; officers, directors, or trustees of parties; and all other persons, associations of persons, firms, partnerships, corporations, or organizations which have a financial interest in, or another interest which could be substantially affected by, the outcome of the particular case.

Time of initial filing
With the first filing (and any subsequent filing) of a complaint and answer.

Negative report
The local rule is silent.

Disclosure form
Certificate of Interested Parties Form, located in the Appendix of Forms to the Local Rules.

Number of copies
The local rule is silent.

Scope of applicability
Civil cases (L.R. 3.2); criminal cases ("These Local Rules . . . are to be construed consistently with the generally applicable (Civil) Local Rules, *supra.*"); bankruptcy proceedings in the district court are presumed covered.

Obligation to update
The local rule is silent.

U.S. District Court for the Northern District of Illinois

General Rule 2.23, Notification as to Affiliates

The court expects to renumber General Rule 2.23 as General Rule 3.2 soon, if it has not already done so. The provisions of the original rules are expected to remain intact. A form titled "Disclosure of Affiliates Pursuant to Local Rule 3.2" will be provided to counsel for reporting. This form includes space for counsel to furnish stock ticker symbols.

Who must file

Any party that is an affiliate of a public company.

Required information

Identification of any public company of which the party is an affiliate, where

(1) The term "public company" means a corporation any of whose securities are listed on a stock exchange or are the subject of quotations collected and reported by the National Association of Securities Dealers Automated Quotations Systems (NASDAQ).

(2) The term "affiliate of a public company" means another corporation that controls, is controlled by or is under common control with the public company. The term includes but is not limited to a corporation 10 percent percent or more of whose voting stock is owned by the public company.

(3) The term "control" of a corporation means possession, direct or indirect, of the power to direct or cause the direction of the management and policies of that corporation through the ownership of voting securities or otherwise.

Time of initial filing

A plaintiff files notification with the complaint; a defendant files notification with the answer or with a motion in lieu of answer; if a party becomes a party after the filing of the complaint, the notification is filed with the first pleading filed on behalf of the party.

Negative report

The local rule is silent.

Disclosure form

The local rule is silent.

Number of copies

The local rule is silent.

Scope of applicability

Civil and criminal cases are presumed from the wording of the local rule, applicability to bankruptcy cases and other matters is not known.

Obligation to update

The local rule is silent.

U.S. District Court for the Southern District of Illinois

Rule 11.1.b, Disclosure of Interested Parties/Affiliates

Who must file
Private (non-governmental) parties.

Required information
Identification of any publicly owned corporation, not a party to the case, that has a financial interest in the outcome of the case.

Time of initial filing
At the time of the initial pleading.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Civil.

Obligation to update
The local rule is silent.

U.S. District Court for the Central District of Illinois

General Rule 11.3, Certificate of Interest

Who must file
All non-governmental parties and amicus curiae, unless the party is a pro se litigant (but only corporate parties and amici provide financial information).

Required information
If the party or amicus is a corporation: identification of a parent corporation, if any, and identification of corporate stockholders that are publicly held companies owning 10 percent or more of the stock of the party or amicus.

Time of initial filing
With the complaint or upon the first appearance of counsel in the case.

Negative report
The local rule is silent.

Disclosure form
Form prescribed in the local rule.

Number of copies
The local rule is silent.

Scope of applicability
Applicable in all proceedings in all of the courts in the district (CD-IL 1.1).

Obligation to update
The local rule is silent.

Note
Gen R 11.3 is similar to LR 5.05 of E.D.Wis. However, the pro se exception for filing parties does not exist in the E.D.Wis. rule.

U.S. District Court for the District of Kansas

Local Rule 3.2, Required Certification of Interested Parties
Adopted January 1999
Repealed April 1999

Local Rule 3.2 was adapted from Tenth Circuit Rule 46.1.3 entitled "Certification of Interested Parties and Rule 42.1 "Dismissal for Failure to Prosecute." The court adopted its local rule effective January 1, 1999, and repealed it in April 1999. Repeal was based on a finding that problems with the rule's enforcement outweighed any advantage the new procedure potentially offered over existing automated procedures for identifying conflicts of interest. See the Part III section titled "A District Court's Decision to Repeal Its Local Rule on Financial Disclosure" for more information about the court's decision to abandon Local Rule 3.2.

The structure of the repealed rule is summarized below.

Who must file
All parties.

Required information
Identification of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, or other legal entities who are financially interested in the outcome of the litigation (if a large group of persons or firms can be specified by a generic description, no individual listing is required); identification of all parties not named in the caption of the initial pleading or paper; for corporate parties and interested entities, identification of all parent and subsidiary corporations; identification of attorneys not entering an appearance in the court who have appeared for any party in any administrative proceedings sought to be reviewed, or in any related proceedings that preceded the action being pursued in the court.

Time of initial filing
With the initial pleading or other paper filed for a party.

Negative report
The local rule is silent.

Disclosure form
Form provided by the clerk and outlined in the local rule.

Number of copies
The local rule is silent.

Scope of applicability
All civil proceedings.

Obligation to update
Stated.

Note 1

The repealed rule established the following consequences for failure to comply: "If a party fails to comply with the provisions of this rule, the clerk shall notify the party that unless the failure of compliance is remedied within 10 days from the date of the notice the following action will be taken: (a) If the party is a plaintiff, that the action will be dismissed as to that party plaintiff for lack of prosecution; (b) if the party is other than a plaintiff, that default will be entered against that party for lack of prosecution." No cases ever had these sanctions applied under the local rule.

Note 2

Excerpt from a July 2, 1999 letter from Clerk of the Court Ralph L. DeLoach to Abel Mattos of the Administrative Office of the United States Courts, describing enforcement difficulties with the repealed rule:

"[The rule] required *all* parties to attach a certificate of Interested Parties to *every* initial pleading filed in *every* civil case. An issue quickly developed regarding what constituted an 'initial pleading.' An example would be whether a Motion for Extension of Time (to answer a Complaint) filed by a defendant would be considered an initial pleading. The docket clerks were overwhelmed with this issue as pleadings come with many different titles. If a party failed to attach the required Certificate, a notice was sent from the Clerk's Office to the assigned judge indicating non-compliance with the rule. The judge would then determine whether further action was necessary. When a Certificate was filed in compliance with the Rule it was then sent to the assigned judge for a determination of a possible conflict of interest.

"Needless to say, the amount of paperwork generated by this Rule was voluminous. It greatly impacted the workload of both Clerk's Office staff and chambers staff. A great deal of time was spent following up on non-compliance with the Rule. Special codes were created to enable reports to be generated from ICMS tracking delinquent Certificates filing status. The court determined that a lot of work was being done to find the one 'needle in a haystack.'"

U.S. District Court for the District of Maine

Civil Rule 83.7, Corporate Disclosure Statement
Local Bankruptcy Rule 1002-1(b)(3), Disclosure Statement

Who must file
Civil cases: non-governmental corporate parties.
Bankruptcy cases: non-governmental non-individual debtors.

Required information
Civil cases: identification of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public.
Bankruptcy cases: identification of "affiliates" and "insiders" as defined in 11 U.S.C. § 101(2), (31).

Time of initial filing
Civil cases: with the party's first appearance.
Bankruptcy cases: with the petition commencing the case, or within fifteen days of filing the petition.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Civil cases, bankruptcy cases.

Obligation to update
The local rule is silent.

Note
Bankruptcy cases and proceedings pending in the district court are subject to disclosure provisions under Maine Bankruptcy Rule 1001-1.

U.S. District Court for the District of Maryland

Civil Rule 103.3, Disclosure of Affiliations and Financial Interest

Who must file
Parties.

Required information
The identity of any parent or other affiliate, if the party is a corporation, and a description of the relationship between the party and such affiliates; the identity of any corporation, unincorporated association, partnership or other business entity, not a party to the case, which may have any financial interest whatsoever in the outcome of litigation, and the nature of the financial interest; the term "financial interest in the outcome of the litigation" includes a potential obligation of an insurance company or other person to represent or to indemnify any party to the case; information to be provided to the district court clerk.

Time of initial filing
When filing an initial pleading or promptly after learning of the information to be disclosed.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
Two.

Scope of applicability
Civil cases.

Obligation to update
The local rule is silent.

U.S. District Court for the Eastern District of Michigan

Civil Rule 103.3, Disclosure of Affiliations and Financial Interest

Who must file
All corporate parties to a civil case and all corporate defendants in a criminal case, *unless* the party is the United States or an agency thereof, or is a state government or an agency or political subdivision thereof

Required information
From a corporate party that is a subsidiary or affiliate of any publicly owned corporation not named in the case: identification of the publicly owned parent corporation or affiliate, and the nature of the corporate relationship (a corporation is considered an affiliate of a publicly owned corporation for purposes of the rule if it controls, is controlled by, or is under common control with a publicly owned corporation).

From parties generally: identification of any publicly owned corporation or its affiliate, not a party to the case, which has a substantial financial interest in the outcome of the litigation that is aligned with the financial interest of the party by reason of insurance, a franchise agreement, or indemnity agreement, and additionally, identification of the nature of the substantial financial interest held by the corporation or its affiliate.

Time of initial filing
With the filing of the first pleading or paper, or as soon as the party becomes aware of the corporate affiliation or financial interests, or as otherwise ordered by the judge to whom the case is assigned.

Negative report
Required.

Disclosure form
Provided by the clerk.

Number of copies
The local rule is silent.

Scope of applicability
Civil and criminal cases.

Obligation to update
Stated.

U.S. District Court for the Northern and Southern Districts of Mississippi

(operating under uniform local rules)

(proposed) Local Rule 3.1(D), Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Who must file
All parties (including amici) to a civil action, a maritime proceeding, or a bankruptcy proceeding filed in the district court, and all corporate defendants in a criminal prosecution; the rule does not apply to the United States, to state and local governments in cases in which the opposing party is proceeding without counsel, or to parties proceeding in forma pauperis.

Required information
A non-governmental corporate party must identify parent corporations, publicly held companies owning 10 percent or more of the party's stock, similarly situated master limited partnerships, real estate investment trusts, joint ventures, syndicates, or other legal entities whose shares are publicly held or traded.

The disclosure form, but not the proposed rule, asks that grandparent and great-grandparent corporations be identified.

The disclosure form, but not the proposed rule, asks that publicly held corporations or other publicly held entities that have a direct financial interest in the outcome of the litigation be identified, along with the nature of the interest.

Time of initial filing
The clerk will deliver the disclosure form to parties with the notice of a case's having been assigned to a district judge; return filing is required within ten days of receipt.

Negative report
Required.

Disclosure form
Disclosure of Corporate Affiliations and Other Entities With a Direct Financial Interest in Litigation; the form is provided by the clerk.

Number of copies
The local rule is silent.

Scope of applicability
Civil actions, maritime proceedings, bankruptcy proceedings, and criminal cases.

Obligation to update
Stated.

Note
Proposed local rule.

U.S. District Court for the Eastern District of Missouri

Local Rule 2.09, Disclosure of Corporation Interests

Who must file
Non-governmental corporate parties.

Required information
Identification of all parent companies of the corporation, subsidiaries not wholly owned, and any publicly held company that owns 10 percent or more of the corporation's stock.

Time of initial filing
With the party's first pleading or entry of appearance.

Negative report
Required.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Civil and criminal cases.

Obligation to update
Stated; amendment to be filed within seven days of the change.

U.S. District Court for the Western District of Missouri

Local Rule 3.1, Disclosure of Corporation Interests

Who must file
Non-governmental corporate parties.

Required information
Identification of all parent companies of the corporation, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public.

Time of initial filing
With the party's first pleading or entry of appearance.

Negative report
Required.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Civil and criminal cases.

Obligation to update
Stated; amendment to be filed within seven days of the change.

U.S. District Court for the District of Nevada

Local Rule 10-6, Certificate as to Interested Parties

Who must file
All private (non-governmental) parties in cases other than habeas corpus cases.

Required information
Identification of all persons, associations of persons, firms, partnerships or corporations known to have an interest in the outcome of the case.

Time of initial filing
At the time counsel enter the case.

Negative report
Required.

Disclosure form
Form prescribed in the local rule.

Number of copies
The local rule is silent.

Scope of applicability
All cases except habeas corpus cases.

Obligation to update
The local rule is silent.

Note
The court finds the current rule insufficient, and has asked the Standing Committee on Local Rules to consider a proposal modifying the rule to provide that "concurrent with the filing of a complaint or a responsive pleading the party shall be required to file a list of the names of any publicly traded subsidiary and/or parent companies and/or corporation of the party" (August 6, 1999, letter from District Court Executive/Clerk of the Court Lance S. Wilson).

U.S. District Court for the District of New Hampshire

Local Civil Rule 83.6(a)(4), Appearances

Who must file
Non-governmental corporate parties and non-governmental corporate defendants.

Required information
Identification of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public.

Time of initial filing
At the time an appearance is filed.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Civil cases, bankruptcy cases, agency review proceedings, and criminal cases.

Obligation to update
Stated.

U.S. District Court for the Southern and Eastern Districts of New York

(operating under uniform local rules)
Civil Rule 1.9, Disclosure of Interested Parties

Who must file
Private (non-governmental) parties.

Required information
Identification of any corporate or other parents, subsidiaries, or affiliates of the party, securities or other interests that are publicly held.

Time of initial filing
Filing of the initial pleading or other court paper on behalf of the party.

Negative report
The local rule is silent.

Disclosure form
The reverse side of the civil cover sheet used in the Eastern District of New York has a section directing corporate parties to identify corporate parents, subsidiaries and affiliates

Number of copies
The local rule is silent.

Scope of applicability
Civil actions.

Obligation to update
The local rule is silent.

U.S. District Court for the Western District of Pennsylvania

Local Rule 3.2, Disclosure Statement

Who must file
A corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding.

Required information
Identification of all parent companies, subsidiaries, and affiliates that have issued shares or debt securities to the public, where: (1) "affiliate" means a person that directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity, (2) "parent" means an affiliate controlling such entity directly, or indirectly through intermediaries, and (3) "subsidiary" means an affiliate controlled by such entity directly or indirectly through one or more intermediaries.

Identification of the represented entity's general nature and purpose.

If the entity is unincorporated, identification of any members of the entity that have issued shares or debt securities to the public.

No listing is required, however, of the names of members of a trade association or professional association, where "trade association" is defined as a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.

Time of initial filing
At the time of the filing of the initial pleading or other court paper on behalf of the party, or as otherwise ordered by the court; if an emergency or other situation makes filing the disclosure statement impossible or impracticable, the statement shall be filed within seven days of the date of the original filing, or such other time as the court may direct.

Negative report
Disclosure Statement, but not the local rule, indicates that a negative report should be filed.

Disclosure form
Form titled Disclosure Statement, located in Appendix A of the local rules.

Number of copies
The local rule is silent.

Scope of applicability
All proceedings.

Obligation to update
Stated.

Note
LR 3.2 of W.D.Pa. is identical to LR 3.2 of S.D.Ala.

U.S. District Court for the District of South Carolina

Local Rules 26.01; 26.03(I); 26.04; 26.06(J); 26.07, General Provisions Governing Discovery; Duty of Disclosure.

Who must file
Any party (plaintiff or defendant) that is either a publicly owned entity, or is a partner, parent, subsidiary or affiliate of a publicly owned entity (except for parties in bankruptcy proceedings and other specifically exempted case types listed in Local Rule 26.01).

Required information
Identification of the publicly owned entity and its relationship to the disclosing party; identification of any publicly owned entity not a party to the case that has a significant financial interest in the outcome of litigation and the nature of the interest

Time of initial filing
A plaintiff files disclosure with the initial pleading.

A defendant files within thirty days of the later of (1) defendant's responsive pleading or (2) the date on which the person asserting a claim against the defendant serves answers to interrogatories and produces documents pursuant to the local rule.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Civil cases, except for the following case types which are exempted under Local Rule 26.01: (a) habeas corpus cases; (b) all government foreclosure cases; (c) all government forfeiture cases; (d) three judge court cases; (e) petitions to quash IRS summons; (f) review of administrative rulings; (g) social security cases; (h) bankruptcy proceedings; (i) veterans administration recovery cases; (j) cases in which there is any pro se litigant; (k) all cases assigned as multi-district litigation pursuant to 28 U.S.C. 1407; (l) condemnation cases; and (m) claims for relief within the admiralty and maritime jurisdiction act set forth in Rule 9(h) of the F.R.Civ.P. and the Supplemental Rules for Certain Admiralty and Maritime Claims.

Applicability may also extend, by inference, to criminal cases (see references to defendants in Local Rules 26.06(J) and 26.07).

Obligation to update
The local rule is silent.

U.S. District Court for the Southern District of Texas

Standing Order, Order for Conference and Disclosure of Interested Parties
The order is served on parties during the initial pretrial conference.

Who must file
Parties appearing for an initial pretrial and scheduling conference.

Required information
Identification of all persons, associations of persons, firms, partnerships, corporations, affiliates, parent corporations, or other entities that are financially interested in the outcome of the litigation; if a group can be specified by a general description, individual listing is not necessary.

Time of initial filing
Within fifteen days of receipt of the order.

Negative report
The standing order is silent.

Disclosure form
The standing order is silent.

Number of copies
The standing order is silent.

Scope of applicability
Civil cases, including cases litigated pro se, except for the following case types which are exempted under Local Rule 8: (a) prisoner civil rights; (b) state and federal habeas corpus; (c) student and veteran loan; (d) Social Security appeals; (e) bankruptcy appeals; and (f) forfeiture of seized assets.

Obligation to update
Stated.

Note
The standing order states, "Failure to comply with this order may result in sanctions, including dismissal of the action and assessment of fees and costs."

U.S. District Court for the District of Vermont

General Order No. 45, In Re: Disclosure of Corporate Interests
The court expects to convert the standing order into a formal local rule when local rules revision is next undertaken.

Who must file
All non-governmental corporate parties.

Required information
Identification of parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates that have issued shares of ownership to the public.

Time of initial filing
With a party's first appearance.

Negative report
The order is silent.

Disclosure form
The order is silent.

Number of copies
The order is silent.

Scope of applicability
All proceedings.

Obligation to update
The order is silent.

U.S. District Court for the Eastern District of Wisconsin

Local Rule 5.05, Certificate of Interest

Who must file
All non-governmental parties and amicus curiae (but only corporate parties and amici provide financial information).

Required information
If the party or amicus is a corporation: identification of a parent corporation, if any, and identification of corporate stockholders which are publicly held companies owning 10 percent or more of the stock of the party or amicus.

Time of initial filing
With the appearance of the party or upon the first filing of a paper on behalf of the party, whichever occurs first.

Negative report
The local rule is silent.

Disclosure form
Form prescribed in the local rule.

Number of copies
The local rule is silent.

Scope of applicability
As a practical matter, the rule is applied only to civil cases, although nothing stated in LR 5.05 or other local rules of the court specifically limits the scope of disclosure to civil cases.

Obligation to update
The local rule is silent.

Note
The rule requires the following additional information: the full name of every party or amicus represented in the case and the name of all law firms whose partners or associates appear for a party or are expected to appear for the party.

The court is currently revising the local rules and expects to renumber Local Rule 5.05 and move it to a section titled "General Local Rules"; such a move would make the requirement for disclosure applicable to "all proceedings."

LR 5.05 is very similar to GenR 11.3 of C.D. Ill.

U.S. District Court for the Western District of Wisconsin

The court has no local rule, court-wide standing order, or individual standing orders on the subject of party disclosure of financial interests information. Private parties that are businesses, companies, or corporations are expected, however, to provide such information at the outset of a case on a form provided by the clerk.

Who must file
Private (non-governmental) parties that are businesses, companies, or corporations.

Required information
If a party is a subsidiary or affiliate of a publicly owned corporation, the party is required to identify the parent corporation or affiliate and the relationship between such and the party; the party is also to identify any publicly owned corporation not a party to the case that has a financial interest in the outcome of litigation and the nature of the financial interest.

Time of initial filing
At the time of initial pleading.

Negative report
No written procedure indicates whether a negative report is required.

Disclosure form
A form titled Disclosure of Corporate Affiliations and Financial Interest is provided by the clerk.

Number of copies
Not known.

Scope of applicability
Civil cases.

Obligation to update
No written procedure indicates whether parties have an obligation to update the disclosure form.

District Judge Views on the Utility of Financial Interests Information

To learn whether local filing requirements meet the needs of the district courts, and to learn about the efficacy of FRAP 26.1 filing requirements, we wrote to chief judges (in some instances, individual judges) in district courts where financial disclosure is routine. In district courts with filing requirements equivalent to FRAP 26.1, we asked whether the judges found the local rule sufficient to identify conflicts of interest and whether the information provided under the local rule had ever failed to signal a conflict of interest. In district courts where filing requirements are more extensive than those of FRAP 26.1, we asked whether judges found the additional information useful in detecting conflicts of interest and whether the judges were aware of instances in which limiting disclosure to FRAP 26.1 requirements would have failed to signal a conflict of interest.

Filing Requirements Equivalent to FRAP 26.1

Two courts have financial disclosure requirements that are essentially equivalent to the limited requirements of FRAP 26.1. We asked the chief judge the following questions:

(1) Have the judges in your district found that Local Rule [number] permits them to identify potential financial conflicts of interest?

(2) Are you aware of circumstances in your court where Local Rule [number of the relevant local rule] failed to provide sufficient information to alert a judge to a conflict of interest requiring recusal?

Both judges responded affirmatively to the first question and negatively to the second question. The requirements have been in effect only a short time, but both courts report that limited financial disclosure requirements have been satisfactory.

Filing Requirements That Go Beyond FRAP 26.1

Courts broaden their disclosure requirements by extending the range of filing parties or the type of information to be filed, or both. We posed the following questions to chief judges (and modified questions to two M.D.Fla. judges) in courts with broadened disclosure requirements:

(1) Have the judges in your district found collected information that goes beyond what is required by FRAP 26.1 useful in detecting potential conflicts of interest?

(2) Are you aware of circumstances where limiting the requested information to that required by FRAP 26.1 would have failed to alert a judge to a conflict of interest requiring recusal?[10]

Nineteen of twenty-two judges contacted responded.[11] Thirteen judges responded by letter and six responded by telephone. Two of the letter responses were drafted by individuals to whom the chief judge had referred the matter (one a judge, the other the clerk of court). One of the telephone responses came from the clerk of court acting on behalf of

[10] We also asked a third question, "Does the court's collection of financial interests information that goes beyond what is required by FRAP 26.1 serve a function other than assisting judges in determining their recusal obligations?" There were no affirmative responses to this question.

[11] We located a new district court local rule as we finalized the report and did not solicit a response from the court's chief judge.

the chief judge. In the discussion that follows, we do not distinguish between local court rules and other directives. We refer to them collectively as "rules."

The responses to the questions are summarized in Table 3. One chief judge reported having polled the judges of the court; the responses of the individual judges were consistent and they are reported as a single count in the table below. A second chief judge forwarded the questions to the judges in his district and heard back from one colleague, who responded to both questions in the negative. We have eliminated the response of the second judge as well as the response offered by that court's Vice Chair of the Advisory Committee on Local Rules in support of the need for broad disclosure. The response of the court that wrote to say its local rule requires less disclosure than FRAP 26.1 is omitted from the totals for the first question.

Table 3. District Judge Reports on the Usefulness of More Information

Question	Yes	No	Difficult to say	No response
Have the judges in your district found collected information that goes beyond what is required by FRAP 26.1 useful in detecting potential conflicts of interest?	11	1	2	4
Are you aware of circumstances where limiting the requested information to that required by FRAP 26.1 would have failed to alert a judge to a conflict of interest requiring recusal?	2	7	3	6

When asked about the utility of collecting information that goes beyond FRAP 26.1 requirements, eleven of the twelve judges who framed a response to the question said that broader information is useful. Respondents tended to support this assessment with additional comment. Two judges described their court's rule as having "prophylactic" value. Two other judges stated that it is best to provide judges with as much information, as early as possible, to avoid later conflicts. Two more judges cited the need to be sensitive to the appearance of a conflict of interest as well as any actual conflict of interest.

When asked whether they were aware of circumstances in which the limited FRAP 26.1 reporting requirements would have permitted a conflict of interest to go undetected, only two of nine judges responding to the question answered affirmatively. Five respondents qualified their answers to our questions by noting that the court's local rule had not been in effect very long.[12]

The reports on these two related, but distinct, questions may appear to present a contradiction. In courts where broader disclosure is routine, there is strong support for information that goes beyond what is required by FRAP 26.1. In those same courts, however, there is only limited evidence favoring the utility of the additional information. The following observation by one of the respondents explains the apparent contradiction:

> Having answered your specific questions, I would like to add my personal view of the utility of our Local Rule, in contrast to that of F.R.A.P. 26.1. I believe we intended that the certificate serve a pro-

[12] In contrast, two respondents indicated that their rule had a long history. An additional respondent volunteered that the court's rule had been in effect two years, but the need to act on the information disclosed occurred rarely.

phylactic function. No matter how careful a judge may be in reviewing cases for possible recusal, there will always be some possibility of an unforeseen circumstance. I think we intended our Local Rule to place the burden on the parties of informing us of any circumstance which could possibly trigger a recusal. Thus, if a judge relies on information in the certificate, but later the necessity for recusal becomes apparent, it will be clear from the public record that the parties did not adequately advise the judge of the relevant facts. While this would not insulate the judge's failure to recuse from judicial scrutiny, it would be helpful in explaining the judge's predicament to the parties and the public.

A District Court's Decision to Repeal Its Local Rule on Financial Disclosure

In the course of our research, we became aware that the District of Kansas recently adopted and then abandoned a local rule on disclosure, finding it excessively burdensome. The circumstances leading to the adoption and repeal were unusual, and we did not find a similar situation in other district courts, but we felt it was important to speak with personnel in that court to learn whether their experience might inform general considerations of whether, and how, to draft such rules. This section summarizes our understanding of the court's experience.[13]

Newspaper articles appearing in May 1998 reported that some federal judges in the Kansas City area had presided over suits involving companies in which the judges owned stock. Judges in the District of Kansas responded to the articles by adopting a local rule requiring counsel to disclose financial information in civil cases. The rule, which was intended to help inform judicial disqualification and recusal decisions, went into effect on January 1, 1999.[14]

Local Rule 3.2 required every party in every civil case to attach a Certificate of Interested Parties to the party's initial pleading. The rule stated that sanctions of dismissal or default judgment would be imposed on parties failing to comply with the rule.[15] Attorneys complied by identifying, as applicable:

(1) all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, or other legal entities financially interested in the outcome of the litigation;

(2) all parent and subsidiary corporations for corporate parties and interested entities;

(3) all parties not named in the caption of the initial pleading or paper; and

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[13] Honorable John W. Lungstrum (U.S. District Court Judge), Sheryl Loesch (chief deputy clerk), Ingrid Campbell (office supervisor), and Lee Kinzer (operations manager) spoke candidly and were especially helpful in describing the court's experience. In addition to their reports, we have also relied on information in a letter written by and provided to us by the clerk of the court, Ralph De Loach. This letter described several problems encountered with the rule, and was addressed to Abel Mattos, an Administrative Office employee who staffs the Judicial Conference Committee on Court Administration and Case Management.

[14] The court also developed an education program to raise awareness of the issue with judges and chambers staff, and installed software in the clerk's office to automatically screen for conflicts of interest.

[15] Only one other district court, the Southern District of Texas, explicitly states that failure to comply with disclosure requirements may result in sanctions, including dismissal of the action and assessment of fees and costs. The timing of the disclosure statement and the parties to whom the rule applies differ substantially from the timing and parties covered by the District of Kansas rule. The Southern District of Texas requires disclosure from parties that have proceeded to the pretrial conference stage.

(4) attorneys not entering an appearance in the court who have appeared for any party in any administrative proceedings sought to be reviewed, or in any related proceedings that preceded the action being pursued in the court.

Court sources reported that problems with the rule arose soon after it was enacted. One set of problems derived from how the rule was implemented and administered. To safeguard against early, inadvertent rulings in cases presenting a conflict of interest, the court required compliance with the rule before a case was allowed to go forward. Clerk's office staff were charged with determining initially whether parties had complied. Resolution of compliance questions required considerable staff time; special docketing codes had to be created to enable the court to track delinquent filing status on certificates; paper generated by various tracking procedures was voluminous. Clerks found aspects of the rule ambiguous and often referred decisions on compliance to chambers staff and the assigned judge for final determination. Many cases were stayed pending resolution of compliance issues and few conflicts were identified.

A few examples of the reported problems may be illustrative. Local Rule 3.2 required every party to attach a Certificate of Interested Parties to its initial pleading or paper. The absence of an attachment might signal either that parties had no information to disclose or, alternatively, might present an instance of noncompliance. Paperwork would go to chambers with a label indicating that the party was "possibly" non-compliant. The interpretation of "initial pleading or paper" as a trigger for the filing requirement was also grounds for confusion, since initial pleadings may appear under various titles, and many filings fail to conform to the traditional complaint-answer sequence. If a complaint were followed by a respondent's motion to extend time, for example, docket clerks had to seek clarification on whether to consider the motion as the initial pleading.

Another set of problems followed from differences in how vigorously the court's judges pursued compliance. Some judges were strict about compliance, and would stay proceedings until statements were filed. Other judges allowed cases to proceed, because the disclosure statements were not needed for their own recusal determinations. The latter group of judges included those with few or no assets presenting possible conflicts of interest, and those who, after publication of the newspaper articles, took the initiative of providing the clerk's office with a list of their corporate holdings. Judges who made their holdings publicly available held counsel responsible for consulting the lists and bringing potential conflicts of interest to their attention. The ambiguities complicated the work of clerk's office staff, who were responsible for seeking compliance and notifying parties that their failure to comply would result in sanctions if compliance was not forthcoming.

Counsel, we were told by court sources, often found compliance burdensome, owing to the volume and detail of information required. This was true particularly in cases where legal relationships between various entities were complex. We were told that parties found the reach of the disclosure requirement confusing, and the effort to compile and cross-check lists expensive and time-consuming. Court staff reportedly spent a lot of time advising counsel on the filing requirements.

The judges of the court repealed Rule 3.2 in April 1999, a few months after enactment. The vote to repeal was unanimous, and no alternative local rule was adopted. The court now leaves it to individual judges to decide whether disclosure is required in cases before

them. Two of the court's judges still require parties to file financial interests information. The three judges who made the names of portfolio-held companies publicly available continue to do so and provide the clerk's office with monthly updates. All judges with a potential need to recuse for financial reasons provide the Clerk's office with information compatible with the court's automated screening software.

Many of the problems experienced with Rule 3.2 were administrative in nature. The problems and inefficiencies of the newly instated procedure placed obvious burdens on court staff, but several factors make conclusions about the shortcomings of the procedure risky. First, the procedure was in effect for only a short a period of time. With increasing experience, it is reasonable to expect that staff would develop operating procedures to address questions they struggled with initially. Increasing experience and education efforts should also reduce confusion experienced by the bar. Second, minor changes to the rule's provisions might greatly reduce procedural and administrative ambiguity. Amending the rule to require (negative) disclosure statements from parties with nothing to disclose, for example, would clarify whether compliance was reached in individual cases. Third, the court appears to have operated with parallel systems in place for potential financial conflicts of interest. Some judges provided financial interests information to parties, while others collected such information from parties. The commitment to seeing parties comply with the rule would likely depend on which custom the judge favored.

Because of these circumstances, lessons that the Rules Committee or other district courts might take away from the District of Kansas experience are somewhat limited. Our interviewees advocated the practice of making judicial financial information available for party inspection in lieu of having parties file disclosure under local rule provisions. Many federal judges are likely to resist public posting of assets, however, and the events in Kansas suggest the potential for problems arising when a local rule is in tension with the practices of individual judges. On balance, the Kansas experience may be most informative as a demonstration of what can, but need not, go amiss when a court implements requirements for parties to file financial interests information.

Part IV. Analysis of Financial Disclosure Filing Requirements in the Bankruptcy Courts and Bankruptcy Appellate Panels

The district court in which a bankruptcy case commences has jurisdiction over the case, and a district court judge may handle first-level bankruptcy adjudication. The district courts additionally hear appeals from final judgments, orders, and decrees of the bankruptcy court. Typically, however, a district court will refer a bankruptcy matter to the bankruptcy judges in the district's associated bankruptcy court. Most of the bankruptcy courts have local rules governing procedural aspects of bankruptcy cases referred from the district court. Consequently, requirements for financial disclosure in bankruptcy matters may be found in both the district courts and the bankruptcy courts. Our search for bankruptcy courts with local rule requirements for financial disclosure turned up four such courts. Table 4 identifies the bankruptcy courts and their provisions.[16]

Table 4. U.S. Bankruptcy Courts Requiring Party Disclosure of Financial Interests Information

Court	Local Rule or Directive	Rule Title
Bankruptcy Court for the District of Columbia	LBankrR 5004-1	Disclosure of Corporate Affiliations and Financial Matters
Bankruptcy Court for the S.D. Georgia	Uniformity of Practice Statement	Local Rules for Bankruptcy Cases; Uniformity of Practice Statement
Bankruptcy Court for the C.D. Illinois	District Court General Rule 1.1	The general and civil rules of the district court apply in all of the courts in the district.
Bankruptcy Court for the D. Maine	LBankrR 1002-1(b)(3)	Disclosure Statement

Each of the bankruptcy courts listed in Table 4 is in a district where the district court has a financial disclosure rule in effect. With the exception of the bankruptcy court in the District of Maine, the bankruptcy courts follow the disclosure rule of the district court. Local Rule 5004-1 of the bankruptcy court for the District of Columbia states that the applicable rule from the district court applies to adversary proceedings and contested matters in the bankruptcy court. The Uniformity of Practice Statement in the local rules of the bankruptcy court for the S.D Georgia directs that the relevant rule of the district court applies by incorporation to bankruptcy cases and proceedings. General Rule 1.1 of the district court for the C.D. Illinois directs that the general and civil rules of the court apply in all of the courts in the district, including the bankruptcy court.

Parties appealing a final judgment from the bankruptcy court to the district court in the Central District of California are subject to filing requirements under local bankruptcy rules of the district court (see Table 2). Parties moving to withdraw reference from the bankruptcy court to the district court must meet the same filing requirements. The bankruptcy court for the Central District of California does not, however, require disclosure in cases referred from the district court.

[16] Standard Bankruptcy Form 7, Statement of Financial Affairs, is completed by debtors and provides the court some, albeit limited, financial information.

Pursuant to 28 U.S.C. §158(b), appeals from bankruptcy court judgments, orders, and decrees may be heard by a bankruptcy appellate panel instead of a district court. The panels consist of three sitting bankruptcy judges designated by the circuit council. Six circuit judicial councils have established such bankruptcy appellate panels.[17] Four of the courts of appeals in those six circuits have a local rule requiring disclosure of financial interests information. Table 5 lists the courts and their rules.

Table 5. Bankruptcy Appellate Panel Rules Requiring Party Disclosure of Financial Interests Information

Bankruptcy Appellate Panel	Local Rule	Rule Title
Second Circuit	BAP LR 8009.1(c)	Disclosure of Interested Parties
Eighth Circuit	BAP LR 8009.A(1)	Certification of Interested Parties
Ninth Circuit	BAP LR 5(c)	Certification as to Interested Parties
Tenth Circuit	BAP LR 8001-2(b)	Certificate of Interested Parties

Financial Disclosure Requirements in the Bankruptcy Courts and Bankruptcy Appellate Panels

Tables summarizing bankruptcy court local rules and provisions for handling appeals by bankruptcy appellate panels follow. The format is identical to tables summarizing the district court provisions.

[17] Circuit court of appeals with BAP programs are the First, Second, Sixth, Eighth, Ninth, and Tenth circuits. The district courts within a circuit are not required to participate. Only the Ninth Circuit has full participation by all district courts within the circuit.

U.S. Bankruptcy Court for the District of Columbia

Local Bankruptcy Rule 5004-1, Disclosure of Corporate Affiliations and Financial Matters

Local Bankruptcy Rule 5004-1 does not yet reflect recently completed revisions to the District Court Local Rules. Local Bankruptcy Rule 5004-1 should reference Local Civil Rule 26.1 in lieu of Local District Rule 109. Local Bankruptcy Rule 5004-1 currently reads: "Local District Rule 109 applies to adversary proceedings and contested matters in the Bankruptcy Court, with the required certificate to be filed in contested matters with a party's paper commencing the contested matter or a party's paper opposing the relief sought in the contested matter."

Who must file
Corporate parties and corporate intervenors to adversary proceedings and contested matters in the bankruptcy court.

Required information
In conformance with Local District Rule 109 (now Local Civil Rule 26.1) of the District Court for the District of Columbia, a party or intervenor must identify any parent, subsidiary, or affiliate of that party or intervenor which has any outstanding securities in the hands of the public.

Time of initial filing
With a party's paper commencing the contested matter or a party's paper opposing the relief sought in the contested matter.

Negative report
The local rule is silent.

Disclosure form
The form prescribed is the same as for the district court.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy cases.

Obligation to update
Stated in the district court local rule, so applicable in bankruptcy matters as well.

Note
Local Bankruptcy Rule 5004-1 makes parties to adversary proceedings and contested matters in the bankruptcy court subject to the same disclosure provisions required by the district court.

U.S. Bankruptcy Court for the Southern District of Georgia

Local Rules for Bankruptcy Cases: Uniformity of Practice
The Uniformity of Practice Statement directs that Civil Local Rule 3.2 of the U.S. District Court for the Southern District of Georgia applies by incorporation to bankruptcy cases and proceedings.

Who must file
All private (non-government) parties.

Required information
In conformance with Local Rule 3.2 of the district court, parties identify all parties; officers, directors, or trustees of parties; and all other persons, associations of persons, firms, partnerships, corporations, or organizations which have a financial interest in, or another interest which could be substantially affected by, the outcome of the particular case.

Time of initial filing
The local rule is silent.

Negative report
The local rule is silent.

Disclosure form
Certificate of Interested Parties, located in the Appendix of Forms to the Local Rules.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy cases in bankruptcy court.

Obligation to update
The local rule is silent.

U.S. Bankruptcy Court for the Central District of Illinois

General Rule 1.1 of the U.S. District Court for the Central District of Illinois directs that the general and civil rules of the court apply in all of the courts in the district.

U.S. Bankruptcy Court for the District of Maine

Bankruptcy Rule 1002-1(b)(3), Disclosure Statement

Who must file
Non-governmental, non-individual debtors.

Required information
Identification of all "affiliates" and "insiders", as defined in 11 U.S.C. §101(2),(31).4

Under 11 U.S.C. §101(2) "affiliate" means—

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

Under 11 U.S.C. §101(31) an "insider" includes—

(A) if the debtor is an individual: (i) relative of the debtor or of a general partner of the debtor; (ii) partnership in which the debtor is a general partner; (iii) general partner of the debtor; or (iv) corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation: (i) director of the debtor; (ii) officer of the debtor); (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership: (i) general partner of the debtor; (ii) relative of a general partner in, general partner of, or person in control of the debtor; (iii) partnership in which the debtor is a general partner; (iv) general partner of the debtor; or (v) person in control of the debtor;

(D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;

(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and

(F) managing agent of the debtor.

Time of Filing
With the petition or within fifteen days thereafter.

Negative report
The local rule is silent.

Disclosure form
The local rule is silent.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy cases and proceedings under Title 11 pending in the district court and in the bankruptcy court (Local Bankruptcy Rule 1001-1).

Obligation to update
The local rule is silent.

Bankruptcy Appellate Panels in the Second Circuit Court of Appeals

BAP Local Rule 8009.1(c), Disclosure of Interested Parties

Who must file
Private (non-governmental) parties.

Required information
Identification of persons, associations of persons, firms, partnerships and corporations which may have an interest in the outcome of the case; identification of the connection and interest in the appeal.

Time of Filing
With the initial brief.

Negative report
The local rule is silent.

Disclosure form
The general form of the disclosure certificate is prescribed in the BAP rule.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy appeals before a bankruptcy appellate panel.

Obligation to update
The local rule is silent.

Note
The information is provided on the inside cover of the initial brief.

Bankruptcy Appellate Panels in the Eighth Circuit Court of Appeals

BAP Local Rule 8009.A(1), Certification of Interested Parties

Who must file
Appellant (and appellee if the appellee exercises the option to prepare and file a separate appendix with its brief, Internal Operating Procedures Manual at IOP III.B.2).

Required information
Identification of parties that have an interest in the outcome of the appeal; identification of the connection and interest in the appeal.

Time of Filing
At the same time as a party's brief (Internal Operating Procedures Manual at IOP III.B.2).

Negative report
The local rule is silent.

Disclosure form
The general form of the disclosure certificate is prescribed in the BAP rule.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy appeals before a bankruptcy appellate panel.

Obligation to update
The local rule is silent.

Note
The information is provided in an appendix to the appellant's brief.

Bankruptcy Appellate Panels in the Ninth Circuit Court of Appeals

BAP Local Rule 5(c), Certification as to Interested Parties

Who must file
Parties.

Required information
Identification of all persons, associations of persons, firms, partnerships and corporations which have an interest in the outcome of the case.

Time of Filing
The local rule is silent.

Negative report
The local rule is silent.

Disclosure form
The general form of the disclosure certificate is prescribed in the BAP rule.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy appeals before a bankruptcy appellate panel.

Obligation to update
The local rule is silent.

Note
The information is provided on the inside cover of the initial brief.

Bankruptcy Appellate Panels in the Tenth Circuit Court of Appeals

BAP Local Rule 8001-2(b), Certificate of Interested Parties

Who must file
Parties, including pro se parties (BAP Rule 8001-2(a)).

Required information
Identification of all parties to the litigation not revealed by the caption of the notice of appeal; identification of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, or other legal entities that are financially interested in the outcome of the litigation; for corporations, identification of all parent corporations and identification of any publicly held company that owns 10 percent or more of the corporation's stock; an individual listing is not necessary if a large group of persons or firms can be specified by a generic description; identification of attorneys not entering an appearance in the court who have appeared for any party in the bankruptcy court case or proceeding sought to be reviewed, or in related proceedings that preceded the original action being pursued in this court.

Time of Filing
With each entry of appearance; first entry of appearance should be filed within ten days after service of notice that the appeal has been docketed with the court (BAP Rule 8001-2(a)).

Negative report
Required.

Disclosure form
Form 3. Entry of Appearance, Certificate of Interested Parties, and Oral Argument Statement, located in BAP L.R. Appendix A.

Number of copies
The local rule is silent.

Scope of applicability
Bankruptcy appeals before a bankruptcy appellate panel.

Obligation to update
Stated.

Part V. Summary and Conclusions

The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is evaluating whether a national rule requiring party disclosure of financial interests information in district and bankruptcy courts is necessary, and if so, how the rule should be structured. To assist the committee with its work, the Federal Judicial Center studied practices and variations in methods that are in use in courts where financial information from parties is collected. Our study revealed the following: (1) more than half of the circuit courts of appeals require broader disclosure than the disclosure provided by FRAP 26.1; (2) a significant number of district courts have rules or procedures requiring disclosure; and (3) few bankruptcy courts require disclosure. The variations in the practices of the appellate, district, and bankruptcy courts are numerous. In a review of current practices, we found no consensus approach.

Courts of Appeals

Federal Rule of Appellate Procedure 26.1 is currently the only federal rule that requires disclosure of financial interests information. The rule obligates non-governmental corporate parties to file a statement identifying parent corporations and companies owning 10 percent or more of the party's stock. The disclosure required by FRAP 26.1 is limited, both in terms of who must file (corporate parties only) and what they must file (the identification of parent corporations and publicly held companies owning 10 percent or more stock in the party).

The First, Second, and Eighth circuits make no additional provisions for collecting disclosure information. In contrast to these courts of appeals, the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, District of Columbia, and Federal circuits require additional information from parties by local rule.

The appellate courts expand disclosure required under FRAP 26.1 in two ways. They either broaden the range of parties subject to disclosure and/or they expand the scope of information to be filed. All ten appellate courts with local rules broaden the range of parties who must file information. All except the Seventh and Federal circuits additionally expand the scope of information to be filed.[18]

The additional filing requirements involve two types of information. The first is information that identifies groups of entities with a financial or business connection to the party, over and above the connection that exists by reason of being a parent corporation or company owning 10 percent or more of the party's stock. Parties are usually guided by a listing of entities considered applicable to the requirement; if such disclosure is required, the listing is specified in the local rule of the court.

The second type of information is information that identifies entities with a general financial interest in the outcome of the litigation. Again, the local rule will normally provide guidance by providing a listing of types of entities that must be disclosed.

The appellate court local rules vary substantially. The two most important differences involve who must file disclosure information and what must be filed. These differences

[18] The Seventh Circuit rule requires a listing of law firms and lawyers who have appeared, or will appear, for the party, but for the purpose of this report, this information is not considered an extension of the FRAP 26.1 requirements on financial disclosure.

define the extent to which the courts collect more information than what FRAP 26.1 requires. Other dimensions defining differences among the rules include the time frame for filing disclosure, whether a statement is required if a party has nothing to report, the number of copies required for submission, the scope of applicability to different appeal types such as civil, bankruptcy, and criminal proceedings, and whether the local rule imposes a continuing obligation on parties to keep financial disclosures updated.

District Courts

There is no national rule corresponding to FRAP 26.1 in the district and bankruptcy courts. Nineteen district courts currently have a similar local rule, however, and several other district courts (or individual judges within a court) have fashioned general orders or alternative procedures for collecting responsive information. In addition to the district courts with active disclosure requirements, two courts that operate under a uniform rules agreement have a proposed rule under consideration.

The local rules from two district courts—the Central District of Illinois and the Eastern District of Wisconsin—conform closely to the disclosure requirements specified in FRAP 26.1. The remaining district courts oblige parties to provide more disclosure.

Local rules in a number of these courts are modeled on the precursor to current FRAP 26.1, which required parties to disclose any subsidiaries and affiliates that issued stock to the public. The local rules in other courts require broader disclosure. Like the appellate courts, the district courts provide for the additional information in two ways. They either broaden the range of parties subject to disclosure or they expand the scope of information to be filed. Expanding the scope of information entails identifying groups of entities with various financial or business connections to the party, or identifying, more generally, entities with an interest in the outcome of the litigation. Often, the local rules are quite specific as to what types of entities must be disclosed. These entities may include not only parent corporations, subsidiaries, and affiliates, but also trade associations, partnerships, conglomerates, insurers, and others.

Variations in the district court rules and procedures are numerous. The important variations reflect differences in who must file disclosure information, the types of cases covered by the local rule (some courts limit the application to civil litigants only, others apply the rule more widely), and the type of information that must be filed. Other dimensions that produce differences among the rules include the time frame for filing disclosure, whether a statement is required if a party has nothing to report, the number of copies required for submission, and whether the local rule imposes a continuing obligation on parties to keep financial disclosures updated.

To assess the effectiveness of the disclosure requirements in the district courts, we wrote to chief judges (or in some instances, individual judges) in courts with local rules or procedures for collecting broad financial information. We asked whether the judges in the district found their local rule's requirement for "additional" information useful in detecting conflicts of interest. Eleven of the twelve judges who answered the question indicated that the information was useful. We went on to ask whether the judge was aware of circumstances where limiting the disclosure to FRAP 26.1 requirements would have failed to alert a judicial officer to a conflict of interest. Only two of the seven judges answering the question answered affirmatively. Judges in courts with broader disclosure

requirements than FRAP 26.1 favor those broader requirements, even though empirical support for their effectiveness cannot be demonstrated.

We also solicited views from the chief judges of two courts requiring limited disclosure. Both indicated that the local rule in their court, modeled after the current version of FRAP 26.1, permitted judges to identify potential financial conflicts of interest. Neither was aware of circumstances in their courts where the local rule had failed to provide sufficient information to detect a conflict of interest.

In the course of our research, we learned that judges in the District of Kansas recently enacted, and then repealed, a local rule requiring parties to disclose substantial amounts of financial interest information. Unlike other district court rules, Rule 3.2 of the District of Kansas anticipated that dismissal or default sanctions would be imposed on parties failing to comply with its provisions. Court sources told us that problems with the rule arose soon after the rule was enacted, and that these problems threatened to overwhelm staff in the clerk's office. The problems described to us involved drafting, administration, and enforcement issues. The court abandoned the procedure after finding that the burden of enforcing the rule outweighed the value of the information collected.

Bankruptcy Courts and Bankruptcy Appellate Panels

Our research indicated that only four bankruptcy courts, those in the District of Columbia, Southern District of Georgia, Central District of Illinois, and the District of Maine, have rules or procedures for collecting financial disclosure information. With the exception of the bankruptcy court in the District of Maine, the bankruptcy courts follow the disclosure rule in effect in the district court. The bankruptcy court in the District of Maine has a local rule tailored to bankruptcy practice.

Appeals taken to bankruptcy appellate panels are covered by disclosure requirements in four circuits.

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Rule 51: Requests Before Trial and More

Rule 51 was considered briefly at the March, 1998 meeting, in response to a memorandum that was substantially the same as the version set out below. The immediate impetus was provided by the Ninth Circuit proposal to legitimate local rules that require that proposed instructions be filed before trial. The Committee agreed with the suggestion that the question should not be left to disposition by local rules — there should be a uniform national practice, whatever may prove to be the best practice. The Committee also concluded that if the rule is changed to allow a pretrial deadline for requests, there must be provision for supplemental requests to reflect new issues that first appear at trial. Finally, the Committee concluded that further thought should be given to other possible changes in Rule 51. There was no commitment to any change, but the topic was held for further study. The draft set out below has been on the agenda at each subsequent meeting, but has not commanded time for discussion.

The Criminal Rules Advisory Committee earlier took up the same issue and published for comment a revised Criminal Rule 30 that would provide for instruction requests "at the close of the evidence, or at any earlier time that the court reasonably directs." The Committee Note said: "While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment now permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57." In an attempt at coordination, a copy of the Civil Rules memorandum was provided to the Criminal Rules Committee. At their October, 1998 meeting, they expressed an interest in the broader questions addressed to Civil Rule 51 and suggested that the Civil Rules Committee take the lead in considering these questions. It also was earnestly suggested by several members of the Criminal Rules Committee that it would be desirable to require that instructions always be given before final arguments. The proposed revision in Criminal Rule 30 has been incorporated into the style revision of the Criminal Rules, and will be published for comment as part of the style project with an eye toward adoption with the style package.

There is no indication that the Criminal Rules Committee feels an urgent need for prompt revision of the rules on jury instructions. There is a real question whether it is wise for this Committee to take up consideration of Civil Rule 51 now, in face of the prospect that consideration of comments and testimony on the proposed discovery amendments may monopolize the time available at the spring meeting. It may be helpful, however, to begin the discussion of Rule 51. The most important question is whether the time has come to rewrite the rule so that it more nearly reflects current practices. The draft rule illustrates the kinds of issues that would be considered if the task is attempted. Other issues almost certainly will arise, and of course the best resolutions of the issues remain to be identified.

The Ninth Circuit Beginning

In the wake of its review of local rules, the Ninth Circuit Judicial Council has recommended that Civil Rule 51 be amended "to authorize local rules requiring the filing of civil jury instructions before trial." This recommendation raises at least three distinct questions. The most obvious is whether it is good policy to require that requests for instructions be filed before trial in some cases or in all cases. If pretrial request deadlines are desirable, it must be decided whether this matter should be confided to local rules or instead should be approached in a national rule. On the face of it, there is no apparent reason to relegate this matter to local option. It is difficult to imagine variations in local circumstances that make this policy more desirable in some parts of the country but less desirable in other parts. No more will be said about this second question. The third and least obvious question is whether a general change in the Rule 51 request deadline should be the only change proposed for Rule 51. Rule 51 notoriously "does not say what it means, and does not mean what it says." If some part of the request-objection-review question is to be addressed, perhaps the rule should be approached as an integrated whole.

Pretrial Instruction Requests

The first sentence of Rule 51 now reads:

> At the close of the evidence or at such earlier time during trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests.

This sentence seems to limit the court's authority to directing that requests filed before the close of the evidence be filed "during trial," not before trial. It is difficult to find anything in the generalities of Rule 16 that can be read as an implicit license to direct earlier requests. Local rules that require pretrial requests are at great risk of being held invalid as inconsistent with Rule 51.

Three principal advantages seem to underlie the interest in pretrial jury requests. Pretrial requests will help the court if it wishes to provide preliminary instructions at the beginning of the trial. All parties will have a better idea of the instructions likely to be given, and can shape trial presentations accordingly; this advantage would be enhanced if the court were required to make at least preliminary rulings on the requests before trial. The court will have more time to consider the requests, particularly if it is not required to make final rulings before trial. There may be incidental advantages as well. The competing requests may focus the dispute in ways that support renewed consideration of motions to dismiss or for summary judgment. The better focus may instead suggest that potentially dispositive issues be tried first, cf. Rules 16(c)(14) and 50(a), or be designated for separate trial. Advantages of this sort are most likely to be realized if the instruction requests are made part of the pretrial conference procedure.

The potential disadvantages of pretrial instruction requests arise from inability to predict just what the evidence will reveal. In smaller part, the problem is that wishful parties may request instructions on issues that will not be supported by trial evidence. In larger part, the problem is that even wishful parties may not anticipate all of the issues that will be supported by trial evidence. It will not do to prohibit requests as untimely when there was good reason to fail to anticipate the evidence that supports the request.

The simplest way to accommodate these conflicting concerns would be to strike the limiting language from Rule 51:

> At the close of the evidence or at such earlier time ~~during the trial~~ as the court reasonably directs, any party may file written requests * * * .

The Committee Note could point to the reasons that may justify a direction that requests be filed before trial, particularly in complex cases. The reasons for caution also should be pointed out. One of the cautions might be a reflection on the meaning of Rule 51's fourth sentence: "No party may assign as error the giving or the failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict * * *." This sentence does not mean that it is enough to make a request for the first time, couched as an "objection," before the jury retires. The objection works only if there was a duty to request, and there is a duty to request only if a timely request is made.

The reason for considering Rule 51 in more general terms is suggested by the cautionary observation that might be written to explain the difference between a request and an objection. It is easy for the uninitiated to misread Rule 51. It can be revised to convey its messages more clearly.

General Rule 51 Revision

Rule 51 can be read easily only by those who already know what it means. A party who wants an issue covered by instructions must do both of two things: make a timely request, and then separately object to failure to give the request as made. The cases that explain the need to renew the request by way of objection suggest that repetition is needed in part to ensure that the court has not simply forgotten the request or its intention to give the instruction, and in part to show the court that it has failed in its attempt to give the substance of a requested instruction in better form. An attempt to address an omitted issue by submissions to the court after the request deadline fails because it is not an "objection" but an untimely request. Many circuits, moreover, recognize a "plain," "clear," or "fundamental" error doctrine that allows reversal despite failure to comply with Rule 51. This doctrine is explicit in the general "plain errors" provision of Criminal Rule 52; the contrast between this general provision and Rule 51 has led some circuits to reject the plain error doctrine for civil jury instructions.

Although unlikely, it also is possible that the formal requirements of Rule 51 may discourage the timid from making untimely requests that would be granted if made. Requests framed as objections may well be given, despite the risk that tardy requests will seduce the court into error, confuse the jury, or at least unduly emphasize one issue.

Present Rule 51 is set out as a prelude to a revised draft, adding only numbers to indicate the points at which distinct thoughts emerge in the text:

> [*1: Requests*] At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. [*2: Instructions*] The court, at its election, may instruct the jury before or after argument, or both. [*3: Objections*] No party may assign as error the giving or the failure to give

an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

The following draft Rule 51 is only an approximation that suggests many of the issues that might be addressed by a comprehensive attempt to adopt a rule that better guides parties and courts:

Rule 51. Instructions to Jury: Objection

(a) Requests. A party may file written requests that the court instruct the jury on the law as set forth in the requests at the close of the evidence or at an earlier reasonable time directed by the court. [Permission must be granted to file supplemental requests at the close of the evidence on issues raised by evidence that could not reasonably be anticipated at the time initial requests were due.] The court must inform the parties of its proposed action on the requests before jury arguments. {The court may, in its discretion, permit an untimely request [to be] made at any time before the jury retires to consider its verdict.}

(b) Objections. A party may object to an instruction or the failure to give an instruction before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity must be given to make the objection out of the jury's hearing.

(c) Instructions. The court may instruct the jury at any time after trial begins. Final instructions must be given to the jury immediately before or after argument, or both.

(d) Forfeiture; plain error

(1) A party may not assign as error a mistake in an instruction actually given unless the party made a proper objection under subdivision (b).

(2) A party may not assign as error a failure to give an instruction unless the party made a proper request under subdivision (a), and — unless the court made it clear that the request had been considered and rejected — also made a proper objection under subdivision (b).

(3) A court may set aside a jury verdict for error in the instructions that has not been preserved as required by paragraphs (1) or (2), taking account of the obviousness of the error, the importance of the error, the costs of correcting the error, and the importance of the action to nonparties.

Committee Note

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The

revisions in text will make uniform the conclusions reached by a majority of decisions on each point.

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(3), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial. Particularly in complex cases, pretrial requests can help the parties prepare for trial. In addition, pretrial requests may focus the case in ways that invite reconsideration of motions to dismiss or for summary judgment. Trial also may be shaped by severing some matters for separate trial, or by directing that trial begin with issues that may warrant disposition by judgment as a matter of law; see Rules 16(c)(14) and 50(a). The rule permits the court to further support these purposes by informing the parties of its action on their requests before trial. It seems likely that the deadline for pretrial requests will often be connected to a final pretrial conference.

The risk in directing a pretrial request deadline is that unanticipated trial evidence may raise new issues or reshape issues the parties thought they had understood. The need for a pretrial request deadline may not be great in an action that involves well-settled law that is familiar to the court. Courts should avoid a routine practice of directing pretrial requests.

Untimely requests are often accepted, at times by acting on an objection to the failure to give an instruction on an issue that was not framed by a timely request. The revised rule expressly recognizes the court's discretion to act on an untimely request. The most important consideration in exercising discretion is the importance of the issue to the case — the closer the issue lies to the "plain error" that would be recognized under subdivision (d)(3), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered — the earlier the request deadline, the more likely it is that good reason will appear for failing to recognize an important issue. Courts also must remain wary, however, of the risks posed by tardy requests. Hurried action in the closing minutes of trial may invite error. A jury may be confused by a tardy instruction made after the main body of instructions, and in any event may be misled to focus undue attention on the issues isolated and emphasized by a tardy instruction.

Objections. No change is intended in the requirements for making objections.

Instructions. Subdivision (c) expressly authorizes preliminary instructions at the beginning of the trial, a device that may be a helpful aid to the jury. In cases of unusual length or complexity, interim instructions also may be made during the course of trial.

Forfeiture and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. An objection, on the other hand, is sufficient only as to matters actually stated in the instructions. Even if framed as an objection, a request to include matter omitted from the instructions is just that, a request, and is untimely after the close of the evidence. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. This doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. The authority to act on an untimely request despite a failure to object is established in subdivision (a). Subdivision (d)(2) establishes authority to review

the failure to grant a timely request, despite a failure to add an objection, when the court has made clear its consideration and rejection of the request.

Many circuits have recognized the power to review errors not preserved under Rule 51 in exceptional cases. The foundation of these decisions is that a district court owes a duty to the parties, to the law, and to the jury to give correct instructions on the fundamental elements of an action. This duty is shaped by at least the four factors enumerated in subdivision (d)(3).

The obviousness of the error reduces the need to rely on the parties to help the court with the law, and also bears on society's obligation to provide a reasonably learned judge. Obviousness turns not only on how well the law is settled, but also on how familiar the particular area of law should be to most judges. Clearly settled but exotic law often does not generate obvious error.

The importance of the error must be measured by the role the issue plays in the specific case; what is fundamental to one case may be peripheral in another. Importance is independent of obviousness. The most obvious example involves law that was clearly settled at the time of the instructions, only to be overruled by the time of appeal.

The costs of correcting an error are affected by a variety of factors. If a complete new trial must be had for other reasons, ordinarily an instruction error at the first trial can be corrected for the second trial without significant cost. A Rule 49 verdict may enable correction without further proceedings.

In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties. Common examples are provided by actions that attack government actions or private discrimination.

Other Possible Revisions

The revisions set out above reflect issues frequently encountered in present practice. At least in large part, they reflect what most courts do. Other possible changes can also be noted:

Serve Requests: Rule 51 does not require that instruction requests be served on all parties. It seems likely that exchange is routine, and that courts will require exchange if the parties fail to do it. It might be helpful to adopt an express requirement that all requests be served on all parties, particularly if the requests are filed before trial.

Make Objections on the Record: It has been held that specific objections made during "extensive discussions off the record in chambers concerning the jury instructions" are not sufficient — that "to preserve an argument concerning a jury instruction for appellate review, a party must state distinctly the matter objected to and the grounds for the objection on the record." Dupre v. Fru-Con Engineering Inc., 8th Cir.1997, 112 F.3d 329, 333-334. Is this a trap for the unwary that should be set out on the face of Rule 51?

Who Must Object: Rule 51 says that a party may not assign as error the giving or the refusing to give an instruction "unless *that* party objects thereto * * *." This requirement is preserved in the draft revision. But why should it not be enough that any party has complied with Rule 51? Particularly when there are coparties, should it not be enough that the matter urged on appeal was properly raised by any party?

Direction to Request: Illinois Supreme Court Rule 239(b) provides: "At any time before or during the trial, the court may direct counsel to prepare designated instructions. * * * Counsel may object at the conference on instructions to any instruction prepared at the court's direction, regardless of who prepared it * * *." Is there any reason to adopt a similar provision for Rule 51?

Anything Else: ?

XII-XIII

Rule 81(a)(2)

The Criminal Rules Advisory Committee recommends that Rule 81(a)(2) be amended as follows:

> (2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions. ~~The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.~~

This proposal will bring Rule 81(a)(2) into accord with the Rules governing § 2254 and § 2255 proceedings; those rules govern as well habeas corpus proceedings under § 2241. In its present form, Rule 81(a)(2) includes return-time provisions that are inconsistent with the provisions in the Rules Governing §§ 2254 and 2255. The inconsistency should be eliminated, and it is better that the time provisions continue to be set out in the other rules without duplication in Rule 81. Rule 81 also directs that the writ be directed to the person having custody of the person detained. Similar directions exist in the § 2254 and § 2255 rules, providing additional detail for applicants subject to future custody. There is no need for partial duplication in Rule 81.

The provision that the Civil Rules apply to the extent that practice is not set forth in the § 2254 and § 2255 rules dovetails with the provisions in Rule 11 of the § 2254[1] Rules and Rule 12[2] of the § 2255 Rules.

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[1] Rule 11: "The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

[2] Rule 12: "If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, or any applicable statute, and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules.

Reporter's Preliminary Note

Civil Rule 81(a)(2): Habeas Corpus Return Time

This Note is cautiously captioned preliminary because your Reporter knows nothing of habeas corpus practice. The problem is presented by Magistrate Judge Mary Stanley Feinberg, whose opinion in *Wyant v. Edwards*, S.D.W.Va. No. 1:97-0023, is appended. It is another in the string of pesky Rule 81 problems that seem to arise because people seem not to bother with consulting Rule 81 when making related rules changes.

One thing that makes the problem pesky is that it is difficult to state directly. The source of the problem begins with the time limits set in 28 U.S.C. § 2243 for the return to a petition for habeas corpus. These limits have been partly superseded by Civil Rule 81(a)(2), which in turn seems to have been superseded by Rules 1(b) and 4 of the Rules Governing Section 2254 Cases. The problem is whether Rule 81(a)(2) should be amended to recognize this apparent supersession, or whether some more drastic course should be taken.

The foundation of federal habeas corpus jurisdiction is set by 28 U.S.C. § 2241. Section 2243 provides that a judge or court entertaining an application for habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted. It further provides that the writ or order to show cause "shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed."

The first supersession of the § 2243 time limits was effected by the 1971 amendment of Civil Rule 81(a)(2). Since 1971, Rule 81(a)(2) has provided:

> **(2)** These rules are applicable to proceedings for * * * habeas corpus * * *, to the extent that the practice in such proceedings is not set forth in statutes of the United States and has heretofore conformed to the practice in civil actions. The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.

The Advisory Committee Note explained the reasons why additional time may be needed for state-prisoner petitions under § 2254. "The substantial increase in the number of such proceedings in recent years has placed a considerable burden on state authorities. Twenty days has proved in practice too short a time in which to prepare and file the return in many such cases. Allowance of additional time should, of course, be granted only for good cause."

The next step came with the adoption of the Rules Governing

Section 2254 Cases, effective on February 1, 1977. Rule 4 provides that the judge may order summary dismissal of a petition.

> Otherwise the judge shall order the respondent to file an answer or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

Rule 4 cuts entirely free of the 3-day, 20-day, and 40-day periods, and likewise drops the "good cause" element. The Advisory Committee Note explains that Rule 4 accords "greater flexibility than under § 2243 in determining within what time period an answer must be made." After briefly describing § 2243 and the modification made by Rule 81(a)(2), the Note says: "In view of the widespread state of work overload in prosecutors' offices * * *, additional time is granted in some jurisdictions as a matter of course. Rule 4, which contains no fixed time requirement, gives the court the discretion to take into account various factors such as the respondent's workload and the availability of transcripts before determining a time within which an answer must be made."

All of this leaves things clear for habeas corpus petitions filed by state prisoners. Rule 4 supersedes both § 2243 and Rule 81(a)(2). Rule 81(a)(2) is, to this extent, misleading. Some amendment is required.

There is no parallel problem for motions for relief by federal prisoners under § 2255. Rule 4(b) of the § 2255 rules provides that the judge "shall order the United States Attorney to file an answer or other pleading within the period of time fixed by the court * * *." The Advisory Committee Note explains that this Rule 4 "has its basis in § 2255 * * * which does not have a specific time limitation as to when the answer must be made."

The awkward problem arises from petitions for habeas corpus filed under § 2241 by people who are not in state custody — and who thus are outside § 2254 and the direct operation of the § 2254 rules — and who are not seeking relief available under § 2255. As to them, there is a compelling argument that the time limits of Civil Rule 81(a)(2) have been superseded by the § 2254 rules through Rule 1(b). Rule 1(a) states that these rules govern the procedure on applications under § 2254. Rule 1(b) states:

> **(b) Other situations.** In applications for habeas corpus in cases not covered by subdivision (a), these rules may be applied at the discretion of the United States district court.

This provision establishes discretion, not a command. Apparently it leaves a district court free to apply the § 2254 rules — including the return-time provision of Rule 4 — or not to apply the rules. The discretion to apply a discretionary time rule, however, is effectively power to supersede the Rule 81(a)(2) limit of 3 days, to be extended only for good cause and for no more than an additional 20 days.

Rule 11 of the § 2254 rules muddies the picture to some extent. It provides:

> The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules.

This provision should not be read to undo the effects of § 2254 Rule 4 on Civil Rule 81(a)(2). For § 2254 petitions, it is clear that Rule 4 supersedes Rule 81(a)(2). There is no reason to ignore Rule 4 under Rule 11, which applies only "to petitions filed under these rules," when dealing with a habeas corpus petition that is not filed under § 2254 and thus is not literally "filed under these rules."

The conclusion that § 2254 Rule 4 supersedes the return-time limits of Civil Rule 81(a)(2) is supported by such scant authority as appears to exist. The history is explored in Judge Feinberg's opinion. The clear ruling was made in Kramer v. Jenkins, N.D.Ill.1985, 108 F.R.D. 429, a habeas corpus proceeding brought by a petitioner in federal custody. Judge Nordberg concluded that Rule 4 supersedes § 2243 time limits under the supersession clause of the Rules Enabling Act, 28 U.S.C. § 2072. Rule 4 likewise supersedes Civil Rule 81(a)(2) because it was adopted several years after Rule 81(a)(2) was amended. In Clutchette v. Rushen, 9th Cir.1985, 770 F.2d 1469, 1473-1475, the court, dealing with a petition under § 2254 by a state prisoner, confirmed that Rule 4 supersedes both the specific day limits and the good cause requirement of Rule 81(a)(2). (Bennett v. Collins, E.D.Tex.1993, 835 F.Supp. 930, reflects the many extensions of return time that were permitted before the respondent's persistent delays in meeting even generously extended limits drove the court to impose sanctions.)

The result seems to be clear enough. The 3-day, 20-day, and 40-day return-time limits in Rule 81(a)(2), and the good-cause limit, have been superseded by Rule 4. Supersession is direct for all cases covered by § 2254. In other cases, it requires exercise of the district court's discretion to invoke Rule 4 through Rule 1(b).

It is not clear whether this result was intended. There are seemingly persuasive reasons to embrace it nonetheless. Return time is governed by district court discretion in habeas corpus proceedings brought by state prisoners under § 2254, and also in § 2255 proceedings. Only habeas corpus petitions that fall outside these more common proceedings remain for Rule 81(a)(2). It would be convenient to have a single procedure for all of these proceedings.

The contrary argument would be that indeed different time limits are appropriate for habeas corpus proceedings brought by people in federal detention and outside of § 2255. It may be urged that these cases often present special needs for prompt action that were responsible for the initially tight time periods set by § 2243. It also may be urged that these petitions do not present the problems confronting state officials besieged with torrents of habeas corpus petitions.

The balance of these arguments can be struck only by those familiar with the realities of practice in the habeas corpus proceedings that present the question. It would be desirable to provide a clear answer in the rules once the answer is found. The simplest solution would be to delete the time provisions from Rule 81(a)(2). It might be better to adopt the Rule 4 time provisions into Rule 81, so as to avoid the need to work through Rule 1(b) and Rule 4. But if the Rule 4 approach is not suited to non-§ 2254 habeas corpus proceedings, then a specific provision must be crafted for Rule 81(a)(2).

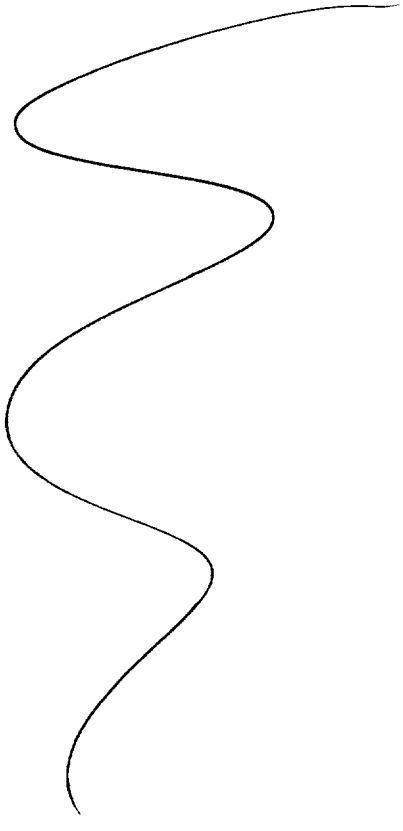
As a final note, there may be some advantage in combining this question with other Rule 81 questions now on the docket. The question of copyright practice has long been on the Committee's agenda. The final sentence of Rule 81(a)(1) also is on the agenda; it refers to mental health proceedings in the United States District Court for the District of Columbia, proceedings that no longer seem to exist.

Supplemental

Agenda

Book

Materials



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WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

March 30, 2000

MEMORANDUM TO THE CIVIL RULES COMMITTEE

SUBJECT: *Agenda Material and Dinner on April 10, 2000, at 6:30 P., in Washington, D.C.*

I am attaching the agenda book for the Civil Rules meeting in Washington, D.C. I am also attaching the Civil Docket Sheet and material regarding *Special Masters*, prepared by the Federal Judicial Center. Please bring the materials with you to the meeting.

The meeting will be held on Monday and Tuesday, April 10 and 11, in the Judicial Conference Center of the Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E. It will be held each day at 8:30 a.m. to 5:00 p.m. Juice, breakfast breads, coffee, and tea will be available at the meeting.

On behalf of Judge Niemeyer, I have arranged a committee dinner for Monday evening, April 10, at 6:30 p.m., at the DC Coast Restaurant. The restaurant is located at The Tower Building, 1401 K Street, N.W. - a 10 minute taxi ride from the Washington Marriott Hotel.

I have attached a copy of the menu; selections will be made at the dinner. Alcoholic beverages, specialty drinks, and bottled water will be available at the dinner upon request and for cash payment.

Spouses and guests are welcome at the dinner. If you or your spouse or guest plan to attend, please fax the attached form to (202) 502-1755 **or advise my office by 12 Noon, Eastern Time, on Thursday, April 6. The restaurant requires a final count of dinners three days before the dinner, after which time the Rules Office will be charged for any cancellations**.

Please note that we will pay for your dinner directly by government purchase order to eliminate incurring state taxes. Therefore, do not send a check to me for the cost of your meal and do not submit the meal expense on your travel voucher for reimbursement. The cost of your dinner is $55.38 and should be subtracted from your allowable expenses of $302 for that day. **If your spouse, guest, or companion will be attending the dinner, however, please send a check to me for $60.88 per person, because that cost is not included in the purchase order.** The check can arrive at my office after the date of the meeting.

If you have any questions, please call Anne Rustin or Judy Krivit at (202) 502-1820.

John K. Rabiej

Attachments

cc: Honorable Anthony J. Scirica

DC Coast Restaurant
Dinner Menu

Platters of Hors d Oeuvres:

Lobster Springrolls with Creamy Sesame Sauce,

Mini Crabcakes with Creole Remoulade Sauce, and

Roasted Pepper and Pesto Bruschetta.

Choice of Entree:

Mushroom Crusted Halibut, with Portobello Mushroom, Truffled Potatoes and Porcini Broth, or

Grilled Cowboy Cut Angus Ribeye, with Green Chili Macroni and Cheese, and Tumbleweed of Crisp Onions.

Choice of Dessert:

Macadamia Crusted Chocolate Tart, with Carmelized Pineapple Sauce and Banana Cream, or

Fresh Berries.

Coffee or Tea.

DINNER AT DC COAST RESTAURANT

Civil Rules Committee
April 10, 2000
6:30 P.M.

Please notify my office of your decision to attend the dinner by 12 Noon, Eastern time, on Thursday, April 6. You can fax this form to my office at 202-502-1755.

Name_____

I will attend____ I will not attend____

Number attending____

AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
[Financial disclosure statement]	Request by committee on Codes of Conduct 9/23/98	11/98 — Cmte considered 3/99 — Agenda Subcmte rec. Hold until more information available (2) 4/99 — Cmte considered; FJC study initiated 10/99 — Discussed **PENDING FURTHER ACTION**
[Copyright Rules of Practice] — Update	Inquiry from West Publishing	4/95 — To be reviewed with additional information at upcoming meetings 11/95 — Considered by cmte 10/96 — Considered by cmte 10/97 — Deferred until spring '98 meeting 3/98 — Deferred until fall '98 meeting 11/98 — Request for publication 1/99 — Stg. Cmte. approves publication for fall 8/99 — Published **PENDING FURTHER ACTION**
[Admiralty Rule B, C, and E] — Amend to conform to Rule C governing attachment in support of an in personam action	Agenda book for the 11/95 meeting	4/95 — Delayed for further consideration 11/95 — Draft presented to cmte 4/96 — Considered by cmte 10/96 — Considered by cmte, assigned to Subcmte. 5/97— Considered by cmte 10/97 — Request for publication and accelerated review by ST Cmte 1/98 — Stg. Com. approves publication at regularly scheduled time 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct **PENDING FURTHER ACTION**
[Admiralty Rule-New]— Authorize immediate posting of preemptive bond to prevent vessel seizure	Mag. Judge Roberts 9/30/96 (96-CV-D) #1450	12/24/96— Referred to Admiralty and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) **PENDING FURTHER ACTION**
[Inconsistent Statute] — 46 U.S.C. § 786 inconsistent with admiralty	Michael Cohen 1/14/97 (97-CV-A) #2182	2/97 — Referred to reporter and chair Supreme Court decision moots issue **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Non-applicable Statute]— 46 U.S.C. § 767 Death on the High Seas Act not applicable to any navigable waters in the Panama Canal Zone	Michael Marks Cohen 9/17/97 (97-CV-O)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Subcmte rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[Admiralty Rule C(4) — Amend to satisfy constitutional concerns regarding default in actions *in rem*	Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) **PENDING FURTHER ACTION**
[CV4(c)(1)] — Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 — Deferred as premature **DEFERRED INDEFINITELY**
[CV4(d)] — To clarify the rule	John J. McCarthy 11/21/97 (97-CV-R)	12/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Subcmte rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV4(d)(2)] — Waive service of process for actions against the United States	Charles K. Babb 4/22/94	10/94 — Considered and denied 4/95 — Reconsidered but no change in disposition **COMPLETED**
[CV4(e) & (f)] — Foreign defendant may be served pursuant to the laws of the state in which the district court sits	Owen F. Silvions 6/10/94	10/94 — Rules deemed as otherwise provided for and unnecessary 4/95 — Reconsidered and denied **COMPLETED**
[CV4(i)] — Service on government in Bivens suits	DOJ 10/96 (96-CV-B; #1559)	10/96 — Referred to Reporter, Chair, and Agenda Sub cmte. 5/97 — Discussed in reporter's memo. 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions **PENDING FURTHER ACTION**
[CV4(m)] — Extension of time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 — Considered by cmte **DEFERRED INDEFINITELY**
[CV4]— Inconsistent service of process provision in admiralty statute	Mark Kasanin	10/93 — Considered by cmte 4/94 — Considered by cmte 10/94 — Recommend statutory change 6/96 — Coast Guard Authorization Act of 1996 repeals the nonconforming statutory provision **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV4] — To provide sanction against the willful evasion of service	Judge Joan Humphrey Lefkow 8/12/97 (97-CV-K)	10/97 — Referred to Reporter, Chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV5] — Electronic filing		10/93 — Considered by cmte 9/94 — Published for comment 10/94 — Considered 4/95 — Cmte approves amendments with revisions 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED**
[CV5] — Service by electronic means or by commercial carrier; fax noticing produces substantial cost savings while increasing efficiency and productivity	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96; 9/10/97 (97-CV-N); William S. Brownell, District Clerks Advisory Group 10/20/97 (97-CV-Q)	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee 5/97 — Discussed in reporter's memo. 9/97 — Information sent to reporter, chair, and Agenda Sub cmte. 11/98 — Referred to Tech. Subcommittee 3/99 — Agenda Sub cmte. rec. Refer to other cmte (3) 4/99 — Cmte requests publication 6/99 — Stg. Comte approves publication 8/99 — Published for comment **PENDING FURTHER ACTION**
[CV5(d)] — Whether local rules against filing of discovery documents should be abrogated or amended to conform to actual practice	Gregory B. Walters, Cir. Exec., for District Local Rules Review Cmte of Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/98 — Cmte. approved draft 6/98 — Stg Cmte approves with revision 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg. Comte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct **PENDING FURTHER ACTION**
[CV5(d)]— Does non-filing of discovery material affect privilege	St Cmte 6/99	10/99 — Discussed **PENDING FURTHER ACTION**
[CV6] — Modifying mailbox rule	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV6(b)] — Enlargement of Time; deletion of reference to abrogated rule (technical amendment)	Prof. Edward Cooper 10/27/97; Rukesh A. Korde 4/22/99 (99-CV-C)	10/97 — Referred to cmte 3/98 — Cmte approved draft with recommendation to forward directly to the Jud Conf w/o publication 6/98 — Stg Cmte approves 9/98 — Jud. Conf. Approves and transmits to Sup. Ct. 4/99 — Supreme Court approve 12/99 — Effective **COMPLETED**
[CV6(e)] — Time to act after service	ST Cmte 6/94	10/94 — Cmte declined to act **COMPLETED**
[CV8, CV12] — Amendment of the general pleading requirements	Elliott B. Spector, Esq. 7/22/94	10/93 — Delayed for further consideration 10/94 — Delayed for further consideration 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(b)] — General Particularized pleading	Elliott B. Spector	5/93 — Considered by cmte 10/93 — Considered by cmte 10/94 — Considered by cmte 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(h)] — Ambiguity regarding terms affecting admiralty and maritime claims	Mark Kasanin 4/94	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Approved for publication 9/95 — Published 4/96 — Forwarded to the ST Cmte for submission to Jud Conf 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Supreme Court 12/97 — Effective **COMPLETED**
[CV11] — Mandatory sanction for frivolous filing by a prisoner	H.R. 1492 introduced by Cong Gallegly 4/97	5/97 — Considered by cmte 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) **PENDING FURTHER ACTION**
[CV11] — Sanction for improper advertising	Carl Shipley 4/97 (97-CV-G)	5/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV11] — Should not be used as a discovery device or to test the legal sufficiency or efficiency of allegations in pleadings	Nicholas Kadar, M.D. 3/98 (98-CV-B)	4/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Await preliminary review by reporter (6) 8/99 — Reporter recommends removal from the agenda 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV12] — Dispositive motions to be filed and ruled upon prior to commencement of the trial	Steven D. Jacobs, Esq. 8/23/94	10/94 — Delayed for further consideration 5/97 — Reporter recommends rejection 11/98 — rejected by cmte **COMPLETED**
[CV12] — To conform to *Prison Litigation Act of 1996*	John J. McCarthy 11/21/97 (97-CV-R)	12./97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full committee consideration (4) **PENDING FURTHER ACTION**
[CV12(a)(3)] —Conforming amendment to Rule 4(i)		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup.Ct. **PENDING FURTHER ACTION**
[CV12(b)] — Expansion of conversion of motion to dismiss to summary judgment	Daniel Joseph 5/97 (97-CV-H) #2941	5/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV14(a) & (c)] — Conforming amendment to admiralty changes		6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct. **PENDING FURTHER ACTION**
[CV15(a)] — Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 — Delayed for further consideration 11/95 — Considered by cmte and deferred **DEFERRED INDEFINITELY**
[CV 15(c)(3)(B)] —Clarifying extent of knowledge required in identifying a party	Charles E. Frayer, Law student 9/27/98 (98-CV-E)	9/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. accumulate for periodic revision (1) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV23] — Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)	5/93 — Considered by cmte 6/93 — Submitted for approval for publication; withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95; studied at meetings. 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — Approved for publication by ST Cmte 8/96 — Published for comment 10/96 — Discussed by cmte 5/97 — Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 — Stotler letter to Congressman Canady 6/97 — Changes to 23(f) were approved by ST Cmte; changes to 23(c)(1) were recommitted to advisory cmte 10/97 — Considered by cmte 3/98 — Considered by cmte deferred pending mass torts working group deliberations 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV23] — Standards and guidelines for litigating and settling consumer class actions	Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97 (97-CV-T)	12/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV23(e)] — Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97 (97-CV-S)	12/ 97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV23(e)] — Require all "side-settlements," including attorney's fee components, to be disclosed and approved by the district court	Brian Wolfman, for Public Citizen Litigation Group 11/23/99 (99-CV-H)	12/99 Referred to reporter, chair, and Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV23(f)] — interlocutory appeal	part of class action project	4/98 — Sup Ct approves 12/98 — Effective **COMPLETED**
[CV26] — Interviewing former employees of a party	John Goetz	4/94 — Declined to act **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV26] —Initial disclosure and scope of discovery	Thomas F. Harkins, Jr., Esq. 11/30/94 and American College of Trial Lawyers; Allan Parmelee (97-CV-C) #2768; Joanne Faulkner 3/97 (97-CV-D) #2769	4/95 — Delayed for further consideration 11/95 — Considered by cmte 4/96 — Proposal submitted by American College of Trial Lawyers 10/96 — Considered by cmte; Sub cmte. appointed 1/97 — Sub cmte. held mini-conference in San Francisco 4/97 — Doc. #2768 and 2769 referred to Discovery Sub cmte. 9/97 — Discovery Reform Symposium held at Boston College Law School 10/97 — Alternatives considered by cmte 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. **PENDING FURTHER ACTION**
[CV26] —Does inadvertent disclosure during discovery waive privilege	Discovery Subcmte	10/99 — Discussed **PENDING FURTHER ACTION**
[CV26] — Presumptive time limits on backward reach of discovery	Al Cortese	10/99 — Removed from agenda **COMPLETED**
[CV26] — Electronic discovery		10/99 — Referred to Subcmte 3/00 — Subcmte met **PENDING FURTHER ACTION**
[CV26(c)] — Factors to be considered regarding a motion to modify or dissolve a protective order	Report of the Federal Courts Study Committee, Professors Marcus and Miller, and Senator Herb Kohl 8/11/94; Judge John Feikens (96-CV-F); S. 225 reintroduced by Sen Kohl	5/93 — Considered by cmte 10/93 — Published for comment 4/94 — Considered by cmte 10/94 — Considered by cmte 1/95— Submitted to Jud Conf 3/95 — Remanded for further consideration by Jud Conf 4/95 — Considered by cmte 9/95 — Republished for public comment 4/96 — Tabled, pending consideration of discovery amendments proposed by the American College of Trial Lawyers 1/97 — S. 225 reintroduced by Sen Kohl 4/97 — Stotler letter to Sen Hatch 10/97 — Considered by Sub cmte. and left for consideration by full cmte 3/98 — Cmte determined no need has been shown to amend **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV26] — Depositions to be held in county where witness resides; better distinction between retained and "treating" experts	Don Boswell 12/6/96 (96-CV-G)	12/96 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV30] — Allow use by public of audio tapes in the courtroom	Glendora 9/96/96 (96-CV-H)	12/96 — Sent to reporter and chair 11/98 — rejected by cmte **COMPLETED**
[CV30(b)] — Inconsistency within Rule 30 and between Rules 30 and 45	Judge Janice M. Stewart 12/8/99 (99-CV-J)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Discovery Sub cmte. **PENDING FURTHER ACTION**
[CV30(b)(1)] — That the deponent seek judicial relief from annoying or oppressive questioning during a deposition	Judge Dennis H. Inman 8/6/97 (97-CV-J)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — rejected by cmte **COMPLETED**
[CV30(d)(2)] — presumptive one day of seven hours for deposition		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. **PENDING FURTHER ACTION**
[CV30(e)] — review of transcript by deponent	Dan Wilen 5/14/99 (99-CV-D)	8/99 — Referred to agenda Subcmte 8/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV32] — Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 — Submitted for consideration 10/96 — Considered by cmte; FJC to conduct study 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV33 & 34] — require submission of a floppy disc version of document	Jeffrey K. Yencho (7/22/99) 99-CV-E	7/99 — referred to Agenda Subcmte 8/99 — Agenda Sub cmte. rec. Refer to other Sub cmte. (3) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV34(b)] — requesting party liable for paying reasonable costs of discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions (moved to Rule 26) 6/99 — Stg Comte approves 9/99 — rejected by Jud. Conf. **COMPLETED**
[CV36(a)] — To not permit false denials, in view of recent Supreme Court decisions	Joanne S. Faulkner, Esq. 3/98 (98-CV-A)	4/98 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — rejected by cmte **COMPLETED**
[CV37(b)(3)] — Sanctions for Rule 26(f) failure	Prof. Roisman	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV37(c)(1)] — Sanctions for failure to supplement discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. **PENDING FURTHER ACTION**
[CV39(c) and CV16(e)] — Jury may be treated as advisory if the court states such before the beginning of the trial	Daniel O'Callaghan, Esq.	10/94 — Delayed for further study, no pressing need 4/95 — Declined to act **COMPLETED**
[CV40] — precedence given elderly in trial setting	Michael Schaefer 1/19/00; 00-CV-A	2/00 — Referred to chair, reporter, and Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV43] — Strike requirement that testimony must be taken orally	Comments at 4/94 meeting	10/93 — Published 10/94 — Amended and forwarded to ST Cmte 1/95 — ST Cmte approves but defers transmission to Jud Conf 9/95 — Jud Conf approves amendment 4/96 — Supreme Court approved 12/96 — Effective **COMPLETED**
[CV43(f)—Interpreters] — Appointment and compensation of interpreters	Karl L. Mulvaney 5/10/94	4/95 — Delayed for further study and consideration 11/95 — Suspended by advisory cmte pending review of Americans with Disabilities Act by CACM 10/96 — Federal Courts Improvement Act of 1996 provides authority to pay interpreters **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV44] — To delete, as it might overlap with Rules of EV dealing with admissibility of public records	Evidence Rules Committee Meeting 10/20-21/97 (97-CV-U)	1/97 — Referred to chair, reporter, and Agenda Sub cmte. 3/98 — Cmte determined no need to amend **COMPLETED**
[CV45] — Nationwide subpoena		5/93 — Declined to act **COMPLETED**
[CV45] — Notice in lieu of attendance subpoenas	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to chair, reporter, and Agenda Sub cmte. 8/99 — Agenda Sub cmte. rec. Remove from agenda 10/99 — Consent calendar removed from agenda **DEFERRED INDEFINITELY**
[CV45] — Clarifying status of subpoena after expiration date	K. Dino Kostopoulos, Esq. 1/27/99 (99-CV-B)	3/99 — Referred to chair, reporter, and Agenda Sub cmte. 8/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV45] — Discovering party must specify a date for production far enough in advance to allow the opposing party to file objections to production	Prof. Charles Adams 10/1/98 (98-CV-G)	10/98 — Referred to chair, reporter, Agenda Sub cmte., and Discovery Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV45(d)] — Re-service of subpoena not necessary if continuance is granted and witness is provided adequate notice	William T. Terrell, Esq. 10/9/98 (98-CV-H)	12/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV47(a)] — Mandatory attorney participation in jury voir dire examination	Francis Fox, Esq.	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Considered by advisory cmte; recommended increased attention by Fed. Jud. Center at judicial training **COMPLETED**
[CV47(b)] — Eliminate peremptory challenges	Judge Willaim Acker 5/97 (97-CV-F) #2828	6/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Cmte declined t take action **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV48] — Implementation of a twelve-person jury	Judge Patrick Higginbotham	10/94 — Considered by cmte 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — ST Cmte approves 9/96 — Jud Conf rejected 10/96 — Cmte's post-mortem discussion **COMPLETED**
[CV50] — Uniform date for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV50(b)] — When a motion is timely after a mistrial has been declared	Judge Alicemarie Stotler 8/26/97 (97-CV-M)	8 /97 — Sent to reporter and chair 10/97 — Referred to Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV51] — Jury instructions filed before trial	Judge Stotler (96-CV-E) Gregory B. Walters, Cir. Exec., for the Jud. Council of the Ninth Cir. 12/4/97 (97-CV-V)	11/8/96 — Referred to chair 5/97 — Reporter recommends consideration of comprehensive revision 1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/98 — Cmte considered 11/98 — Cmte considered 3/99 — Agenda Sub cmte. rec.Ready for full Cmte consideration 4/99 — Cmte considered 10/99 — Discussed **PENDING FURTHER ACTION**
[CV52] — Uniform date for filing for filing post trial motion	BK Rules Cmte	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV53] — Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 — Considered by cmte 10/93 — Considered by cmte 4/94 — Draft amendments to CV16.1 regarding "pretrial masters" 10/94 — Draft amendments considered 11/98 — Subcmte appointed to study issue 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/99 — Discussed (FJC requested to survey courts) **DEFERRED INDEFINITELY**
[CV56] — To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Reporter recommends rejection 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV56(c)] — Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 — Considered by cmte; draft presented 11/95 — Draft presented, reviewed, and set for further discussion 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision **PENDING FURTHER ACTION**
[CV59] — Uniform date for filing for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV60(b)] — Parties are entitled to challenge judgments provided that the prevailing party cites the judgment as evidence	William Leighton 7/20/94	10/94 — Delayed for further study 4/95 — Declined to act **COMPLETED**
[CV62(a)] — Automatic stays	Dep. Assoc. AG, Tim Murphy	4/94 — No action taken **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV64] — Federal prejudgment security	ABA proposal	11/92 — Considered by cmte 5/93 — Considered by cmte 4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV65(f)] — rule made applicable to copyright impoundment cases	see request on copyright	11/98 — Request for publication 6/99 — Stg Cmte approves 8/99 — Published for comment **PENDING FURTHER ACTION**
[CV65.1] — To amend to avoid conflict between 31 U.S.C. § 9396 governing the appointment of agents for sureties and the Code of Conduct for Judicial Employees	Judge H. Russel Holland 8/22/97 (97-CV-L)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Cmte declined to act in light of earlier action taken at March 1998 meeting **COMPLETED**
[CV68] — Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 (96-CV-C); S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by cmte 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 — Referred to reporter, chair, and Agenda Sub cmte. (Advised of past comprehensive study of proposal) 1/97 — S. 79 introduced § 303 would amend the rule 4/97 — Stotler letter to Hatch 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to cmte's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV 74,75, and 76] — Repeal to conform with statute regarding alternative appeal route from magistrate judge decisions	Federal Courts Improvement Act of 1996 (96-CV-A) #1558	10/96 — Recommend repeal rules to conform with statute and transmit to ST Cmte 1/97 — Approved by ST Cmte 3/97 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to reporter and chair 5/97 — Reporter recommends that other Conf. Cmte should handle the issue 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV77(d)] — Fax noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CV-N)	9/97 — Mailed to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for consideration by full Cmte (4) 4/99 — request publication 8/99 — Published for comment **PENDING FURTHER ACTION**
[CV77(d)] — Facsimile service of notice to counsel	William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	11/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for consideration by full Cmte (4) **PENDING FURTHER ACTION**
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken **DEFERRED INDEFINITELY**
[CV81] — To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV 81(a)(2)] — Inconsistent time period vs. Habeas Corpus rule 1(b)	Judge Mary Feinberg 1/28/97 (97-CV-E) #2164	2/97 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Considered and referred to Criminal Rules Cmte for coordinated response 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV81(a)(1)] — Applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Cmte considered 5/97 — Reporter recommends consideration as part of a technical amendment package 10/98 — Cmte. includes it in package submitted to Stg. Cmte. for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment **PENDING FURTHER ACTION**
[CV81(a)(1)] — Applicability to copyright proceedings and substitution of notice of removal for petition for removal	see request on copyright	11/98 — Request for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment **PENDING FURTHER ACTION**
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision 5/97 — Reporter recommends that it be included in next technical amendment package 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) 4/99 — Cmte considered **PENDING FURTHER ACTION**
[CV82] — To delete obsolete citation	Charles D. Cole, Jr., Esq. 11/3/99 (99-CV-G)	12/99 — Referred to reporter, chair, and Agenda Subcommittee **PENDING FURTHER ACTION**
[CV83(a)(1)] — Uniform effective date for local rules and transmission to AO		3/98 — Cmte considered 11/98 — Draft language considered 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approved for publication 10/93 — Published for comment 4/94 — Revised and approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV83(b)] — Authorize Conference to permit local rules inconsistent with national rules on an experimental basis		4/92 — Recommend for publication 6/92 — Withdrawn at Stg. Comte meeting **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV84] — Authorize Conference to amend rules		5/93 — Considered by cmte 4/94 — Recommend no change **COMPLETED**
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by cmte **DEFERRED INDEFINITELY**
[Pro Se Litigants] — To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Cmte, to support proposal by Judge David Piester 7/17/97 (97-CV-I);	7/97 — Mailed to reporter and chair 10/97 — Referred to Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Schedule for further study (3) **PENDING FURTHER ACTION**
[CV Form 1] — Standard form AO 440 should be consistent with summons Form 1	Joseph W. Skupniewitz, Clerk 10/2/98 (98-CV-F)	10/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) **PENDING FURTHER ACTION**
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) **PENDING FURTHER ACTION**
[Adoption of form complaints for prisoner actions]	Iyass Suliman, prisoner 8/3/99 (99-CV-F)	8/99 — Referred to reporter, chair, and Agenda Sub cmte. **PENDING FURTHER ACTION**
[Electronic Filing] — To require clerk's office to date stamp and return papers filed with the court.	John Edward Schomaker, prisoner 11/25/99 (99-CV-I)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Technology Sub cmte. **PENDING FURTHER ACTION**
[Interrogatories on Disk]	Michelle Ritz 5/13/98 (98-CV-C); see also Jeffrey Yencho suggestion re: Rules 3 and 34 (99-CV-E)	5/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[To change standard AO forms 241 and 242 to reflect amendments in the law under the Antiterrorism and Effective Death Penalty Act of 1997]	Judge Harvey E. Schlesinger 8/10/98 (98-CV-D)	8/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**

SUMMARY OF COMMENTS RECEIVED REGARDING PROPOSED RULE 53

On October 26, 1999, I sought comments from seven people with respect to a draft proposed revision to Rule 53 prepared several years ago by Professor Cooper. Five of those people, plus the Federal Courts Committee of the Association of the Bar of the City of New York, have responded with written comments. I think it would be useful to summarize the highlights of those comments. Before doing so, and in order to provide some context, I shall briefly summarize both the current Rule 53 and Professor Cooper's draft proposed rule.

THE CURRENT RULE

The current Rule is divided into six sections. Without repeating the entire Rule, the following is a synopsis of each section.

1. **Appointment and Compensation**: Empowering a court to appoint a Special Master and directing that compensation be fixed by the Court;

2. **Reference**: A reference shall be "the exception and not the rule." In jury matters a reference shall be made only when issues are "complicated", in non-jury cases only when "exceptional condition" requires it. Consent is only mentioned with respect to the appointment of a Magistrate Judge, which does not require these findings;

3. **Powers**: Refers to orders of reference suggesting that they may specify the Master's powers. Specifying that Master has power to conduct hearings, take all measures that are "necessary and proper" for the efficient performance of duties, require

production of evidence, rule on admissibility of evidence, administer oath, take testimony;

4. **Proceedings**: Master may schedule hearings, compel attendance of witnesses; require submissions of statements of account;

5. **Report**: Requiring preparation of a report which must be filed and served, together with transcript of hearings and evidence considered. In non-jury cases court must accept findings of fact unless clearly erroneous–specifying time limit for objections and requiring an opportunity to be heard. In jury cases, master shall not report the evidence but should submit findings which are admissible in evidence before the jury, subject to the court's rulings on objections. If parties stipulate that findings of fact are final, court will only consider questions of law. A draft report may be submitted to the parties prior to filing.

6. **Application to Magistrate Judge**: A Magistrate Judge may be appointed as a Special Master.

PROFESSOR COOPER'S PROPOSED REVISED RULE

Professor Cooper's proposed rule is divided into eleven sections. Without retyping the entire proposed rule, I will simply describe the sections and the highlights of each.

1. **Appointing**: Describing when a Master may be appointed, directing that the appointee be free of conflicts and not appear before the judge and that the court

should consider expense to the parties when making such an appointment;

2. **Duties**: Listing 15 specified functions (including, inter alia, settlement, discovery and post-trial proceedings, but specifically excluding dispositive motions;

3. **Order Appointing Master**: Specifying notice and hearing prior to appointment; and requiring an explicit order of appointment which includes the terms and scope of the appointment;

4. **Master's Powers**: That which is necessary and proper to perform assigned duties;

5. **Master's Authority**: Notice hearings, hold hearing, do that which is necessary and proper to perform assigned duties;

6. **Hearings**: Master may compel attendance of witnesses, administer oaths, examine witnesses, rule on admissibility of evidence, etc.;

7. **Master's Orders**: Requiring that orders be filed, docketed and served;

8. **Master's Reports**: Permitting Master to circulate a draft report to the parties; requiring filing and service of report, together with exhibits and transcripts;

9. **Action on Master's Order, Report or Recommendation**: Time limit on objections to orders or reports; opportunity to be heard; Court required to adopt, modify, or reject; standards of review;

10. **Compensation**: Requiring compensation to be addressed in appointing Order;

11. **Application to Magistrate Judge**: Magistrate Judge may serve as Special Master under certain circumstances, but is not eligible for compensation.

SUMMARY OF COMMENTS

On balance, most respondents believe that a rule revision is long overdue, although two of the respondents expressed some concern that a new rule might limit judicial discretion. Even those two, however, felt that there were some areas that a new rule should address. The following are a list of the suggestions most frequently mentioned.

I. **When should a Special Master be appointed**?

Most commentators continued to believe that the consent of the parties should be required, but that in exceptional circumstances, the Court could appoint a Special Master even without consent. Every commentator was anxious to retain the exceptional circumstances requirement, whether or not consent was given. One commentator suggested that the decision to appoint a Special Master should be immediately appealable.

As to what duties are appropriate for Special Masters, the functions drawing the greatest consensus were the use of Special Masters to "mediate or otherwise facilitate settlement" and to "supervise discovery in complex cases." Most commentators favored the use of Special Masters in post-trial proceedings to enforce complex decrees or to accomplish specialized functions such as an accounting. More

than one commentator opposed any use of masters in cases where juries are the fact finders. Indeed, one commentator also opposed the use of trial masters in the non-jury context, noting that such an appointment might offend Article III or become an end run around the consent jurisdiction accorded to Magistrate Judges pursuant to 28 U.S.C. § 636(c).

II. **Who should be appointed as a Special Master**?

Most commentators suggested that language be added in the Rule explicitly noting that Special Masters are subject to the conflict of interest provisions found in 28 U.S.C. § 455. Other suggestions included that a Special Master may not appear before the appointing judge during the term of the appointment, although her law firm may appear, and that a sentence be added requiring that "a master have the qualifications and experience appropriate to the task."

III. **How should decisions of the Special Master be reviewed?**

All of the commentators focused on this question. The consensus appeared to favor de novo review, at least on the record developed before the Special Master. See or cf. United States v. Raddatz, 447 U.S. 667, 684 (1980) (Magistrate Judge's fact finding role in criminal case constitutionally permitted only if a de novo determination of the evidence considered by the Magistrate Judge is undertaken by the District Judge). An abuse of discretion standard was seen as giving too much power to a Special Master, and the clearly erroneous standard was favored for purposes other

than findings of fact following an evidentiary hearing. All commentators believed that the standard of review should be addressed in the Rule.

IV. **Compensation of Special Masters**.

Many commentators chose to address this question although there appeared to be no consensus on the question. Suffice it to say that some thought that sharing the costs equally was the only fair approach, one specifically rejected a "means" test unless the party with the "means" to pay agreed to do so. One commentator specifically noted that a cost shift to the "troublemaker" should not occur until after the proceeding is over. As far as the rate of compensation, most commentators agreed that a Special Master should be permitted to charge her usual hourly rates, although she may choose to reduce her fee or even provide her services without charge.

V. **Communications with Special Masters**.

Many commentators chose to address this question in two ways: (1) Should the Special Master be permitted to have ex parte communications with the District Court; and (2) Should the Special Master be permitted to have ex parte communications with the parties. The consensus was that these issues should be explicitly addressed in the Order of Appointment, if not in the Rule.

Rule 51. Instructions to Jury: Objection

(a) Requests.

(1) A party may file written requests that the court instruct the jury on the law as set forth in the requests at the close of the evidence or at an earlier reasonable time directed by the court. Supplemental requests at the close of the evidence are timely as to issues raised by evidence that could not reasonably be [have been?] anticipated at the time the initial requests were due.

(2) The court must inform the parties of its proposed action on the requests before jury arguments.

(3) The court may[, in its discretion,] permit an untimely request to be made at any time before the jury retires to consider its verdict.

(b) Objections. A party may object out of the jury's hearing to an instruction or the failure to give an instruction before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of [for?] the objection.

(c) Instructions. The court:

(1) may instruct the jury at any time after [the] trial begins, and

(2) must give final instructions to the jury immediately before or after [jury] argument[s], or both.

(d) Forfeiture; Plain Error.

(1) A party may not assign as error a mistake in an instruction actually given unless the party made a proper objection [properly objected] under Rule 51(b).

(2) A party may not assign as error a failure to give an instruction unless the [a?] party made a proper request under Rule 51(a), and – unless the court made it clear that the request had been considered and rejected – also

made a proper objection under Rule 51(b).

(3) A court may set aside a jury verdict for error in the instructions that has not been preserved as required by Rule 51(d)(1) or (2), taking account of [the obviousness of the error, the importance of the error, the costs of correcting the error,] {the obviousness, importance, and costs of correcting the error,} and the importance of the action to nonparties.

Rule 54. Judgments; Costs

* * *

(d) Costs; Attorney's Fees.

(2) Attorney's Fees.

(A) A claim for attorney fees and related nontaxable expenses must be made by motion unless substantive law makes the fees or expenses an element of damages to be proved at trial.

(B) Unless a statute or a court order provides otherwise, the motion must:

(i) be filed within 14 days after [the] entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds that entitle the moving party to the award;

(iii) state or fairly estimate the amount sought; and

(iv) if the court directs, disclose the terms of any agreement about the fees claimed.

(C) At the request of a party or a class member, the court must allow adversary submissions on the motion in accordance with Rule 43(d) or Rule 78. The court may decide issues of liability for fees before it receives submissions on the value of the services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

Rule 58. Entry of Judgment

(a) Entry.

(1) Every judgment and [every] amended judgment must be entered [set forth] on a separate document, but [entry on] a separate document is not required to enter an order disposing of a motion:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for attorney['s] fees under Rule 54 ~~if the district court extends the time to appeal under Rule 58(e)(2)~~;

(D) for a new trial[,] or to alter or amend the judgment[,] under Rule 59; or

(E) for relief under Rule 60 ~~if the motion is filed no later than 10 days {computed using Federal Rule of Civil Procedure 6(a)} after the judgment is entered~~.

(2) Subject to [the provisions of] Rule 54(b):

(A) the clerk must, without awaiting {the court's} direction [by the court], promptly prepare, sign, and enter the judgment when:

(i) the jury returns a general verdict, or

(ii) the court awards only costs or a sum certain, or denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict [with answers to]{accompanied by} interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2).

(b) Time of Entry. Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62:

(1) when it is entered in the civil docket under Rule 79(a), and

(2) if entry on a separate document is required by Rule 58(a)(1), upon the earlier of these events:

(A) [the] entry on a separate document [under Rule 58(a)(1)], or

(B) the expiration of 60 days from entry on the civil docket under Rule 79(a).

(c) Cost of fee awards.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a timely motion for attorney fees is made under Rule 54(d)(2) the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59.

(d) Request entry. A party may request that judgment be entered [set forth] on a separate document as required by Rule 58(a)(1).

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Additions to Rule 5(b) Material:

(1) Note, p. 5, third paragraph

Finally, subparagraph (D) authorizes adoption of local rules providing for service through the court. Electronic case filing systems will come to include the capacity to make service by using the court's facilities to transmit all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, making use of the court's transmission facilities to serve the filed paper on all other parties. Transmission might be by such means as direct transmission of the paper, or by transmission of a notice of filing that includes ~~a hyperlink~~ an electronic link for direct access to the paper. Because service is under subparagraph (D), consent must be obtained from the persons served.

Summary of Comments, end p. 8

Hon. Dean Whipple, 99-CV- : Chief Judge Whipple reports on experience in W.D.Mo. as a prototpye CM/ECF court. A lawyer who agrees to participate in the CM/ECF system signs a statement agreeing to receive service of electronic filing on behalf of the client by hand, facsimile, authorized e-mail, or first-class mail. The party served in this way can read or download the paper from the court's system. An electronic notice of filing apparently includes a hyperlink to the paper, facilitating prompt access. Chief Judge Whipple suggests this change in the language proposed for Rule 5(b)(2)(D): "Delivering a copy by any other means, including electronic ~~means~~ notice, consented to * * *."