ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, D.C.
April 23-24, 2001

AGENDA
Advisory Committee on Civil Rules
April 23-24, 2001

1. Opening Remarks of Chairman

2. **ACTION** — Approval of Minutes of Meeting on October 16-17, 2000, and Meeting on March 12, 2001

3. **ACTION** — Proposed Amendments to Rules 54, 58, 81, and New Rule 7.1 for Transmission to the Committee on Rules of Practice and Procedure

4. Report of Class Action Subcommittee (distributed in separate mailing)

5. **ACTION** — Proposed amendments to Rule 53 (special masters) for publication

6. **ACTION** — Proposed amendments to Rule 51 (jury instructions) for publication

7. Report on "Electronic Discovery" Conference held at Brooklyn Law School

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ORAL PRESENTATION

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 16 and 17, 2000

The Civil Rules Advisory Committee met on October 16 and 17, 2000, at La Paloma in Tucson, Arizona. The meeting was attended by Judge David F. Levi, Chair; Sheila L. Birnbaum, Esq.; Judge John L. Carroll; Justice Nathan L. Hecht; Professor John C. Jeffries, Jr.; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Professor Myles V. Lynk; Assistant Attorney General David W. Ogden (by telephone); Judge Lee H. Rosenthal; Judge Thomas B. Russell; Judge Shira Ann Scheindlin; and Andrew M. Scherffius, Esq.. Judge Paul V. Niemeyer attended as outgoing chair. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter for the Discovery Subcommittee. Judge Michael Boudin attended as liaison from the Standing Committee, and Professor Daniel R. Coquillette attended as Standing Committee Reporter. Judge James D. Walker, Jr., attended as liaison member from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej represented the Administrative Office. Thomas E. Willging represented the Federal Judicial Center. Judge T.S. Ellis, III, Judge Jean C. Hamilton, and Judge William W Schwarzer attended to present a panel discussion on differentiated case management, expeditious case processing, and the possibility of developing a small-claims procedure. Observers included Loren Kieve (ABA Litigation Section); Alfred W. Cortese, Jr.; Sharon Maier (ABA Litigation Section — Rule 23 Subcommittee); Jon Cuneo; and Fred Souk.

Judge Levi opened the meeting by introducing the new members, Justice Hecht and Judge Russell. He noted that Mark Kasanin's term of appointment has been extended, furthering the benefits of continuity provided by veteran Committee members. And he expressed appreciation for the service rendered by Justice Durham during her years as a Committee member.

Appreciation: Judge Niemeyer

Judge Levi further expressed the thanks of the Committee to Judge Niemeyer for his work as member and then chair. He noted that Judge Niemeyer had guided the Committee through many topics, including some that were contentious. Judge Niemeyer continually insisted that in all projects, both noncontentious and contentious, the Committee look beyond the technical details to consider the larger issues of policy and social interest that shape good procedure. In areas of potential danger, he saw to it that the Committee took the time necessary to become fully informed. Efforts were made to hear from as many different voices as possible. Public comments and testimony at hearings were studied carefully. Conferences were arranged. Empirical work by the Federal Judicial Center was regularly sought. The Committee emerged from the work with a solid foundation for each project. A resolution of thanks and appreciation from Chief Justice Rehnquist was read to hearty applause.

Judge Niemeyer responded by noting that the Committee's process has been satisfying and fulfilling. Among the rules launched during his time with the Committee is the class-action appeal rule, Rule 23(f). Although Congress has not yet adjourned, it seems likely that the discovery amendments scheduled to take effect on December 1 will indeed remain on schedule. Other recent work has included such long-pending projects as a package of amendments to the Admiralty Rules

and abrogation of the Copyright Rules of Practice. The Committee's work has been in the finest traditions of American lawmaking. "Town meetings" were held, experts were consulted, studies were encouraged. Large numbers of alternative proposals were studied. The level of debate, discussion, and compromise has been of the highest. "Sometimes, during discussions, we came in close." When there was a close division of views, the Committee refused to act; instead it continued to work until consensus was achieved. The public hearings were very helpful — those who participated took the Committee and its work seriously, and the Committee took them seriously. When the Committee eventually came to agreement on a desirable rules change, Committee members became advocates for the change, first in the Standing Committee and by going also to the bar associations and other associations. Testimony was given in Congress, and work was done with Congressional staff. Congress showed real respect for the Committee's knowledge, approach, and work. The Judicial Conference, the final step of and Advisory Committee's direct advocacy, also took the Committee's work seriously. The Department of Justice and its members on the Committee, Frank Hunger and David Ogden, also were very thoughtful and helpful participants in the process.

Judge Niemeyer continued his remarks by noting that institutions such as this Committee thrive on tradition more than on written rules. Committee traditions account for much of the impressive quality of its deliberations and work. All of the members who have served on the Committee over the past seven years have worked hard and made valuable contributions. The Federal Judicial Center has provided strong research support, not only through the regular relationship through Tom Willging but also throughout the entire research staff. Relations with other Judicial Conference committees have worked rather well, in part because of support from the Administrative Office and particularly from John Rabiej. Professor Marcus has been very helpful, in the grandest tradition, as special reporter for the discovery subcommittee.

Service with the Committee, in short, has been a privilege and a pleasure.

Judge Levi expressed the Committee's appreciation to Susan Niemeyer for her regular participation and support in Committee activities. Professor Coquillette brought Judge Scirica's regrets for not being able to attend the meeting, and respects to Judge Niemeyer.

Rules Update

Judge Levi summarized the "pipeline" of rules proposals. Three packages of amendments are slated to take effect December 1, 2000, unless Congress acts to defer. Rules 4 and 12 deal with service and time to answer when an officer of the United States is sued in an individual capacity for acts in connection with official duties. Admiralty Rules B, C, E, and Civil Rule 14, seek to distinguish forfeiture practice from admiralty practice in response to the great expansion of forfeiture proceedings in recent years. Discovery reforms are embodied in amendments of Rules 5, 26(a), 26(b)(1), 26(b)(2), 26(d), 26(f), 30, and 37(c).

The Judicial Conference in September approved and will transmit to the Supreme Court amendments in Rules 5, 6, and 77 to deal with electronic service of papers after initial process, as well as a package that would abrogate the antique Copyright Rules of Practice and adopt a new Rule 65(f) to confirm the application of Rule 65 interlocutory procedures to copyright seizures.

New rules proposals were published for comment in August. One proposal would adopt a new Rule 7.1 on corporate disclosure, to parallel a revised form of Appellate Rule 26.1 and a new criminal rule. Amendments to Rules 54 and 58 would integrate with proposed amendments of Appellate Rule 4 to end the "time bomb" problems that have arisen when failure to enter judgment on a separate document means that appeal time never starts to run. Comments on these proposals are due by February 15, 2001. A hearing has been scheduled for January 29, 2001, in San Francisco in conjunction with hearings on proposed Appellate and Criminal Rules changes. It is too early to guess whether there will be any persons who wish to testify on the Civil Rules proposals at that hearing.

Legislative Report

John Rabiej delivered a report on Administrative Office efforts to track legislation that might affect civil procedure. Thirty or forty bills have come into this category. Congress is working toward adjournment, somewhat later than expected, and this phase of the process is difficult to monitor because omnibus appropriations bills frequently are used to enact unexpected provisions that had not been successful in more direct legislative attempts.

Concern continues to attach to discovery protective orders. A longstanding "sunshine-in-litigation" proposal was attached for a while to legislation designed to establish criminal penalties for failures to disclose product defects and recall information. The discovery provisions, however, have been removed from the bill that appears to be on the way to enactment.

There is good hope that the Judicial Improvements bill will pass. This bill includes a provision that will "sunset" the one remaining provision of the Civil Justice Reform Act.

Several class-action and attorney conduct bills bear directly on the work of the rules committees. The House passed a minimum-diversity class-action bill, and the Senate Judiciary Committee reported out a different bill. The Senate class-action bill includes a provision that would require the Judicial Conference to make recommendations. Class-action legislation is likely to emerge again in the next Congress. There also has been active attention to attorney-conduct rules for government attorneys. Senator Leahy is sponsoring a bill that would require the Judicial Conference to report recommendations within a year with respect to contacts with represented persons, and to report within two years on other government attorney-conduct issues. Different proposals are being considered in the House, including adoption of the Rule 4.2 proposal of the Ethics 2000 Commission that would permit contact with a represented person when approved by court order. Again, if no legislation is adopted in this Congress these issues are likely to reappear in the next Congress. Professor Coquillette noted that it is this level of Congressional interest, and particularly the provisions that would direct prompt consideration by the Judicial Conference, that has stimulated the continuing work of the Attorney Conduct Subcommittee.

April Minutes

The draft minutes for the April 2000 meeting were approved, subject to correction of typographical and style errors.

Rule 23

Judge Rosenthal reported for the Rule 23 Subcommittee. The subcommittee is approaching the continuing Rule 23 project by attempting to determine whether there are amendments that are sensible and feasible, remembering the need to ensure that a seemingly desirable change will actually work in relation to the changing nature of class actions.

Much time and effort have been devoted to Rule 23 over a period of many years. Proposals were published for comment in 1996; the only one of those proposals to be adopted up to now is new Rule 23(f). Rule 23(f) already is working as hoped. Several courts of appeals have articulated the standards used to act on petitions for leave to appeal, and the courts of appeals already are beginning to use these appeals to provide greater guidance on class-certification issues. Rule 23(f) also will provide a relief valve for the pressures that can flow from grant or refusal of class certification. Rule 23(f), however, does not of itself address the many concerns reflected in the 1996 hearings and the work that led to the 1996 proposals and flowed from considering those proposals.

Mass-tort problems came to occupy a very basic role in committee work. The great pressures that flow from attempts to work through mass-tort litigation have affected Rule 23 as well as many other areas of procedure. The debates over Committee proposals were revealing — there is disagreement and real uncertainty about the means appropriate to address the dislocations caused by mass torts.

"Consumer" class actions also have been studied. There is a great divide on the question whether these classes are appropriate. Opponents argue that the "private attorney general" concept masks efforts to win through litigation goals that cannot be won in the political process, or more simply to enrich attorneys. But supporters argue that the benefits can be enormous, both for the public good and for providing often small but still meaningful remedies to individual class members. The published proposal to allow a court considering class certification to weigh the benefits of a class victory against the burdens of class litigation withered under vigorous cross-fire from these opposing camps.

The concern to define the appropriate roles for class litigation continues. But this is an increasingly dynamic area. From 1990, there have been increasing filings first in federal courts, and more recently in state courts. This growth inspired the Committee's work, just as it inspired lawyers. But now we are hearing that many state courts are changing the practices that brought fame to some courts for "drive-by" class certifications. Statutes, court rules, and court decisions have restricted the liberal certification practices that flourished for a few years.

Another trend may have peaked and receded. Settlement classes became familiar in several substantive areas, and then an attempt was made to extend this practice to mass-tort cases. The Amchem and Ortiz decisions have cut back on mass-tort settlement classes; it is thought that these decisions have made it impossible to settle some mass-tort classes, and more difficult to settle those that do eventually settle. As settlement comes to seem less likely, greater judicial management has resulted. As part of the certification process, the parties may be asked to provide plans of the tasks and time that would be required to prepare for trial. And, if certifications to not dwindle down because settlement-only certifications are restricted, the result may be more class-action trials.

All of these questions have been illuminated by the empirical work undertaken by the Federal Judicial Center and the Rand Institute for Civil Justice.

The subcommittee has made a preliminary decision to focus its efforts on the process of class actions, not the standards for class certification. Certification standards already are perceived to be exacting. The processes of appointing counsel, making fee awards, and reviewing proposed settlements have become the central subjects. The general question is whether Rule 23 can do more to provide structural assurances of fairness.

Another development has been overlapping, duplicative class actions, and class actions that are parallel to nonclass proceedings that involve large numbers of aggregated plaintiffs. It is difficult to find means within the scope of the Rules Enabling Act to deal with the inefficiencies and unfairness that can result from overlapping and competing class actions.

The materials in the agenda book have not matured to a stage that would support detailed discussion and revision. They are more preliminary, but designed to support discussion of the advisability of working further on these topics. The four Rule drafts address review of class settlements (but not settlement-class certification), attorney appointment, attorney fees, and appeal standing. The model notice and related forms being developed by the Federal Judicial Center raise also the question whether the notice provisions of Rule 23 should be revised. These models are intended to focus discussion, but not to exclude consideration of other possible Rule 23 revisions. Suggestions for other topics that might be developed will be welcomed.

The draft Rule 23 codifies current "best practices" for reviewing settlements. It does not attempt to restate or revise the criteria to be considered, nor does it attempt to set out a complete and exclusive list. It does not attempt to restate or revise the settlement-class teachings of the Amchem and Ortiz opinions. It seems likely that as Rule 23(f) appeals are heard and resolved, there will be a better foundation to consider whether to address settlement-class certification explicitly in Rule 23.

The settlement-review rule includes a provision that would allow class members to opt out after the terms of a proposed settlement are made known, whether or not there was an earlier opportunity to opt out and without regard to the general rule that class members cannot opt out of mandatory Rule 23(b)(1) or (b)(2) classes. This provision was developed in part in recognition of the "hybrid" classes certified under Rule 23(b)(2) that include both injunctive or declaratory relief with damages relief, but it reaches all forms of classes. There is substantial controversy and uncertainty surrounding both the proposed opportunity to opt out of the settlement of a mandatory class and the proposed requirement that a second opportunity be allowed when a settlement is announced after expiration of the initial period for opting out of a (b)(3) class. It has been protested that increased opportunities to opt out will make it more difficult to achieve settlement. But at the same time it is recognized that often successful settlements have been achieved in (b)(3) classes that have been certified at the same time as a proposed settlement is preliminarily approved, giving an opportunity to opt out after the initial settlement agreement.

Another set of problems arises from the role of objectors. What provisions should be made for discovery? Should successful objectors be awarded expenses, including attorney fees?

Objections can be made for good reasons, but objections also can be made for obstruction, delay, or the hope of being bought off. It is very difficult to draft rule terms that distinguish between "good" and "bad" objectors. The draft invokes Rule 11, but this device may be both redundant and ineffective.

Disclosure or discovery of "side agreements" is another topic that has proved difficult to grasp. How can such agreements be defined? There are many kinds of understandings that may be reached, whether or not articulated, in the process of hammering out a class settlement. Some are trivial. Some are important, but only to a few class members. Further development seems desirable before this topic can be addressed by the rule.

There is a continuing demand for greater judicial scrutiny of proposed settlements. Draft Rule 23(e)(5) seeks to distill the most obvious things that have been articulated by the courts. But the list itself obviously raises the question whether it is wise to encumber the rule with so many factors. One risk of this approach is that practice may be frozen around the list. The list cannot be complete, but factors not in the list may be taken less seriously. Some or even many of the factors in the list may not be relevant to a particular settlement, but a court may feel obliged to consider and make findings with respect to each. These risks are diminished if the list is set out in a Committee Note, not in the rule, or is relegated to some other place such as the Manual for Complex Litigation. Yet the earlier hearings on Rule 23 provided advice that there is a need for greater scrutiny and guidance. And some of the factors in the list seem to move beyond things that have been clearly identified in current practice; examples are provided by the focus on plans for distributing an award to class members, and by the consideration of the reasonableness of attorney-fee provisions.

Present decisions provide little guidance on "appointment" of class counsel. The draft rule would give courts a greater opportunity to seize control at the outset. It is not clear whether this much judicial involvement is desirable. The draft also imposes severe limits on what an attorney may do on behalf of a class before being appointed as class counsel. These provisions need much more study, in face of challenges that they ignore much common, desirable, and often necessary practice. The danger of impairing class interests also may be questioned in light of the fact that the class is not technically bound by acts taken before class certification.

The class attorney appointment rule lists several factors to be considered in selecting counsel. Many have been recognized for years in addressing the effective representation requirement, and are not controversial. But there is a new one, asking whether selection of counsel can be done in a way that facilitates coordination with other actions. There are few opportunities to effect coordination by rule provisions, and this one may both prove effective and avoid the federalism concerns that surround many alternative proposals.

The attorney-fee draft presents first the question whether the rules should address this topic at all. There is a lot of sentiment to do something that will help the process of making careful awards, but there is much disagreement whether a court rule is the proper means of proceeding. There is equally disagreement as to the factors that might be adopted. The factors included in the draft rule draw from the RAND report, and many of them focus on tying fees to the benefits actually won for class members. The draft deliberately avoids any choice between lode-star and percentage-of-recovery approaches to fee calculations. It requires disclosure of side agreements, again raising

the question of defining the agreements that must be disclosed and raising also the question whether courts should be concerned at all with the arrangements for dividing the awarded fee among different lawyers.

The draft on appeal standing responds to the rule in many circuits that a class member must win intervention to have standing to appeal the judgment in a class action. The first question is whether the intervention procedure is in fact the better procedure, asserting a measure of control that will discourage ill-informed or mischievous appeals.

Clear-language proposals have regularly been made for class-action notice rules. A simple rule demand for clear language, however, may not accomplish much. Better results may flow from providing good examples. With this thought in mind, the Federal Judicial Center agreed to undertake to collect good notice examples and then to synthesize a model notice from the best examples. This work is well under way, and will continue; the current drafts are included in the agenda materials. Much good may come from making the final product available through the Center by on-line availability to lawyers, use in judicial training, and other means.

The subcommittee has a tentative but ambitious goal to develop concrete proposals for detailed consideration at the Committee meeting next April. Refined versions of the present drafts would be presented.

Following this introduction, there was a review of several features of the drafts, including items not described in the introduction.

The provision for revealing "the terms of all agreements or understandings made in connection with the proposed settlement, dismissal, or compromise" is set forth alternatively as a requirement of disclosure in the notice of proposed settlement or as a proper subject for discovery by an objector. Objections have been made as to each approach, but it also has been urged that these matters are so important that both should be adopted — a summary should be required with the notice of proposed settlement, and further discovery should be available to an objector.

The question of a right to opt out of a proposed settlement includes a wrinkle that has not been much discussed. The draft speaks of an opportunity to request exclusion from the class. Disapproval of the settlement, however, may mean that those who sought to opt out of the settlement would prefer to remain in the class. Thought should be given to providing that exclusion from the settlement means exclusion from the class only if the settlement is approved.

The provision for discovery to aid in appraisal of the apparent merits of the class position might be revised in ways that reduce the concern that discovery will go so far as to undermine one of the principal objects of settlement. Discovery might be aimed at information "reasonably necessary to support the objections," or discovery might be conditioned on a preliminary showing of reasons to doubt the adequacy of the settlement.

The provisions on objectors include a new subparagraph, draft Rule 23(e)(4)(B), that limits the ability of an objector to settle the objections on terms that yield the objector treatment more favorable than the terms available under the class settlement. The concern is that a class member who advances objections on behalf of the class is both assuming a fiduciary duty to the class, similar

to the duty of a court-recognized class representative, and is assuming powers of delay and obstruction that draw from the need or desire to conclude the settlement. If the settlement indeed is inadequate as to the class, any added benefit wrung from the class adversary should be spread over the class unless the objector occupies a distinctive position that is not fairly reflected in the class definition. These concerns are reflected in the requirement that court approval must be won. The draft is intended to require approval by the trial court, even if an appeal is pending. It may prove desirable to discuss the relationships between trial court and appellate court when the settlement is reached pending appeal: under present procedure, the objector can simply settle and withdraw the appeal. It does not seem a markedly different or untoward interference with the appeals court's jurisdiction to condition this result on approval by the trial court. The trial court is likely to be in a much better position than the appeals court to appraise the terms of the settlement.

One of the factors listed for review of a proposed settlement is the extent of participation in settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master. This factor reflects recurring suggestions that courts should play a role in structuring settlement negotiations to protect against self-serving or inadequate representation by designated class representatives and class counsel. Familiar suggestions include appointment of a class guardian, creation of a steering committee of nonrepresentative class members, use of a special master in a role somehow different from that of a class guardian, or direct judicial involvement. The Committee has regularly concluded that an attempt to graft such devices onto Rule 23 is likely to produce more confusion than benefit. But formal or informal efforts along these lines may prove valuable in particular cases. Actual use of one or another of these devices may provide useful reassurance that the settlement reflects generally held class interests.

Another of the factors would consider the probable resources and abilities of the parties to pay, collect, or enforce the proposed settlement judgment. A settlement that seems to promise generous but illusory benefits may not be as wise as a differently structured settlement that, in the end, may prove more useful. It may prove difficult to translate this abstract concern into practice. And there is a risk that this factor will encourage sloppy consideration of the increasingly questioned "limited fund" concept, encouraging courts to accept uncritically the terms of a settlement that the parties seek to justify primarily on the ground that nothing more is possible.

The list of factors also would permit consideration of the existence and probable outcome of claims by other classes and subclasses. This factor relates to the factor that would authorize comparison to results actually achieved for others, but goes beyond it. The comparison would not be entirely one-way: it would authorize consideration of the risk that this settlement would seize for this class an unfair portion of the assets likely to be available for other claimants. The most notorious concern in this dimension relates to "futures" claimants who have not yet filed actions, and who may not yet have mature claims or even be aware that they may have claims. There are manifest grounds for concern in this direction, but at the same time it is difficult to ask a court to disapprove a proposed settlement because it is too generous to the only parties before the court.

The last factor singled out for preliminary attention was the one that authorizes consideration of rejection of a similar settlement by another court. It is difficult to preclude approval of a settlement that has been earlier rejected; further information may show that a proposal that once

seemed inadequate is indeed reasonable and adequate. But perhaps some means should be attempted to strengthen this effort to defeat attempts to "shop" a settlement by successive presentation to different courts. An attempt even might be made to restrict the opportunity of a state court to approve a settlement that has been rejected by a federal court, treating disapproval as a judgment binding on the same class or a substantially identical class.

A final and distinct feature of the Rule 23(e) draft is paragraph (6), a continuation of a concept that has carried forward from early draft revisions. This paragraph would authorize the court to appoint a magistrate judge or another person to conduct "an independent investigation and report to the court on the fairness" of a proposed settlement. The purpose of this provision is to overcome the failure of adversariness that arises when the parties have joined in presenting and championing a proposed settlement. The court's agent is charged to undertake an investigation in the way that an objecting class member might do, if the objector had sufficient funds, incentive, and ability to pursue the inquiry. The potential advantage is apparent, particularly in actions that do not spontaneously yield well-financed and properly motivated class-member objectors. The potential disadvantages are equally apparent in the form of delay, cost, and the potential for recommendations that rest on an unduly optimistic view of the costs and prospects of further litigation on the class claim. The virtue of the device in enabling an investigation that a judge could not properly undertake in the office of judge, moreover, may also be a vice — the court's role as neutral arbiter of the dispute may seem compromised when the court appoints an agent to investigate rather than to receive presentations by the adversaries.

The first question in the discussion was whether draft Rule 23(e)(6) contemplates that the investigator appointed by the court could consider all of the factors listed in draft Rule 23(e)(5) for court review. The answer was that the terms of the investigation would be defined by the court: it could be completely open-ended, but also might be confined to one or a few specific inquiries. It was further suggested that although this role is not a familiar one for courts, the device could become usefully productive in some cases.

Turning to the provisions for objectors, it was noted that there are professional objectors who "go from settlement to settlement"; "they want to be, and unfortunately are, bought off." "Their weapon is time." There is one who has filed objections in at least 20 cases in the last two years. Objecting to class-action settlements has become a cottage industry. If we guarantee discovery, there will be still more objectors. Under present practice, discovery can extend even to the settlement negotiation process if there is a showing of probable collusion. The need for discovery by objectors is much reduced by the common practice under which the settling parties make the results of their pre-settlement discovery available to the objectors. The proposals aimed at objectors may make it more — too much more — difficult to achieve settlements. The Association of the Bar of the City of New York and the Department of Justice have expressed concerns that the proposals would discourage settlements. And we do not need to do anything to encourage objectors; we have them now. As it is, objectors thrive because it is always possible to negotiate a small increment in the settlement and then point to the change as the basis for an award of fees. A settlement that provides coupons to be redeemed within six months can be modified to allow redemption within eight or nine months, and so on.

A broader perspective was taken by asking generally what the Committee is — and should be — trying to do. Over the years, it has been said that there are weaknesses in the class-action process. The question is to identify and remedy the weaknesses that are susceptible of cure. Rule 23 establishes a form of public representation; courts have a special interest and responsibility, unlike the situation when an attorney is directly responsible only to an individual client, and the client is responsible for the attorney. Who is looking after the public — either the specific "public" of class members, or the broader public that may be served when a class action is used for public enforcement purposes? Is it to be only the class attorney, who often is self-selected? Most class members do not know the class attorney. The defendant wants peace. The result is an undemocratic process that may dispatch the claims of class members without due regard for their interests.

On this view, one thing that can be done is to improve transparency. Next, we can recognize that the court is in charge of the class attorney, and the attorney is accountable to the court. Many of the class-action bills pending in Congress reflect this view.

There is not much that can be done to elicit greater involvement by class members. Notice will not get them directly involved, but they are involved in a more attenuated sense even when they may not want to be involved. It would be better to move toward opt-in classes, but that approach is not likely to survive the Enabling Act process.

We should constantly remember that there are historic reasons for the mandatory (b)(1) and (b)(2) classes. If we take that away, we lose much of our legitimacy.

A separate rule on appointment of class counsel and fee awards, together, would be a good idea.

These remarks were met by the observation that judges have all these powers now.

The role of class attorneys was reintroduced with the observation that veterans of the class-action debates have regularly heard that class actions have moved beyond attorney representation of clients. The goal has become "fairness" in some more general sense. Continued efforts should be made to draft rules on attorney appointment and fees, and on other matters, that may improve the fairness of the process. The prospect that such proposals will encounter stiff opposition should not dissuade the subcommittee.

It was said again that courts have the necessary powers of regulation and control, but with the elaboration that it is difficult to find the support that does exist in the case law. Codification in Rule 23 will make the powers more effective. Courts are willing to take hold and assert themselves. The subcommittee should continue work on its proposals to stimulate debate and reach acceptable resolutions.

The "laundry list" of factors in draft Rule 23(e)(5) was questioned by asking whether it implies that the court should consider all of these factors in each case. A settlement effected through negotiations that do not involve anyone other than the class representatives, class adversary, and counsel may be entirely proper; does draft Rule 23(e)(5)(E) suggest that the settlement should be doubted on this score? The Rules do not often resort to laundry lists; perhaps this approach should be dropped.

It was suggested that the draft rules deal with attorney conduct, and that great sensitivity must be observed. Federal intrusion on regulation of attorneys is a "third rail" in federal-state relations. That is why the Standing Committee has a hard-working subcommittee on Rules of Attorney Conduct. The attorney-conduct inquiry has not focused on the role of attorneys in class actions. But attorney appointment and fees are topics that are addressed by state rules. So is fiduciary responsibility to the class. There is a new body of law developing under the "fiduciary duty" label, outside the formal Rules of Professional Responsibility. The Federal Rules already address attorney conduct through such provisions as Appellate Rule 46, Civil Rule 11, and so on. But many people believe that the Federal Rules should not address attorney conduct, and care should be taken in approaching these topics.

Texas experience was noted. The courts considered these topics, and decided that they were better fit for legislation. The legislature, however, wanted nothing to do with such problems, and if anything is to be done it is now up to the courts to do it. Doing it remains a challenge. The idea that class members should be able to opt out of a (b)(1) or (b)(2) class settlement deserves skeptical attention. The long list of settlement-review factors may have unintended effects; it is difficult to control the impact of such lists. But Rule 23 is social engineering in the courtroom; courts have created the rule, and have a duty to fix it when that proves possible. The problem of professional objectors is one that deserves attention; some frame the question as pirates who prey on the other pirates involved in class litigation, but it remains true that class members should know what went into the settlement and have an opportunity to object.

The question of "side agreements" was framed by asking what sorts of agreements may be made incident to settlement. One form has been that seen in the Amchem and Ortiz cases, where counsel separately negotiated settlements of the present cases in parallel with class settlement of future claims. That process was very public, and consciously addressed. Other agreements involve such things as splitting attorney fees in ways that courts do not learn about — there is a real question whether courts should care how a total fee is divided once it has been set. Increasingly, fees are set separately under agreements that in form provide that the fees do not come out of the class recovery. But possible concerns remain that the agreement for a fee award up to a stated ceiling was negotiated in tandem with the class settlement, and that the total fee may seem excessive if part of it is shunted off to counsel who did little work and incurred little risk in relation to the allocated share. Another form of agreement may be settlement for individual class members represented by an objecting attorney on terms more favorable than general class terms, capitalizing on the costs of objection-induced delay. Other agreements may involve understandings that discovery results will not be shared with lawyers in other cases, that other class actions will not be brought or that individual plaintiffs will not be represented in related litigation [some states apparently permit such agreements]. In some litigation these agreements have been reached after an inquiry into separate agreements was made on the record. In others, objectors have been bought off, apparently with a share of class counsel fees, but discovery has been denied as to the terms.

The general observation was made that there is no assurance that tomorrow's practice will be the same as today's practice.

A number of "picky" points were raised. The draft rules do not address the question of settlement on appeal by a class representative, a question involved in the recent Ninth Circuit decision in the United Airlines litigation. The possibility that a settlement should be evaluated for its effect on future claimants, draft Rule 23(e)(5)(H), is troubling — why should the court be concerned with more than fairness to the class before it? The expressed concern that an independent court-directed investigation under draft Rule 23(e)(6) takes the court outside ordinary judicial functions, on the other hand, is overstated; the court has to take on a nonadversary, class-protecting role in class litigation. The draft rule on attorney fees seems to authorize awards in circumstances that may involve so much substantive lawmaking as to fall outside the Enabling Act. And, more broadly, it should be asked whether it is wise to attempt to make rules when the background of practice is continually changing.

Turning back to objectors, it was observed that draft Rule 23(e)(4)(A) provides for fee awards to objectors, but does not speak to fee awards against objectors apart from the invocation of Rule 11. This should be addressed; bad objectors do exist, and mere reference to Rule 11 is not sufficient deterrence.

The Rule 23(e)(4)(B) attempt to regulate settlements with objectors, focusing on terms "reasonably proportioned to facts or law that distinguish the objector's position from the position of other class members" was questioned on the ground that the "reasonably proportioned" concept is "not crystal clear."

It also was urged that the provision for court direction of an independent investigation of a proposed settlement should be beefed up. "Sunshine, transparency" are important. A third party can be critically useful as an adversary to the joined forces of class counsel and class opponent. A "guardian ad litem" for the class is a good idea.

It was asked what information is now made public in fee applications. The answer was that usually there is a paragraph or two in the notice of proposed settlement that describes what fees may be sought. The actual applications run to hundreds of pages, providing detailed information. But interest in the information is seldom shown.

The draft rule on appointing class counsel was the next topic of discussion. The introduction of the draft began by emphasizing that the draft is a rough first pass that has not been considered at any length by the subcommittee. The very first part, subsection (a)(1), does two very different things. The first sentence states simply that an attorney may not act on behalf of a class until appointed by the court.

The second sentence of draft (a)(1), set out in brackets, covers a substantial portion of a proposition that has proved highly controversial. In broadest form, the proposition is that no one can act on behalf of a class until the class is certified. This proposition is scaled back in the draft, but the draft still would provide that no one may conduct court proceedings on any matter related to class certification or the merits of the class claims, and no one may engage in out-of-court settlement discussions, until appointed to represent the putative class. Supporters of this approach urge that official approval is required to ensure that an attorney who seeks to represent a class is competent, does not have disabling conflicts of interest, and has at least a moderately effective class

representative to supervise the representation. The dangers of pre-appointment activity are thought to be particularly great with respect to settlement negotiations, where an attorney may sell out class interests in return for an understanding as to attorney fees.

The balance of the draft, subdivision (b), would establish an appointment procedure that requires an application for appointment even if only one attorney seeks to represent the class. The information required in an application is, for the most part, similar to information routinely considered in determining whether a named class representative will, with the help of intended counsel, adequately represent the class. One part of the information identifies "the terms proposed for attorney fees and expenses"; this inquiry would legitimate, but not directly encourage, the "bidding" practices that have attracted renewed interest in recent decisions. As noted earlier, another new factor asks whether appointment of counsel who represents parties or a class in parallel litigation could facilitate coordination or consolidation to reduce the problems of parallel litigation. A separate paragraph, (b)(4), sets out alternatives that would direct either that no consideration be given to the fact that one applicant has filed the action, or that no significant weight be given to this fact.

The first comment went to attorney responsibility issues. An attorney deciding whether to file a class action may not know until the actual filing whether the action will be in a state court or a federal court. The attempt to regulate what is done on behalf of a class before filing trenches heavily on state regulation of attorney conduct in circumstances that may not yield even the eventual justification that the action has come to federal court and to generate corresponding federal interest. State chief justices dislike present local federal court rules on attorney conduct. Anything that addresses such questions as who can represent a class, fiduciary duties, and the like, invades state territory. Most states take the position that state rules bind an attorney admitted to practice in the state no matter what court the attorney may act in. This proposal should be coordinated with the Attorney Conduct Subcommittee.

A second comment was that the rule is misdirected. It aims at all class actions, but routine class actions do not need it. There are many class actions in which no one is competing to represent the class, and no one can be induced to become a competitor.

The draft rule was defended by asking how an attorney comes by authority to represent a class. It is not enough to say that Rule 23 establishes the authority. The representative class-member client may or may not be a "real client" at all; some class representatives are recruited by, and subservient to, class counsel. But even when the class representative has genuinely and independently selected class counsel, the class representative has no authority to act for the class until the court authorizes it. The court is responsible for binding the class to representation by this attorney, and should be active in discharging its responsibility. The draft rule requires a hearing, and that is good.

It was asked whether it would help to attempt to tailor the rule more closely to the different needs of different kinds of cases. The Private Securities Litigation Reform Act, for example, establishes a procedure for selecting lead plaintiffs, who then are responsible for picking class counsel. Any rule should recognize this statutory procedure, and perhaps should simply cede to it.

From a somewhat different perspective, it was widely agreed that the factors listed in the draft subdivision (b) all are considered by courts now in determining whether to certify a class. The anticipated quality of representation by counsel is an important part of the certification decision. What, then, is added by establishing a formal procedure for appointing class counsel?

Turning back to the feature that prohibits any action on behalf of a class before appointment as class counsel, it was noted that many things are done before a certification decision. Discovery on the certification question is common. The draft seems to prohibit any of this activity before appointment. That is too rigid. Some softening, at least, is necessary.

It also was noted that particularly difficult problems will arise with respect to counsel for a defendant class. One common problem is that no one defendant wishes to be responsible for paying the incremental costs that come with representation of the class: how is it fair for a court to appoint counsel in such circumstances? How, for that matter, will the court get any application for appointment? But a quite different problem arises when a defendant is willing or even eager to provide representation for the class: how can we trust that there will be no conflicts of interest among class members, and how can we protect against them? These problems may be so difficult as to require that an attorney-appointment rule be limited to plaintiff classes. But any such limit might stir speculation that the rule rests on hostility to plaintiff classes.

Class Attorney Fees

Another draft rule would address determination of fees for class counsel. As noted earlier, it does not attempt to choose between lode-star and percentage-of-recovery methods of setting fees. For the most part, at least, this rough initial draft simply sets out factors that are familiar from present practice. But it does raise some difficult questions.

A first range of questions goes to authority to make a rule governing attorney fees. There is firm ground as to fees based on statutory provisions, when a settlement includes fee-payment terms, and when an award is made out of a class recovery. But the draft would authorize an order for payment by members of the class, or by a party opposing the class, on more open-ended terms. Payment by class members may seem particularly important with respect to a defendant class, and might alleviate the concerns with appointing a defendant-class attorney. Payment by a class adversary who has lost to the class may seem attractive as well, but what distinguishes class litigation from other litigation that is covered by the uniquely "American Rule" that generally bars fee shifting? Finding Enabling Act authority for these general provisions may prove difficult or even impossible.

Brief discussion suggested a general anticipation that any rule on attorney fees will be met with vigorous opposition from plaintiff-class counsel.

It was asked why the general Rule 54(d)(2) provisions, which include specific reference to submissions by class members, are not adequate to the task. These provisions establish a procedure for seeking a fee award, but do not address the grounds for making an award or the criteria for measuring it. The question posed by the draft is whether a rule addressing these questions is desirable, and whether — if desirable — can be adopted in the rulemaking process.

It was noted that the American Bar Association Model Rules of Attorney Conduct include a provision that attorney fees must be reasonable. In theory, a district court can proceed directly against an attorney who charges an unreasonable fee. The local rulemaking process has asserted authority over attorney fees. Direct disciplinary procedures are possible.

Judge Rosenthal concluded this discussion by noting that the question for the moment is not authority but guidance for a court embarked on determining a fee award. A rule could give support to measure the award in an orderly and disciplined way. But work is needed to harmonize with other rules and to consider cross-references, particularly to Rule 54(d)(2).

Appeal Standing

Draft Rule 23(g) in the agenda materials is new; it has not been considered at all by the subcommittee. It would authorize appeal from a class-action judgment by a class member. The proposal was spurred by a submission from attorneys in the California Attorney General's office. The rule in several circuits is that a class member can achieve "standing" to appeal a class-action judgment only by winning intervention in the district court. If intervention is denied, the order denying intervention can be appealed, but the class-action judgment can be appealed only upon reversal of the order denying intervention. This procedure has been adopted in the belief that allowing class members to appeal would undermine control of the class action by the court-approved representatives and their lawyers, and frustrate the court's own responsibility.

The argument for permitting appeal by class members is simple. They will be bound by the judgment. Individual rights or defenses will be taken away by the judgment. Our entire system of procedure and trial-court responsibility is built on the premise that appeal is available as a matter of right to test the correctness of the judgment. A person who is to be bound should have a right to appeal. This argument takes on special force when the class judgment rests, as so often happens, on a settlement that has been approved by the court. There is a risk not only that the class representatives have entered into an improvident settlement, but also that the trial court may not have sufficient adversarial input to test the adequacy of the settlement and may be affected by a temptation to conclude troublesome litigation.

The structure of the draft builds from these arguments to permit appeal by a class member from any judgment based on a settlement or dismissal approved under Rule 23(e), and from any other judgment that is not appealed by a class representative. This structure reflects a belief that a settlement is so distinctively precarious that a non-representative class member should be able to appeal even in the no-doubt unusual situation in which a class representative also is appealing. Perhaps the distinction is overly refined. The draft Committee Note serves as the vehicle for addressing obvious surrounding problems: a class member can present on appeal only issues that were properly preserved in the trial court; if a class member appeals before a class representative takes an appeal, the class member's appeal "is suspended, and should expire upon submission of the appeal on the merits"; if many class members appeal, the court of appeals can designate one or more to serve as class representatives for the appeal. The Note also identifies the question whether appeal standing should be restricted to the final judgment. A class member, for example, may wish to appeal under Rule 23(f) from an order granting certification of a class, arguing that certification is improper, that the named representatives are inadequate, that the class has been defined too broadly,

and so on. The court of appeals can protect itself, the district court, and the appointed class representatives by denying permission to appeal. The danger of delay and strategic misuse may seem to overwhelm these advantages, however; further thought is needed.

Discussion began by asking whether there is a real problem that needs to be addressed. It was further asked whether a Civil Rule can supersede standing rulings by the courts — is this a rule of procedure at all? And even if a rule can properly address the question, is it wise to permit appeals that can tie a case up for years after those initially responsible have become satisfied with its conclusion?

It was recognized that the question is a tricky one. Perhaps there is no real problem with current practice; there are no empirical data to demonstrate that bad dispositions of class actions are surviving only because nonrepresentative class members are unable to win intervention to appeal under present practice. Just as with anything else that increases the role of objectors, we must be careful.

Notice

Thomas Willging presented the notice and related drafts being developed by the Federal Judicial Center. He noted that the draft "is still in mid-point." They hope to find a linguist to review it, and then will test it on groups of non-lawyers. There are a number of issues yet to be resolved. Perhaps the most important remaining challenge will be an attempt to draft a one-page summary that has a chance of being read and understood by class members.

Another issue goes to the language used to describe the preclusive effects of remaining in a class. The scope of claim preclusion that attaches to a class-action judgment may appropriately be somewhat different from the scope of claim preclusion that follows individual litigation. Finding language to capture these concepts in a way that means anything to nonlawyers will be difficult.

It would be helpful to have Committee members submit their own top five candidates for words or phrases that should be eliminated as jargon.

Further attention is needed with respect to the part of the notice that describes what a class member can expect to receive from the litigation. The present draft has two alternatives: one in a loss-per-unit form (so many cents per share of stock), the other in a loss-per-person form (a fund divided per capita by an uncertain number of claimants). There are serious questions whether either example is useful outside the securities litigation field that inspired each.

The sections on selecting an individual attorney and on making individual appearances "seemed to get out of control." Rule 23 does require notice of the right to appear. These matters will be considered further.

Mr. Willging was asked whether forms would be prepared for other types of litigation. He responded that the aim is to develop a "skeleton" that can be adapted to several forms of action. No attempt will be made to develop a generic form in the elaborate detail of the notice created for the current fen-phen litigation.

It was noted that the subcommittee may continue to consider possible amendments to Rule 23 addressing the notice obligation. It might help to specifically include a reminder of the need to seek "plain English" in notices. The time may have come to recognize the need to attempt some form of notice in Rule 23(b)(1) and (b)(2) class actions. It may be possible to soften the requirement of notifying all identifiable class members in actions that involve very large classes and no more than very low dollar recoveries for any individual class member. These issues remain open on the agenda.

The concluding remark was that a one-page summary form, if it can be created, will be the most useful possible product of this work.

Simplified Procedure

The simplified procedure project was launched as a broad response to the Advisory Committee's responsibility to consider the overall working of the Civil Rules. Section 331 of the Judicial Code instructs the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," and to recommend to the Supreme Court "[s]uch changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay * * *." These goals, reflected in Civil Rule 1, remain elusive. The continuing process of attempting to adapt the Civil Rules to new forms of litigation and evolving litigation behavior often seems to make the Rules less simple. It is important to draw back from the details from time to time, and to ask whether larger-scale revisions may be appropriate. The Committee has had discovery on its agenda continually for more than thirty years, and occasionally has asked whether the pleading rules might be asked to carry a more substantial share of the pretrial communication function. The simplified procedure project is designed to ask whether the time has come to pare back some of the complexities, perhaps by designating some categories of cases for a package of rules that would enhance pleading and disclosure, while diminishing the role of discovery.

Judge Kyle introduced the Simplified Rules Subcommittee report by noting that the Subcommittee's purpose at this meeting is to seek a sense of direction. The topic was put on the agenda by Judge Niemeyer, who was asked to summarize the initial directions of inquiry.

Judge Niemeyer gave the background. The Committee's discovery work led to consideration of the burdens of discovery and the relationship between discovery and notice pleading. We have never dared to reopen the 1938 package of notice pleading and discovery. The 1938 reform was a reaction to the spirit of technicality that had come to dominate Code pleading. Discovery was to be managed by attorneys, with the court as a backstop. The most vigorous complaints over the years have arisen from the conduct of depositions and "scorched earth" tactics. Any attempt to revise the present integrated system of pleading and discovery for all actions, however, would be extraordinarily perilous. Rather than take on the whole system, the Simplified Procedure project is designed to begin with some discrete categories of litigation. If success is achieved with these cases, the experience may provide the foundations for more general revisions several years in the future.

Part of the inspiration for this project has been the American Law Institute Transnational Rules of Civil Procedure project. That project seeks to identify the central tasks of adjudication that

are common to all procedural systems and to develop simple rules that can discharge those tasks effectively.

It is hard to know what would happen if simplified rules were adopted. If they were made optional, would people opt into them? Can we properly make any such rules mandatory for some categories of cases?

The project has been discussed, in preliminary form, with several bar groups and with groups of district judges. There has been much positive reaction. But there also has been concern about possible interference with local ADR rules, and more generalized concern. One particular concern must be met head-on: the proposal is not to develop a cheap and inferior set of rules for "small claims." It is an attempt to develop rules that will give better results in cases that may be overwhelmed by full application of all the procedures available under the general Civil Rules. We should remember that discovery is not used at all in something like 40% of federal civil actions, and is little used in another 25% to 30%. Perhaps these cases would benefit from rules that, at little cost, require more detailed initial pleading and disclosure.

It has seemed desirable to pursue this effort. One goal may be to develop a set of optional rules that are so attractive that litigants will choose to be governed by them.

To pursue these questions in a larger perspective, the Subcommittee has invited Judges Ellis, Hamilton, and Schwarzer to present experiences and proposals that look in different directions. Those who have questioned the broad attempt to develop a set of simplified rules have looked in several directions. One direction challenges the assumption that the federal rules are "too much" for many cases that are, or better would be, in the federal courts. The very fact that most federal civil actions involve little or no discovery suggests that the rules are not too complex. The theory that federal procedure is too complex, moreover, must deal with the fact that many states have chosen to follow the federal rules for their own courts of general jurisdiction, and that many of the state systems that have developed their own traditional models can hardly be found simpler than the federal model. Perhaps most importantly, it is urged that federal courts already have the power to adopt simplified procedures for cases that deserve them. The sweeping management powers established by Civil Rule 16, and the broad judicial discretion built into the discovery rules, ensure that no litigant need be overwhelmed by strategic misuse of procedural opportunities. Individual case management is protection enough. In addition, several courts have developed differentiated case management plans that ease the potential burdens of individualized management. These plans establish presumptive procedural limits for each of several "tracks," and encourage the parties to work together in choosing the appropriate track.

The question, in short, is a familiar one: time and again, a proposed procedural revision is met by the response that the flexibility and discretion built into the Civil Rules establish ample authority to accomplish the goals sought by the revision. The issue may be not so much the adequacy of present rules as the adequacy of implementation. The conclusion that present rules are adequate in the abstract need not defeat revision — it may be easier to guide discretion by general rules than to supervise case-by-case exercise of discretion. But it is important to know how the present rules are working.

It must be emphasized that the draft Simplified Rules are not at all the type of rules that might be developed specifically for pro se litigation. To the contrary, they are simplified only to those who have a professional understanding of procedure. They are not a complete, self-contained system. They only supplement the Civil Rules for certain issues, most notably pleading, disclosure, and discovery. The Civil Rules continue to apply to all matters not directly governed by the draft Simplified Rules. Implementation requires expert knowledge of all of the Civil Rules, both general and simplified.

Judge Schwarzer described a small-claims procedure that he has developed for consideration. The proposal is an "anti-Rules" proposal in the sense that it depends entirely on party consent. It begins with the observation that many actions in federal courts involve dollar stakes that are low in relation to the cost of litigation. The Federal Judicial Center review showed that for the actions in which the amount of the demand is known, more than 11% involved demands for less than $50,000, and more than 16% involved demands for less than $150,000. There also are many cases pursued pro se. The purpose of this model is to facilitate rapid, inexpensive access to justice for small-stakes cases. The result also might be to save some judicial resources.

This small-claims proposal is consensual. The action would be filed in the same way as any action. Possible election of the small-claims rules would be raised at the initial scheduling conference or by similar means. Once the rules are selected, the common obstacles to speedy disposition are removed. There are no motions, no conferences after the initial conference, and little discovery because the time frame for getting to trial does not allow much time for discovery. All complexities are avoided. Jury trial is eliminated. There is no need to adopt any new procedure rules. A general order could establish the system.

The incentives for electing this system begin with a guaranteed trial date in 30 or 60 days. This speedy trial guarantee is possible only if most judges of the court join in the system; each judge would agree to be available for a period of one or two months to give priority to these cases. The early trial system also is likely to change the judge's role, assigning more responsibility to the judge because the parties have not had as much opportunity to be prepared. Such rapid access to justice is important, and may attract many litigants.

Another incentive could be developed by establishing a cap on damages, perhaps $75,000. Plaintiffs might agree in return for speedy and inexpensive trial, while defendants would be attracted by the limit on recovery.

Although no rules changes are needed to establish this system on a local basis, the proposal might be supported by adding consideration of expedited procedures to the list of topics considered at the Rule 26(f) conference.

This system would provide "rough and ready justice," but there may be room for that in our system.

Judge Hamilton introduced the differentiated case management plan of the Eastern District of Missouri by observing that when the Civil Justice Reform Act was enacted, "we were in quiet desperation. Our case management needed overhaul." They reacted by adopting differentiated case management, developing the ADR program, and putting magistrate judges "on the wheel" to be

assigned at random to try civil cases subject to the right of any party to opt for trial before a district judge.

The differentiated case management plan has five tracks, including three that set expected times to trial: an expedited track, with 12 months to trial; a standard track, with 18 months to trial; and a complex track, with 24 months to trial. The other tracks are for "administrative" cases that involve disposition on records that have already been developed (such as social security disability review cases), and pro-se prisoner cases.

The expedited track was designed to have no Rule 16 component. But we have found that most lawyers have trouble thinking of their cases in this mold, so there are not many cases assigned to this track. It has not matured the way we thought — the problem seems to be a psychological one, not a pragmatic one. But lawyers may want more than 12 months to prepare for trial. The court has not yet thought whether there are ways to force more cases into this track. There also are very few cases in the complex track. Most cases seem to be standard cases.

To make the track system work, judges must take care to enforce the time rules.

One thing that has changed is that the court has gone back to voluntary disclosure. Lawyers, initially suspicious, have come to think that voluntary disclosure is a good thing.

Adoption of the differentiated case management system involved a real culture change. It has been very helpful. Probably it has not increased the number of settlements, but it seems to encourage early settlements. Lawyers get together before the first Rule 16 conference. They propose time schedules that ordinarily can be adopted without change — they are careful in framing the initial schedule because they know that most of the court's judges are reluctant to allow changes once the plan is adopted.

The process of adopting the differentiated case management program was itself good for the district. Judges were brought together not only with lawyers but also with the court staff. Judges are more amenable to suggestions for change; the court has fine-tuned many things as it has gone along.

Judge Ellis began his description of the "rocket docket" practices in the Eastern District of Virginia by noting that the set of draft simplified rules seems well done. But the effort is like the virtuoso design of a good concrete canoe — the world has no need even for the most expertly designed concrete canoe. The Rulemaking process is long and arduous. Before entering the fray, there should be a major demonstration of need, founded on empirical studies that show what the need is. The burden of proof is on the proponents of change. As one obvious question: how many cases involving stakes of less than $50,000 are delayed in resolution because of current rules? It is necessary to figure out the problem before devising a fix. There do not seem to be any studies that show a need, and it is not likely that any studies that may be undertaken will show a need. But any change should be preceded and supported by empirical study.

Lawyers want a truce in rulemaking. We have rules changes almost every year, and important rules changes every few years. The capacity of the bench and bar to absorb change should not be taxed without a strong showing of important advantages to be won.

Some courts have devised procedures for categories of cases, called differentiated case management. This tells us, first, that some courts perceive a need for this in their local circumstances, but does not tell us that any particular local plan will work for other courts. The Eastern District of Virginia practices would not work in the Southern District of New York — the practices would not even be perceived as fair there. Eastern District judges are not proselytizing for export of their practices. The adoption of local plans tells us, next, that courts already have power to do this. Rather than devise new national rules, the most that may be needed is to have the Federal Judicial Center include information about the adoption and use of local plans as part of its educational program.

It does not seem likely that there is a large group of cases that are delayed by current rules. And there is a risk that a plan that adopts a specific target for time-to-disposition will simply entrench the target as the norm, when speedier disposition could be achieved.

The level of differentiation in this docket management plan begins with standard orders. The standard orders, however, can be changed. Lawyers agree to additional time more frequently than had been anticipated.

The Eastern District of Virginia program was initiated by Judge Walter Hoffman in 1962; that was the old rocket docket. Along about 1977 Judge Albert V. Bryan Jr. came to the court, and became the architect of the present system. The system is simple, with three basis components.

First, there is a quick, fixed, and immutable trial date. It is, however, a mistake to set the trial date at the time the action is filed. Instead, the court sends out a standard scheduling order setting a four- or five-month discovery cutoff, and a final pretrial conference date. Trial is about a month from the final pretrial conference. Many "big" cases are filed in the court, often involving lawyers from outside the district; by the time of the final pretrial conference, the lawyers from outside have been educated by local counsel to understand that there are *no* continuances.

Second, there has to be judicial discipline to try cases. Judges should not hesitate for fear of being wrong. Judges "should do our best, thoroughly and thoughtfully," but expeditiously. It also helps to have an effective summary judgment practice, supported by the circuit court.

Third, there must be a supportive local legal culture. The culture has developed over the years; it is far more important and effective than local district rules could be.

The result of this system is that there are only a few exceptions to the practice of holding trial from six to nine months after filing. That is not because the district has an unusual mix of cases. To the contrary, it seems to have a typical mix. Some very complicated cases begin and end within this time frame. Even patent actions, with the substantial amounts of time required for "Markman" hearings, can be managed in this way.

Magistrate judges discharge the court's responsibilities with respect to discovery. They work hard.

The practices in the Eastern District of Virginia probably cannot be exported to other districts. But the district does not need to import an additional layer of simplified rules.

General discussion began with the suggestion that the time has come to reexamine the consensus that individual case assignment is the best vehicle for intensive case management. We should look hard at the model that makes any judge available to try any case; we may find that this system in fact works better. It was noted that in the Eastern District of Virginia the Alexandria court has a master docket. In other parts of the district individual dockets are used. The master docket supports flexibility, but in all parts of the district judges are available to try cases assigned to a different judge. This is important.

Other devices as well can be used to speed trials. In Alexandria a jury is picked in no more than two hours, apart from a big capital case or equally momentous actions. The local legal culture accepts the proposition that a witness cannot be kept on the stand for a day and a half in the hope of "getting a nibble." Cases do try fairly quickly. It is recognized that a jury trial has a maximum length of two or three weeks if there is any hope of jury comprehension. In a very long case, the lawyers may be asked, after using half of the time they claim to need to examine a witness, what else they want to ask.

It was asked whether the Eastern District of Virginia practices are supported by the local bar because they think the practices serve their interests? The answer was uncertain. The leadership of the judges may have been important in the beginning, when there were few judges and they were "very strong." But the local culture is now ingrained, and such cultures do not change rapidly. Court rules do not trump culture. Change does occur over time — the mix of cases changes. But the rocket docket general practice has not changed much in thirty years, apart from making better use of magistrate judges in discovery and settlement. The practice works. "Lawyers know it." The lawyers manage the system without requiring management by the judges.

It was urged that another layer of rules, adopted in the name of simplification, is not what we need just now. One feature of the draft rules would require that each document that may be used to support a claim be attached to the pleading stating the claim; "we do not need this mess." Another feature would restore the 1993 initial disclosure practice, and perhaps expand it; we should not revive that practice. The entirely consensual proposal advanced by Judge Schwarzer has much to commend it, but it may be asked whether we need even to rely on magistrate judges. How about using lawyers as pro tem judges? A panel of qualified and willing lawyers could be established, one of whom would be assigned to each case in the system. This works in California state courts. This is "ADR with teeth," done with party consent. Not many lawyers can take $50,000 cases; such a system might make justice available to persons who now are unable to proceed.

It was noted that each of the three systems described by the judges panel sets time limits, and does not change anything in the Rules to give direction on how the time limits are to be met. There is a judge there, however, to make the time limit credible. So it was noted that in the Eastern District of Missouri the judge has control of the trial date and ordinarily will not change it once it has been set, but the parties control most matters on the way to meeting the trial date. Practice in the District of Minnesota is much the same. These systems are quite different from the draft "simplified rules." Has there been anything done in local Civil Justice Reform Act plans that is similar to the simplified rules?

It was observed that "any set of rules exists in delicate tension with local culture." Since the 1983 amendments, Rule 16 has contributed to substantial changes in local legal cultures. The initial disclosure provisions in the 1993 version of Rule 26(a)(1) had a similar effect in some districts. National rules can make a difference, but should be used sparingly for this purpose. The question is whether there is a need for special rules for the many small-stakes cases that do, or might better, come to federal courts. The very fact that there are many small-stakes cases in federal courts now may suggest that there is no need for new rules. One alternative is to reconsider the question whether individual dockets contribute to delay in getting to trial. It has also been suggested that Rule 83 should be changed to authorize innovative local rules, with permission of the Judicial Conference, to provide a framework for controlled experimentation.

It was noted that state systems commonly have small-claims courts. In Texas, a separate track was created in district courts, available initially on election of a plaintiff who must agree to limit any recovery to a maximum of $50,000; defendants cannot easily get out of this track. Discovery is limited, amendment of the pleadings is limited, and other procedural opportunities also are curtailed. After two years, "no one uses it." It was hoped that it would be used by banks in collection actions, in small personal-injury actions, and the like. But there have been perhaps 100 cases on this track.

A similar experience was reported for the "expedited track" adopted in the Southern District of New York. Lawyers did not want it, viewing it as a lesser procedure. The "small" cases are not a problem there. "They tend to go away." Lawyers recognize the small cases, know they cannot afford to try them, limit discovery, and settle. When a small case comes to a Rule 16 conference, it is assumed that it will involve one deposition for each party, and will go to trial in six months. This is done without creating a differentiated case management program.

The suggestion that Rule 83 might be amended to authorize experimental local rule procedures was met with the observation that this basic proposal was advanced several years ago and withdrawn in the Standing Committee. The continuing emphasis on national uniformity, and the continuing valiant efforts to curtail disuniformity stemming from local rules, suggest that any proposal along these lines will meet vigorous resistance.

Non-prisoner pro se cases get the same process as other cases in the Eastern District of Virginia. They may involve relatively low damages, and perhaps an injunction. They get done. There are pro se clerks for prisoner cases; that work is more specialized. Few of the prisoner pro se cases get to hearing or trial.

Motions in the Eastern District of Virginia are handled on Fridays. Every judge is required to be available on Friday, and commonly encounters many unfamiliar cases. Motions are decided orally from the bench; the order then gets typed up. Many motions are disposed of in a single day, often including complex cases. Only a small number are taken under advisement. Good law clerks are an indispensable help.

It was noted that so-called "firm" trial dates infuriate lawyers if they prove to be fictional. And discovery cut-offs should be set just before a real trial date, not a fictitious one. This can be accomplished only with a major cultural change in the federal courts.

The Committee expressed thanks to the panel members for their very informative and helpful presentations.

Discovery Subcommittee

The Discovery Subcommittee has scheduled a discussion of discovery of computer-based information for October 27 in Brooklyn. Judge Carroll asked Professor Marcus to describe the plans. Professor Marcus observed that at the April meeting he had suggested that the March conference had moved us forward, but that perhaps we were no closer to the starting line. The October 27 meeting "may bring us within sight of the starting line."

More than three years ago, during the meetings and hearings that led to the discovery amendments scheduled to take effect this December 1, lawyers started telling us that the Committee should think about discovery of computer-based information. Those questions were deferred while more familiar questions were addressed. The March conference increased our level of familiarity.

The fact that a second conference has been scheduled does not indicate a determination that something must be done now. "Doing nothing remains a strong option" for the time being. The list of participants for the conference has been filled in. The materials for the conference include first drafts on a number of rules amendments that might be considered, but there is no implicit suggestion that any of these drafts should be pursued further. And the drafts do not pursue such topics as more aggressive teleconference trials; revising rules language that stems from the dawn of the computer revolution; addressing the issues that arise when a party wants to seek discovery by addressing queries directly to another person's computer system. The models, however, are intended to give concrete perspective and a basis for discussion. The "low impact" proposals tell people to talk about issues of computer-based discovery. The others tell people what to do about it.

It would be possible to expand the initial disclosure model to address explicitly the need to include computer-stored information in response to discovery, but to excuse any obligation to provide back-up or deleted information unless the court orders it. Provisions on preserving computer-based material are possible, but we do not do that for other forms of information that may become the subject of discovery request. The problems of preservation may be distinctive, however, because of the lament that in many computer systems the only way to ensure that full information is preserved is to stop operating the system. Cost-allocation questions will be sensitive and difficult to approach. Questions of inadvertent privilege waiver also persist, both with respect to computer-based information and more generally.

After the conference, the subcommittee may be in a position to decide whether the time has come to attempt to draft rules changes for discovery of computer-based information. It will be necessary to understand why it is appropriate to attempt special provisions for such information, and then to determine what to try to provide.

Admiralty Rules

A substantial set of amendments to the Supplemental Admiralty Rules are set to take effect on December 1. These amendments reflect the fruit of several years of work that relied on the close involvement of the Maritime Law Association and the Department of Justice. The major purpose

was to reflect the growing use of the Admiralty Rules in civil forfeiture proceedings, making changes that make desirable distinctions between forfeiture practice and true admiralty practice. In April, Congress adopted the Civil Asset Forfeiture Reform Act of 2000. The Act contains several provisions that are inconsistent with the amended admiralty rules. Because the admiralty rules will take effect after the statute took effect, the inconsistent provisions seem to supersede the new statute.

Working closely with the Department of Justice, and with the help of the Maritime Law Association, four sets of changes are proposed to bring the Admiralty Rules into line with the new statute. The Department of Justice supports all of the proposed changes as a means of eliminating the confusion that otherwise will result as courts attempt to work their way through the process of reducing apparent inconsistencies to a workable system.

The first proposed change is the simplest. Admiralty Rule C(6)(a)(i)(A) provides that a statement of interest must be filed within a period 20 days; new 18 U.S.C. § 983(a)(4)(A) sets the period at 30 days. The 20-day period was initially chosen because of a belief that it coincided with pending legislative proposals. Had it been known at the time that the new statute would adopt a 30-day period, the same 30-day period would have been proposed for Rule C. The Committee approved the recommendation that Rule C be amended to adopt the 30-day period; the Committee Note will state simply that the change is made to conform to the statute. This change is so far technical that the Committee also recommends that it be sent by the Standing Committee to the Judicial Conference for approval without publication.

The second proposed change is more complicated. The statute departs from Rule C(6)(a)(i)(A) in describing the events that trigger the 30-day period for filing a statement of interest. Rule C(6) sets the period to run from "the earlier of (1) receiving actual notice of execution of process, or (2) completed publication of notice under Rule C(4)." New § 983(a)(4)(A) sets the period as "not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint." The differences in wording the reference to publication of notice do not seem troubling. The difference between "receiving actual notice of execution of process" and "service of the Government's complaint" is more troubling. There may be some occasional differences between "execution of process" and "service of the * * * complaint," but they are likely to be rare. There is, however, a difference between actual notice and service. The difference is most apparent when the person filing a statement of claim is not a person served. These differences are likely to be resolved in most forfeiture proceedings by the alternative reliance on the 30-day period that begins on completion of publication, but it has seemed better to resolve them. The Committee approved a recommendation to amend Rule C(6)(a)(i)(A) to conform to the statute, to read:

> **(A)** within ~~20~~ 30 days after the earlier of (1) ~~receiving actual notice of execution of process~~ the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), * * *.

Again, the Committee Note would state simply that the change is made to conform to the new statute. The Committee concluded that this change is sufficiently significant to require publication for comment.

The third proposed change goes to the procedure for answering in a forfeiture proceeding. New Rule C(6)(a)(iii) provides that a person who files a statement of interest must "serve" an answer within 20 days after filing the statement. New 18 U.S.C. § 983(a)(4)(B) provides that the person must "file" an answer within 20 days. There is no necessary inconsistency between these provisions: It is easily possible both to serve and file within the 20-day period. If there is any inconsistency, it is between the statute and Civil Rule 5(d), which requires filing within a reasonable time after service. The different requirements, however, may prove a trap for the unwary. The better response seems to be to amend Rule C(6)(1)(iii) to require both service and filing within 20 days. The ordinary rule requirement is that a pleading be served; there is no apparent reason to abandon that requirement in forfeiture proceedings. The statutory requirement of filing within 20 days, however, can be added to Rule C(6) to draw attention.

Exploration of this proposal included consideration of an inadvertent drafting slip in new Rule C(6)(b)(iv). This rule is the admiralty practice analogue of the forfeiture proceeding. It was drafted to require that the answer be filed within 20 days of filing the statement of interest, without referring to service. The reference should have been to service. There is no apparent need to retain a filing requirement in this provision; it is recommended for Rule C(6)(a)(iii) only to conform to the new forfeiture statute.

The Committee recommended that Rule C(6) be amended as follows:

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute: * * *

(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement. * * *

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a): * * *

(iv) a person who asserts a right of possession or any ownership interest must ~~file~~ serve an answer within 20 days after filing the statement of interest or right.

The Committee Note will state that the "filing" requirement is added to Rule C(6)(a) to parallel the statute, and that the filing requirement is changed to service in C(6)(b) to correct an inadvertent drafting slip. This change is recommended for publication, in part because other changes are recommended for publication.

The fourth and final proposed change involves Rule C(3)(a)(i). The rule requires the clerk to issue a summons and warrant for the arrest of the property involved in a forfeiture proceeding. New 18 U.S.C. § 985 provides that in most circumstances, real property involved in a forfeiture proceeding is not to be seized before entry of an order of forfeiture. It is no longer appropriate to require issue of a warrant for arrest. To meet this new statute, the Committee voted to recommend to amend Rule C(3)(a)(i) to read:

(3) Juridical Authorization and Process.

(a) Arrest Warrant.

(i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under applicable statutory procedures. * * *

The Committee Note would direct attention to the new statute.

It was decided to recommend this change for publication, primarily because other proposed amendments also are being proposed for publication.

The question whether to recommend any of the changes for publication was viewed as relatively close. The proposed changes are intended to bring the rules into line with the new statute, apart from the change from filing to service in Rule C(6)(b)(iv). In some ways it would be convenient to have the changes take effect as soon as possible — the fastest possible timetable would be to urge the Standing Committee to recommend adoption without publication in time for action by the Judicial Conference in March 2001, with transmission by the Supreme Court to Congress by the end of April, to take effect on December 1, 2001. Publication of the proposals, however, should go a long way toward ensuring that litigants and courts are able to act in conformance with the statute. And publication will help to ensure that nothing has been overlooked.

Rule 53: Special Masters

Judge Scheindlin presented the report of the Rule 53 Subcommittee. The time has come to determine whether the Subcommittee should bring a final proposed Rule 53 revision to the Committee at the April 2001 meeting.

Rule 53 now addresses only trial masters. Masters in fact are used extensively for pretrial and post-trial purposes. Before trial, masters are used extensively for such purposes as supervising discovery and mediating settlement. After trial, masters are used to help in formulating equitable decrees and to monitor decree enforcement. The present rule is outdated and provides no guidance for current practices.

The current draft revision has been circulated for comment to lawyers, law professors, and the Rule 53 Subcommittee. The Federal Judicial Center responded to the Committee's request by conducting a study of special master practices that Thomas Willging headed; a report on the study was provided at the April meeting. The study confirmed the prevalence of pre- and post-trial master appointments. It also showed that courts appointing masters are as inclined to cite no authority for the appointment as to cite Rule 53. Judges and attorneys consulted during the second phase of the study showed some interest in Rule 53 amendments, but stressed the need for breadth and flexibility while avoiding inappropriate stimulus to the use of special masters.

After describing the several subdivisions of the draft rule, key issues were identified: should a revised rule eliminate the use of trial masters whose report is read to a jury? Although the draft

continues this practice, the Subcommittee and Reporter believe that the practice is inappropriate. It overlaps use of a court-appointed expert under Evidence Rule 706, but without the safeguards and advantages that surround a court-appointed expert trial witness.

Draft Rule 53(a)(1)(B) carries forward the "exceptional condition" requirement in present Rule 53. It is meant to refer to the trial-master practice embodied in Rule 53. A different standard is used for pretrial and post-trial appointments under draft Rule 53(a)(1)(D).

Draft Rule 53(b) is a "laundry list" of duties that may be assigned to a special master. There are roughly three groups: pretrial duties, in paragraphs 1-7; trial duties, in paragraphs 8-9; post-trial duties, in paragraphs 10-14. Paragraph 15 provides a final "other duties" category. These lengthy provisions could be reduced to more general provisions for pretrial, trial, and post-trial uses, or to other broader and more general terms.

It is fair to ask whether all uses of trial masters should be abolished, for judge-tried cases as well as jury-tried cases. The Supreme Court has dramatically reduced the occasions for this practice, and the time may have come to end it entirely.

Draft Rule 53(c)(1) provides opportunity for hearing before any appointment of a master. This is new, but seems a good idea.

Draft Rule 53(c)(2)(D) provides for detailed specification of the dates for action by a master. It is not clear whether this much detail is appropriate.

Draft Rule 53(c)(2)(E) requires the court to specify whether ex parte communications are appropriate between the master and the parties, or between the master and the court. The Federal Judicial Center study found substantial concern about these questions. This provision should not be controversial.

Draft Rule 53(c)(2)(F) opens the question of standards for reviewing special master orders. The question is addressed also in subdivision (i). Perhaps these provisions should be further clarified or simplified.

Draft Rule 53(c)(2)(G) may well be deleted. It provides that the order appointing a master may require a bond. This provision responds to concern about the potential liability of a master. A Civil Rule probably cannot address the substantive question whether a special master is entitled to absolute judicial immunity. A bond requirement, however, could provide protection and might be taken as the sole basis for liability. There is no known present practice in this dimension, and it may be better to put the question aside.

Draft Rule 53(h) provides that a master may submit a draft report to counsel before reporting to the court. Perhaps this permission should be changed to a requirement.

Draft Rule 53(i)(5) provides de novo review by the court of a master's recommendations with respect to questions of law, unless the parties stipulate that the master's disposition will be final. Is this appropriate?

Draft Rule 53(j)(3) addresses allocation of the master's compensation among the parties, including potentially controversial provisions for considering "the means of the parties and the extent

to which any party is more responsible than other parties for the reference to a master." These provisions deserve further consideration.

Draft Rule 53(k), finally, limits use of magistrate judges as special masters. This provision opens up much more general questions about the proper relationships between appointment of special masters and magistrate judges. These questions too deserve further attention.

The first question asked in the general discussion was whether courts continue to use special masters at all for trial purposes. The Federal Judicial Center study in fact found that this practice continues. A case involving complex documentary evidence would be an example. There is no provision for cross-examination of the master; the practice continues to be separate and distinct from the use of court-appointed expert witnesses. And there continue to be occasional uses of a trial master whose report is read to a jury without any cross-examination of the master.

The next question asked what percentage of masters are appointed by consent. The Federal Judicial Center study found that 70% of appointments were made "without opposition." A large fraction of those cases involved true consent. In some of the cases, however, lawyers who would have preferred not to consent refrained from objecting because they feared antagonizing the judge. It was noted that if there is true consent, the parties will frame the appointing order, defining the master duties that they truly want.

It was observed that judicial power is very broad, extending apparently to the limits of judicial creativity. It would be a mistake to draft a rule "backward from what we see." If we could survey state-court practice we likely would find great use of special masters, and judges will continue to think of still newer uses. Perhaps we should abandon both the draft subdivision (a) statement of standards for appointment and the draft subdivision (b) list of appropriate master duties. The rule could begin with the draft subdivision (c) provisions for the order appointing a master, including the requirement that the order state the master's duties. We could delete the general "powers" provision in subdivision (d). It may be better not to speak to the use of special masters in jury trials; perhaps Article III requires that a court be permitted to appoint a special master to assist in a jury trial. The resulting rule would accept and regularize the present open-ended approach.

A response was that limits in the rule help to prevent an impatient judge from evading the limits of the magistrate-judge statute by appointing a magistrate judge to do otherwise unauthorized acts as a master. Although the 1968 magistrate-judge statute specifically authorizes appointment of a magistrate judge as master, that provision has been largely overtaken by subsequent expansions of magistrate-judge powers.

It was urged that much of the material in the draft rule would be better covered in a Federal Judicial Center pamphlet. The draft includes a level of detail that most rules do not approach. We should be reluctant to freeze so much detail in the text of a rule. A very short list would be better.

A more sweeping approach was suggested — it would be better to abolish Rule 53 entirely. It is wrong to use lawyers, or nonlawyers, to discharge judicial duties. The draft, by expanding the descriptions in the rule, will further encourage the inappropriate use — that is to say, any use — of masters.

It was argued from the other side that we need to adapt Rule 53 to accommodate what is happening. Masters can be valuable judicial adjuncts, particularly in litigation that involves technical matters. A new rule should state broad standards for appointment; provide a hearing for the appointment decision; define standards of review; and consider the condition, found in draft Rule 53(a)(1)(D), that no district judge or magistrate judge of the district is available to discharge the responsibilities to be assigned to the master. Agreement was expressed, but with a question whether the draft Rule 53(b)(1) reference to masters who mediate or facilitate settlement will lead to appointment of ADR participants as masters. This question was met with the observation that some courts apparently do appoint ADR facilitators as masters, hoping that the appointment will establish a basis of judicial immunity that otherwise might not attach.

Returning to the broader question, it was noted that present Rule 53 "is complicated, and mostly irrelevant to present practice." But there does not seem to be an overwhelming need for change, given the frequent use of consent-acquiescence to arrange master appointments. On the other hand, it may be desirable to bring the rule into conformity with present practice, leaving flexibility that will support further developments. Although no final decision need be made now whether to recommend revisions, the gap between Rule 53 and practice is a strong reason to clean up the rule. Clarification and guidance of the process are important. The level of detail is less important, and indeed too much detail may prove to be a problem. The ways in which further flexibility may be needed can be illustrated by the increasingly familiar questions that surround discovery of computer-based information, and the enhanced level of judicial discovery supervision contemplated by the December 1, 2000 discovery amendments.

A different suggestion was that although there is a mismatch between Rule 53 and practice, it may be better to leave bad enough alone. But if revision is undertaken, the better approach is to be more general and permissive, less directive. The details should be left to some form other than the text of the rule. The new rule could identify appropriate processes, perhaps designate some things that are forbidden, but not designate too much.

It was asked whether there are variations in practice across the country, and whether it is appropriate to interfere if master practice is more developed in some sections than in others. Should we be encouraging all courts, or courts that do not use masters as extensively as other courts, to increase the frequency of references? It was responded that there is no particular sense whether local practices vary, although it might be guessed that particularly busy districts have more incentive to rely on masters. The Federal Judicial Center survey did not identify any local differences.

It was noted that Texas does not favor use of masters, partly because of the expense to the parties. California courts, on the other hand, seem to rely extensively on masters.

It was suggested that federal practice varies more among individual judges than among districts. Masters are used, and will be used more frequently. It would be very helpful to have a set of rules on how to appoint masters, and on how a master's report is reviewed. But it would be a mistake to provide extensive detail on the responsibilities and duties that can be assigned to a master.

Topics that might profitably be addressed in the rule were suggested. One is conflicts of interest, a matter touched by draft Rule 53(a)(2). Another is ex parte communications — the Federal

Judicial Center study found that this is one of the topics that most troubles courts, lawyers, and masters; the draft simply provides that the order of appointment must address this topic, and it was agreed that the appropriateness of ex parte communications depends on the purposes of the appointment. A settlement master, for example, may be unable to operate without ex parte communications with the parties. Other issues that should be addressed, at least in the order of appointment, are the standard of review by the court (which helps substitute for the lack of cross-examination), and compensation. On these and perhaps other matters, masters are used for so many different purposes that it may be better to list issues that must be addressed in the order of appointment than to attempt to resolve the issues in a more general way by specific rule provisions.

It was observed, in response to a question, that there seems to be general agreement among magistrate judges that there are appropriate occasions for using special masters.

It also was observed that the Standing Committee is more likely to be receptive to a proposed rule that simplifies present Rule 53, even as it expands the rule to reflect current practices. As with the current efforts of the Rule 23 Subcommittee, it may be useful to focus more on the process of appointing special masters than on the substantive standards for appointment.

It was agreed that the Rule 53 Subcommittee would work at paring the initial draft down to a "core" draft, to be presented at the April 2001 meeting. It is not clear whether there will be opportunity to take the final steps toward recommending publication or abandoning the project in April, but it would be good to have a well-developed draft.

Rule 51

Civil Rule 51 has been on the agenda for some time, but consideration has been deferred in the press of more urgent matters.

Consideration of Rule 51 began with a suggestion from the Ninth Circuit Judicial Council that something should be done to legitimate the numerous local district rules that provide for submission of requested jury instructions before the start of trial. These rules seem inconsistent with the text of Rule 51, which provides for filing requests "[a]t the close of the evidence or at such earlier time during the trial as the court reasonably directs * * *." The Committee has determined in earlier discussions that there is no apparent reason to leave this question to local rules. If, as seems to be agreed, it makes sense to allow a court to direct that requests be filed before trial begins, Rule 51 should be amended to permit the practice on a uniform basis. The Criminal Rules Committee has already published, and in August 2000 republished, a proposal to amend Criminal Rule 30 to provide for instruction requests "at the close of the evidence or at any earlier time that the court reasonably directs."

The question that remains on the agenda is whether Rule 51 should be revised in other ways. The present text of the rule does not give clear guidance to the interpretations that have grown up; an acerbic description is that "Rule 51 does not say what it means, and does not mean what it says." A draft has been provided to bring into the rule a clear statement that a failure to instruct is ordinarily reviewable only if a party has both requested an instruction and separately objected to the failure to give an instruction, but at the same time to make it clear that the request need not be repeated as an objection if the court had made clear that it had considered and rejected the request. The draft also

would express the "plain error" rule that has been adopted in most of the circuits, but explicitly rejected in the Seventh Circuit.

Beyond clarification of matters now addressed by Rule 51, a revised draft considered at the meeting would address matters not now covered by Rule 51. It would require the court to inform the parties of all proposed instructions, not only its action on party requests. It would make it clear that instructions may be given at any time after trial begins, and would provide for supplemental instructions. In addition, the draft would allow any party to rely on the requests or objections of another party, so long as the request or objection directly addresses the same issue and position.

The first comment in the discussion observed that the practice of informing the parties of all proposed instructions before jury arguments makes it possible to take objections before the instructions and arguments, enabling the court to direct the jury to begin deliberations as soon as arguments and instructions have been completed. The alternative of providing a gap for objections between the concluding presentations to the jury and actual submission is undesirable.

But it may be useful to provide one final chance to object to deviations from the proposed instructions as provided to the parties. Appellate judges report that a substantial number of district judges appear to compose important parts of their jury instructions as they are delivering the instructions. And at times a judge who says that one instruction will be given actually gives a different instruction.

As a matter of drafting detail, it was suggested that care must be taken to fit the required time for objecting to the provision for supplemental instructions. An objection to a supplemental instruction, as contemplated by draft Rule 51(b)(4), usually cannot be made "before closing arguments" as draft Rule 51(c) would require. This problem might be cured by deleting the reference to closing arguments, but it is important that closing arguments be made with full knowledge of the instructions — an objection before the instructions will not serve that goal if the court delivers the instructions after closing arguments. Work is needed on the timing of objections: they should be required before instructions are given, but opportunity also must be afforded to object to the way the instructions were actually given.

Another question is whether an objection that was not timely made as to the original instruction can be salvaged by making it when the instruction is repeated. It was concluded that it is proper to object to a decision to reread only part of an instruction when more should be given, but that it is too late to object to the substance of the original instruction.

It was noted that many judges submit written instructions to the jury, but it was not recommended that this practice be required by Rule 51.

It was noted that to the extent that Civil Rule 51 overlaps Criminal Rule 30, vigorous efforts should be made to conform to the style of Rule 30 without doing violence to the traditions that have grown up around the language of present Rule 51.

The question was raised whether it is necessary to address the sensible and ongoing practice of giving supplemental instructions, in light of the difficulty of relating this practice to the proper timing of objections. It was responded that it is useful to provide for supplemental instructions

because they can be tricky; there is a risk that in the desire to facilitate continued jury deliberations with minimum disruption, the court may forget the need to ask the lawyers for their input. One judge observed that when the jury sends in a note or request, it is good practice to draft a proposed response and then request the parties to respond to the proposal. The request and response should be in open court, although the failure to get party input should not lead to reversal if the supplemental instructions were correct or harmless.

Discussion of the plain error standard asked whether stating it in the text of Rule 51 will create mischief. It was responded that the draft provision is useful. It reflects what most, but not all, appellate courts do now. It gives great flexibility. The plain error test applies to allow review of errors not properly preserved in the trial court across a vast range of mistakes in civil proceedings. Jury instructions properly fall within its sweep. And the ongoing standard, incorporated in the simple reference to "plain error," makes it very difficult to win reversal.

Another question was addressed to the provisions that would allow a party to take advantage of requests and objections made by another party who had presented the self-same issue. There are many cases with coparties. It was urged that each party should be required to do something explicit, if only to state adoption of the requests or objections of another party. But it was urged in response that all the purposes of Rule 51 have been served if the court has had a clear opportunity to consider an issue and, with appropriate request and objection, has consciously chosen the instruction actually given. There is no need to punish a party whose lawyer may have been inept or may have decided unwisely that there was no need to reiterate points already clearly made and clearly considered. It was the sense of the Committee members that because objections to instructions are so often related to the particular evidence admitted as to a particular party, the district judge needs to know which of the parties objects to the instruction in evaluating the cogency of the objection. It was tentatively concluded, however, that the draft should be revised by changing "a" party to "that" party.

Rule 43(a)

Magistrate Judge Morton Denlow wrote to the Committee to suggest that the rules reflect the practice of holding a trial on summary-judgment papers. This practice has gained increasing recognition for situations in which summary judgment is not appropriate, but the parties have agreed that the court should decide the case on the summary judgment papers without hearing live witnesses. The procedure depends on the consent of all parties, on the agreement of each party that it does not wish to present any live witness. The result of the procedure is far different from summary judgment. Rather than decide the question of law whether there is sufficient evidence to pass beyond the threshold for judgment as a matter of law, a question that is reviewed de novo on appeal, the trial court actually decides the case. The Rule 52 requirements for findings of fact and separate conclusions of law must be honored. Appellate review of the fact findings is for clear error, not as a matter of law.

The draft Rule 43(a)(3) prepared to illustrate the proposal was more general than the transformation-of-summary-judgment cases that inspired it. It would allow part or all of the testimony of a witness to be presented in written or recorded form, with the consent of all parties and in the court's discretion. Some courts are experimenting already with such devices as presentation of the direct testimony of expert witnesses by written reports, followed by in-court testimony that

begins with cross-examination. More generally, parties who recognize that a case is not suitable for summary judgment still may prefer trial on a written record. The unavailability of witnesses, the difficulty and cost of producing witnesses, the cost of a live trial in relation to the matters at stake, or even a sense that a written record provides a fully satisfactory basis for decision may prompt consent.

General discussion concluded that there is no need to pursue these issues at present. At most, there is a small problem. The Committee's general reluctance to proliferate rules changes during a period that has seen many rules changes should control.

Next Meeting

The next meeting was tentatively scheduled for April 23 and 24, 2001. The site may be in Washington, D.C., or at Stanford Law School.

Respectfully submitted,

Edward H. Cooper
Reporter

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

March 12, 2001

The Civil Rules Advisory Committee met on March 12, 2001, at the Administrative Office of the United States Courts. The meeting was attended by Judge David F. Levi, Chair; Sheila L. Birnbaum, Esq.; Judge John L. Carroll; Justice Nathan L. Hecht; Professor John C. Jeffries, Jr.; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Professor Myles V. Lynk; Bonnie Osler, Esq., for the Department of Justice; Judge Lee H. Rosenthal; Judge Thomas B. Russell; and Judge Shira Ann Scheindlin. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter. Judge Anthony J. Scirica, Chair, Judge Michael Boudin, liaison, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Professor Jeffrey W. Morris, Reporter of the Bankruptcy Rules Advisory Committee, also attended. Judge Walter K. Stapleton joined the meeting as Chair of the Federal-State Jurisdiction Committee. Peter G. McCabe and John K. Rabiej represented the Administrative Office. Karen Kremer was an additional Administrative Office participant. Thomas E. Willging represented the Federal Judicial Center; Robert Niemic of the Judicial Center also attended. Observers included Craig Jacob and Jeffrey Greenbaum (ABA Litigation Section Class-Action Committee); Francis Fox (American College of Trial Lawyers); James Rooks (ATLA); Alfred W. Cortese, Jr.; Jon Cuneo; Chris Jennings; Francis McGovern; Sol Schreiber; and Melvin Weiss.

Judge Levi opened the meeting by noting that Professor Jeffries has been selected to be the next Dean of the University of Virginia Law School.

The purpose of the meeting is to discuss and consider proposals of the Rule 23 Subcommittee. It is not a meeting to reach decisions or take votes on specific proposals. Committee reactions from this meeting will be considered and reflected in the proposals to be brought to the Committee at the April meeting.

The Subcommittee has covered an immense amount of ground, and has covered it in detail. The full Committee now needs to have time to consider the proposals — and alternatives, including alternatives put aside by the Subcommittee — in detail. The process of consideration will be carried forward by this meeting, but it should continue throughout the interval before the April meeting.

The original impulse to study Rule 23 arose from fear that classes were being improvidently certified. There were protests that the risks and burdens of class litigation forced "extortionate" settlements, enriching class lawyers but often yielding little or no real benefit to class members. And there were counter-concerns that other class actions were selling off valuable claims of class members for very little, again for the benefit of the class lawyers, this time for the benefit of defendants, but still without benefit for class members. Rules addressed to the certification process were proposed. Only Rule 23(f) survived. Rule 23(f) has been a success. One result of Rule 23(f) appeals may be a reduction in the number of improvident class certifications. But Rule 23(f) of itself will do little for the problem of "reverse-auction" settlements that sell off class claims for too little.

There have been good empirical studies by the Federal Judicial Center and the RAND Institute for Civil Justice. The FJC study showed, not surprisingly, that the "average" class action does not seem to present many problems. The RAND study reviewed the literature, interviewed lawyers, and considered ten specific class actions in depth. The focus there shifts to the big cases, the troublesome cases. RAND concludes that we need more judicial oversight.

Concern about fairness of settlements was focused in the 1996 settlement-class proposal. That proposal triggered an explosion in academia, protesting that if a class could not be certified for litigation any settlement surely would be unfair.

Those who think that on the whole the class-action process is working well may not believe that there is any need to act on the Subcommittee proposals. But RAND and substantial anecdotal evidence — including the information gathered in the comments and testimony on the 1996 proposals — suggest there are a lot of settlements that are not fair to class members.

A sketch of the Subcommittee's work as of January was presented to the Standing Committee. Part of the advice suggested then was that the Advisory Committee should work first to identify the best solutions to the problems that deserve new provisions. Only after considering the best solutions should attention turn to the limits imposed by the Enabling Act and the wisdom of testing those limits; the best solutions may have to be put aside because better pursued by legislation than rulemaking, but this conclusion cannot be reached until the best solutions are identified. It also was recognized that it may be desirable to publish alternative rules versions for comment when the best approach remains uncertain or when concerns about Enabling Act limits continue to beset the solutions that seem best.

Judge Rosenthal then introduced the Subcommittee Report. The purpose of presenting these drafts is not only to provide an advance look in preparation for the April meeting, but also to get reactions and comments that will support further refinement. The refinement may take the form of alternative drafts for publication.

These proposals are the first integrated package to be presented by the Subcommittee. The package responds not only to mass torts — after five years of studying those problems — but also, flexibly, to "small-claims" class actions.

Among the goals pursued by the proposals are these: To provide in Rule 23 improved structural assurances of fair settlement; to improve relations of class attorneys to the class and court, and to regulate attorney fees; and to address, within the rules, the problem of overlapping, duplicating, competing class actions.

In order of subdivisions, Rule 23(c) addresses the time for certification, notice, and the preclusion effects of a refusal to certify a class; 23(e) addresses settlement review; 23(g) provides for federal-court regulation of other litigation that overlaps with a proposed or certified federal class; 23(h) addresses appointment of class counsel; and 23(i) addresses attorney-fee awards.

Professor Cooper then presented a more detailed overview of the 23(c), (e), and (g) proposals.

Rule 23(c) would be amended in several ways. The first would revive a proposal that was published in 1996, changing the requirement that the court decide the certification question "as soon as practicable" to a requirement that it decide "when practicable." The change in part reflects the reality that most courts take several months to determine whether to certify a class. This reality in turn reflects the need to become informed about the case. Many courts recognize that resolution of the (b)(3) tests asking whether a class action is superior to other modes of adjudication, and requiring

that common questions predominate, can be applied only after determining what issues are likely to be presented at trial. That determination in turn requires some measure of discovery to show what the dispute on the merits will be; and it is desirable to manage the discovery so that it does not entail all of the merits discovery that must be had if a class is certified, but so that there will be no need to repeat the same discovery after certification. Some courts require presentation of a "trial plan" that predicts what issues will actually be disputed at trial as part of this process. On the other hand, there is a risk that relaxation of the requirement may encourage unnecessary delay; it is desirable to ensure reasonable dispatch in gathering the information needed to support the certification determination, and to ensure prompt determination once the information is available.

The draft (c)(1)(A) would require that an order certifying a class "define" the class claims, issues, or defenses. There is some concern that this requirement may demand too much of foresight, and require frequent amendment. But the requirement is useful in defining the stakes, setting a framework for discovery and settlement negotiations, and informing class members of the interests at stake. This draft also would require that the order certifying a (b)(3) class state the right to request exclusion, supplementing the present requirement that the right to opt out be stated in the notice to the class.

Draft (c)(1)(B) would amend the present provision that the power to alter or amend a certification decision extends up to "decision on the merits." The new event that cuts off alteration or amendment would be "final judgment." This change reflects the concern that events that seem to be a decision on the merits — such as a ruling on liability — may be followed by other events, such as formulation of a decree, that show the need to revise the class definition.

The most novel addition to (c)(1) is set out in (c)(1)(C). This provision would preclude any other court from certifying a class after a federal court has refused to certify substantially the same class for failure to satisfy the prerequisites of Rule 23(a)(1) or (2), or for failure to satisfy the standards of Rule 23(b)(1), (2), or (3). The court that refused certification could release this "certification preclusion" either at the time of denying certification or later. This provision is the first in a package of changes designed to address the problems presented by successive, competing, and overlapping class actions.

The notice provisions of (c)(2) also would be changed. A plain language requirement is added, with a Note observation that in some cases it may be desirable to provide notice both in English and in some other language. This provision requires that the order certifying a class state the potential consequences of class membership. Notices often attempt to do that now, but it will be necessary to avoid undue complexity if any purpose at all is to be served.

Draft (c)(2)(A) would, for the first time, require that notice be given to members of a (b)(1) or (b)(2) class. The purpose of notice is not to protect the right to request exclusion, because class members cannot request exclusion from such classes. The purpose instead is to establish an opportunity for class members to challenge the certification or the class definition, and to superintend the adequacy of representation by class representatives and class counsel. Earlier drafts stated this purpose in seeking to identify the method of notice to be used. It has been objected that this explicit statement is an undesirable invitation to reopen class certification. The present draft

substitutes a formula that seeks notice that provides "a reasonable number of class members an effective opportunity to participate in the action."

Earlier drafts provided for reliance on "sample notice" in (b)(3) classes "if the cost of individual notice is excessive in relation to the generally small value of individual members' claims." This provision has been dropped, in part from concern with the due process undertones of the Eisen decision and in part from concern that it may seem unfair to afford an opportunity to opt out to some class members while effectively withholding it from others.

The review of proposed class settlements, draft Rule 23(e), has received more attention by the Subcommittee than any other part of the package. It was decided at the beginning not to attempt to revive a "settlement class" proposal, and that decision has not been reconsidered. Lower courts are working through the implications of the Amchem decision, and it seems premature to attempt either to restate the Amchem opinion in Rule 23 or to attempt to revise any of its implications.

The first feature of draft (e)(1) is that it makes explicit a rule followed by many courts now. Court approval is required for voluntary dismissal, settlement, or compromise of any action brought as a class action even if this action occurs before certification, affects only individual claims, and does not purport to dispose of class claims. The Federal Judicial Center has consulted the data base for its class-action study, and has found that precertification dismissals do occur. Approval is not required for involuntary dismissals that require court action. Notice of a proposed voluntary dismissal, settlement, or compromise is required if the class has been certified, but is not required if a class has not been certified. The court retains power to order notification under Rule 23(d) if the class has not been certified.

Draft (e)(1)(B) makes explicit the requirement that there be a hearing on a proposed settlement. It also sets the standard for review — the settlement must be fair, reasonable, and adequate. This standard is found in many cases today. The draft says laconically that the court may approve only "on finding" that the standard is satisfied. This language is meant to require specific findings of the factors that persuade the court that the settlement is fair, reasonable, and adequate. More detailed language may yet be suggested. Earlier drafts included a long list of factors to be considered in evaluating a proposed settlement; this list has been demoted to the Note, and the Note has been stripped of the lengthy explanations that once were attached to each factor. The list, dubbed a "laundry list," was removed because of several concerns. It was feared that no matter how explicit the statement that the list did not exclude consideration of other factors, courts would focus on the list and pay little attention to other concerns that might be more important than any listed factor. There was a related concern that the list would become a "check list," mechanically checked off without devoting sufficient thought to the relative importance of the different factors in the circumstances of each particular case. And there is a nearly aesthetic objection to including such lists in the text of a rule — the rules have not included long lists of factors, and this is not the occasion to begin a new tradition.

The second paragraph of draft (e) recognizes the court's authority to direct that the parties supporting a settlement file "a copy or a summary of any agreement or understanding made in connection with the proposed settlement." This term is necessarily vague. The underlying concern is that there may be "side agreements" reached in the settlement environment that are not expressed

as part of the settlement agreement, but that capture for other interests benefits that might instead have gone to class members. Earlier drafts required either disclosure or filing; the present version has avoided any general requirement, leaving this question to the discretion of the court.

Draft (e)(3) creates a new "settlement opt-out." Early versions provided this opt-out opportunity on settlement of any form of class action. There was resistance to permitting exclusion from a "mandatory" (b)(1) or (b)(2) class, however, and the provision was limited to (b)(3) classes. The opt-out opportunity was further reduced by allowing the court to deny any second opt-out opportunity if good cause is shown. The concerns were that settlements may occur in circumstances that afford the court ample information to measure the quality of the settlement, and to find that there is no good reason to seek exclusion. There was an added concern that some lawyers might seek to entice class members to opt out of the settlement, hoping to build on the settlement terms to reach individual settlements more favorable than the class terms, seizing the benefit of the more favorable terms by exacting attorney fees greater than those allowed under the terms of the settlement. Some Subcommittee members have concluded that even as reduced, this provision is an important protection against improvident settlement. Attempts to bolster the role of objectors have fallen because of concern with the misuse of objections to seize the strategic advantages that flow from delaying implementation of a settlement. Absent any assurance of effective objections, an opportunity to opt out affords important protection.

Paragraph (e)(4) recognizes the right of class members to object to a settlement. It has been suggested that the rule should be redrafted to distinguish explicitly between objections advanced as an individual matter and objections advanced on behalf of the class. This distinction is implicit in the provisions of draft (e)(4)(B), which limits the opportunity to settle an objection made by a class member on behalf of the class. A class member may object for reasons that essentially challenge the class definition, urging that the position of the class member is different from that of other class members and deserves individual treatment. A class member may, on the other hand, object that the settlement is unfair to other class members as well. (e)(4)(B) requires court approval of the settlement of objections made on behalf of the class. Approval is independently required by (e)(1) if the settlement changes the terms of the class settlement. But if the settlement goes only to the treatment of the objector, this provision allows court approval of terms different from the terms available to other class members only on showing that the objector's position is different. The long sentence stating this proposition has been found complicated by some subcommittee members, but no suggestion has been made for simplification. It may prove wise to drop the sentence, limiting this subparagraph to a requirement that the court approve settlement of any objection made on behalf of the class.

A provision that has long been set out in revised versions of subdivision (e) would have allowed the court to appoint a magistrate judge or other person to investigate and report on the terms of a proposed settlement. This provision was in effect designed to assure that there would be an objector acting in good faith and adequately supported to conduct an effective inquiry into the settlement. It has been dropped for several reasons. One concern goes to the opportunity of the parties to respond to the report. The analogy to an objector suggests that the report should be made in the same way as objections by any other objector, and subject to response in the same way. That may prove to be a complicated and costly process, with the parties paying not only their own

expenses but also the expenses of the court-appointed investigator. In addition, this court-directed investigation is a substantial departure from our general tradition that the court in an adversary system functions as umpire, not as inquisitor.

Another provision that has been dropped would have allowed an objector to appeal approval of a settlement, and to appeal any other class judgment that is not appealed by a class representative. The procedure followed in many circuits today requires that an objector win intervention in the district court in order to establish "standing" to appeal. If intervention is denied by the district court, the objector must appeal the denial of intervention and can win review on the merits only after winning reversal of the denial. Fears have been expressed that this procedure is a trap for the unsophisticated and unwary objectors who do not know of it. But the subcommittee concluded that there are advantages in requiring intervention. The district court is in a good position to evaluate the objector's intentions and the plausibility of the objections. There is no reason to believe that intervention is often denied for inadequate reasons. Serious mistakes can be corrected by reversing a denial of intervention.

The final paragraph of draft (e), paragraph (5), is the second part of the package of proposals aimed at competing and overlapping classes. This paragraph precludes any other court from approving a class settlement after a federal court has refused to approve substantially the same settlement, "unless changed circumstances present new issues as to the fairness, reasonableness, and adequacy of the settlement." This "settlement preclusion" is designed to prevent the practice of "shopping" settlements among different courts. It is restricted to cases in which a class has been certified. It would not prevent settlement shopping if a court is presented with simultaneous requests to certify a class and approve a settlement and, dissatisfied with the settlement, refuses to certify a class. This limit reflects both conceptual and pragmatic concerns. Conceptually, it is difficult to explain how a class can be precluded when the class had not come into being at the time a proposed settlement is rejected. Pragmatically, it is possible that inadequate representation accounts for the failure to win approval of the settlement — without prior certification, there has not been any independent measure of adequate representation.

The final part of the proposals, apart from the attorney appointment and attorney fee provisions, is new draft 23(g). This draft aims at establishing control of overlapping, competing, and successive class actions. The power of control is established by authorizing the court, before deciding whether to certify a class or after certifying a class, to enter an order directed to any member of a proposed or certified class respecting litigation in any other court that involves the class claims, issues, or defenses. This power need not be exercised. Often there will be no occasion even to consider the impact of separate litigation. When other litigation threatens effective control of the federal proceedings, the response may take many forms, including a decision to let the other proceedings continue untouched. Orders may be directed to class members with respect to proceedings in other courts. It may be useful to consider the possibility of orders directed to arbitration. Concerns have been expressed recently that arbitration agreements are being used to prevent effective enforcement of important rights through class actions; employment agreements and a variety of consumer agreements are cited as examples. But arbitration is a substantive right, commonly arising from contract, and may deserve special protection. The very purpose of arbitration, for that matter, is to avoid judicial resolution in favor of an alternative mode of

resolution. It also must be clear that this provision is not designed to allow a single federal court to control acts by the Judicial Panel on Multidistrict Litigation.

The reason for establishing control in a federal court springs from concerns that absent control in some tribunal, it may not be possible to proceed in an orderly fashion to determine whether class treatment is appropriate, to define the class, and — if a class is certified — to manage the class litigation. Different courts may engage in races to certify and to reach judgment. The race may be to the bottom, encouraging defendants to play would-be class representatives against each other in a "reverse auction" that awards judgment and attorney fees to the class representatives most willing to strike a bargain favorable to the defendant. Even apart from that danger, simultaneous proceedings in two or more courts may impose unnecessary expense on the party opposing the class. Federal power to create a class and to pursue a class action to judgment in reasoned fashion must be protected.

The desire to protect orderly federal class-action procedure is implemented easily enough when the challenges arise among federal courts. The Judicial Panel on Multidistrict Litigation is available to maintain order, and has been successful. When the challenges arise from proceedings in state courts, however, the Panel is not available. State-court proceedings, however, are protected by long traditions of comity and federalism. These traditions are embodied in the anti-injunction act, 28 U.S.C. § 2283. The right to proceed in state court also may be seen as a "substantive right" that cannot be abridged by an Enabling Act rule. Authority to enjoin state proceedings might even be seen as an enlargement of federal subject-matter jurisdiction. These concerns are addressed in separate memoranda on the Enabling Act and on § 2283. The questions are important and sensitive, but there are strong arguments supporting Enabling Act authority to adopt provisions of the sort set out in proposed subdivision (g).

Subdivision (g)(2) expressly recognizes that the response to competing class actions need not be an assertion of control by a federal court. The court may choose to stay its own proceedings as the best means of effecting coordination. The draft would further protect this means of cooperation by relaxing the general requirement that a class certification determination be made as soon as — or when — practicable.

Finally, draft (g)(3), set out in brackets to identify its tentative nature, would expressly recognize authority to consult with the judges of other courts. Many state and federal judges now effect coordination of parallel actions by means of informal consultations. Some judges are uncertain of the authority to engage in such activities, however, and it may be useful to recognize it explicitly.

It would be possible to provide more elaborate descriptions of methods of cooperation in the draft. Some courts, for example, have been able to establish systems of "joint" discovery under which discovery is taken once for the purposes of all actions, and the results of discovery are available for use in each action as if the discovery had been undertaken directly in that action. Other courts have effected coordination by appointing the same person as special master. Yet other imaginative and effective devices have been used. But it would be difficult to capture these alternatives in a rule; the attempt has been foregone.

Professor Marcus provided a more detailed overview of Rules 23(h) and (i). Together these subdivisions present a package for oversight of class counsel, in forms somewhat scaled back from earlier versions.

Since the draft reviewed at the October Advisory Committee meeting, Rule 23(h) on appointing class counsel has been scaled back in several ways. The October draft included strong limits on pre-appointment activities that have disappeared. References to the "fiduciary" role of class counsel have disappeared. The requirement that an application for appointment as class counsel be filed in a defendant-class action is removed. And the provision that the appointment decision should assign no weight to the fact that an applicant had been the first to file is gone.

The appointment rule begins with an exception for a situation governed by contrary statutory provisions. This exception is aimed at the Private Securities Litigation Reform Act and any other statutes that Congress may enact on this subject. Subject to this exception, (h)(1)(A) establishes the court's obligation to appoint class counsel. (1)(B) articulates the lawyer's responsibility to fairly and adequately represent the interests of the class; this phrasing is taken, with only slight adaptation, from Rule 23(a)(4). The draft includes a bracketed and controversial addition that would define the class as the lawyer's client. Identification of the class as client is a topic that requires careful discussion.

The appointment procedure of 2(A) recognizes the possibility of competing applications by authorizing the court to set a reasonable time for filing applications. This provision may tie to the Rule 23(c) proposal that would change the time constraint on the certification decision from "as soon as" to "when" practicable. Applications are required only in plaintiff-class actions; although the court is responsible for appointing class counsel in a defendant-class action as well, an application is not required. One question that has come up repeatedly is whether an application can be filed on behalf of a "consortium" of attorneys; the draft Rule does not address this question, but the draft Note does.

The draft of (2)(B) is set out in alternative versions. The second sets out a list of information that must be included in an application for appointment as class counsel. The first is shortened, calling for information about all pertinent matters bearing on the ability to represent the class, but also referring in an optional addition to information about proposed terms for fees and nontaxable costs, and about representation of parties in parallel litigation that might be coordinated or consolidated with the pending class action.

Draft (2)(c) provides that an order appointing class counsel may include provisions regarding the award of fees or nontaxable costs under Rule 23(i). This explicitly ties the two subdivisions together. Advance attention to fee issues may provide opportunities for review and control during the course of the proceedings.

The first question raised by the Rule 23(i) fee draft is "why do this"? Fees matter. The RAND study concludes that judges who take a role on fees can have effects not only on the size of the eventual award but also on the way the action proceeds. And Rule 54(d)(2), although it addresses fee awards in class actions as well as in other actions, is not detailed with respect to class-action fee awards.

The October draft could have been interpreted to provide new authority for fee shifting, and new authority for who should pay fees. Those provisions have vanished. Any fee award requires an independent basis of authority. The earlier draft required that discovery be allowed to objectors. That provision has been softened and set out in brackets as a subject of possible deletion.

The present draft applies to all counsel, not only class counsel. Objectors may be entitled to fees. So may other lawyers who helped the class, including a lawyer who developed and filed the action but was not appointed as class counsel.

One question of detail presented by (i)(1) is whether the timing of fee applications should be governed by case-specific order, or should continue to be governed by the general provisions of Rule 54(d)(2).

The question of side agreements is present here, as with review of proposed settlements.

Another question is who should get notice of fee proceedings: "parties"? All class members? If class members get notice, should it be only for applications by class counsel?

The role of objectors also must be addressed. How warmly should they be welcomed? Should anything be said about discovery by objectors?

The provision in (i)(3) for hearing and findings does not say whether these requirements arise only when there are objections. Any such limit would require a definition of what is an "objection," perhaps in the Rule but at least in the Note. It has seemed easier to require a "hearing" for all cases.

Subdivision (i)(4) presents a laundry list of factors that might be considered in determining the amount of a fee award. The first question raised by this draft is whether anything should be said beyond the simple statement in the first subdivision sentence that the court may award "reasonable attorney fees and related nontaxable costs." It is difficult to expand on a direction to be reasonable with only a few words; the likely choice is between a long list and silence. No one has yet suggested that the list is incomplete, but that does not mean that the list is needed. It should be remembered that draft (h)(2)(C) provides that the order appointing class counsel may include directions as to fees. The order may provide for interim fee information as the case progresses. This may prove a suitable alternative to more detailed guidance in the Rule.

The fee draft does not attempt to provide any guidance on the choice between percent-of-recovery, "lodestar," or "blend" approaches to fee determinations.

The subdivision (h) and (i) drafts may be seen as a package for governing appointment and fees. The provision in (h) for considering the possibility that the selection of class counsel may be useful in coordinating or even consolidating parallel litigation provides as well a tie to the provisions in draft 23(g) dealing with overlapping and competing actions.

Following these introductions, the first question was whether this package is a set of proposals "whose time has come"? There has been a lot of input from practicing lawyers to inform the answer. It was answered that the subcommittee has continued to hear that there are problems. The RAND report underscores that conclusion. The problems "have changed at the edges — this is a rapidly moving area —" but the problems persist.

And so the discussion moved to detailed examination of the drafts. The object was not so much wordsmithing as review of the basic approaches: what are the intended consequences, and what problems are there either with the intent or the general execution?

Overlapping Classes

Overlapping classes and other related litigation are addressed by three draft provisions: Rule 23(c)(1)(C), which would bar any other court from certifying a class that has been denied certification by a federal court; Rule 23(e)(5), which would bar any other court from approving a settlement that has been rejected by a federal court; and Rule 23(g), which would recognize a federal court's authority to control litigation by class members in other courts.

An initial question asked about the interplay between the certification-preclusion and settlement-rejection provisions. It happens with some frequency that a court is simultaneously presented with a proposed settlement and a request to certify the class. Suppose the settlement is rejected, and rejection of the settlement is the basis for simultaneously refusing to certify the class: should another court be precluded from certifying the same class either for an improved settlement or for litigation? Is refusal to certify because a settlement is inadequate implicitly a refusal based on inadequate representation, which would not preclude certification when adequate representation is found? There was a sense that later certification should not be precluded, but no resolution of the question whether further drafting might be needed. Restoration of the provision that denies preclusion effect if a change of law or fact justifies reconsideration would address this problem.

It also was asked whether attaching preclusive effect to a denial of certification would prompt more appeals. Rule 23(f) appeals may be limited, but the denial also may be followed by a final judgment that supports appeal of the certification issue. Courts will be asked to defeat the preclusive effect of their own orders; perhaps that is protection enough. It is not clear whether a Rule 23(f) appeal would lie from a refusal to defeat preclusion — the language of the rule seems limited to the order denying certification, but the refusal to defeat preclusion may be part of the order denying certification.

Another question was whether (c)(1)(C) should bar a federal court from certifying a class that has been refused certification by a state court. It is clear enough that a federal rule could direct a federal court to do that. But if a state court does not seek to impose that consequence on its own denial of certification, and other state courts are free to ignore the denial, it may be wondered whether the value of seeming equal treatment is worth it. In addition, the reasons that might lead a state court to take such steps as refusing certification of a nationwide class are particularly likely to be different from the considerations that might bear on certification of the same class by a federal court. But it may be desirable to observe in the Committee Note that a federal court should consider carefully the reasons given by a state court for refusing to certify a class, and to demand a showing of good reasons to certify a class rejected by a state court if the certification issues are the same.

The most fundamental question asked what purpose is served by precluding a state court from certifying a class that a federal court has refused to certify. This is a powerful tool, or weapon. A defendant can renew in the second court the arguments that persuaded the first court to deny certification. It can point to the fact that the first court did deny certification. Preclusion is an

"extraordinary reach." The response pointed to a federal refusal to certify a nationwide class. State-court certification of the same class, reaching people in many other states, may take on issues that no court should undertake to address in a class setting. The federal court, for example, may have been deterred by choice-of-law difficulties; should a state court be free to ignore the same difficulties, or to presume to resolve them?

It was agreed that there may be problems with some courts in some states, but asked whether certification preclusion is an appropriate response. The data on "abuse" are not clear. How often will a state judge actually certify a class after a federal court has refused certification? Preclusion between federal courts is not particularly troubling, especially within the same district or circuit, but extending preclusion to state courts remains troubling. One response was that the federal court can take account of these concerns in deciding whether to make its refusal to certify preclusive. And if the (c)(1)(C) draft is changed to incorporate the once-discarded provision that a change of law defeats preclusion, state courts would have substantial freedom to reexamine the certification issue.

The need for any form of certification preclusion was challenged by the observation that a rule cannot be made to address every problem that may arise. Is there good reason to believe that repetitive certification requests are a frequent and substantial problem? The Subcommittee reports that many lawyers believe there is a problem. In at least some substantive areas, many class actions are filed concerning the same basic core of events — races to the courthouse are triggered by product recalls, publication of studies questioning product safety, and government investigations. Congress has shown concern about state class actions, and continues to consider bills that would essentially preempt state class actions by providing for removal on the basis of minimal-diversity jurisdiction with only a few opportunities for escape to state court. Federal courts can address multiple federal filings through the MDL procedure, there is a common belief that the rate of consolidations is increasing, and the increase may be due to increasing filings of overlapping class actions.

Turning to draft subdivision (e)(5), it was asked whether it has sufficient force to be worthwhile. Although it purports to bar other courts from approving substantially the same settlement after rejection by a federal court, it is easy to make minor changes that will persuade a willing court that the second settlement is not substantially the same as the rejected settlement. It also allows approval if changed circumstances present new issues as to fairness, reasonableness, or adequacy, an open invitation to reconsideration and approval. The attempt to preclude other courts will generate "a lot of grief," and the attempt is so feeble that it does not justify the grief.

Support for abandoning draft (e)(5) was offered by asking why preclusive effect should be given to a determination that is a matter of discretion. If a second judge's discretion is exercised to approve a settlement that has been rejected in the first judge's discretion, there is no basis for arguing that one exercise of discretion should preclude a second exercise of discretion. Either choice — approval or rejection — often will be right, for such is the nature of discretion.

After the observation that the settlement-preclusion rule applies between federal courts as well as between a federal court and state courts, it was asked why this preclusion rule should not be made parallel to the certification-preclusion rule by allowing a court that rejects a settlement to provide that its rejection is without prejudice to approval by another court. The response was that

the parties remain free to present the same settlement a second time to the court that initially rejected it; that is enough.

The ease of making minor settlement changes seem substantial, and of arguing for changed circumstances, was pressed again. One response is that courts will not often be easily fooled — there is no special incentive to encourage the process of shopping settlements. In addition, the presence of the federal rule will encourage other courts to think carefully about the systemic costs of facilitating the migration of questionable settlements around the country.

A second response was to ask whether the ease of invoking the escape options in draft (e)(5) should be addressed by making the rule more demanding. The most demanding form would preclude any other court from approving any settlement on behalf of substantially the same class following rejection of a first proposed settlement. This form could be softened by allowing the first court to release the preclusion effect, as in the (c)(1)(C) certification-preclusion draft.

It was asked what source of authority supports a Civil Rule that undertakes to bind state courts by the preclusive effects of a federal judgment. This question was connected to the later discussion of the broader provisions of draft subdivision (g), but found different. Proposed (e)(5) applies only when a federal court has certified a class. It is generally accepted that Rule 23, as we know it, is valid. The very purpose of a federal class action is to produce a judgment that binds the class and all class members by res judicata. The scope of claim preclusion may be adjusted to recognize that class litigation is different from individual litigation by class members, but res judicata is the goal. It is accepted that a class judgment based on settlement establishes res judicata. These results flow from Rule 23. It is a logical extension to conclude that the class, bound by a settlement presented by its representative and approved by the court, is equally bound by the court's refusal to approve a settlement presented by the class representative. This response met a renewed expression of uncertainty.

It was asked whether there is a practical problem so serious as to justify these efforts to control state-court freedom. Are there data to show how often successive efforts are made to certify the same class or win approval of the same settlement? To show how often parallel state-court litigation, in class form or other forms, actually interferes with management of a federal class action?

It was recognized that detailed data do not exist and will be hard to generate. The RAND report points to a phenomenon widely perceived by many practicing lawyers — the number of state-court class-action filings is increasing. Often it is said that there is a migration to state courts, and away from federal courts, because many federal courts are tightening the application of certification criteria. There have been some notorious successes in persuading state courts to approve settlements that have been rejected by another court, and even by several other courts. But a few notorious successes do not of themselves demonstrate a general or persisting problem.

Another part of the response was that the Rule 23(e) proposals are designed to enhance judicial review of settlements. If the result is that settlements are more frequently rejected, past experience may not be a reliable guide to future experience — there will be more frequent occasions for attempting to win state approval following federal rejection.

The response also noted that these proposals do not reflect a fear that state courts will "get it wrong." The proposals do not attempt to do anything about the choice whether to go to federal court or state court. They aim only at the situation in which someone has gone to federal court, and the question is whether a second or simultaneous resort to state court should be accepted. When a federal court has considered and rejected a settlement, it is better to require at least a new showing before another court can reexamine the matter.

Another response was that in the real world, there are judges favored by one litigant or another. Some are federal judges, some are state judges. Litigants shop for a preferred judge, and they shop with respect both to certification and to settlement. There is no way to know just how often this happens. And the question of settlement shopping cannot be put aside by supposing that the parties will simply go first to the court they expect will be most complaisant. The litigation commonly begins as truly adversary; it is only after a deal has been made that the parties may join in promoting the settlement, and may carry their cooperation over to seeking out another court after the first has rejected their efforts.

Rule 23(g) then came on for discussion. As drafted, it would allow a federal court to restrain litigation in other courts, state or federal, class-based or otherwise aggregated or individual, not only after certification of a federal class but even before certification. The first question was whether the Subcommittee thought about relying on Rule 23(g) alone, without also adding the certification-preclusion and settlement-rejection-preclusion provisions. Orders directed to class members as part of ongoing federal class proceedings may seem less troubling than preclusion.

Another question was whether the rule or the Note should specify criteria for restraining related litigation. The concept of criteria was thought attractive, but no specific criteria were volunteered. Criteria may be particularly attractive with respect to pre-certification orders.

The question also was seen as an attempt to extend the general rules on parallel litigation to class members, which may not be much of a reach, and also to members of a potential class, which may be more of a reach. Regulating litigation by nonparties simply because they fall within the limits of a class proposed in the complaint of a would-be class representative would establish control very early in the process. There is no notice to class members, no opportunity to opt out, before certification.

It was noted that courts now assert the power to restrain related litigation in order to protect an impending class-action settlement, and assert the power even when the class has not yet been certified. The question is not so much pre-certification restraint as how far the power should extend beyond protection of an imminent settlement that, if it succeeds, will carry class certification with it.

One response was that defendants will ask to freeze other litigation a week after filing. "That is too much." And it was rejoined that it may not be too much if the complaint is filed at the same time as a proposed settlement and proposal for certification.

Another perspective was that the draft would achieve the advantages of the federal multidistrict litigation procedure for all courts, state and federal. It could support, among other things, coordinated discovery to be used in all actions, without necessarily interfering with the

progress of other actions in other ways. There are real benefits in going forward in one forum. Parties to other litigation do not always get notice when an application is made to the multidistrict litigation panel.

Perhaps the hardest cases will occur when the federal court is considering certification, but recognizes that some individual state actions should be allowed to proceed. A member of the considered class, for example, may present an urgent need to proceed to judgment. Easy cases will involve the pendency of several actions that seek certification of essentially the same class by different courts. It might be possible to express some of these distinctions in the rule, speaking directly to discovery, races to certify, and races to judgment.

It is important that the draft recognizes that federal-court control can work the other way. Rather than restrain activity in other courts, the federal court may stay its own hand.

It was urged that the draft would solve a lot of problems if it can be reconciled with the anti-injunction provisions of 28 U.S.C.A. § 2283. How far can we back up from the immediately impending settlement and still act in aid of the federal court's jurisdiction?

It was asked how does a federal court get personal jurisdiction to direct orders to persons who may be members of a class not yet certified, when there is no other connection to the state where the federal court sits?

Other problems with respect to proposed classes may arise. The statute of limitations is tolled by filing the class complaint. But the ability to coordinate proceedings in all courts is much enhanced if restraining power arises on filing. And the certification preclusion proposal, by its very nature, does not depend on certification of a class.

On the other hand, the need for certification preclusion may be reduced because courts today have come to realize the benefits of coordinating discovery in parallel proceedings and in many circumstances effective coordination is achieved. Courts are aware of the ability to coordinate in informal ways, and are doing more of it. It may not be necessary to include specific authorization in the rule, as draft (g)(3) would do; a reminder in the Note may be enough. It also was suggested that (g)(3) may carry a negative implication that consultation is not appropriate on other matters or in other situations. This concern also points toward a comment in the Note, without specific provision in the rule. On the other hand, some judges continue to fear that informal coordination rests on improper ex parte communication. The parties have expressed consternation about private discussions among judges in some well-known cases. Our tradition is that parties should have an opportunity to influence every judicial decision by direct argument; it is difficult to reconcile the tradition with the consultation practice absent some express recognition. Even the express recognition may be seen as simply deferring the problem: the concern of litigants is well placed.

The next suggestion was that the draft could be limited in a number of ways. The federal court's authority to stay proceedings by class members could arise only after a class is certified; it could be limited to orders directed to other class litigation; it could apply only to restrain filing new actions after the order enters; it could not permit restraint of statewide class actions. These suggestions were supported as getting on the right track. The proposal will be controversial, particularly with respect to control of individual actions. But it must be recognized that in some

situations litigation that appears to be framed as a number of individual actions is effectively coordinated — the most effective coordination occurs when a single lawyer or group of lawyers has a large "inventory" of clients whose individual actions are effectively aggregated in fact, if not in form. We must focus on identifying the problems to be cured. Many class actions do not involve parallel litigation, and pose no problem; this situation is most likely with actions involving localized problems, or small individual claims that even in aggregate do not entice multiple would-be class representatives. Other class actions involve a few class members who may have claims that will support individual litigation, but many who do not. Still others may include many class members who can bring individual actions, or such large total damages that several groups may vie for the rewards of framing the class action that wins the race to judgment. It is very difficult to generate data that sort out these various possibilities.

The several proposals addressed to overlapping and successive actions and settlement attempts were recognized as among the most difficult proposals in the package. Intellectually, federalistically, and practically they pose genuine challenges. This draft is the first effort to accomplish something like this in the rules.

One question presented by the package is whether the preclusion proposals in (c)(1)(C) and (e)(5) should stand alone, or whether all of these proposals should be brought together in (g). A response was that (g) is better standing alone, because it rests on the specific device of orders directed to class members. (e)(5) should include express recognition of the court's power to leave other courts free to review and accept a rejected settlement, in a way that is directly parallel to the certification-preclusion provision in (c)(1)(C) and that is similar to the discretion built into (g). Even with that change, it remains troubling to some.

This resistance to the (e)(5) rejected-settlement provision was found surprising. If there is a real-world problem that is worth addressing, the provision makes sense. The parties are always free to return to the court that rejected the settlement and ask it to set them free; it would be surprising, however, for a court that has found a settlement inadequate to conclude that the parties should be left free to persuade another court that the settlement is adequate. The response, however, was twofold — first, the draft permits the parties to defeat preclusion easily by making cosmetic changes in the settlement or generating new circumstances; and second, the discretion of the first court should not close off an exercise of discretion by a second court.

This discussion was seen as revealing different philosophies. The settlement-review draft seeks to make settlement review meaningful. The review is meaningful only if rejection carries real consequences. Real consequences require closing off subsequent attempts to win approval of the same settlement, absent meaningful changes in the circumstances that bear on reasonableness. The opposing view is that review is a subtle process, and that we need a safety valve that protects against unwise rejection, even though unwise approval is limited only by appellate review for abuse of discretion. This view may be satisfied, as its proponent suggests, by giving the first court power to release the preclusion — reconsideration by a second court does not automatically mean approval, and the initial rejection will be considered as part of the reconsideration. On the other hand, there are reasons to believe that the draft is too lenient — the arguments that changed circumstances justify reconsideration should be made to the first court, which is much better able to evaluate the purported

changes in relation to all of the information considered in reaching the initial rejection. And there is no apparent reason to suppose that another court should be free to reopen a prior decision simply because the decision involved large elements of discretion. A discretionary finding that a settlement is adequate results in judgment and res judicata; a discretionary finding that a judgment is not adequate deserves equal respect.

This suggestion stimulated the observation that if indeed there is a problem with settlement shopping that deserves attention in the rules, it is difficult to understand why there should be an opportunity to relitigate the same issues. It is possible that res judicata principles will evolve to deal with this problem, but it may be better to frame the principles in a rule, so long as there is reason to believe that there is a real-world problem.

Objector Settlement

Attention turned briefly to the provision in draft (e)(4)(B) that requires court approval of settlement by a class member who has objected to a proposed settlement on behalf of the class. It was asked why this provision is not simply another version of the settlement opt-out included in draft (e)(3). The response was that the objector remains a member of the class, entitled to — and bound by — the benefits of the class judgment, absent successful objection or a particular settlement that confers distinctive individual terms. A class member who opts out takes nothing by the judgment, and is free to pursue individual remedies. It was later urged that this distinction should be drawn more sharply in the rule, and responded that the distinction is clear now. Opting out means leaving the class. Objecting means remaining in the class.

Observer Observations

Judge Levi noted again that the process of considering Rule 23 continues to be, as it has been for a decade, arduous and contentious. It is important that comments not be restrained by any sense that robust criticism is inappropriate. Vigorous criticism will addressed to any proposal that emerges from the committee. As part of this process, the observers were invited to comment.

Melvin Weiss offered several observations. First, there is a major problem in attempting to include traditional commercial-type cases and mass torts in a single class-action rule. In handling all types of class actions, he has found some judges who apply Amchem-type analysis to commercial cases. The parties want to settle, without prior certification. The court is asked to preliminarily approve certification and settlement, but concludes that Amchem principles stand in the way. There is a risk of being stuck with an "anti-class-action idealogue." The parties should be free to accomplish what the plaintiffs and defendant agree is a good result. We should trust the lawyers to be responsible. Following rejection, the lawyers then look for another forum to accomplish the same good purpose. Second, we should not call class members "parties." This can have adverse effects in looking for conflicts of interest. Class counsel should not be seen as representing individual class members. Third, there are lots of lawyers and lots of actions. If we make a rule that denial of certification precludes another court from certifying the same class, there will be problems. There are continuing wrongs; the first lawyer may not effectively develop the argument for class certification. It is better to trust the judges; the defendants will provide all the argument needed to prevent improvident certification after the first court has denied certification.

Sol Schreiber suggested that the General Motors fuel-tank litigation is the only case that has gone from federal-court rejection of a settlement to state-court approval. Shopping settlements has not happened between federal courts. And state courts have changed a lot in the last few years; there may be only one terrifying forum left. But it was observed in response that the FJC study of 407 cases found only one rejection of a proposed settlement. The proposals for more rigorous scrutiny may result in more rejections, which in turn will stimulate more settlement shopping.

Jeffrey Greenbaum said that overlapping class actions are a serious problem in commercial litigation. The package of proposals is just that — a package that does things that the (g) proposal to permit orders directed to individual class members does not accomplish by itself. To have to resist certification repeatedly is expensive. But (g) does present personal-jurisdiction difficulties with respect to enjoining members of a class not yet certified.

Francis Fox observed that the overall effort is worthwhile. It addresses real problems. There will be issues "around the edges," but the problems should be addressed by a bold effort. It is not clear yet whether the proposals are the right combination.

Settlement Review

The more general provisions of revised Rule 23(e) call for increased scrutiny of proposed settlements. They also include a settlement opt-out provision.

The first question addressed the proposed settlement opt-out. As drafted, members of a (b)(3) class would have a right to opt out of a proposed settlement unless good cause is shown to deny the opportunity to opt out. Who has the burden on the question whether the opt-out opportunity should be defeated? The good cause requirement itself puts the initial burden on the persons who seek to defeat the opportunity. The draft Note entrenches this by saying that the opportunity to request exclusion should be available with respect to most settlements. The Note also suggests that although the parties should be free to negotiate settlement terms that are conditioned on denial of any settlement opt-out, a court should "be wary" of accepting this condition.

The drafting history has considered other alternatives. It is recognized that uncertainty whether there will be a settlement opt-out opportunity, and uncertainty as to the effect of the opportunity, will complicate settlement negotiations. A settlement may be negotiated in circumstances in which the court is persuaded that it has solid information for evaluating the settlement, and that the settlement readily satisfies the "fair, reasonable, and adequate" standard. A settlement may be negotiated during trial, or even after trial. Or litigation of other cases may have produced a "mature" dispute in which likely outcomes are well known and readily evaluated. Or the parties may have engaged in thorough pretrial discovery, producing comprehensive information fully understood by the court. Or parallel government enforcement proceedings may generate ample information. These concerns might lead to a rule that is neutral, leaving the settlement opt-out to the discretion of the court on a case-by-case basis. Or, as suggested in a footnote to the draft, the court might afford class members a provisional opt-out opportunity: class members are afforded to state whether they wish to be excluded from the settlement, and the court can take account of their objections and consider the number of objectors in deciding whether to approve the settlement and whether to allow exclusion.

This history was further illuminated by the observation that the inspiration for allowing the court to defeat the settlement opt-out was experience at the albuterol trial. The settlement agreement was reached two days before the end of trial. There was no opt out, just as there would have been no opportunity to opt out if the trial had been completed by judgment. Settlement might not have been possible had class members been allowed to opt out.

The next question was why the rule should be drafted to "presume" that there is an opportunity to opt out, to be defeated only on showing good cause. The explanation was again found in drafting history. Earlier Rule 23(e) drafts included strong support for objectors. The support included mandatory fees for "successful" objections, and discretionary fees for unsuccessful objections. It also included a right to discovery sufficient to appraise the merits of the claims being settled. These provisions were discarded one by one. Mandatory fees for successful objectors were the first to fall, confronted by the fact that a successful objection may lead not to increased class recovery but to rejection of any settlement and perhaps decertification of the class. The other provisions also were stripped away, in part because of the direct burdens and in part because of concern that objectors frequently appear for reasons that have little to do with protecting the class. There are, to be sure, "good" objectors whose motives are to enhance the class-action process and who contribute in important ways to evaluation of proposed settlements. But there also are "bad" objectors, who seek to seize the strategic opportunities created by the objection process to gain private advantage. Growing discouragement with the prospect of enhancing settlement review by supporting objectors focused attention on the settlement opt-out. The initial draft would have provided an absolute right to opt out of settlement in any class action, whether it be a "mandatory" (b)(1) or (b)(2) class or an opt-out (b)(3) class. An added complication would have allowed a class member to opt out of the settlement without opting out of the class, so as to retain the advantages of class membership if the settlement should be rejected. This provision too was reduced, first by eliminating the complications and by limiting it to (b)(3) classes. Then the court's power to defeat a second opt-out at settlement was added for cases in which there already had been one opportunity to request exclusion. This gradual process does not mean that the perfect concluding point has been reached; it merely explains why the burden of justification was placed on those who would defeat a second opt-out opportunity on settlement.

Further explanation of the settlement opt-out was offered. Class members often fail to request exclusion when the opportunity is presented before settlement for reasons more of inertia than careful calculation. They also may expect that the named class representatives and counsel will pursue the action vigorously to a favorable outcome. When presented with a specific proposed settlement, attention is focused. If the proposed settlement does not live up to expectations, opting out can be desirable.

Brief discussion produced agreement that the opportunity to engage in discovery in connection with settlement review will not be affected by the choice whether to require a showing of good cause to support a court's determination to deny a settlement opt-out.

An observer asked whether there is a limitations problem with the settlement opt-out, observing that defendants will argue that somehow the suspension of the limitations period that began when the class-action complaint was filed has been triggered retroactively as to those who opt

out on settlement, defeating any opportunity to file a new action after opting out. The answer was that this limitations argument is not plausible. The limitations period must be tolled until a class member elects to opt out; it makes no difference whether opting out occurs as the first opportunity in a (b)(3) action or as a second opportunity established — again, only for a (b)(3) action — under the proposed settlement opt-out provision. The observer suggested nonetheless that it would be better to make an express provision in the rule to address the limitations issue, even though Rule 23 itself does not speak to the tolling effect in other circumstances.

A more complex prediction was asked for: will the prospect of a second opportunity to request exclusion deter opting out at the first opportunity? If so, is that a bad thing — it would mean that class members prefer to see the actual settlement terms before deciding whether to "accept" the terms. And how would this uncertain prediction be affected by the choice whether to require a good-cause showing to defeat the settlement opt-out? One response was that the opportunity to await actual settlement terms is "a reasonable free ride; a good thing."

It was noted that the opt-out will be "hard for settlement; people can get out more easily than by objecting." This effect was, indeed, exactly what the proposal intends.

An observer urged that the settlement opt-out is impractical. It will increase costs. The notice of pendency costs a lot. There is greater certainty if parties can negotiate a settlement knowing how many members have opted out of the class. Members who opt out of a class "almost never sue separately"; the exceptions occur in mass torts, where the "farmers have a no-fee-supervision field day" by soliciting opt-outs and bringing follow-on actions using the settlement terms as a floor for bargaining upward. The settlements that have been reached on terms that allow future claimants to opt out after injury becomes manifest have been reached because "that is all you can get."

It was responded that defendants may want peace; the question is whether — and on what terms — they are entitled to it. We do not have opt-in classes because we fear that inertia will prevent many potential members from joining. Opt-out classes capture the inertia in a different direction. If a class member concludes that the settlement is wrong, why deny the opt-out? A number of defense lawyers believe that settlements can be negotiated on these terms. The ability to do so is demonstrated by many (b)(3) cases in which the settlement is negotiated before the first opportunity to opt out.

It was asked whether the settlement opt-out is an unfair opportunity to have your cake and eat it too — the class member gets the benefit of class representation, and then refuses to pay the price. Having opted out, the class member may realize benefits from the class-action representation in many ways. An answer was that this objection may be persuasive as to the alert, attentive class member who is aware of the nature of the representation and remains informed about the conduct of the litigation. But that rare creature is not the object of concern addressed by the settlement opt-out.

A different fairness concern arose from the issue of attorney fees. If many members opt out, how is the class attorney paid for work done on behalf of the entire class? A response was to observe that if many members opt out, there is good reason to doubt the adequacy of the settlement. And the

rejoinder was that the class settlement "goes to the median"; members who have unusually valuable claims will opt out, leaving the settlement to compensate the median claims fairly and overcompensate the less valuable claims without the leveling effect of reducing the high-end claims.

The position of class members with distinctively valuable individual claims was approached from a different perspective, drawing from experience in bankruptcy proceedings. The settlement opt-out can be seen as an alternative to the proposal in draft (e)(4)(B) that a class member who has objected on behalf of a class can settle on distinctively favorable terms only with court approval. The distinctively different class member perhaps should have objected to the class definition at the outset, arguing that those with distinctive claims should be placed in a subclass or excluded entirely. On this perspective, the opportunity that arises on settlement might properly be limited to situations in which the settlement itself shows reasons for distinctive treatment that were not apparent at the time of certification.

Yet another concern was addressed to the lawyer who has not participated in the class action in a way that will earn a share of the class-fee award. This attorney has every incentive to urge clients to opt out, not because the settlement is bad but because a larger fee can be earned in other proceedings. This suggests that although there should be a provision for settlement opt out, the burden should be placed on a protesting party to show cause for it.

It was suggested that most opt-outs today occur as lawyers get new clients and persuade them to opt out through advertising or other means of "reaching out." Opting out is not really an individual decision. The lawyers start advertising when the settlement is announced, so long as the first opportunity to request exclusion remains open; they even "hit the Internet." They intend to bargain up from the settlement floor, and to win larger fees than would be available through participation in the class action. This happens because settlement and certification occur together. And it is a reminder that settlements can be negotiated at a time when the number of opt-outs remains unknown, and in circumstances in which the terms of settlement will affect the opt-out decisions. The class members who appear to object typically are upset by attorney fees and related matters.

It also was observed that the settlement opt-out proposal has been found workable both by judges and others with rich experience in supervising class-actions and by equally experienced defense attorneys. And it was asked whether the settlement opt-out will be an issue in anything but mass-tort personal injury cases; will consumers opt out of small-claims class settlements? Is the settlement opt-out a good answer to the "Bank of Boston" case, in which class members found that their liability for class-attorney fees exceeded their individual recoveries? The opt-out then is not to preserve a realistic opportunity to pursue separate litigation, but to protect against burdens imposed on class members by the settlement. In other cases, the opt-out might be used to signal disapproval of the settlement even without any thought of pursuing individual actions. As to the mass-tort cases, the basis for concern with the settlement opt-out seems to be that the "opt-out farmers" will solicit opt-outs for purposes that are likely to result in fees so high as to lead to lower net recoveries by class members who elect exclusion for the purpose of pursuing individual actions. Is it protection enough against this risk that the judge has the authority to deny any settlement opt-out?

It was suggested that it makes best sense to address the concerns that underlie the settlement opt-out by requiring that the opt-out proponents persuade the judge of the reasons for allowing an opt-out opportunity. And it was responded that neutral terms are better, relying on the judge's discretion without attempting to assign a burden one way or the other. But many felt that expression in neutral terms is likely to work out to impose the burden on the party who wants an opportunity to opt out. And it was responded further that none of these choices is likely to make any difference — the issue is not a burden of fact proof, but a burden of argument. The arguments and the decision will be made the same way, no matter where the "burden" lies.

The possibility of a provisional settlement opt-out was raised again. The court would inform class members that they should indicate whether they wish to be excluded if the court should decide to permit exclusion. It was said that the uncertainty facing the parties during negotiation, the great difficulty class members would have in attempting to understand the necessarily complex notice describing provisional exclusion, and the delay in deciding on exclusion, make this alternative simply "too much." It has never been done. Of course the court can consider the number of those who opt out of the settlement under the straight-forward opt-out proposal in deciding whether to approve the settlement as to the members who remain in the class.

An observer offered the final observation about the settlement opt-out. This opportunity will reduce the total class settlement because the defendant will need to maintain a reserve to pay off the unknown number and amount of opt-out claims. The opt-out is most needed in the mass-tort setting, particularly when the settlement is reached before the tort is really mature. But no one is certifying mass-tort classes any longer, so there is no need even there.

Other aspects of the (e)(5) settlement-review draft were discussed briefly.

Early drafts included a lengthy list of "factors" to be considered in reviewing a settlement. These factors have been moved to the Note, and the review standard expressed in many cases has been put into the draft as part of (e)(5)(B) — the court must find that the settlement is "fair, reasonable, and adequate." It was urged that it would be good to return the list of factors to the text of the rule. The list will help the judge who does not confront many class actions. An observer seconded this thought — good judges do not need to have the list in the rule, but for judges less well-versed in class-action practice, a list in the rule will help both the lawyers and the judge. Another observer noted that a judge is bound by the text of the rule, but is not bound by the Note. Others, however, expressed a preference for keeping the list in the Note. Placement in the rule will generate arguments that the Rule has been violated. The list, moreover, addresses an evolutionary process of review — the factors to be considered will change over time, but the text of the rule will be hard to change. And lists could be added to many rules, but have been avoided. A list of factors is appropriate for inclusion in a rule only if the list is very short and self-contained. It was agreed that the factors should not be in the text of the Rule.

Draft subdivision (e)(2) confirms the court's discretionary authority to direct parties seeking approval of a settlement to file copies or summaries of "any agreement or understanding made in connection with a proposed settlement." The concern is that the process of negotiating a settlement may at times be surrounded by events that are not directly reflected in the settlement terms presented to the court for approval. The best-known illustrations are provided by the process in which asbestos

class-action settlements were negotiated after the class lawyers had first negotiated settlements of large numbers of pending individual actions. There also may be agreement on positions to be taken on fee applications, division of fees among counsel, discovery cooperation, or other matters.

An observer noted that some local court rules require that fee-sharing agreements be filed, but that there is no apparent reason for this requirement. Consider this analogy. A single law firm may have a partner whose main responsibility is tending to clients by bringing them to the firm and acting as liaison with the firm lawyers who do the clients' work. These lawyers may be handsomely compensated in the firm. Why should it be any different when a referring lawyer sends a client to a class-action lawyer? And it is not clear what other forms of agreements may be made and might be covered by this provision. Defendants typically want their discovery documents back. Although they seem undesirable, confidentiality orders ordinarily are entered; discovery materials are returned under the terms of these orders. An agreement not to represent clients in future related matters would be unethical. It used to happen in some fields that a firm would represent both the class and individuals within the class, but that does not seem to happen any more.

Another observer suggested that in mass torts, a settlement may establish a pot of money that is allocated among claimants by the lawyer. This seems to happen mostly in state courts, and at times may include unseemly arrangements to allocate some part of the money to individuals who were not injured as compensation for bringing clients to the lawyers. But other observers said that such events occur only when there are de facto aggregations by filing many individual claims, either in consolidated proceedings or as formally separate actions. They do not happen in class actions.

It was asked whether the power to direct filing of agreements incidental to settlement "causes heartburn" — are there real difficulties that might follow from filing? The proposal springs from the belief that the court should be fully informed. It gives the court better control over the information it gets. There is a concern that possible benefits for the class may be bargained away into other channels. There was no response to the "heartburn" question.

Attorney Appointment and Fee Provisions

Professor Marcus introduced the draft attorney-appointment and fee provisions, currently styled as subdivisions (h) and (i). He suggested that in some ways, the appointment provisions in (h) are not controversial. The lawyer "at least mainly" represents the class. People understand that. The draft provides an opportunity to think about financial arrangements at the time of appointment, and this seems advantageous. This can be advantageous for its own sake, even when it does not have any bearing on the selection of the lawyer to be appointed as class counsel. And in some circumstances it may assist in the process of selecting counsel.

Subdivision (h)(1)(B) defines the duty of the class attorney. Even now, it is prudent for an attorney to tell a client who would be a class representative that upon certification, the attorney no longer represents the client alone. But no one is really clear on what the relationship between class attorney and class members is. This definition of duty requires the attorney to "fairly and adequately represent the interests of the class." That part has not stirred much controversy. Four additional words are set out in brackets; these words would specify that the attorney must represent the class "as the attorney's client." Those four words have stirred considerable controversy. Defining the

class as client may be seen as a beginning step toward the theory that the class is an entity, but this step would not begin to address the many other issues that might be affected by viewing a certified class as a jural entity of some unspecified type. Defining the class as client also would have an uncertain impact on the relations between federal procedural law and state professional-responsibility law. In one sense, state law would be limited by the federal concept that the class attorney represents the class, not individual class members. But state law would remain free to determine the nature of the attorney's responsibility to the class client.

It was urged that the question whether to define the class as the class attorney's client "is very complicated." There will be problems even without adding these four words. But adding them will exacerbate the problems. The Federal Rules of Attorney Conduct project shows how pervasive these problems are. States have their own rules on conflicts of interest, competence, and zealousness. The Conference of Chief Justices will believe that this rule trespasses on the domain of state law. Many states seek to regulate the activities of their lawyers in federal court. Many local federal-court rules take over the local state rules of professional conduct. This is not only a question of discipline; it will be a malpractice rule. The federal-state jurisdiction committee has an interest in these questions.

Another comment was that it is not feasible even to begin consideration of the "class-as-client" provision without undertaking a close study of state attorney-conduct rules. The implications of defining the class as client must be worked out through many different areas of professional responsibility. As an added illustration, it will be necessary to decide whether another attorney can approach a class member, or whether the class member is a "represented" person. It is equally important to define and reckon with the state-law obligations that would be triggered by defining the class as client. These consequences "are much more important than a tilt one way or the other." Talking about it in the abstract is too dangerous. Although Rule 23 itself creates new situations for application of state professional responsibility rules, the working assumption now is that states get to answer these questions on their own.

A still more exotic illustration was offered of a civil rights action in which class counsel asserted that because all class members were clients, counsel had a right of access to sealed records that are available under state law only to a client's attorney.

It was asked whether the Note should say anything about state professional responsibility. It was responded that the Note should not say anything. This is an area of attorney conduct. The rule backs into this area less intrusively if it omits any reference to the class "as the attorney's client." Later, however, the person who made this response observed that adding the reference "may be the right thing to do." And short of that, it may be appropriate to state the duty of class counsel to fairly and adequately represent the interests of the class.

Defining the client as the class was defended as a central part of Rule 23 procedure. It is essential, on this view, that federal law identify what it is that happens when a federal court certifies a class. A class-action class does not exist in nature. The class is created by the certification. Federal law establishes the conditions for certification, and establishes such limits as the right to request exclusion from a (b)(3) class. Federal law provides that class representatives cannot bind the class to a settlement simply by accepting settlement terms — the court must review and approve. Federal law has decided, at least in some cases, that class counsel may present a proposed class

settlement for approval even though the representative class members approved at the time of certification reject the settlement. There must be a uniform predicate for addressing other questions of the relationship between a class and the lawyer who represents the class. Class counsel, for example, may at some time have engaged in litigation against one or more persons or firms that now are members of the present class: it is not tolerable that 25 states can say that the federal court must disqualify class counsel because class representation makes each class member a client, while 25 other states can say that disqualification is not required because the client is the class, not individual class members.

An observer pointed out that the common assumption of plaintiffs' class attorneys is that they represent the class. The class, although an amorphous entity, is the client. The problem of the class that includes former adversaries arises constantly. And there are situations in which the class representative wants class counsel to do something that class counsel concludes is not in the best interest of the class; the cases say that in these circumstances the attorney's duty is to the class, not to the representative.

The understanding of plaintiffs' counsel that the class is the client was confirmed by others.

It was generally acknowledged that state law has seldom addressed the professional responsibility issues raised by class representation. The American Law Institute Restatement of the Law Governing Lawyers found there was no basis in state law for attempting to define principles. It was suggested that the lack of state law may be due to the fact that "no one makes a fuss." The judge can regulate these matters in the governance of the case, although that does not directly control professional-responsibility consequences. This suggestion was renewed later, in somewhat different terms: the court can address these problems on a case-by-case basis in managing the action.

Note was taken of the Third Circuit Task Force that is inquiring into the appointment of class counsel. Much of the attention will focus on auctions, but other issues will be studied as well. Some attention will be paid to questions raised by administration of the Private Securities Litigation Reform Act — one question is whether the Act's provision that the designated lead plaintiff selects counsel can be superseded by court appointment of class counsel. The Federal Judicial Center is undertaking to study all of the cases in which class-counsel appointments have been decided by auction as part of the Third Circuit Task Force work.

Further discussion of the "as the attorney's client" phrase suggested that the federal court creates the class, and state law defines the professional-responsibility consequences. It was asked whether omission of this phrase is "deciding it the other way," or whether the statement that the appointed attorney must fairly and adequately represent the interests of the class actually means the same thing but more obscurely? An observer suggested that in practice there usually is a committee of attorneys appointed by the court to represent all interests, giving a "blurred situation." Another observer suggested that if the client is defined as the class, it is impossible to have a defendant class action. It was suggested again that stating the duty of representation does not carry the "connotations for trouble with state law" that arise from adding an explicit statement that the class is client.

Discussion turned to the provisions defining the appointment procedure. Draft (h)(2)(B) is presented with two options. The minimum draft fills less than four lines, stating that an application

for appointment to represent a plaintiff class must include information about all pertinent matters bearing on the applicant's ability to represent the class. That minimum does not address two rather novel items that are included in the more extended drafts. One item asks for information about terms proposed for attorney fees and nontaxable costs. The other asks for information about the possibility that the attorney is engaged in parallel litigation that might be coordinated or consolidated with the class action. These two items could be added to the minimum draft without addressing other factors. Or a longer list of factors, here presented as "Option 2," could be drafted. The longer list itself includes items that might be debated, such as a requirement that the application reveal fee agreements made with others.

The first observation about the application procedure was that in many civil rights actions there is no competition to be class attorney. Why should there be a delay for applications when there are not likely to be any? And if there are competing applications, how does this procedure relate to the Rule 23(a)(4) obligation of the class representative to provide fair and adequate representation?

This observation was echoed by noting that in most class actions the issue never comes up. There is no need for an application in those cases, no reason to give the defendant an additional occasion "to take pot-shots at the adequacy of plaintiffs' counsel."

It was responded that it is the court that is appointing class counsel. It should have an application. Without an explicit appointment rule, the court is obliged to assure itself that counsel will provide adequate representation as part of the Rule 23(a)(4) adequate-representation inquiry. That means getting information. In cases without competing applications, it may be sufficient to elicit the necessary information at the hearing on Rule 23(a)(4) adequate representation, without requiring a formal separate document. The Note can say that the papers moving for certification can constitute the application. But that still leaves the question of the time when the application information must be provided. In routine cases, the information will be simple and it will be easy to provide it.

Discussion turned to the choice whether to include a list of factors to be addressed in the application. The "laundry list" point was made in terms parallel to the discussion of draft Rule 23(e)(5). It was added that the draft recognizes that much of the information specified in the list of factors should be kept confidential: why make the lawyers file the information in an application that must be kept sealed from the adversary?

It was asked how potential applicants will learn of the pending class action and the opportunity to apply for appointment. The answer was that "courts have no trouble finding lawyers." If the action is filed, the lawyers will come.

The advantages of the application process in supporting orders directed to fee determinations at the outset of the proceeding were again noted. Many of the routine class actions are filed under fee-shifting statutes. Applications that address fee determinations will be helpful.

It was noted that in bankruptcy, applications for appointment as counsel are required. The applications must contain far more information than even the most detailed draft of (h)(2)(B) would require, and arguments are made that still more information should be required. Perhaps it is better not to start down this road at all.

Turning to draft subdivision (i) on attorney fees, the first question addressed was the (i)(4) laundry list of factors bearing on fee determinations. The draft does not attempt to choose between percentage-of-recovery, lodestar, or blended approaches. The factors bearing on fee determination seem common to all of these approaches. The draft does not include any mid-point alternative, unlike the appointment draft. The reasonable choices seem to lie between an extensive list of factors and a simple statement, at the beginning of (i), that the court may award a reasonable fee. The Note can speak to the factors that help determine reasonableness. But if factors are to be listed in the rule, it is important to get the right list.

The first suggestion was that the list should be put in the Note. Some of the items in the list may be redundant with each other — the quality of representation, for example, may overlap the focus on results achieved. Each case is different, and each representation is different. This suggestion was seconded by an observer, who remarked that we have 20 or 25 years of experience and opinions that provide guidance. Another observer added that it really makes little difference what the rule says. Different circuits have generated different lists of factors, but the results seem to be substantially the same. Still, there are areas of present practice that should be improved. Most courts refuse to pay for work done in litigating fee petitions; that is not fair. And class counsel often have to advance large sums to cover out-of-pocket expenses; awards for nontaxable expenses ordinarily have not allowed interest, even in cases that have dragged on for a decade or more. That too is not fair. And if there is to be a list, it might help to add a "market-place" test that asks not what is the "right" fee, but what fee would the market pay. The market test can be measured by what individual counsel get — if individual counsel for mass-tort class opt-outs can command 33% fees, class counsel should get that. And, to repeat, the differences in the lists of factors generated by different circuits make little difference to the lawyers.

It was asked why we should undertake to establish a standard for fees by court rule? We have no special reason to create a laundry list. Nor is any list likely to be "polished." These factors can be put in the Note if there is some reason to believe that will be helpful to some courts.

A different approach was suggested by reflecting that the ABA rules of professional responsibility and state rules have laundry lists of factors that bear on determining reasonable fees. The lists are different from the list in draft subdivision (i). That of itself is a reason not to put the list in the rule.

Turning to what the Note might say, it was suggested that the Note could observe that the circuits have their own lists. The Note could avoid confusion by characterizing any list as simply examples of the things that are considered by various circuits.

Yet another set of questions was raised by observing that a court rule may not be of much help in many fee-shifting situations. When fees are awarded under the terms of a statute, interpretation of the statute will set the award criteria. When state law provides for the fee award, federal courts will have even less ground to maneuver. And fees may be resolved by agreement in some of the federal-law cases that do not involve statutory fee shifting. Perhaps there are not many cases that will be addressed by a rule.

Reason to say something in the rule was found in the observation that fee awards constantly provide grounds for criticism of class-action practice. But that does not mean that the rule need say anything more than that the court may award a reasonable fee; the rest can be set out in the Note.

This comment was followed by the suggestion that there is an "enormous difference" between listing factors in the rule and referring to them in the Note. Putting the factors in the rule will generate "Erie" questions for cases governed by state law. Discussion in the Note provides ready orientation for the inquiry, but causes no harm.

Turning to specific items in the list, it was suggested that the "risks of litigation" should be noted more explicitly, without relying on the possible implications of the reference to contingency. In response, it was asked why there is any need to bother with the list if there is a contingent-fee agreement. An answer was that certification often sets aside the contingent-fee agreement.

Discussion turned to the opening reservation. The draft does not attempt to choose between methods of calculating fees, but the "critical issue today" is the choice between lodestar, percent-of-recovery and blend methods.

A separate question is whether a federal class-action court can limit enforcement of the full contingent fees provided by agreements between a class-member client and an individually retained attorney. The footnotes in the draft discuss these issues. One of the observers said that in mass tort cases where there are large numbers of individual actions, a committee is formed to work things out. Work is done by attorneys who are steering committee members. Then it is necessary to find a way to compensate them for work that does not benefit their own clients alone, but redounds to the benefit of others. It is not clear how a rule can handle these problems. The problems are being worked out in practice; it may be premature to attempt to address them by rule.

It was suggested that it may not be wise to attempt to address the factors that bear on reasonable-fee determinations even in a Note. The Note cannot reasonably address all of the complications raised in this discussion, such as the role of state law. There are real Enabling Act and Erie problems.

In response, it was noted that the comments and hearings on the 1996 Rule 23 proposals repeatedly urged that the process for determining fee awards needs to be disciplined, rationalized, made clear. But, it was protested, that goes to the process, not to fee standards. The draft rule, however, is an attempt to put it in process terms. There is a perception that judges are letting lawyers get away with too much. Tightened procedures may redress that problem.

It also was urged that the rule draft was never meant to change the standards for statutory fee shifting. It was meant to regulate common-fund settlements and awards. That may be a big limit.

It was asked whether there is any benefit to having a rule that is not to establish uniform national standards. A response was that it is much safer to say something simple in the Note — there are many factors, as described in cases to be cited, and not to attempt a uniform rule.

Turning to drafting details, it was suggested that there is too much repetition in the bracketed materials in (i)(1) dealing with agreements or undertakings. The reference to Rule 54(d)(2)(B) should be retained, displacing the alternative that would require a fee motion to be made "as directed

by the court." The reference is valuable in establishing the relationship between Rule 23(i) and Rule 54; without the reference, people would be uncertain on the relationship. The time allowed for fee motions in Rule 54 may not be sufficient in all class-action situations, but Rule 54 allows the court to set a different time. That is protection enough.

In response to the question whether subdivision (i) should refer to discovery by fee objectors, it was urged that it is better to say nothing here, for the reasons that led to deleting objector-discovery provisions from earlier drafts of Rule 23(e). We do not want to encourage more open-ended discovery.

Questions about notice of the fee motion also were raised. If there is a settlement, the settlement notice can present the fee issue, as is the practice now. The notice typically says that the attorneys will ask for no more than a stated amount, but does not go into allocations, fee agreements, or the like. But suppose there is a judgment that does not otherwise require notice to the class: who is to pay for notice of the fee application? The defendant? Class counsel? What means of notice is reasonable? One response was that cost affects what is reasonable; the intent of the draft is to allow flexibility. And it was argued that in statutory fee-shifting cases, where the fee is to be paid by the defendant rather than out of the class recovery, there may not be any class interest that justifies any notice to the class at all. But it was responded that even in fee-shifting cases, the class does have an interest in how much money the lawyer gets, and in knowing about it.

Judge Levi concluded the meeting by asking committee members to continue to think about the issues raised by the day's discussion, and other issues raised by the drafts. These questions will be back on the April agenda. It will be a matter of some consequence even to decide — if that should be the committee disposition — not to do anything now. And if the decision is to publish recommended rules amendments, we should think about the option to publish alternative versions of some amendments. We can be confident that publication of any of these proposals will stir lively comment.

Judge Rosenthal added that the Rule 23 Subcommittee will study this day's discussion and search for responses. Revised drafts will be circulated before the April meeting. The discussion today has been very helpful, and will support further refinement of the proposals.

Respectfully submitted,

Edward H. Cooper
Reporter

RULES PUBLISHED FOR COMMENT IN AUGUST 2000

Three sets of rules proposals were published for comment in August 2000. The hearing scheduled for January 29, 2001 was cancelled because no one asked to testify. Summaries of the written comments are provided with the discussion of each proposal. Almost all of the comments were devoted to issues that were discussed thoroughly before the proposals were published. The fact that there are few surprises should not deflect further deliberation. Although the debates are familiar, the views of experienced practitioners and widely representative bar groups lend added support to some of the competing positions. It is not a foregone conclusion that any of the proposals should be recommended to the Standing Committee for adoption.

Discussion of each of these proposals is complicated by the fact that none of them is the responsibility of the Civil Rules Advisory Committee alone. Indeed, it is fair to say that none of them originated with the Civil Rules Committee. As these notes are written, it is not possible to anticipate the actions that will be taken by the other advisory committees this spring. An attempt will be made to coordinate with the Appellate Rules Advisory Committee; the fruits of that effort will be presented at the meeting of this committee.

New Rule 7.1

Rule 7.1 Disclosure Statement

(a) Who Must File.

(1) Nongovernmental Corporate Party. A nongovernmental corporate party to an action or proceeding in a district court must file two copies of a statement that:

(A) identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation, and

(B) discloses any additional information that may be required by the Judicial Conference of the United States.

(2) Other Party. Any other party to an action or proceeding in a district court must file two copies of a statement that discloses any information that may be required by the Judicial Conference of the United States.

(b) Time for Filing; Supplemental Filing. A party must:

(1) file the Rule 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court, and

(2) promptly file a supplemental statement upon any change in the information that the statement requires.

(c) Form Delivered to Judge. The clerk must deliver a copy of the Rule 7.1(a) disclosure to each judge acting in the action or proceeding.

Committee Note

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 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 a majority of the circumstances that are likely to call for disqualification on the basis of financial 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 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 of the United States Courts, is in the best position to develop any 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 statement that applies in all courts.

Rule 7.1(a)(2) requires every party to file a disclosure statement if the Judicial Conference acts to adopt requirements that reach a party that is not a nongovernmental corporation. It cannot be predicted what information will be required, of what parties, if the Judicial Conference adopts additional requirements. The Judicial Conference may adopt requirements that apply only to some, not all parties. In that case, only the designated parties need file. Even if the requirements apply to all parties, it seems likely that many parties, and particularly individual parties, will not have any information that falls within the required categories. In that case, the Rule 7.1(a)(2) requirement is satisfied by filing a statement that indicates that there is nothing to disclose as to any of the required categories.

Rule 7.1 does not prohibit local rules that require disclosures in addition to those required by Rule 7.1 unless the Judicial Conference adopts a form that preempts additional disclosures.

Recommendation

The comments summarized below raise two fundamental questions, each of which was discussed extensively by several committees before Rule 7.1, Appellate Rule 26.1, and Criminal Rule 12.4 were published for comment. Rule 7.1 appears to delegate rulemaking authority to the Judicial Conference, in defiance of full Enabling Act procedures. And there is a difficult question whether and when Rule 7.1 might preempt local district rules that impose additional disclosure requirements. As extensive as it was, the prior discussion achieved compromise positions rather than clearly dispositive conclusions. Both of these issues deserve renewed consideration before final recommendations are made.

Delegation to Judicial Conference

As published, Rule 7.1(a)(1)(B) and 7.1(a)(2) require disclosure of "information that may be required by the Judicial Conference of the United States."

One concern expressed in the comments is that Judicial Conference exactions are not readily available to practicing lawyers. This concern would be addressed by stating each required disclosure explicitly in Rule 7.1. Implementation of any Judicial Conference requirements, however, should be readily accomplished. The requirements should be expressed in forms that are widely available and that become an automatic part of routine filing procedure. There may be brief transition problems, but they will be handled with common sense.

The more fundamental concern is that an Enabling Act Rule should not mandate adherence to requirements formulated by a process outside the Enabling Act, even under auspices so prestigious as the Judicial Conference. In one sense, this path has been taken before. Rule 83(a)(1) dictates that a local rule "shall conform to any uniform numbering system prescribed by the Judicial Conference of the United States." Rule 5(e) provides that a local rule may "permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." The Judicial Conference action provided for by each of these rules is narrow and does not involve any fundamental policy. Development of additional disclosure requirements for nongovernmental corporate parties, and development of all disclosure requirements that may be imposed on other parties, is a far more important endeavor. The precedents established by Rules 5(e) and 83(a)(1) do not resolve the doubts that may be felt on this score.

A powerful expression of the Enabling Act concern is provided by Judge Easterbrook's comments on the parallel provisions in Appellate Rule 26.1, as quoted and summarized by Reporter Schiltz. The nubbin is that it ill becomes the rules committees to urge regularly that Congress should respect the Enabling Act process and then to recommend rules that abridge, enlarge, or modify the Enabling Act process. The history of the disclosure rules project should serve at the same time to exacerbate this concern and to alleviate it.

Many members of the various committees that have developed the disclosure rules have expressed grave doubts whether any of the rules of procedure should address disclosure requirements. If Appellate Rule 26.1 had not led the way more than a decade ago, these doubts might have prevailed now. None of the rules committees expresses any sense of special competence in the problems that arise from the Code of Judicial Conduct. Another Judicial Conference committee, the Committee on Codes of Judicial Conduct, works constantly with these problems. That Committee should have a better-informed sense of the inevitable compromises that must be made in this area. It is not possible to require disclosure and judicial review of every bit of information about every litigant that might give rise to disqualification. The most that can be attempted is disclosure of the forms of information that account for the most common grounds of disqualification. It might be better for the rules committees to do nothing in this area. The Committee on Codes of Judicial Conduct, however, has taken the lead in urging that formal rules of procedure be adopted. Deference to their experience and wisdom has led to the published proposals.

This history provides, paradoxically, the strongest argument for putting aside the concern that the proposed rules effect an improper delegation of Enabling Act authority. The argument is that disclosure requirements could be adopted by the Judicial Conference, on advice of the Committee on Codes of Conduct, without any exercise of Enabling Act authority. The question is not one of

the procedural rules that govern litigation but one of court administration. There is a sufficient touch of "practice and procedure" to support formal rules, and some advantage in providing notice to the bar through the formal rules. But reliance on the Judicial Conference does not reflect any "delegation" of Enabling Act authority. The proposed rules serve only to reflect — and provide notice to the bar of — the independent Judicial Conference authority to regulate these matters.

Should the Enabling Act arguments prevail despite this rationalization, Rule 7.1 could continue to serve a purpose. If it were to be pursued without further consideration of disclosure by parties other than nongovernmental corporations, the changes would be easy to accomplish. Rule 7.1(a)(1)(B) and 7.1(a)(2) would be deleted, leaving the remainder to go forward. This paring back, for these reasons, likely would not require a second publication for comment. But if it were decided that Rule 7.1 should be developed further, imposing additional disclosure requirements to take the place of possible future Judicial Conference action, further and difficult work will remain to be accomplished.

Local Rule Preemption

The story of the relationship between proposed Rule 7.1 and local disclosure rules begins with Appellate Rule 26.1. Before Rule 26.1 was adopted, a draft that required extensive disclosures was circulated among circuit judges for comment. The reactions were so diverse and hostile that the advisory committee withdrew to a much narrower version. Recognizing the limited nature of the disclosures required, the advisory committee observed that the circuits might wish to adopt circuit rules calling for additional disclosures. Rule 26.1 has been further narrowed since its adoption by deleting the former requirement for disclosures relating to corporate subsidiaries. Most of the circuits have adopted local rules; some of the local rules call for far more information than Rule 26.1 requires. Predictably, wide variations have emerged among the local circuit rules.

A number of district courts have adopted local disclosure rules. A local district rule is likely to resemble the local circuit rule, a circumstance that may contribute to the wide diversity of local district disclosure requirements.

Against this background, the "local rule problem" provoked the usual reactions. Proliferation of local rules is not favored by many of those engaged in the national rules process. At the same time, it was recognized that proposed Rule 7.1, modeled on current Appellate Rule 26.1, requires only minimal disclosures. The outcome of the debates was captured in the final sentence of the Committee Note: "Rule 7.1 does not prohibit local rules that require disclosures in addition to those required by Rule 7.1 unless the Judicial Conference adopts requirements that preempt additional disclosures." This sentence reflects an understanding that real benefits may emerge from experience with local rules that supplement Rule 7.1, not only in directly avoiding tardy discovery of disqualification problems but also in paving the way for more detailed national disclosure requirements that really work. At the same time it reflects the hope that one day it may be possible to adopt uniform national requirements. Uniform requirements not only make life easier for the lawyers who practice in multiple districts, but also make life much easier for institutional litigants who engage in litigation in many different districts.

Reactions to this local-rule reference have suggested that a Judicial Conference rule cannot preempt a local court rule. Local rules are authorized by 28 U.S.C. § 2071. There is no explicit

requirement that they be consistent with Judicial Conference pronouncements. The statute that establishes the Judicial Conference, 28 U.S.C. § 331, may carry implications that defeat any authority to preempt — implications that also bear on the "delegation" question discussed above. The fourth paragraph of § 331 provides that the Conference "shall also submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business." Preemption of a local rule is more than a suggestion or recommendation.

The Bankruptcy Rules Advisory Committee has recommended that the final sentence of the Committee Note be stricken because Judicial Conference requirements cannot preempt local rules.

The Appellate Rules Advisory Committee Reporter has recommended that this question should be resolved by amending each rule "to state explicitly that the Judicial Conference has the authority to provide that, with respect to the requirements that it promulgates pursuant to Rule [7.1], those requirements will preempt local rules on the topic of financial disclosure (whether or not those local rules 'conflict' with the requirements)." This thought can be expressed in terms that recognize Judicial Conference authority to determine whether — and how far — to preempt local rules. Part of the price to be paid for this approach might be that explicit statement in the rule will entrench the appearance that the rule is delegating Enabling Act authority to the Judicial Conference.

There is no apparent enthusiasm in any quarter for preempting local rules before the Judicial Conference adopts disclosure requirements. The prospect of tying preemption provisions to the Judicial Conference may augment doubts about adopting any Enabling Act Rules that venture into disclosure requirements. Because this project originated in the Standing Committee and will be resolved there, the most important responsibility of the Civil Rules Committee will be to consider these problems and report whatever hierarchy of reactions may emerge.

Summary of Comments on Rule 7.1

00-CV-001, Committee on Federal Courts, Association of the Bar of the City of New York: The practical reasons that lead to delegating responsibility to the Judicial Conference are understandable. But "[t]he committee is concerned * * * that the necessary contents of a disclosure statement may be less accessible to the bar and to the public if they are not set forth in the rules themselves."

00-CV-002, Public Citizen Litigation Group (Brian Wolfman): Supports Rule 7.1, and Appellate Rule 26.1, for the reasons stated in the Committee Note. The Note should state that the rule applies to cases pending when the Rule takes effect, and that the parties must file disclosure statements within a reasonable time (perhaps 60 days) in such cases.

00-CV-004, Ninth Circuit Conference of Chief Bankruptcy Judges, Hon. Louise De Carl Adler: The Bankruptcy Rules Advisory Committee is working on disclosure rules for contested matters and adversary proceedings. Pending development of these rules, "there [should] be an express exemption from application of proposed Rule 7.1 to cases and proceedings in bankruptcy."

00-CV-005, Federal Civil Procedure Committee, American College of Trial Lawyers, Gregory P. Joseph: Support two aspects of the proposal: (1) it is desirable to address disclosure in the Civil Rules "so that there is a uniform national standard." (2) "[T]hese disclosure statements ought not be limited to corporations, but extended to nongovernmental parties generally." But disagrees with

delegation of further work to the Judicial Conference. There is a trap for the unwary in "referencing a set of requirements that are not included in the Rules, may not exist and are not readily available." The Judicial Conference is part of the process of making Civil Rules; it "is in a position to ensure that all disclosure requirements it deems important become a part of the Rules." But if the Judicial Conference becomes responsible, a useful way to make litigants aware of Judicial Conference disclosure requirements would be to place them in the Civil Cover Sheet. (This will not help with Appellate Rule 26.1, however.)

00-CV-006, Federal Magistrate Judges Association Rules Committee (draft Report): Supports Rule 7.1. The disclosures will prove helpful. "This is consistent with the practice in many district courts currently which has been provided General Order or Local Rule, but certainly should be addressed on a nationwide basis through the federal rules."

00-CV-012, William J. Borah: (Mr. Borah reviewed the proposals for the Civil Practice and Procedure Section of the Illinois State Bar Association.) Rule 7.1(a)(1)(A) is a good idea, "and it would also give the opposing party information about the corporate structure of the opponent." The 7.1(a)(1)(B) and 7.1(a)(2) requirements to disclose information required by the Judicial Conference cannot be the subject of comment yet, "when we don't even know what the Judicial Conference might recommend."

Comments on Appellate Rule 26(a)(1)

Some of the comments on Appellate Rule 26(a)(1) raise issues that apply to Rule 7.1 as well. The following summaries were prepared by Dean Patrick Schiltz, Reporter for the Appellate Rules Advisory Committee.

Jack E. Horsley, Esq. (00-AP-002) supports the amendment, which, he says, "will strip away a veil of concealment."

Judge Frank H. Easterbrook (7th Cir.)(00-AP-012) strongly supports two aspects of the proposal — extending the disclosure obligation to non-corporate parties and requiring supplementation — but is "appalled" by a third — giving authority to the Judicial Conference to modify the disclosure obligation without going through the Rules Enabling Act process. Judge Easterbrook's objections to the Judicial Conference provision are several: (1) The provision short-circuits the Rules Enabling Act. The judicial branch keeps telling Congress not to short-circuit the process; the judicial branch impairs its credibility when it short-circuits the process itself. (2) the provision would weaken the role of the Standing Committee. "Other Committees of the Conference will see (and use) an opening into rules-related issues, and the ability of the Standing Committee to coordinate matters of practice and procedure will be undermined." (3) The provision would create a hardship for lawyers, as the Judicial Conference does not publish its standards in any central, readily accessible location. Judge Easterbrook recalls that some years ago the Advisory Committee on Appellate Rules proposed that the Judicial Conference be given authority to set technical standards for briefs, and that the proposal was rejected by the Standing Committee on the grounds described above. He urges that the Judicial Conference provision of proposed Rule 26.1 suffer a similar fate.

Judge Easterbrook also questions the assertion in the Committee Note that standards on disclosure issued by the Judicial Conference could preempt local rules. He points out that Rule

47(a)(1) provides that local rules "must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States." Judge Easterbrook interprets Rule 47(a)(1) to provide that "[o]nly statutes, rules, and one *particular* Judicial Conference action supersede local rules."

D.C.Circuit Advisory Committee on Procedures (No number; arrived too late to be summarized by Dean Schiltz). Opposes the proposed amendments to Appellate Rule 26.1. "[M]ore than enough information is already being disclosed pursuant to the current version of Rule 26 [sic] and the various local rules." The provision for Judicial Conference disclosure rules "means that each party's attorney will have to be checking on a regular basis to determine whether the Judicial Conference has revised its thinking." Delegation to the Judicial Conference also seems inconsistent with the public comment rules adopted under § 2073(a) and with the requirement that rules be transmitted to Congress no later than May 1, see section 2074.

New Rules 54(d)(2), 58

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).

Rule 58. Entry of Judgment

~~Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be~~

~~denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may 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. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.~~

(a) Separate Document.

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for 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;

(D) for a new trial, or to alter or amend the judgment, under Rule 59; or

(E) for relief under Rule 60.

(2) Subject to Rule 54(b):

(A) the clerk must, without awaiting the court's direction, 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; and

(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 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 a separate document is required by Rule 58(a)(1), upon the earlier of these events:

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

(B) when 60 days have run from entry ~~on~~ in[1] 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 for Entry. A party may request that judgment be set forth 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 separate document requirement has been ignored in many cases. The result of failure to enter judgment on a separate document[2] 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

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[1] This was published as "on." "In" is correct; see Rule 79(a).

[2] "on a separate document" was omitted from the published version. It seems better to include it.

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 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. Many of the enumerated motions are frequently made before judgment is entered. The exemption of the order disposing of the motion does not excuse the obligation to set forth the judgment itself on a separate document.

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 set forth on a separate document, as should be done, the new provision 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, 54, 59, and 60 begin to run after expiration of 60 days from entry of the judgment in 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 time of entry for motions, appeal, and enforcement.

This Rule 58(b) amendment defines "time of entry" only for purposes of Rules 50, 52, 54, 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 creation of 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 set forth 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 60 days after entry in 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.

Recommendation

The comments on Rules 54(a) and 58 focus on Rule 58. Some parts of some of the comments seem to reflect misunderstanding of Rule 58 as it now is. Other parts of some of the comments seem to reflect misunderstanding of the proposal published last August. It may be that the confusions are related. In any event, the suggestions for drafting improvement all involve manifest shortcomings and have not provided inspiration for further clarification. One possible variation is set out at the very end of the summary of comments.

New Rule 58(a)(1) carries forward the requirement that every judgment be entered on a separate document, and adds an explicit requirement that every amended judgment be entered on a separate document. But it further provides that a separate document is not required for an order "disposing of" a motion under Rules 50, 52, 54, 59, or 60. The result is that if action on any of these motions leads to an amended judgment, a new separate document is required. A separate document also is required if the judgment, although unchanged, was not set out on a separate document before the motion was disposed of. But no separate document is required if the motion is denied, or is granted in terms that do not amend a judgment that is properly set out on a separate document. An order granting a motion to amend findings of fact, for example, may not lead to any change in the judgment.

Rule 58(a)(1) drew little comment. Public Citizen Litigation Group finds it a "close question," but believes that the separate document requirement should be retained for these orders.

Compliance with the separate document requirement does not impose a great burden. And in complex cases the separate document will alert the parties that appeal time is running.

Rule 58(a)(1) was drawn in reliance on Dean Schiltz's exhaustive study of Rule 58 decisions. The courts of appeals are divided on application of the separate-document requirement to the orders listed in new Rule 58(a)(1). The list is geared to the list of motions in Appellate Rule 4(a)(4) that suspend appeal time until "entry of the order disposing of the last such remaining motion." The list is somewhat broader than the Appellate Rule 4(a)(4) list because it omits distinctions drawn by Rule 4(a)(4) — for example, it does not require that the motion be timely, and it applies to all Rule 60 motions rather than those made no later than 10 days after judgment is entered. This expansion resulted from the conclusion that the separate document requirement should not be further complicated. The recommendation to the Appellate Rules Committee rests on the belief that Rule 58(a)(1) should go forward as published.

Rule 58(b)(2) is quite a different matter. Here, as with Rule 7.1, the history of this project is important. The beginning was a proposal by the Appellate Rules Committee to amend Appellate Rule 4(a)(7) to provide in essence that the time to appeal starts to run 150 days after an order was entered on the civil docket even though the order was not set forth on a separate document as required by Civil Rule 58. This proposal was advanced to address the "time bomb" problem — the separate document requirement was added to Rule 58 to provide a clear signal that appeal time has started to run, a purpose that led all circuits other than the First Circuit to conclude that appeal time does not start to run until the judgment is set forth on a separate document. The concern is that there are countless numbers of district-court judgments that can be appealed long after all parties understood the litigation had concluded, only because judgment was not set forth on a separate document. The difficulty of proceeding by way of Rule 4(a)(7) alone was that the result would be different times for appeal and for making post-judgment motions. Appeal time might have run, for example, although want of a separate document meant that the time to move for such relief as a new trial had not even begun to run. This difficulty led to the joint drafting process that yielded the published proposals. The Civil Rules Committee was responding to the urgent need felt by the Appellate Rules Committee, not to an independent sense that in fact there is a pressing problem arising from delayed explosion of Rule 58 time bombs.

The public comments include many comments hostile to the "60-day" provision in Rule 58(b)(2). The comments come from many organizations that have great collective experience with federal appeals, and that have provided thoughtful and helpful comments on many rules proposals over the years. There is a common theme. Rule 58 was amended nearly four decades ago to provide a clear signal that appeal time has started to run. The ambiguity and complexity of many orders makes the clear signal more important now than ever. It is easy for a district court to honor the separate-document requirement. Adherence to the requirement, moreover, may lead the district court to think more carefully about the intended finality of its actions. The proposed solution will reset the appeal-time traps that were decommissioned by the separate-document requirement. The traps will be less often fatal if the time period should be extended from 60 days to 180 days, but still will create problems. These problems will be created for little purpose — the abstract fear of long-delayed appeals does not correspond to any real problem. It is better to adhere to the present rule, remembering that any party who is anxious to ensure that appeal time begins to run upon final disposition of an action can request entry of judgment on a separate document.

These are powerful arguments that deserve serious consideration. Dean Schiltz has advised the Appellate Rules Committee that it would be desirable to extend the 60-day period to the 150 days set out in the original Appellate Rule 4(a)(7) proposal, but that otherwise the integrated package of amendments should go forward for adoption. Although the 60-day period originated in the Civil Rules Committee, there is little reason to resist this extension. The deeper question whether to allow defeat of the separate-document requirement after 150 days remains. Dean Schiltz has responded to the argument that compliance with Rule 58 is both easy and important by observing that appellate courts have without avail been beseeching district courts to comply with Rule 58 for nearly 40 years. In addition, some cases are dismissed before the defendant is served — in these cases, a long-delayed appeal may be the first event that informs the appellee of the litigation. The separate document requirement may be a good idea, but it has been proved unworkable. The time-bomb problem, on this view, is sufficiently important to justify qualifying the separate document requirement by the 150-day escape provision.

The reactions of this committee may be strongly influenced by the final recommendations of the Appellate Rules Committee. It seems desirable to adopt the two minute changes flagged by the footnotes to the published text as set out above. Apart from those changes, the final decision to recommend qualification of the separate-document requirement remains difficult. Many lawyers with extensive appellate experience oppose the proposal as unwise and unnecessary. The Appellate Rules Committee may well act by pressing ahead. Its action will be available for consideration when this topic is deliberated.

Summary of Comments: Rules 54, 58

00-CV-001, Committee on Federal Courts, Association of the Bar of the City of New York: The Rule 58 proposal may resurrect the trap for the unwary that Rule 58 was designed to eliminate [apparently the fear is that the 60-day period after entry on the docket is too brief]. The "time bomb" problem is better addressed in other ways. The ideal solution is to enforce Rule 58 as it is — district court clerks' offices should enforce an operating procedure that bars a case from being closed without entry of a final judgment embodied in a Rule 58 document. Failing that, the rule should provide that a prevailing party who believes that an order is appealable may serve notice of entry on every other party; the notice would start the running of appeal time. As a third choice, the published rule should provide a waiting period of "at least six months" before entry on the docket supersedes the need for entry of a separate judgment document. It is not unusual for 60 days to pass without any event in an action; it is considerably less frequent for an action to lie six months without anything happening.

00-CV-002, Public Citizen Litigation Group, Brian Wolfman: (1) The Rule 54(d)(2) and 58(a)(1) provisions that would eliminate the separate document requirement for specified post-judgment motions present "a close question," but should be rejected. To be sure, "these kinds of post-judgment rulings are generally discrete and imbued with finality," so a formal separate-document notice of appealability is not much needed. But in complex cases it may remain necessary to have a separate document that alerts the parties that appeal time is running. The burden on courts and clerks is not great — the separate judgment is a short, formulaic document. The party seeking to ensure that appeal times run can request entry of judgment, see proposed Rule 58(d). And it makes sense to

retain the separate-document requirement, as the proposal does, for all post-judgment orders not listed.

(2) "PCLG disagrees strenuously with" the proposal that would allow appeal time to begin 60 days after entry of the judgment on the docket, even though no separate document is filed. "[W]e do not understand why the Rules would retain the separate-document requirement and then allow it to evaporate at some point after an appealable order is entered." The very point of the separate document is to eliminate the ambiguities that surround the final-judgment rule. "[T]his signaling function is quite important because frequently an order is ambiguous as to whether it constitutes a 'judgment' * * *." The losing party, although aware that an order has entered, may not be aware that the order is appealable. The passage of 60 days from entry on the docket does not alleviate that ignorance. This is not a workable compromise between the present rule and the alternative of abolishing the separate-document requirement. The "time bomb" problem does not warrant this response. First, there is an easy remedy — district courts only need abide by the present rule; the prevailing party can help under proposed Rule 58(d) by requesting entry of judgment. Second, "we challenge the assumption that there are many 'problem' cases, despite the number of reported decisions on the topic. Third, the cases that involve any significant delay in taking an appeal "generally are cases of genuine ambiguity as to whether the underlying order is 'final' for purposes of appeal."

00-CV-003, Bradley Scott Shannon: Professor Shannon's comment is difficult to summarize because it is rich in detail. The conclusion picks up on the observation in the draft Committee Note that drastic surgery would be required to fully address the problems that arise from present Rules 54(a) and 58. He agrees, but urges that the time has come for drastic surgery, including revision of Rule 54(a).

Rule 54(a) defines "judgment" for Civil Rules purposes as "a decree and any order from which an appeal lies." If there is no order, a case may move to final disposition without a "judgment" and thus without triggering the separate document requirement of Rule 58. More commonly, district courts have little occasion to think about appealability with respect to many orders that in fact are appealable — the consequence is that appeals are accepted despite failure to enter a separate document, and appeals are dismissed despite entry of a separate document. Rule 54(a) should be amended to refer only to "final" judgments. "Final" would be defined as an order that summarizes the claims disposed of in the action no matter how disposition is accomplished. The order would state whether the disposition is with prejudice, and also would state the precise relief granted.

Rule 58 should retain the separate document requirement, but limit it to the amended Rule 54(a) definition of a "final" judgment. And the present provisions that call for entry of judgment by the clerk in some circumstances, preserved in proposed Rule 58(a)(2), should be discarded. Entry of judgment should be required "very shortly (perhaps 10 days) after disposition of the last remaining claim or claims," and should not be deferred for post-final judgment motions. If a post-final judgment order alters or affects the final judgment in any way, the court should separately prepare and enter an amended final judgment.

00-CV-004, Ninth Circuit Conference of Chief Bankruptcy Judges, Hon. Louise De Carl Adler: "[W]holeheartedly supports the solution proposed. Failure to timely submit a final judgment is

frequently a problem faced by litigants in bankruptcy court and the proposed rules changes will solve it."

00-CV-006, Rules Committee, Federal Magistrate Judges Association (draft Report): Supports the Rule 54 and 58 proposals. The Rule 58 proposal "would help clarify requirements that have been ignored in many cases," and "establishes a basis for insuring that appeal time does not go on indefinitely."

00-CV-007, Advisory Committee on Rules of Practice, United States Court of Appeals for the Ninth Circuit: Expresses concern that "a lack of clarity" could cause "an inadvertent loss of appeal rights." The proposed rule could be read to mean that appeal time never starts to run until a separate document is entered, even in a case in which a separate document is not required. This confusion could lead to a deluge of requests that the court enter a separate document even though none is required. A revised draft is attached. It restates the separate document requirement to apply only to "[a] judgment that terminates a district court action." Time of entry is specified for the situation in which a separate document is entered even though none is required — judgment is entered on the later of the dates when it is entered or when a separate document is entered. (The purpose apparently is to protect against this event: a judgment that does not require a separate document is entered on day 1. On day 15 a separate document is entered. The intending appellant may be confused, believing that appeal time starts on day 16, not day 2.)

00-CV-008, Appellate Practice Section, State Bar of Michigan: The 60-day rule "would create a potential pitfall for litigants where the appealability of the order in question is ambiguous." "The primary rationale for the separate document rule is to create certainty as to when a judgment has been entered, which also provides a readily defined trigger for the 30-day appeal period." A victorious litigant can avoid the time-bomb problem by submitting a proposed separate-document judgment. Adherence to the separate-document requirement is simple. "Finally, the question arises whether there are actually enough 'problem' cases to justify adoption of a 60-day rule that could give rise to a great many problems in its own right."

00-CV-009, Appellate Courts Committee, Los Angeles County Bar Association, James C. Martin: "Heartily endorses" the proposals. "[T]his was an area fraught with peril and confusion. The amendments provide greater certainty on the triggering events for this key jurisdictional issue."

00-CV-010, Michael Zachary: Writes from experience as a Second Circuit supervisory staff attorney and author of an article on Rules 58 and 79(a). Opposes the 60-day rule as one that "does more harm than good." It will return us to the pre-1963 days with "litigants unfairly losing their right to appeal when the order terminating the case is not clear or when certain types of motions which do not affect finality are still pending." Indeed, some may assume that the failure to enter a separate document "indicates the court's belief that the case is not yet concluded." Conversely, premature and protective appeals will be triggered in ambiguous circumstances "simply to insure against loss of the right to appeal." "Moreover, it has not been my experience that many delayed appeals are filed beyond a few months after the usual time for appeal or that prejudice resulted from the delay in those cases." Any remaining problems can be addressed by the prevailing party's opportunity to request entry of a separate document, or by the trial court acting to do so on its own; if belated appeals still slip through in long-closed cases, they can be dismissed "under the laches doctrine."

Drafting suggestions also are made. Both seem to be based on misreading the published proposals, but will be considered with care.

00-CV-011, Sidney Powell: Ms. Powell has been lead counsel in more than 450 federal appeals. She endorses in full the comments of Public Citizens Litigation Group, 002 above. The separate judgment requirement "serves not only the function of signaling the time to appeal, but it also serves as a single document for purposes of bonding or execution."

00-CV-012, William J. Borah: (Mr. Borah reviewed the proposals for the Civil Practice and Procedure Section of the Illinois State Bar Association.) The Rule 58 proposal "seems to make the whole issue even more confusing and complicated. While the commentary acknowledges the confusing state of this matter, I think that more thought should go into this before a proposal is made which adds to the problems. The commentary refers to the possibility that the 'separate document' rule should be abandoned altogether, and this would not be a bad idea."

00-CV-013, District of Columbia Bar, Litigation Section and Courts, Lawyers and the Administration of Justice Section: Accepts the restructuring of Rule 58, and the Rule 58(a)(1) list of orders that do not require a separate document. But urges that when a separate document is required by Rule 58(a)(1), only entry of a separate document should establish entry of judgment. Rule language is proposed for this purpose. The published proposal "will create more problems than it will cure." The proposal would impose on attorneys an obligation to inspect the docket at regular intervals, in part because "courts normally do not give attorneys notice of docket entries." The amendment could mean that an appeal is lost after 90 days even though there is no separate document. "The remedy is to clarify the requirement for entry of a separate document so that failures to follow the rule are less common." In addition, proposed Rule 58(d) should be revised to state that the court must comply with any legitimate request to enter a separate document.

Comments on Appellate Rule 4(a)(7)

Some of the comments on Appellate Rule 4(a)(7) addressed Civil Rule 58 problems but were not described as such. The following summaries were prepared by Dean Patrick Schiltz, Reporter for the Appellate Rules Advisory Committee.

Judge Frank H. Easterbrook (7th Cir.)(00-AP-012) seems to have two major concerns about the proposed revisions to Rule 4(a)(7)(B). * * *

Second, Judge Easterbrook essentially opposes the 60-day provision and favors retaining the separate document requirement as it exists. He argues that, without the warning provided by a separate document, some litigants will fail to recognize that the time to appeal has begun to run and find themselves "hornswoggled out of their appeals." He argues that other litigants will "pepper courts of appeals with arguments that one or another decision marked the 'real' end of the case, so that the clock must be deemed to have started more than 30 days before the notice of appeal." Still other litigants will "bombard[] the court with notices of appeal from everything that might in retrospect be deemed a conclusive order."

The Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association (00-AP-017) objects only to the 60-day provision. It has no objection to the remainder of the Rule 4(a)(7)/FRCP 58 proposal, including the provisions that

would make clear that the appellant alone can waive the separate document requirement and that orders disposing of certain post-judgment motions need not be entered on separate documents. The Committee does note, though, that it would prefer that FRCP 58 instead provide that *all* orders disposing of post-judgment motions be entered on separate documents.

As to the 60-day provision, the Committee believes that it undermines the fundamental purpose of the separate document requirement, which is to provide litigants with a clear warning of when a judgment has been issued and the time to appeal has begun to run. The Committee concedes that the time bomb problem is "a real concern," but winning litigants can easily protect themselves from time bombs simply by asking the district court to enter judgment on a separate document.

D.C.Circuit Advisory Committee on Procedures: (This comment arrived too late to be summarized by Dean Schiltz.) The problem that appeal time never starts to run "should be addressed. However, some of our members found the new rule unnecessarily complicated." One possibility would be to state the number of days that a party has to appeal when no separate judgment is entered. [Note: this was the first approach of the Appellate Rules Committee; it was put aside because failure to make any other change would mean that the Civil Rules would permit motions for judgment as a matter of law, new trial, revised findings, and the like, after appeal time had expired.] The Rule 58(b)(2) proposal would be clearer if it said that when a separate document is required, judgment is entered when it is set forth on a separate document and entered on the docket under Rule 79(a)." [That is what the published rule says; it could be amended to use more words:

(B) Time of Entry. Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62:

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

(2) if Rule 58(a)(1) requires a separate document, on the earlier of these events:

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

(ii) when 60 days have run from entry in the civil docket under Rule 79(a).

It would be possible to add yet another provision, addressed to this problem: judgment may be set forth on a separate document even though none is required. If the separate document is prepared after entry in the civil docket, the unwary may conclude that appeal time starts to run only when the separate document is prepared. So: Day 1, entry in civil docket; day 5, separate document prepared. A notice of appeal filed on Day 32 is late under the published draft or the alternative described above. If we are prepared to apply the 60-day period in this situation as well, a drafting fix would be to rewrite (2):

(2) if Rule 58(a)(1) requires a separate document — or if judgment is set forth on a separate document that is not required — on the earlier of these events: * * *

Including the 60-day limit limits the way in which this approach would create a de facto power to expand appeal time by long-delayed entry of an unnecessary separate document. The issue at stake, however, is only the published Rule 58(a)(1) set of orders that do not require a separate document; a separate document is required for everything else that is appealable. This may be more trouble than anyone needs.

Rule 81(a): Rules Governing Habeas Corpus

Rule 81. Applicability in General

(a) To What Proceedings Applicable.

* * *

(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.~~

Committee Note

This amendment brings 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 Rules and Rule 12 of the § 2255 Rules.

Recommendation

The comment of the National Association of Criminal Defense Lawyers raises two issues.

The first arises from a glitch in the publication process. The second half of the first sentence in the published Committee Note reads: "those rules govern as well habeas corpus proceedings under § 2241." This phrase was marked for deletion during the Standing Committee discussion; it is inaccurate because the § 2254 rules apply to § 2241 proceedings only in the discretion of the district court, Rule 1(b). Somehow the published version failed to catch this change. The comment is right; this clause should be deleted.

The second issue arises from the protest that the § 2254 and § 2255 Rules need more pervasive revision. The comment suggests that the Rule 81(a)(2) revision is premature until that revision is proposed and adopted. The Criminal Rules Committee has concluded that it is indeed appropriate to undertake a more thorough revision of these Rules, and to put them through the style process as well. It is expected that at least a year will be required to complete this project. That leaves the question whether it is premature to go forward with the Rule 81(a)(2) proposal. Rule 81(a)(2) in its present form is inconsistent with the more particular rules that govern these proceedings, and should be made subject to them. Any potential gap in the § 2254 and § 2255 rules is filled by the continuing general provision that the Civil Rules apply to the extent that practice is not regulated by those rules. These considerations suggest that it is proper to proceed now with Rule 81(a)(2). The Criminal Rules Advisory Committee Reporter advises that it is proper to proceed now. There is no apparent risk that anything to be done with the § 2254 and § 2255 rules will require further revision of Rule 81 (our most frequently amended rule) on this score.

Summary of Comments: Rule 81

00-CV-006, Rules Committee, Federal Magistrate Judges Association (draft Report): Supports the proposal, which brings needed consistency to the rules and avoids unnecessary duplication of the § 2254 and § 2255 rules in Rule 81.

00-CV-014, National Association of Criminal Defense Lawyers: Begins with the suggestion that the published amendments of the Rules Governing § 2254 Cases and the Rules Governing § 2255 Proceedings "need more of an overhaul" than provided by the proposed amendments. On this premise, concludes that the related Rule 81(a)(2) amendment "is premature until the habeas rules are more fully reconsidered." And adds a statement that the Committee Note overstates the role of the § 2254 Rules when habeas corpus is sought under § 2241. Rule 1(b) states that in applications for habeas corpus not covered by Rule 1(a) — which describes various petitions under § 2254 — "these rules may be applied at the discretion of the United States district court." [This seems correct; all of the pre-publication correspondence about Rule 81(a)(2) noted the effect of Rule 1(b).]

ADMIRALTY RULES PUBLISHED FOR COMMENT IN FEBRUARY 2001

On January 16, 2001, proposals were published to amend the Admiralty Rules to conform to provisions of the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202 ff. A short comment period was set, closing on April 2, 2001. The purpose of setting a short comment period reflected the unusual circumstances surrounding the amendments. Earlier amendments of the Admiralty Rules were transmitted to Congress by the Supreme Court on April 17, 2000, to take effect on December 1, 2000. One week later, Congress adopted the reform act. Several procedural provisions of the reform act were inconsistent with the amendments. The amendments, however, supersede the new statute because the amendments took effect after the effective date of the statute. The amendments were framed without any information about the legislation that had not yet been clearly developed when the amendments were actually drafted, and there was no intent to supersede the statute. The proposals published in January 2001 seek to conform the Rules to the statute, with the hope that courts will follow the conforming Rules even before they can take effect upon completion of the remaining steps in the Enabling Act process.

No comments have been received on these proposals. The Department of Justice forfeiture experts believe that several more changes are required to adapt the Admiralty Rules to the needs of forfeiture practice, but those changes will require full consideration in the ordinary course of the Enabling Act process. Meanwhile, they believe that the January 2001 proposals should be adopted.

It is recommended that the January 2001 proposals be recommended to the Standing Committee for transmission to the Judicial Conference for approval and submission to the Supreme Court.

Rule C. In Rem Actions: Special Provisions

* * *

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute:

(i) a person who asserts an interest in or right against the property that is the subject of the action must file a verified statement identifying the interest or right:

(A) within ~~20~~ 30 days after the earlier of (1) ~~receiving actual notice of execution of process~~ the date of service of the Government's complaint or (2) completed publication of notice under Rule C(4), or

(B) within the time that the court allows * * *.

Committee Note

Rule C(6)(a)(i)(A) is amended to adopt the provision enacted by 18 U.S.C. § 983(a)(4)(A), shortly before Rule C(6)(a)(i)(A) took effect, that sets the time for filing a verified statement as 30

days rather than 20 days, and that sets the first alternative event for measuring the 30 days as the date of service of the Government's complaint.

(6) Responsive Pleading; Interrogatories.

(a) Civil Forfeiture. In an in rem forfeiture action for violation of a federal statute: * * *

(iii) a person who files a statement of interest in or right against the property must serve and file an answer within 20 days after filing the statement.

(b) Maritime Arrests and Other Proceedings. In an in rem action not governed by Rule C(6)(a): * * *

(iv) a person who asserts a right of possession or any ownership interest must ~~file~~ serve an answer within 20 days after filing the statement of interest or right.

Committee Note

Rule C(6)(a)(iii) is amended to give notice of the provision enacted by 18 U.S.C. § 983(a)(4)(B) that requires that the answer in a forfeiture proceeding be filed within 20 days. Without this notice, unwary litigants might rely on the provision of Rule 5(d) that allows a reasonable time for filing after service.

Rule C(6)(b)(iv) is amended to change the requirement that an answer be filed within 20 days to a requirement that it be served within 20 days. Service is the ordinary requirement, as in Rule 12(a). Rule 5(d) requires filing within a reasonable time after service.

Rule C. In Rem Actions: Special Provisions

* * *

(3) Judicial Authorization and Process.

(a) Arrest Warrant.

(i) When the United States files a complaint demanding a forfeiture for violation of a federal statute, the clerk must promptly issue a summons and a warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances, but if the property is real property the United States must proceed under applicable statutory procedures.

Committee Note

Rule C(3) is amended to reflect the provisions of 18 U.S.C. § 985, enacted by the Civil Asset Forfeiture Reform Act of 2000, 114 Stat. 202, 214-215. Section 985 provides, subject to enumerated exceptions, that real property that is the subject of a civil forfeiture action is not to be seized until an order of forfeiture is entered. A civil forfeiture action is initiated by filing a complaint, posting notice, and serving notice on the property owner. The summons and arrest procedure is no longer appropriate.

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(B) within the time that the court allows * * *.

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4

DISTRIBUTED IN SEPARATE MAILING

ADVISORY COMMITTEE
ON
CIVIL RULES

Agenda Item 4
Washington, D.C.
April 23-24, 2001

AGENDA
Advisory Committee on Civil Rules
April 23-24, 2001

1. Opening Remarks of Chairman

2. **ACTION** — Approval of Minutes of Meeting on October 16-17, 2000, and Meeting on March 12, 2001

3. **ACTION** — Proposed Amendments to Rules 54, 58, 81, and New Rule 7.1 for Transmission to the Committee on Rules of Practice and Procedure

4. Report of Class Action Subcommittee (distributed in separate mailing)

5. **ACTION** — Proposed amendments to Rule 53 (special masters) for publication

6. **ACTION** — Proposed amendments to Rule 51 (jury instructions) for publication

7. Report on "Electronic Discovery" Conference held at Brooklyn Law School

PROPOSED AMENDMENTS TO RULE 23

ADVISORY COMMITTEE ON CIVIL RULES

April 23-24, 2001

Tab I
Introduction and Overview

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
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515 RUSK STREET
HOUSTON, TEXAS 77002

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MEMORANDUM

DATE: April 10, 2001

FROM: Judge Lee H. Rosenthal
Professor Edward H. Cooper
Professor Richard L. Marcus

TO: Members of the Advisory Committee on Civil Rules

SUBJECT: Proposed Amendments to Rule 23

The Subcommittee on Class Actions submits to the Advisory Committee on Civil Rules the attached proposals for amendments to Rule 23. The Subcommittee requests that the Committee approve the submission of the proposed amendments to the Standing Committee, with the recommendation that they be published for comment from the bench and bar. The amendments reflect the Committee's continuing efforts to understand the issues raised by Rule 23 and to refine the proposals to improve the practice of class action litigation.

The Subcommittee has drawn on a wealth of material available on class action litigation. This Committee has been engaged in examining Rule 23 since the 1970s, most recently when the 1996 proposed amendments were published for comment. Those proposals generated extensive, and highly informative, public comment on class action

litigation. The Federal Judicial Center has conducted empirical studies of federal class action suits. In 2000, the RAND Institute for Civil Justice published the results of its detailed case studies and surveys of lawyers engaged in class action litigation in state and federal courts.[1] The Working Group on Mass Torts published a detailed report that included an examination of the problems of mass tort class action suits. In addition to these sources, the Subcommittee has solicited practical input from lawyers as to the current issues they face in class action practice.

This study has revealed that many of the fundamental concerns the Advisory Committee heard during its study of class actions in the 1990s are still present, but there have been changes. The concern whether the aggregation of claims can itself generate abuse and become coercive is still present. The concern about the use of the class action device to coerce settlements of cases that otherwise would likely be dismissed or be tried and lost, by raising the stakes or the costs of dealing with the cases to an intolerable level, is still present. The concern about class actions that might not benefit the members of the class in meaningful ways, yet involve huge transaction and other social costs, is still present. The concern over settlements of consumer cases in which a largely disinterested class receives little but the lawyers receive much is still present. The concern over settlements of mass

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[1] The RAND Institute for Civil Justice Report, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN, discusses the history and status of class action litigation in United States federal and state courts. RAND INSTITUTE FOR CIVIL JUSTICE, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (2000) [hereinafter RAND Report]. It critically examines popular conceptions of the benefits and ills of such litigation from the perspective of the public, the court system, and both plaintiff and defense class action practitioners, including the claims asserted, class recoveries, attorney fee awards, and procedural problems.

tort cases in which individual plaintiffs receive far less than they might achieve outside the class action context is still present.

Since the last proposals were published in 1996 and the interlocutory appeal provision of Rule 23(f) resulting from that effort was adopted in 1998, there have been shifts of focus in the issues class litigation raises. There has been a great increase of class action litigation in the state courts, where, in some cases, the standards for certification and approval of settlements are applied in a less exacting fashion than the federal courts.[2] There has been a corresponding concern over a proliferation of competing, overlapping, duplicative class suits or class actions and other forms of aggregated litigation.

The proposed amendments submitted today also reflect a shift in focus from the Committee's last effort to address the concerns raised by litigation under Rule 23. The rule amendments proposed in 1996 focused on the substance of class certification standards. Recent case law makes it clear that the federal courts find in present Rule 23 demanding certification requirements, particularly as applied to classes certified for trial. However, the commentary, the empirical information, the case law, and the practical input the Subcommittee has received, reflect great concern over the process by which class action

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[2] On the issue of whether class actions are on the increase, the RAND Report notes that while it is difficult to calculate growth trends with precision, both the data and the surveys of lawyers made it clear that "there has been a surge in damage class actions in the past several years, particularly in state courts and in the consumer area." 5 RAND INSTITUTE FOR CIVIL JUSTICE, EXECUTIVE SUMMARY: CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN (1999)[hereinafter EXECUTIVE SUMMARY]. In 1995 and 1996, nearly 60 percent of reported class action decisions came from state court, indicating that a large share of class action litigation takes place there. *Id.* at 6. The RAND Report found considerable evidence that class action attorneys "shop" for judges who are more favorable toward class actions and less demanding in applying certification requirements. *Id.* at 7.

decisions are made, from certification, to class counsel appointment, to settlement approval, and to attorney fee awards. The present proposed amendments focus on class action procedures rather than on certification standards.

The proliferation of competing and overlapping class suits, pending simultaneously in federal and state courts, raises a number of issues. One concern is the potential of such filings to frustrate judicial scrutiny of certification motions, settlements, and fee requests as the means of regulating class action practices. In the current system, class counsel and defendants who wish to evade exacting scrutiny in one court have the ability to take their proposed class or proposed settlement to another court, where the standards may be less rigorous or the court may be more accommodating. Another concern is that competing groups of attorneys may file overlapping class actions to seek advantages through earlier class counsel appointments, different rulings on threshold motions, different discovery timetables and requirements, and the opportunity to seek compensation as the price of ending competing suits. Present procedural mechanisms appear inadequate to provide effective relief or coordination. The proposed amendments include provisions attempting to facilitate effective coordination, while recognizing the respect due to other federal and state courts in which parallel litigation may be filed.

The package of proposed amendments attempts to improve the support within Rule 23 for what the Supreme Court identified in *Amchem Products, Inc. v. Windsor*[3] as the touchstone of litigation under Rule 23: whether there are sufficient "structural assurances" of fairness to the parties who are bound by virtue of the procedural device that enabled class

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[3] 521 U.S. 591 (1997).

actions in the first place. The proposed rule amendments are intended to improve the practice of class actions, by making the litigation of class actions more fair, and class counsel more accountable.

I. Background

A brief discussion of prior proposed rule amendments provides a useful context for the present proposals. In the 1970s, this Committee was exhorted to revise Rule 23 because damage class actions "place an intolerable burden on the federal courts; . . .force defendants into settlement regardless of the merits of the claims because the cost of defense and the size of potential recovery is intimidating; . . . result in procedural unfairness and change the substantive law that is applicable to individual actions; [and] . . . do not benefit the claimant class, but benefit only [the] lawyers who represent it."[4] The Advisory Committee declined to take action at that time.

In the 1980s, the debate whether (b)(3) class actions were "Frankenstein monsters" or "shining knights" renewed as the mass tort suit became more prevalent. Despite the clear statement in the Advisory Committee Notes in 1966 that (b)(3) suits were not intended to apply to mass accidents resulting in injuries to numerous persons, courts around the country certified an increasing number of class actions involving latent, dispersed mass torts. The increasing number of such cases, and the significant amounts of money they involved and generated, led to protests that aggregation itself created such intolerable pressures on defendants as to be abusive. As courts and litigants sought to

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[4] Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 16 & n.44 (1991) (quoting unsigned typed memorandum with handwritten note stating "March 4-5, 1974 Meeting–Advisory Committee on Civil Rules" and entitled "Agenda 1, Rule 23, Preliminary Note").

resolve the burdens imposed by volumes of cases by certifying for settlement classes that could not be certified for trial, protests mounted that such procedural venturesomeness impaired the rights of injured individuals to individualized legal procedures and outcomes. At the same time, there was an increase in class actions under consumer rights statutes, which led to protests that such cases can benefit class counsel with significant fees, but provide class members with insignificant recoveries.

In 1996, after prolonged discussion, the Advisory Committee sent proposed amendments to Rule 23 to the Standing Committee, which approved them for publication. The published proposals focused on the standards for class certification. Proposed Rule 23(b)(3)(F) was specifically directed to small claim consumer class actions. It would have required an inquiry whether class certification "just wouldn't be worth it" -- "whether the probable relief to individual class members justifies the costs and burdens of class litigation." The Committee also attempted to address mass tort class actions by a group of proposed changes to the (b)(3) factors that bear on the superiority of class treatment and the predominance of common issues. Proposed factors A and B would have discouraged class certification when individual class members could practicably pursue individual actions and had a significant interest in doing so, such as exercising control over their own cases. Proposed (b)(3)(C) would have amended present factor (b)(3)(B) to require the district court to examine not only the extent and nature of related litigation involving class members, but also the "maturity" of related litigation involving class members. A third change added a new category, Rule 23(b)(4), that explicitly dealt with settlement classes and provided authority for judges to certify such classes in response to the parties' joint

request. A fourth category of change created a basis for interlocutory appeal from a decision for or against class certification.

The public hearings and comment provided the Committee with the information it needed about the practicality and acceptability of the proposals, information that is uniquely obtained from the public comment process. The volumes of the testimony and the hundreds of written comments are themselves a valuable source of data about class litigation. Proposed Rule 23(b)(3)(F) generated a cross-fire between those opposed to the use of consumer class actions for public regulation and those afraid to lose the benefits. The debate revealed a profound division of informed opinion on the appropriate role of consumer class regulatory enforcement actions, the so-called private attorney general suits. Proposed Rule 23(b)(3)(A) and (B) generated a debate that revealed profound uncertainty and disagreement over what could appropriately be done to address the distortions that mass tort litigation can introduce into the judicial system. The proposal on settlement classes was put aside in anticipation of the Supreme Court's pending decision in *Amchem*.

The interlocutory appeal provision did become law. It is already proving a fruitful source of appellate case law on certification standards, and an effective release valve from the pressure a certification decision can generate. The case law has developed criteria guiding an appellate court's discretionary decision to accept an interlocutory appeal under Rule 23(f). One criterion is whether an appeal may facilitate the development of the law governing certification and provide guidance to the Advisory Committee as it considers whether and how to amend Rule 23.[5] However, Rule 23(f) is a discrete, and limited, reform.

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[5] *See* Blair v. Equifax Credit Servs., Inc., 181 F.3d 832, 835 (7th Cir. 1999).

A December 2000 Federal Judicial Center study of a sample of pending and closed class actions filed after January 1, 1998 reveals that petitions for interlocutory appeal are still relatively rare.[6]

Against this background, the Subcommittee has attempted to identify the areas of litigation under Rule 23 that present the greatest problems and offer the most promise for amelioration by rule amendment.

II. Proposed Rule 23(c)

A. The Timing of Certification: When Practicable

The 1996 Rule 23 proposals included one to amend Rule 23(c)(1) by changing the requirement that a certification decision be made "as soon as practicable" into a "when practicable" requirement. Although public comment was largely favorable, the Standing Committee declined to continue this proposal, on two grounds. One was that it would be better to consider all Rule 23 changes in a single package, leaving apart as clearly separate the Rule 23(f) appeal provision that was adopted. The other was doubt as to the wisdom of the change. It was feared that it would encourage courts to delay deciding certification motions and would lead to an increase in precertification discovery into the merits of a class suit.

The proposed amendment reflects the belief that these concerns, although valid, have been addressed. The proposal is presented as part of a package of amendments, not as a "piecemeal" item. The likelihood of increased delay is not viewed as significant.

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[6] The FJC study showed that in a sample of 135 class action cases examined, 32 cases had a motion to certify ruled on by the district court. Appeal under Rule 23(f) of the ruling on the motion to certify occurred in 2 of the 32 cases.

To the contrary, the amendment would make the language of the rule consistent with the reality of practice, as shown by Federal Judicial Center Study figures on time from filing to certification decisions. It would also afford flexibility for the appointment of counsel process in proposed Rule 23(h). The proposed Committee Note also makes it clear that the amended language does not signal that courts should increase the time before resolving a certification issue, or permit extensive discovery unrelated to certification. The Note makes it clear that a court is to use the precertification period to obtain the information it needs to make an informed decision on certification.

The present language emphasizing the immediate obligation of the court to decide certification has, in some circumstances, led courts to believe that they are overly constrained in the period before certification. The Seventh Circuit read the present rule to defeat the opportunity to seek dismissal or summary judgment before a certification decision, a view that it no longer holds.[7] Lawyers argue that the present rule language does not permit any discovery that involves the merits before certification. Certainly, under the proposed rule as well as under current practice, courts should not consider, and parties should not conduct discovery into, the probable outcome of the merits of the underlying claims. However, a court deciding whether to certify a class must be able to consider the nature of the issues that the merits of the case will present. A court must analyze whether the evidence on the merits is common to the members of the proposed class; whether the

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[7] *Compare* Bennett v. Tucker, 827 F.2d 63, 66-67 (7th Cir. 1987) (holding that district court violated Rule 23 by granting summary judgment before explicitly addressing class certification issue *with* Cowen v. Bank United of Texas, FSB, 70 F.3d 937, 941(7th Cir. 1995) (holding that Rule 23 usually but not always requires district courts to address class certification before merits).

issues are susceptible to class-wide proof; whether there are conflicts problems within classes; and what trial management problems the merits of the case will present.

The proposed language is consistent with the distinction that courts draw, and should draw, between discovery on the nature of the issues on the merits, which is relevant to certification decisions, and discovery that pertains to the probable outcome of the merits, which is not properly conducted until after certification is decided. The proposed Note sets out factors that a court should consider in deciding whether the certification decision is ready for resolution, or is appropriately deferred for specific reasons. The Note is intended to make it clear that precertification delay, and discovery, is limited to that necessary to determine certification issues.

In summary, the proposed "when practicable" language is consistent with the reality of when courts generally make certification decisions. The proposed language is also consistent with the best practice, that a court should decide a certification motion promptly after obtaining the information necessary to make that decision on an informed basis.

B. The Order Certifying a Class: Rule 23(c)(1)(B)

The proposed amendment specifies the contents of an order certifying a class action. Such a requirement facilitates the application of Rule 23(f), by requiring that a court must define the class it is certifying and identify the class claims, issues, and defenses. The proposed amendment also requires that the order certifying a (b)(3) class, not the notice alone, state when and how class members can request exclusion.

C. The Conditional Nature of Class Certification: Rule 23(c)(1)(A)(C)

The proposed rule allows amendment of an order granting or denying class certification at any time up to "final judgment"; the current rule terminates the power at "the decision on the merits," an event that may happen before final judgment. This change avoids possible ambiguity in the 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, although this flexibility should be applied differently in these different contexts. Proceedings to enforce a complex decree may generate several occasions for final judgment appeals and may demonstrate the need to adjust the class definition.

D. The Preclusive Effect of an Order Refusing to Certify a Class: Rule 23(c)(1)(D)

This amendment is the first of three proposals designed to address, and ameliorate, some of the problems raised by competing, overlapping, and duplicative class litigation, proceeding in different courts. Before analyzing the three specific proposals, some background on the problems raised by such litigation provides useful context.

1. Overlapping and Competing Class Suits: The General Problem

The frequency of competing and overlapping parallel suits is high and may be rising. The RAND Institute for Civil Justice studied ten class actions in detail and reported the results in CLASS ACTION DILEMMAS. In four of the ten cases, class counsel filed parallel cases in other courts. In five of the ten class actions, other groups of plaintiff attorneys

filed competing actions in other jurisdictions. There were only two of the ten cases where neither type of additional filings occurred.

In describing the process by which class action plaintiffs' attorneys identify potential areas for litigation, the RAND Report states: "To spread the costs of monitoring [for attractive areas for litigation], they look for opportunities to litigate multiple class action lawsuits alleging the same type of harm by different defendants or in different jurisdictions."[8] The Report states that strategic maneuvering by plaintiffs' attorneys often results in a proliferation of duplicative class action litigation in different jurisdictions. "As a result of competition among class action attorneys, defendants may find themselves litigating in multiple jurisdictions and venues concurrently, which drives transaction costs upward."[9] The Report also states that: "The availability of multiple fora dilutes judicial control over class action certification and settlement, as attorneys and parties who are unhappy with the outcome in one jurisdiction move on to seek more favorable outcomes in another."[10] The RAND Report summarizes:

> the current situation, in which plaintiff class action attorneys can file multiple competing class actions in a number of different state and federal courts, has other important consequences. Duplicative litigation drives up the public and private costs of damage class actions. Perhaps more important, class action attorneys and defendants who negotiate agreements that do not pass muster with one judge may take their lawsuit to another jurisdiction and another judge. Under most circumstances, none of the judges in the different courts in which the case is filed has the authority to preclude action by another judge as long as all cases are still in progress. A class action settlement approved

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8 EXECUTIVE SUMMARY, *supra* note 2 at 9.

9 *Id.* at 15.

10 *Id.*

> by a judge in one court often cannot be overturned by another court, even if the claims settled in the first court are subject to the jurisdiction of the second court. If we look to judges to rigorously scrutinize class action settlements and attorney fee requests . . . finding a way to preclude "end-runs" around appropriately demanding judges is critical.[11]

The RAND Report acknowledges that while competing federal class actions can be consolidated for pretrial purposes by the Judicial Panel on Multi-District Litigation (MDL), neither MDL consolidation nor similar intrastate consolidation provisions can address the problem of competing class actions in different states, or in both federal and state courts.[12]

Lawyers who practice regularly in fields that generate complex, high-stakes, broad-scale class actions provide myriad examples of the problems that can arise from multiple filings of transactionally related claims. A few specific recent examples of class litigation involving a number of parallel suits are described below.

Tobacco

The tobacco class action litigation of the 1990s demonstrates the filing of competing and overlapping class actions. At least 100 federal and state class actions have been filed against tobacco companies since 1985. Most of these cases fall into one of a few categories: (1) damage suits by present or past smokers alleging personal injury from disease, (2) damages and medical monitoring suits by allegedly nicotine-addicted current smokers, (3) suits by smokers alleging misrepresentation under consumer fraud statutes, and (4) actions by nonsmokers seeking damages for secondhand smoke. Given the sheer number of these lawsuits, it is difficult to say which of them may have been filed in response to

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[11] *Id.* at 28-29.

[12] *Id.* at 29.

negative certification rulings in other cases. It is clear, however, that most are competing and overlapping.

It is noteworthy that many of these class actions were filed after the Fifth Circuit Court of Appeals' decertification on May 23, 1996, of a nationwide class of smokers in *Castano v. American Tobacco Co.*[13] The court in *Castano* based its decertification on the prevalence of individual issues associated with addiction and the fact that 50 states' laws would be implicated in such a case. Following that opinion, many dozens of tobacco personal injury class actions were filed in the federal and state courts throughout the country.[14]

Many of the post-*Castano* class actions overlap. In Illinois, for example, two tobacco personal injury class actions were filed in state court and four in federal court, with great overlap among those cases. In one medical monitoring case, plaintiffs' lawyers sought

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[13] 84 F.3d 734 (5th Cir. 1996).

[14] *See, e.g.*, Clay v. American Tobacco Co., 188 F.R.D. 483 (S.D. Ill. 1999) (nationwide class, filed May 22, 1997); Barnes v. American Tobacco Co., 161 F.3d 127 (3d Cir. 1998) (Pennsylvania smokers, filed Aug. 8, 1996); Hansen v. American Tobacco Co., No. LR-C-96-881, 1999 U. S. Dist. LEXIS 11277 (E.D. Ark. July 21, 1999) (Alabama smokers, filed Nov. 4, 1996); Chamberlain v. American Tobacco Co., No. 1:96-CV-2005, 1999 U.S. Dist. LEXIS 5843 (N.D. Ohio April 12,1999) (Ohio class, filed Aug. 14, 1996); Barreras Ruiz v. American Tobacco Co., 180 F.R.D. 194 (D.P.R. 1998) (Puerto Rico class, filed Oct. 23, 1996); Insolia v. Philip Morris Inc., 186 F.R.D. 535 (W.D. Wis. 1998) (Wisconsin class, filed April 18, 1997); Emig v. American Tobacco Co., 184 F.R.D. 379 (D. Kan. 1998) (Kansas class, filed Feb. 6, 1997); Guillory v. American Tobacco Co., No. 97 C 8641, 2001 WL 290603 (N.D. Ill. March 20, 2001) (Illinois class, filed July 7, 1997); Arnitz v. Philip Morris, Inc., No. 00 4208-Div. H (Fla. Cir. Ct. [13th Dist.]–Hillsborough Co.) (Florida class, filed June 30, 2000); Brown v. American Tobacco Co. No. 711400 (Calif. Super. Ct.–San Diego Co.) (California class, filed June 10, 1997); Cocca v, Philip Morris. Inc., CV-99-08532 (Ariz. Super. Ct.–Maricopa Co.) (Arizona class, filed May 19, 1999); Geiger v. American Tobacco Co., 97-07259 (N.Y. Sup. Ct.–Queens) (New York class, filed May 1, 1997); Scott v. American Tobacco Co., No. 96-8461 (New Orleans Civ. Dist. Ct.) (Louisiana class, filed May 28, 1996).

to certify the same type of class which the Third Circuit had refused to certify in *Barnes v. American Tobacco Co.*[15] *Barnes* involved a purported class of Pennsylvania residents, while the later case involved a purported class of Illinois residents.

Bridgestone-Firestone and Ford Tire Litigation

Following the August 9, 2000 recall of millions of Firestone tires, most on Ford Explorers, hundreds of class actions and individual lawsuits were filed against Bridgestone-Firestone and Ford. A newspaper article published 20 days after the recall announcement reported that "at least 100" product liability lawsuits had been filed against Bridgestone-Firestone and Ford by that date.[16] By October 2000, newspapers reported that the number of lawsuits in federal and state court was up to 300, including 47 class actions.[17] The federal individual and class action lawsuits were consolidated by the MDL.[18] Numerous state class actions apparently continued to go forward on parallel tracks. For example, on October 19, 2000, a federal district judge in the Eastern District of Pennsylvania remanded four nearly identical statewide class actions to state court in Philadelphia.[19]

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[15] 161 F.3d 127 (3d Cir. 1998).

[16] *The Lawyers Line Up: Individual Suits and Class Actions Pile Up for Firestone, Ford*, KNIGHT RIDDER NEWSPAPERS (Aug. 29, 2000), *available at* http://www.auto.com/autonews/tlaw29-20000829.html.

[17] *Ride-em Cowboys*, MIAMI DAILY BUSINESS REVIEW, Oct. 20, 2000; *Judge Picked For Tire lawsuits*, DETROIT FREE PRESS, Oct. 26, 2000.

[18] *See In re* Bridgestone/Firestone, Inc.,129 F. Supp. 2d 1207 (S.D. Ind. 2001).

[19] Beatty v. Bridgestone/Firestone, Inc., No. Civ. A 00-4949, 2000 WL 1570590 (E.D. Pa. Oct. 19, 2000) (remanding for lack of $75,000 jurisdictional amount in controversy); Dorian v.

Crude Oil Royalty Litigation

Beginning in 1995, following two oil companies' changes in payment policies on their crude oil purchases, attorneys filed a number of class actions against major oil companies on behalf of oil royalty payees.[20] The first class action (a statewide class) was filed in Texas state court and alleged breach of an implied duty under lease contracts.[21] The next year, another attorney filed a federal nationwide class based on the same factual allegations but alleging federal antitrust violations.[22] Several months later, another group of lawyers filed a similar complaint in Alabama state court, alleging violation of the antitrust laws of the 50 states.[23] During the next two years, additional federal and state lawsuits were filed alleging various combinations of breach of contract, fraud, and federal and state antitrust violations, all based on allegations that the oil producers had individually and together intentionally undervalued crude oil in order to underpay royalties.

In 1997, one defendant in the Alabama class action, Mobil, and class counsel announced a class-wide settlement that would resolve all outstanding state and federal

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Bridgestone/Firestone. Inc.,No. Civ. A 00-4470, 2000 WL 1570627 (E.D. Pa. Oct. 19, 2000) (same); Lennon v. Bridgestone/Firestone. Inc., No. Civ. A 00-4469, 2000 WL 1570645 (E.D. Pa. Oct. 19, 2000) (same); Miller v. Bridgestone/Firestone. Inc., No. Civ. A 00-4475, 2000 WL 1570732 (E.D. Pa. Oct. 19, 2000) (same). A docket search shows that as of April 4, 2001, these four cases, as well as a fifth, are proceeding as a consolidated class action in state court in Philadelphia.

[20] *See In re* Lease Oil Antitrust Litigation (No. II) (MDL), 186 F.R.D. 403, 408, 412 438 (S.D. Tex. 1999) (noting history of the litigation).

[21] *Id.* at 408. *See also Companies Battle Over Oil Royalties*, NATIONAL LAW JOURNAL, June 16, 1997, *available at* http://www.ljx.com/corpcounselor/express/061897/royale.htm.

[22] *See In re* Lease Oil Antitrust Litigation, 186 F.R.D. at 408.

[23] *Id.* at 413-14.

claims against Mobil. Meanwhile, counsel in the federal and Texas statewide class actions negotiated terms that were the basis for an eventual global settlement with a nationwide class.[24]

In January 1998, the MDL transferred the federal class action and 14 other federal lawsuits to a district court in the Southern District of Texas for pretrial proceedings. The court, in order to secure its jurisdiction, enjoined all defendants but Mobil from entering settlement agreements of any federal antitrust claims without the court's approval.[25] By June 1998, the parties had negotiated a final global settlement, which the court preliminarily approved. Mobil argued that its settlement of all state and federal claims in the Alabama class action should be given preclusive effect over the federal antitrust claims in the federal litigation under the Full Faith and Credit Act and *Matsushita Elec. Indus. Co., Ltd. v. Epstein*.[26] The district court disagreed, ruling that preclusion did not apply because Alabama courts would not give preclusive effect to the settlement of claims, such as the federal antitrust claims, over which Alabama courts had no jurisdiction.[27] The Court of Appeals for the Fifth Circuit affirmed.[28]

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[24] *Id.* at 414.

[25] *Id.*

[26] 516 U.S. 367 (1996).

[27] *Id.* at 438.

[28] *In re* Lease Oil Antitrust Litigation (No. II), 200 F.3d 317, 321 (5th Cir.), *cert. denied sub nom.* Mobil Oil Corp. v. McMahon Foundation, 120 S. Ct. 2722 (2000).

Smithkline Beecham Clinical Laboratories Billing Litigation

In 1997, a settlement agreement between the federal government and Smithkline Beecham Clinical Laboratories (SBCL) over alleged improper laboratory billing practices was made public. At least nine putative class action lawsuits were filed, alleging damages on behalf of patients allegedly overcharged for lab tests. Two smaller putative class actions were also filed, one for certain employee benefit plans and another for certain New York patients.[29] The other class actions were federal and were transferred by the MDL to the District of Connecticut for pretrial proceedings. All the putative class actions were based on the same factual allegations.[30] After the Illinois state class action was removed to federal court and then remanded, SBCL moved to stay the action, which was the sixth filed, under Illinois state law providing for stays of duplicative litigation. The state court denied the motion, ruling that because the federal consolidated litigation was in its early stages, federal-state comity concerns were not implicated.[31] The court found that discovery in the state case would likely mirror that in the federal case, so any added discovery burdens would be minimal. The court did not address the problems of duplication, burdensomeness, costs, or inconsistent discovery or motions rulings. The state court cited as significant plaintiffs' argument that the federal court might not certify the class "because it is easier to have a class certified under Illinois rules than under the Federal Rules." *Id.* at 249. When

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[29] *See* May v. Smithkline Beecham Clinical Laboratories, Inc., 710 N.E.2d 460, 462 (Ill. App. [5th Dist.] 1999). Eventually, two more class actions similar to the nine were filed, for a total of eleven.

[30] *Id.*

[31] *Id.* at 248.

plaintiffs' attorneys in the federal action learned of the Illinois court's denial of the stay, they filed appearances as counsel in the Illinois state action. Eventually, the state and federal litigation was resolved in a global settlement.

HMO Litigation

In November 1999, plaintiffs' lawyers filed a class action in Hattiesburg, Mississippi, against five of the largest HMOs, alleging that the insurer's efforts to contain reimbursement costs violated federal laws governing health care plans (ERISA) and the Racketeering Influenced and Corrupt Organizations Act (RICO).[32] By the summer of 2000, it was reported that 56 such class actions had been filed.[33] In October 2000, the MDL transferred the cases to the Southern District of Florida. A number of state class actions continue.[34]

StarLink™ Corn Litigation

There are currently 16 putative class actions pending around the country against Aventis CropScience brought by farmers who planted corn other than StarLink™ corn. StarLink™ corn was genetically modified to produce cry9C, a protein compound expressed as a plant pesticide which was registered with the EPA under FIFRA. The FIFRA registration for cry9C provided that it was for field corn to be used only in animal feed, industrial non-food uses, such as ethanol production, and seed increase. The genetic

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[32] *Lawyers take aim at HMO industry*, LOS ANGELES TIMES, Nov. 24, 1999.

[33] *This HMO Triumph Could Be Short-Lived*, BUSINESSWEEK ONLINE, June 15, 2000, *available at* http://www.businessweek.convbwdaily/dnflash/june2000/nf00615d.html.

[34] *State groups join doctors in suing insurance*, NEW YORK TIMES, March 27, 2001, at 13.

technology for cry9C was developed and licensed by the predecessor of Aventis CropScience to various seed companies, who produced and sold corn seed genetically modified to produce cry9C under the trademark StarLink.

On September 18, 2000, various news media reported that Genetically Engineered Food Alert (a coalition opposed to the use of genetically engineered products in food) had announced the results of testing purporting to find cry9C DNA in certain taco shells sold by Kraft Foods, Inc. ("Kraft"). Thereafter, on September 22, 2000, Kraft announced a voluntary recall of certain taco shells and similar corn products which followed on October 13, 2000.

Between December 28, 2000 and February 22, 2001, sixteen putative class actions were filed by non-StarLink™ farmers, alleging that events related to StarLink™ corn had resulted in a reduced market price for corn. Each of the complaints seeks essentially identical relief based upon similar allegations. Of the 16 lawsuits, three were filed in federal court. The rest were filed in state court and removed to federal court. Motions to remand are pending in several actions and are anticipated in others. The 16 lawsuits have the following common characteristics:

- 12 seek certification of identical classes: nationwide classes of persons who grew corn other than StarLink™ corn in 1998 through 2000.
- 4 seek certification of statewide classes of persons who grew corn other than StarLink™ corn.
- In 13 of the lawsuits, the plaintiffs are represented by the same law firm.
- In the 3 other lawsuits, the plaintiffs are represented by the same law firm.

On February 16, 2001, Aventis CropScience filed a motion to transfer all pending federal actions to the Northern District of Illinois for consolidation by the MDL; the state cases continue.

These are only a few examples of inter-court class-action competition. Other examples are provided by reported decisions that wrestle with the scope of the Anti-Injunction Act, 28 U.S.C. § 2283, as federal courts struggle to maintain orderly procedure in the face of parallel actions. Some of these decisions are described in the separate memorandum on § 2283 submitted in these agenda materials.

Academic commentators have also acknowledged the proliferation of competing class strategies and the enormous expense and burden imposed on the parties and courts as a result. Professor Wasserman concludes that "dueling class actions . . . are rampant."[35] A few years earlier, Professor Miller found "another vexing problem: the filing in different jurisdictions of numerous class actions based on a single transaction or occurrence," that may lead to "a race in which the first judgment prevails against all subsequent ones."[36] Still earlier, Professor Sherman began from the premise that "[d]uplicative litigation is a constant problem in the class action context."[37] The problems

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[35] Rebecca Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 462 (2000).

[36] Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 515, 527 (1996).

[37] Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507 (1987).

of multiple litigation in all forms underlie the American Law Institute project, *Complex Litigation: Statutory Recommendations and Analysis* (1993).

Against this backdrop, the Subcommittee has presented three proposals to address by rule some of the problems of overlapping class actions.

2. Rule 23(c)(1)(D)

Rule 23(c)(1)(D) presents the first overlapping class proposal. It provides that a court refusing to certify a class "may direct that no other court may certify a substantially similar class to pursue substantially similar claims, issues, or defenses unless a difference of law or change of fact creates a new certification issue."

Proposed Rule 23(c)(1)(D) addresses a refusal to certify a class on grounds other than those based on the failings of the would-be class representative. If a court refuses to certify a class because the proposed class does not satisfy Rule 23(a)(1) or (2), or 23(b), the proposed rule permits that court to direct that its order be binding on subsequent courts faced with a substantially similar class pursuing substantially similar claims, issues, or defenses. An exception is created if the later court determines that a difference of law or change of fact creates a new certification issue.

This proposal is similar in part to the version presented at the March 2001 meeting, but is changed in significant ways. The similarity is that preclusion is available only if the refusal to certify rests on failure to satisfy the prerequisites of Rule 23(a)(1) or (2), or on failure to satisfy the standards of Rule 23(b)(1), (2), or (3). A refusal that rests on failure to provide a typical class member to act as representative, or on failure to provide adequate representation, is not eligible for preclusion. The change from the March 2001

proposal is that preclusion now attaches only if the court directs it. This feature recognizes that the court denying certification may believe that the reasons for doing so are not likely to apply in another action. The argument for certification may have been poorly presented, for example, or the action may turn on the law of another forum that is in a better position to decide on certification and to administer a class once certified. And unlike the earlier proposal, any preclusion is limited by expressly recognizing that a difference of law or change of fact may create a new certification issue. A state court considering a later application for class certification is free to conclude that its own class action rule means something different from Federal Rule 23. A federal court considering a later application for class certification is free to conclude that the facts have changed so as to create a new certification issue. These limits do not, however, defeat the utility of a preclusion order. Courts considering subsequent applications for class certification can be expected to honor the direction by evaluating carefully arguments that seek to invoke the exceptions.

There are a number of examples of litigants taking an unsuccessful certification motion to a second court to seek a different result. In *In re Masonite Hardboard Siding Products Litigation*,[38] the federal court sitting as an MDL transferee court denied certification of a purported liability-only nationwide class of purchasers of allegedly defective siding, with proposed subclasses to account for variations in state law, on the ground that neither predominance nor superiority was satisfied. A state court subsequently

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[38] 170 F.R.D. 417, 424 (E.D. La. 1997).

certified the class.[39] Similarly, in *In re Ford Motor Co. Bronco II Prod. Liab. Litig*,[40] the district court judge wrote a detailed opinion setting out the basis for refusing to certify a nationwide class action alleging the unstable nature of sport utility vehicles. Following that decision, a state court in Alabama granted a motion in a virtually identical case to certify a class. In *In re Ford Motor Co. Vehicle Paint Litig.*,[41] another case consolidated in a federal court by the MDL, the court denied certification of a purported class challenging as defective the quality of paint on certain cars and trucks. After this decision, and with no significant differences identifiable in the record, a state court judge handling a remanded case certified the class.[42] Two years later, the Texas Supreme Court reversed the certification, not on preclusion grounds, but on the ground that the class defined by the trial court, vehicle owners who allege that their vehicles had defective paint, was not a clearly ascertainable class.[43]

Some of the cases cited were filed in jurisdictions that have changed their practices, either by cases issued in the highest state court, as in Texas, or by statute, as in Alabama.[44] However, new venues of choice arise to take their place. Lawyers report that

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[39] Noef v. Masonite Corp., No. CV-94-4033 (Ala. Cir. Ct.–Mobile Co.).

[40] MDL No. 991, 177 F.R.D. 360 (E.D. La. 1997).

[41] 182 F.R.D. 214 (E.D. La. 1998).

[42] Ford Motor Co. v. Sheldon, 965 S.W.2d 65 (Tex. App.–Austin 1998), *rev'd*, 22 S.W.3d 444 (Tex. 2000).

[43] Ford Motor Co. v. Sheldon, 22 S.W.3d 444 (Tex. 2000).

[44] In Alabama, the reported data showed that in 1996 and 1997, 91 putative class actions were filed in six rural Alabama counties. In cases in which the court ruled on class certification, the

certain counties in Illinois have experienced a recent surge of certified class actions, including nationwide classes.

In *Avery v. State Farm Mutual Automobile Insurance Co.*,[45] the Appellate Court of Illinois for the Fifth District substantially upheld a class action judgment entered against State Farm Mutual Automobile insurance Company. Although the Appellate Court reduced compensatory damages by $130 million, the resulting judgment still totals over $1 billion, including $600 million in punitive damages, the largest judgment and punitive damages award ever entered in Illinois. As part of its opinion, the Appellate Court affirmed the trial court's certification of a class of approximately five million State Farm policy holders in 48 states who at different times over a ten-year period had any of 33,000 distinct types of non-original equipment manufacturer (non-OEM) parts specified on their State Farm repair estimates. The Appellate Court also upheld the trial court's applications of Illinois law, including the Illinois Consumer Fraud Act, to the claims of class members nationwide. The Appellate Court's decision in *Avery* appears to conflict with *Oliveria v. Amoco Oil Co.*,[46] which held that the Illinois Consumer Fraud Act does not apply to out-of-state consumers and that certification of a multi-state class action would be improper.

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motion was granted. Classes were certified in 43 cases. In 38 cases, a class was certified ex parte, without notice or hearing, on the date the complaint was filed. Thirty of the classes were certified by a single judge. At least 28 of the classes appear to be "nationwide" in scope; others were multistate. Ten percent of the civil cases filed in the least populous county in the state were putative class actions. Statement of the U.S. Chamber of Commerce on Mass Torts and Class Actions, submitted to the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary, March 5, 1998.

[45] No. 5-99-0830 (Ill. App., [5th Dist.] Apr. 5, 2001).

[46] 726 N.E.2d 51 (Ill. App. Ct. [4th Dist.] 2000).

Professor Cooper's separate memo on 28 U.S.C. § 2283 identifies some of the constraints on the use of injunctions to address such maneuvers. In *Clearwater v. Ashland Chemical Co.*,[47] the federal district court denied class certification in a case asserting that a chemical manufacturer had delivered an incorrect chemical for use in pool cleaning, damaging the putative class members' swimming pools. After the denial, the attorney for the class plaintiffs filed a second class action in the Texas state courts, on behalf of the same class and asserting most of the same claims and the same facts. The defendant asked the district court to enjoin class certification in the state court proceeding to protect or effectuate its own earlier denial of class certification. The district court denied the motion. The Fifth Circuit affirmed the result, expressing sympathy with the defendant's "desire to avoid another protracted and costly round of litigation over class certification in the . . . state courts." However, the Fifth Circuit held that the denial of certification was a procedural ruling, collateral to the merits, that lacked sufficient finality to be entitled to preclusive effect. The court noted that the discretionary nature of a certification decision counseled against preclusive effect.[48]

The proposed amendment provides a procedural mechanism for a district court denying certification on certain grounds to provide preclusive effect to that denial, subject to certain limits. The collateral and non-final nature of certification orders prevented interlocutory appeals before Rule 23(f). In approving Rule 23(f), this Committee recognized that specific characteristics of a class certification order made it different from

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[47] 93 F.3d 176 (5th Cir. 1996).

[48] *Id.* at 180.

other, nonappealable, procedural rulings collateral to the merits of a case. Certification orders essentially determine the rest of the litigation. The Committee approved Rule 23(f) to create a procedural mechanism to permit interlocutory appeal otherwise unavailable for non-final decisions. The characteristics and effect of orders denying class certification provide similar support for treating such orders as sufficiently final for preclusion to result. The potential for abuse that is presented by an unfettered opportunity to present the same class action to a different judge and obtain a different result also supports a procedural mechanism permitting a court denying certification to decide to make that denial binding on a subsequent, sufficiently similar, proposed class.

Although a denial of class certification certainly has discretionary elements, the courts have increasingly emphasized the stringent nature of the certification requirements and the relatively narrow discretion involved in some certification decisions. When a court denies certification and concludes that its order should be preclusive under Rule (C)(1)(d), the court is effectively stating that to rule otherwise would be an abuse of that discretion unless grounded on some significant difference in law or facts. The proposed amendment balances the interests of the finality of an order refusing to certify a class with the interest of comity with, and deference to, other courts.

E. Notice: Rule 23(c)

Rule 23(c) requires what the cases now treat as aspirational: class action notices are to be in "plain, easily understood language." This requirement is supported by the model forms of class action notice that will be available to judges and lawyers as a result of the ongoing Federal Judicial Center project to develop such notices.

Rule 23(c) expressly requires notice in (b)(1) and (b)(2) class actions. Notice in these mandatory classes is addressed in an effort to find a functional substitute for the (b)(3) requirement of individual notice, recognizing that because there is no right to request exclusion, individual notice is not mandatory. Notice in such classes is intended to serve more limited, but important, interests, including the interest in deciding whether to participate in the action and in monitoring the conduct of the action, including the conduct of class representatives and class counsel.

III. Settlement Review: Rule 23(e)

A. The Criteria and Process for Approving a Settlement: Rule 23(e)(1) and (2)

Review of proposed class action settlements has occupied the Advisory Committee throughout the ten-year Rule 23 study process. From the beginning, it has been urged that review is hampered by the fact that the class and its adversary join together in supporting approval, depriving the court of the adversary arguments needed to ensure well-informed review. This concern occasionally reflects the fear of collusive settlements, but is expressed as well by those who believe that most class actions are pursued by lawyers of the highest professional integrity. The need for improved judicial review is expressed in the RAND Report and by such observers as George M. Cohen, *The 'Fair' is the Enemy of the Good: Ortiz v. Fibreboard Corporation and Class Action Settlements.*[49] The need for improved judicial review of proposed settlements, and the abuses that can result without

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[49] 8 Sup. Ct. Econ. Rev. 23. (2000).

such judicial review, was a recurring theme in the testimony and written statements submitted to the Committee during the public comment on the 1996 rule proposals.

The 1996 proposals included a "settlement class" provision. That proposal was put aside in the belief that lower-court development of the *Amchem* and *Ortiz v. Fibreboard Corporation*[50] rulings would show whether there is a need for express rule provisions on settlement class certification standards. The development of the case law since *Amchem* and *Ortiz* supports the decision not to craft amendments that would diminish certification requirements for settlement classes. The focus of the Subcommittee's work has instead been on strengthening the rule provisions governing the process of reviewing and approving proposed class settlements.

The focus of the proposed amendment is on providing judges and lawyers with practical assistance and support in making decisions about settlements. The need for such rule support begins with the numerous examples of unfair settlements that this Committee heard about in the last round of rule making. The RAND study, and case law, also provide examples.[51]

Rule 23(e)(1)(C) adopts an explicit standard for approving a settlement for a class: the proposed settlement must be "fair, reasonable, and adequate," and the district court must make detailed findings to support the conclusion that the settlement meets this standard. The Note sets out factors that experience and case law have identified as the most reliable indicators of whether a settlement meets the required criteria. The factors are

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50 527 U.S. 815 (1999).

51 Kamilewicz v. Bank of Boston, 92 F.3d 507 (7th Cir. 1996).

included in the Note, rather than in the text of the rule, to reflect the necessarily flexible and dynamic nature of the considerations that may bear on a proposed settlement. The decision to describe in the Note, rather than list in the text of the rule, the factors courts should consider in making the "fair, reasonable, and adequate" decision in a particular case, was carefully made. The decision reflects concern that listing specific factors in the rule was inconsistent with continued case law development; would increase the likelihood that courts might discount or disregard factors not in the list or treat the factors as a "check list," making routine findings as to each item without seriously considering the few that are most relevant to a particular settlement; and would inappropriately place a long list of factors in a rule. In the face of these concerns, Deborah Hensler — lead investigator in the RAND study — has urged that the amended settlement review rule should "provide more detailed guidance for judges rather than refer them to current case law, which I think offers judges faced with settling parties both of whom urge approval of a settlement little practical assistance in decision-making." Balancing these approaches leads to the current proposal.

The Note sets out in detail the factors judges will often use to measure compliance with the standard that the settlement must be "fair, reasonable, and adequate." By this approach, the amendment is intended to provide practical and detailed assistance to judges and lawyers for conducting a detailed scrutiny of a proposed class action settlement. The amendment seeks to counter the incentives for less stringent review presented by the frequent absence of objectors and the attraction of resolving large and complicated litigation.

The proposed rule addresses other aspects of, and influences on, the terms of a proposed class settlement. Rule 23(e)(1)(A) makes clear what some courts have required, but what lawyers often fail to appreciate: a court must approve the settlement or voluntary dismissal of suits filed as class actions, even if no effort is made to certify the class or a motion is filed but has not yet been decided. The requirement underscores the responsibility counsel assumes merely by filing class action allegations. The amendment also provides a mechanism for a court to protect absent members of a putative class if the circumstances warrant. For example, if the court believes that absent class members are relying on the class suit to protect their interests, a court might consider ordering notice of the dismissal to permit action before the statute of limitations, no longer tolled, runs. Although the amendment requires court approval of a settlement, voluntary dismissal, or compromise even if the class is not certified, the detailed notice, hearing, and review provisions of Rule 23(e) apply only if a class has been certified.

Rule 23(e)(1)(B) requires notice of a proposed settlement, but only when a class has been certified. The notice is to issue in a "reasonable" manner; individual notice is not required in all classes or all settlements.

Rule 23(e)(2) supports a court's examination of the terms of the proposed settlement by making explicit that a court may direct the parties to file a copy or summary of any "agreement or understanding" made in connection with the proposed settlement. Such "side agreements" are often important to understanding the terms the parties have agreed to, but are often not disclosed to the court. For example, Professor Hensler has observed that respondents surveyed in the RAND study reported that when competing class

actions are filed in other courts by other groups of attorneys, those attorneys or their clients may receive compensation to end their competing litigation as part of a settlement. Such compensation is not part of the public record, and is not required to be disclosed to the court asked to approve the settlement before it. Other examples of side agreements include agreements as to cost or fee allocations or agreements to withdraw a settlement if the number of opt outs exceeds a certain number. The Note addresses the need to protect confidentiality as to some types of agreements and provides for that.

B. Opportunities to Request Exclusion from, or Object to, a Settlement: Rule 23(c)(3) and (4)

Successive Rule 23(e) drafts included provisions designed to address the role of objectors in judicial scrutiny of proposed class action settlements. The Subcommittee explored, and rejected, more expansive early versions that increased the ability of objectors to conduct discovery and obtain fee awards. Courts now allow discovery into the negotiation process only on a showing of strong reason to suspect collusion. Mandatory fees for successful objections encounter the problem that a successful objection may result not in a settlement that adds to the class recovery, but instead may result in no settlement or even decertification. The Subcommittee also met considerable concern that increasing court support of objectors might have the unintended consequence of increasing the potential for objectors to exert pressures on the settlement process and to make objections for such strategic purposes. The proposed amendment balances these competing concerns by recognizing explicitly in the rule that a class member may object and may not settle, without court approval, an objection made on behalf of a class.

The shift away from relying on the role of objectors to facilitate increased rigor in judicial scrutiny of proposed settlements led the Subcommittee to seek other ways for courts to obtain assurances of fairness, reasonableness, and adequacy. The amendment creates such a mechanism by allowing a class member to request exclusion from the class after notice of the terms of a proposed settlement. So long as class members can protect themselves against improvident settlement by requesting exclusion, there is less need to worry about supporting objectors.

In many cases, settlement and class certification occur simultaneously, and one notice, with one opportunity to request exclusion, issues. The proposed amendment will not affect the (b)(3) opt-out in such cases. The proposal will only make a difference in cases in which the class is certified for trial and a settlement agreement is reached later. In this type of case, the proposal would allow members of a (b)(3) class who did not request exclusion when the certification notice first issued to have a second opportunity to opt out, once the settlement terms are known.

The proposal presents alternative models for allowing a class member to request exclusion from a (b)(3) class after notice of the terms of a proposed settlement. The first alternative for this provision establishes this opportunity to opt out once the settlement terms are known unless the court for, good cause, determines not to allow this second opportunity. The second alternative is neutral: the settlement notice "may state" terms that afford a second opportunity to request exclusion.

Either approach allows a court to decide that the circumstances make providing a second opportunity to request exclusion inadvisable. The case may have settled

after a substantial part of the trial occurred. Under such circumstances, the court would have a record that provided strong assurances of the quality of the settlement and the adversary basis from which it emerged, and would have less need to rely on class members deciding whether to accept the settlement terms. A case in such a posture is more similar to a fully tried case, making it sensible to treat a class member's right to opt out as it is treated in a case tried to judgment. A class member who does not opt out in response to the certification notice is not permitted to do so when the judgment is entered. On the other hand, if a case is settled shortly after certification, with a commensurately reduced record available to the court, the court and absent class members may both benefit from the class members' informed reaction to the terms of the settlement proposed.

The amendment also recognizes that the opt-out mechanism often captures class members as a result of inertia rather than informed decision, especially when the notice of the right to opt out does not identify the results of the litigation. When a class is simultaneously certified and settled, the notice tells the class members what they can expect from remaining in the class. When a class is certified for trial, the notice cannot tell a class member what he or she will receive by not opting out. That information, which provides a much more meaningful basis for deciding whether to remain in the class, is only available in such a case when it reaches the settlement stage. The proposed amendment would provide a mechanism to the class members to act on the basis of this information.

A court may decide that factors are present that would undermine the cogency of the reasons for this opportunity to seek exclusion. One such reason is identified above – the case has been litigated to a stage that makes it similar to a fully tried suit and reduces

the need for a second opportunity to opt out. Lawyers may also inform the court of the potential for eviscerating a settlement for reasons unrelated to its merits. For example, in a particular case, the lawyers may be aware that opt-out requests are orchestrated by attorneys who have solicited class members to opt out. In such cases, a court might deny any additional opportunity to opt-out after settlement.

C. The Preclusive Effect of a Refusal to Approve a Settlement: Rule 23(e)(5)

Rule 23(e)(5) seeks to reduce "settlement shopping." This provision is the second proposal to address the problems that arise from overlapping and competing class actions. It establishes the preclusion effect of an order that refuses to approve a settlement, voluntary dismissal, or compromise on behalf of a certified class. Another court may not approve substantially the same settlement "unless changed circumstances present new issues as to the fairness, reasonableness, and adequacy of the settlement."

The preclusion provision of Rule 23(e)(5) departs from the model proposed in Rule 23(c)(1)(D). Rule 23(c)(1)(D) applies preclusion to an order denying class certification only when the court directs preclusion. Rule 23(e)(5) establishes preclusion without any need for direction by the court. The difference between the provision for certification preclusion, which arises only on the direction of the court that denies certification, and the provision for settlement disapproval preclusion, which flows automatically from the refusal to approve, rests on several considerations.

A refusal to certify by definition concludes that there is no sufficient reason to bind members of the desired class together, and may rest on inadequate presentation of the arguments for certification. A refusal to approve a settlement, on the other hand, is

given binding effect only if a class has been certified. Moreover, Rule 23(e) imposes rigorous requirements on the parties and the court. A court is obligated by Rule 23(e) to conduct a searching inquiry into the fairness, reasonableness, and adequacy of the proposed settlement. Although there are inescapable elements of discretion in the review, the incentives for a court and the litigant generally weigh heavily in favor of approving a settlement that the parties have negotiated and presented to the court. A court is likely to reject a proposed settlement only if there are good reasons to find that the terms are not fair, reasonable, or adequate. A court's ruling that this class deserves to be protected against this settlement deserves great respect.

At the same time, the preclusion is not absolute. Another court can approve a settlement that is not "substantially the same," or can even approve the same settlement if changed circumstances significantly alter the calculus of fairness. These exceptions are necessary; the alternative that would require any subsequent settlement to come back to the court that rejected the initial settlement would intrude too far on the interests that may support parallel proceedings. Application of the exceptions will call for sensible judgment. The determination whether a new settlement is "substantially the same" must be case-specific. But there is every reason to expect that most courts faced with arguments for substantial changes in settlement terms or circumstances will approach the arguments carefully, recognizing the deference due to a decision to reject the initial settlement under Rule 23(e).

The well-known sequence of events in *In re: General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*,[52] demonstrates the risks that support this proposed amendment and the need for careful application. The Third Circuit reversed approval of a class action settlement. The parties then expanded a pending state-wide class action in a Louisiana state court into a nationwide class and presented a modified settlement for approval to that court. The new settlement terms expanded the value of the coupons provided by the first settlement in several ways—the redemption period was extended from 15 months to 33 months, transferability was enhanced, redemption was permitted on purchase of any General Motors vehicle (with one exception), and commitments were apparently made by a major bank to purchase the transferable coupons, thereby creating a secondary market. Governmental and fleet entities and public interest groups that had objected to the initial settlement supported this settlement. The state court did approve the settlement.

The *GM* case is not the only example. The RAND Report describes others. The RAND Report's description of the polybutylene pipes litigation is illustrative. "[T]he first nationwide class action lawsuit . . . was filed in Texas state court in Houston, where it progressed for 17 months until the judge presiding over the matter rejected a proposed settlement. Meanwhile, another group of attorneys who had copied the original Houston complaint almost verbatim had filed a competing nationwide class action in state court in Greene County, Alabama; they were able to get preliminary approval of a settlement class just six months later, three months after the Houston settlement was turned away by the

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[52] 134 F.3d 133, 139-140 (3d Cir.1998).

judge. The [lawyers whose settlement was rejected in the Houston case] tried to maintain their own case by refiling it in federal court in Galveston, Texas, where they hoped to have the matter heard quickly – before the competing Alabama case was resolved – by a judge with a reputation for a fast docket. Unfortunately for them, that federal judge transferred the case to Houston, where the federal court was backlogged and moving slowly. When yet another set of class action attorneys was ready to file a third competing national class action, they selected a state court in Union City, Tennessee, where they could get a class certified the day they filed the complaint." *Class Action Dilemmas*, at 414-415.

The proposed amendment seeks to ameliorate such "settlement shopping" by providing that an order refusing to approve a settlement has preclusive effect in other courts, state and federal, unless those courts find that changed circumstances present new issues affecting the fairness, reasonableness, and adequacy of the settlement. The proposal balances the deference that should be due a court's rejection of a class settlement with the respect due to the ability of other courts to reach a different result when changed circumstances warrant. The proposal plugs a procedural hole that, if left open, may continue to frustrate the effectiveness of judicial scrutiny over class action settlements.

IV. Overlapping and Competing and Duplicative Class Litigation: Rule 23(g)

This third portion of amended Rule 23 is the most general approach to the problem of multiple simultaneous class litigation. Civil Rule 23 authorizes creation of an artificial construct, a "class," by certification. Certification aims at several procedural purposes, briefly summarized as efficiently achieving a just disposition of related claims on terms that provide consistent outcomes for all who are involved. These purposes can be

thwarted if competing actions proceed without any opportunity for coordination or common control. A federal court that has subject-matter jurisdiction of an action seeking class relief should have the authority needed to protect and fulfill the purposes of Rule 23.

This authority will not mean that every federal class action preempts all parallel litigation. Far from it. Federal restraint begins with the very question whether a class should be certified; pending litigation in other courts, whether framed in class form or otherwise, may weigh heavily against certification. Even when a federal class action is certified, the federal court often will allow other actions to proceed, and indeed may choose to stay its own proceedings. But in situations that seem to call for unitary control, a federal court is likely to be in the best position to evaluate the need and implement any appropriate measures.

Rule 23(g) is presented in two forms. Both alternatives seek to give preemptive control to a federal court that is asked to certify a class or that has certified a class. Each focuses on orders addressed to members of the proposed or certified class. The common theme is the need to protect the purposes of class litigation. The need for protection is most apparent with a mandatory (b)(1) class, established for the very purpose of protecting against the effects of competing litigation that may impose inconsistent liability or prevent effective protection of all class members' rights. Similar needs emerge from the need to establish uniform injunctive or declaratory relief in a (b)(2) class, particularly when reform of important social institutions is involved. Even with opt-out (b)(3) classes, the pressure of competing actions may prevent fulfillment of the purposes served by class certification as to the class members who choose not to request exclusion.

The "strong form" of Rule 23(g)(1) authorizes orders directed to class members "respecting the conduct of litigation in any other court that involves the class claims, issues, or defenses." These terms are, as often, open-ended; the concept of class claim is easily extended to transactionally related theories, without regard to niceties of legal labels or sources of law. Litigation in any form can be regulated, including individual actions. This draft reflects concern that litigation cast as individual actions may in fact be aggregated by means of common representation by the same lawyers and by cooperation among lawyers. But it also recognizes the strong competing interests of the parties and other courts that are involved in parallel litigation. An order directed to other litigation by a class member must be justified by findings that show that the need to protect against interference with the court's ability to achieve the purposes of the class litigation is greater than the class member's need to pursue other litigation.

The narrower form of Rule 23(g)(1) limits orders with respect to other litigation to other class actions; it does not authorize an attempt to regulate litigation in individual or other non-class forms. The most limited form of this alternative introduces a further constraint: the court may not regulate a "state-wide" class action on behalf of persons who reside or were injured in the forum state and who assert claims that arise under the law of the forum state.

Rule 23(g) is completed by two paragraphs that are common to both alternative versions proposed. The second paragraph recognizes that the federal court may choose to stay its own proceedings to coordinate with proceedings in another court, and may defer the class certification decision as part of this coordination effort. The third paragraph

expressly authorizes consultation with other courts as part of the process of determining what course to pursue.

One of the important choices made in the Rule 23(g) proposal is to include authority for a federal court to act before deciding whether to certify the class action filed in that court. Much of the costly, burdensome, and competitive parallel class litigation comes after filing but before ruling on certification. It is common to have a federal court grant a motion for appointment of class counsel well before ruling on certification. Competition for such appointments is a critical factor in lawyers' decisions to file overlapping or duplicative class suits.

For example, in *In re Bankamerica Corp. Securities Litigation,*[53] there were 24 federal securities fraud class actions, filed in six federal district courts, consolidated by the MDL. There were also 7 state class actions filed in California state courts against the same defendants based on the same allegations. One of the plaintiffs' law firms simultaneously filed one of the federal class actions and one of the state class actions. The MDL transferee federal court intended to, and did, appoint lead plaintiffs and lead counsel, months before certifying the class. The federal judge described the actions of the plaintiffs' law firm that had filed the state and federal cases at the same time, as follows:

> When it became clear that the firm's clients lacked the financial stake to become lead plaintiffs in the federal case, and thereby select [that firm] as lead counsel, [that firm] dismissed the federal case to focus on the California cases where no financial stake rules govern the selection of lead plaintiffs and lead counsel. The federal plaintiffs and defendants objected to the dismissal on the grounds that the state proceedings would conflict with the federal proceedings at some indefinite point in the future. Finding no evidence of a

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53 95 F. Supp.2d 1044 (E.D. Mo. 2000).

> current conflict, this Court allowed [that plaintiffs' firm] to dismiss its federal case. . . . Developments since that date have revealed that the Court's trust that [that firm] would cooperate with the federal plaintiffs and not attempt to create conflicts between the federal and state litigation was misplaced.[54]
>
> Hindsight now reveals that the simultaneous filing of suits in state and federal court was a blatant attempt at form shopping. When the federal forum proved unsavory because the [law firm] would not be able to control that case, the firm simply took its marbles and went to play in the state court.[55]

The federal court found that in the state court, the plaintiff law firm's actions included obtaining an order for premature settlement negotiations from the state court, forum shopping, filing numerous inadequate motions for class certification, and attempting to circumvent the prohibitions of the federal securities statutes.[56] The federal district court granted an injunction against the competing state class actions, to protect the right of the federal class action plaintiffs to control the course of the litigation and select counsel of their choice. In that case, the injunction was based upon a finding that the PSLRA created specific federal rights, that would be frustrated if the competing state court class actions continued. However, cases often do not involve such a specific federal right that can be used as the basis for issuing an injunction against parallel state actions. That case is now on appeal in the Eighth Circuit.

Other forms of competition among class action lawyers, that lead to the filing of overlapping class suits, also support an attempt to provide a procedural mechanism to

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54 *Id.* at 1046 (internal footnotes and citations omitted).

55 *Id.* at 1050.

56 *Id.* at 1046-50.

address such suits. Simultaneous inconsistent or conflicting rulings on discovery and threshold motions can be outcome determinative. The competition can lead to the worst of both worlds: huge costs resulting from multiple and duplicative proceedings, and a race to certification divorced from the merits of the certification issue. The proposal reflects the belief that the problems that can arise from competition among class action lawyers justify the complications of providing authorization for a court to issue orders before certifying a class to address overlapping and competing class suits.

The overlapping class proposals demand reflection on two statutory questions: the limits of the Rules Enabling Act, 28 U.S.C. § 2072, and the constraints of the Anti-Injunction Act. These questions are addressed in separate memoranda presented in this agenda book. The proposals reflect the belief that the procedural mechanisms proposed are consistent with the limits of both statutes.

V. Class Counsel Appointment: Rule 23(h)

All recent examinations of class action practice recognize the crucial significance of class counsel. Legislative initiatives take account of the centrality of the class attorney. But Rule 23 nowhere addresses the selection or responsibilities of class counsel. Proposed Rule 23(h) fills that gap by articulating the responsibility of class counsel and providing a procedure for selecting them. The procedure proposed attempts to capture the best practices followed in some courts. Such a provision in the rule would facilitate greater uniformity in handling these matters. The proposed rule also provides a method for the court to consider whether to provide early directives about attorney fee awards in appropriate cases.

Paragraph (1)(A) recognizes the requirement that class counsel be appointed for each class that the court certifies. Until that appointment is made, counsel does not have authority to bind the class legally. As the Note points out, however, the court may appoint lead or liaison counsel during the precertification period as a case management measure. But the rule itself does not attempt to regulate the precertification activities of the attorney who filed the action. Settlement discussions may occur during this period. If the discussions result in a settlement, counsel would by presenting that settlement to the court for approval certify that the representation provided was in the best interests of the class.

Paragraph (1)(B) states that class counsel "must fairly and adequately represent the interests of the class." Bracketed language in the March 12, 2001 draft characterized the class as "the attorney's client." That characterization has been removed. In addition, the discussion in the Note of the distinctive role of class counsel has been expanded, making it clear that the relationship between class counsel and the individual members of the class is not the same as the one between a lawyer and an individual client. Appointment as class counsel entails special responsibilities.

Paragraph (2), dealing with appointment procedure, has also been refined since the March 12, 2001 meeting. The former requirement that there be an "application" for attorneys seeking appointment as class counsel for a plaintiff class has been removed, and the Note makes it clear that the needed information about counsel's qualifications can be included in a class certification motion. Accordingly, there need be no additional filings in cases in which only the lawyer who filed the case is considered for appointment as class counsel. Others seeking appointment, however, would ordinarily need to file a formal

application. The proposed language responds to the concern that Rule 23(h) may impose undue burdens in class actions in which competing applications are unlikely. If there is only one attorney seeking class counsel appointment, who files the case and the class certification motion, a separate class counsel appointment application is not required. However, the attorney seeking class counsel appointment must provide the court with the information specified to permit an informed decision.

Paragraph (2)(B) continues to say that the court may allow a reasonable period for attorneys seeking appointment to apply, but that should not delay most class actions. The Note also observes that the court may take account of the likelihood that there will be competing applications when deciding whether to defer the decision. Like other factors, this would bear on when certification is "practicable" under Rule 23(c)(1).

The March 12 draft of paragraph (2)(B) contained two options regarding applications for the position of class counsel in plaintiff class actions. This paragraph has been recast to remove the application feature and to describe the responsibility of the court in making the selection of class counsel as directed by paragraph (1)(A). The rule lists three aspects of potential class counsel that the court must consider – experience in handling class actions and other complex litigation, work done in identifying or investigating potential claims in this case, and resources committed to the case – and authorizes the court to direct counsel to provide information about these topics or any other topics the court decides are germane. The rule invokes the purpose of the application, demonstrating the applicant's ability fairly and adequately to represent the interests of the class, and sets out basic information a court must consider, but does not detail the information to be submitted.

"Side agreements" regarding fees are no longer mentioned in the rule, and are instead covered in the Note. The rule also specifically authorizes the court to direct counsel to propose terms for attorney fees and nontaxable costs. The Note attempts to make it clear that no single factor is decisive. In addition, it points out that although the rule is cast in terms of the court's focus in choosing class counsel, it also guides potential class counsel in determining which topics to address in their submissions to the court.

The rule also authorizes the court to make any other orders in connection with selecting class counsel. One might be to direct competitive applications rather than one request from a consortium of counsel. Another could be to invite bidding for the position.

The rule recognizes the benefits that competition for class counsel position may provide for some cases. Paragraph 2(A) therefore states that the court may allow a "reasonable period" after a class action is filed for attorneys seeking appointment as class counsel to apply. In the same vein, the rule tries to distinguish between free riders and lawyers who have furthered the class interests by focusing in Paragraph 2(B) on the work the applicant has done "identifying or investigating potential claims."

The rule specifically authorizes the court to direct that counsel provide information on additional subjects and to propose terms for awarding fees and costs in the order appointing class counsel. The provision encourages counsel and the court to reach early shared understandings about the basis on which fees will be sought. Such a provision has been encouraged by judges emphasizing the importance of judicial control over attorney

fee awards.[57] This feature might foster competitive applications – even bidding in some cases if invited by the court – and might also serve as a more productive way for the court to deal in advance with fee award matters that seem to defy regulation after the fact.

Another topic that has generated discussion is the appropriate handling of defendant class actions. Those are infrequent compared to plaintiff class actions, but do occur. It seems clear that class counsel must be appointed in a defendant class action, and desirable to declare that they owe the same obligation to the class as class counsel for a plaintiff class. Accordingly, the appointment requirement applies to both plaintiff and defendant class actions. The proposed amendment calls for appointment of class counsel, with the attendant obligations to the class, in all class actions; the Note emphasizes the court's authority to elicit information from potential class counsel to inform the choice of who should be appointed.

Finally, paragraph (2)(C) suggests that the court consider provisions regarding attorney fees and nontaxable costs in its order appointing class counsel. The court's authority to include provisions regarding fees in its order appointing class counsel, noted above, provides a bridge to the proposed attorney fees rule.

VI. The Attorney Fees Rule: Rule 23(i)

Attorney fees play a prominent role in class action practice and are the focus of much of the concern about class actions. The RAND Report emphasizes the significant role that attorney fees play in the actual and perceived fairness of class action litigation.

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[57] *See, e.g., In re* Cendant Corp. Prides Litigation, No. 99-5555, ____F.3d____, 2001 WL 276677 (3d Cir. 2001).

The RAND Report's most specific recommendations are that judges must assume much greater responsibility for determining attorney fees, rather than simply accepting previously negotiated arrangements, and must determine fees in relation to the actual benefits created by the lawsuit. *Executive Summary*, p. 24.

The RAND Report recommendation reflects how burdensome it can be for courts to apply detailed and meaningful scrutiny of fees in complex cases, and how tempting it can be to approve the fee sought with little analysis, when such cases settle. The RAND Report recommendations also reflect the cynicism that arises from the sheer size of attorney fees awarded in mass tort cases. In presenting the recommendations, the RAND Report emphasized data it collected on abuses relating to class action attorney fee awards, particularly as part of settlements. The RAND Report summarizes the many problems accompanying settlements when plaintiff attorneys pocket more in fees than the class members receive in the aggregate; when the disproportion between the returns to members of the class and the returns to the lawyers who represent them is "grotesque"; and when "coupon settlements" afford greater opportunity for plaintiff attorneys and defendants to collaborate in inflating the value of the settlement presented to the judge as the basis for the attorney fee award. RAND, *Class Action Dilemmas,* pp. 83-85.[58]

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[58] Some examples of cases involving such relief and noteworthy attorney fees are summarized in the Senate Report accompanying Senate Bill 353. Two of the examples cited include the polybutelene pipe litigation, in which one group of plaintiff lawyers received $38.4 million and another received $45 million, while the plaintiff homeowners received rebates toward the purchase of new plumbing that they could obtain after they showed leaks in their current systems; a settlement of a case against Southwestern Bill Mobile Systems, Inc., alleging that the company failed to fully disclose that it rounded up customer calls to the next minute, under which the class members received $15 vouchers toward the purchase of cellular telephone products, while the lawyers received more than $1 million in fees.

Currently the only provisions on fee awards in the Civil Rules appear in Rule 54(d)(2). But that rule is not focused on the special features of class actions – particularly settled class actions. Attorney fee awards are so important and distinctive in contemporary class actions that the provisions of Rule 54(d)(2), which are largely attuned to adjudicated actions under fee-shifting statutes, do not provide sufficient direction. In addition, Rule 23(i) should mesh with proposed Rule 23(h), which permits courts to enter early directives about attorney fee awards, and also (in settled class actions) with Rule 23(e), for which expanded criteria (including consideration of fee awards) have been proposed. The amendment addresses these issues in the context of Rule 23, while attempting parallelism where appropriate with Rule 54(d). More pertinent detail is offered, however, regarding the handling of the motion for an award of fees, the rights of objectors, and the criteria to be considered in determining the amount of the fee award.

The starting point is that the rule applies when an award of attorney fees is authorized by law or the parties' agreement in a class action. The award must be "reasonable," and it is the court's job to determine the reasonable amount. The rule does not attempt to influence the ongoing caselaw development regarding a choice between (or combination of) the percentage and lodestar amounts. Accordingly, paragraph (4) of the March 12 draft – which set forth a "laundry list" of factors considered by courts – has been removed from the rule. Note material canvasses those factors.

As emphasized in the Note, because the class action is a creation of the court (grounded in equity), the court has a special responsibility to superintend the attorney fee award, as it also does with regard to proposed settlements. The Note further recognizes the

critical role of the court in assuring that the class action achieved actual results for the class that warrant a substantial fee award. The RAND report concluded that scrutiny of results in connection with fee awards was the "single most important action" judges could take to improve class action litigation. Although there are class actions in which preoccupation with monetary value would be inappropriate, in general it is important to stress the role of value for the class, a point the Note stresses.

Paragraph (1) has been recast to characterize the attorney fee motion as one "under Rule 54(d)(2), subject to the provisions of this subdivision." This change was made to ensure that the timing features covered by Rule 58 (which refers explicitly to Rule 54(d)(2)) would apply to class action fee motions as well. At the same time, the distinctive features of class actions call for application of the provisions of subdivision (i) rather than the different provisions of Rule 54(d)(2).

The motion must be made "at a time directed by the court." The March 12 draft offered two alternatives, one borrowing the timing requirements of Rule 54(d)(2)(B) -- 14 days after entry of judgment. On reflection, however, that provision seemed unsuitable. The Note to that provision makes it clear that Rule 54(d)(2)'s timing is designed for courts that have just completed nonjury trials of cases subject to fee-shifting statutes, and that even in those cases it may often too difficult to assemble the needed information for submission by the appointed date. In class actions, there are few court trials, and the amount of material to be submitted can be very large. Moreover, the date specified in Rule 54(d)(2) would often be too late, and sometimes too early. It would be too late in any case in which a settlement is proposed, for the Rule 23(e) process must unfold before entry of judgment.

It might be too early as to some objectors (particularly those who object to attorney fee motions). This proposal applies to motions by attorneys other than class counsel, including counsel for objectors. So the rule proposal instead says that motions under this subdivision must be submitted "at a time directed by the court."

The rule also requires notice to class members in a reasonable manner (similar to Rule 23(e) notice to the class of a proposed settlement) regarding attorney fee motions by class counsel. Class members might in some circumstances have an interest in motions by others, but the likelihood of that interest, and the added cost of providing more notice, explain the decision not to include notice in other situations. To acquaint class members with fee requests, the proposal calls for notice of a fee motion by class counsel to all class members "in a reasonable manner." It is hoped that this would not often result in an "extra" notice requirement; at least in settled cases, sufficient notice should ordinarily be included in the notice sent out under Rule 23(e), on which the notice requirement is modeled.

Paragraph (2) allows any class member or party from whom payment is sought to object to the motion. Bracketed language about discovery that was included in the March 12 draft has been dropped from the rule. There is no rule language about discovery regarding proposed settlements in Rule 23(e), so it would be odd to include such language here and not there. The Note points out that the court may direct discovery, and links the decision whether to allow it to the completeness of the fee motion, pointing out that broad discovery is not normal in regard to fee motions.

Paragraph (3) calls for a hearing and findings. In settled class actions, the hearing might well be held in conjunction with proceedings under Rule 23(e), and in other

situations there should be considerable flexibility in determining what suffices as a hearing. The findings requirement appears in Rule 54(d)(2) also, and provides important support for meaningful appellate review, as the Note points out. As under Rule 54(d)(2), the court can refer the motion to a special master or magistrate judge. The Note sets out the factors that courts have recently, and consistently, found important to consider in determining whether the fee sought is "reasonable." The Note attempts to identify the analytic framework for such determinations, recognizing that the case law will continue to develop and will have subtle variations from circuit to circuit. The analytic factors discussed in the Note cut across different methods of determining the size of fee awards, such as percentage of fund or lodestar.

The case law emphasizing the obligation of courts to oversee attorney fee awards, by giving a detailed explanation for the fee awarded and by adequately justifying the amount of the fee, is relatively new. However, it does raise the issue whether the rule amendment is necessary. The amendment, stating in the rule itself what some appellate courts have only recently required in applying the rule, is presented as both helpful and important to courts and litigants. The recent appellate decisions reveal the inconsistent application of standards governing fee awards in class settlements in the district courts.[59] Not every circuit has provided guidance by appellate decisions, and the decisions are, of necessity, limited to the facts and record before each court. The subject of fees plays such a critical role in the practice of class suits as to make it important to state in Rule 23 the requirements governing fee awards, for the guidance of litigants, lawyers, and judges.

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[59] *See, e.g., In re Cendant Corp. Prides Litigation,* ____F.3d____ 2001 WL 276677.

VII. Conclusion

Nothing has become simpler or less controversial since this Committee last asked the Standing Committee to publish proposed amendments to Rule 23. But one thing has remained true. Until the bench and bar have an opportunity to examine specific proposed amendments, the ability of this Committee to improve the proposals and appreciate their problems and promise is limited. We look forward to your help in continuing this process.

TAB II

Proposed Rule 23(c)

Proposed Rule 23(c)(1)(A),(B), and (C)

Class Certification Orders

(c) Determiningation by Order Whether to Certify a Class Action ~~to Be Maintained~~ ~~Certified~~; Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses.

(1) (A) ~~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 a person sues or is sued as a representative of a class, the court must when practicable determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses. When a class is certified under Rule 23(b)(3), the order must state when and how members may elect to be excluded from the class.

(C) An order under Rule 23(c)(1) ~~may be~~ is conditional, and may be altered or amended before ~~the decision on the merits~~ final judgment.

(D) A court that refuses to certify — or decertifies — a class for failure to satisfy the prerequisites of Rule 23(a)(1) or (2), or for failure to satisfy the standards of Rule 23(b)(1), (2), or (3), may direct that no other court may certify a substantially similar class to pursue substantially similar claims, issues, or defenses unless a difference of law or change of fact creates a new certification issue.

Committee Note

Subdivision (c). Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is replaced by requiring a decision "when practicable". The notice provisions are substantially revised. Notice now is explicitly required in (b)(1) and (b)(2) classes. A court that denies class certification may direct that no other court may certify substantially the same class unless a new certification Issue is created by changes of fact or application of different law.

Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made "when practicable." 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. But the "as soon as practicable" exaction may divert attention from the many practical reasons that may justify deferring the initial certification decision. The period immediately following filing may support free exploration of settlement opportunities without encountering the pressures that flow from class certification or from the knowledge that only appeal can change a denial of certification. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(h).

Time also may be needed for discovery to support the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits" of the dispute. A court must understand the nature of the disputes that will be presented on the merits in order to evaluate the presence of common issues; to know whether the claims or defenses of the class representatives are typical of class claims or defenses; to measure the ability of class representatives adequately to represent the class; and particularly to determine for purposes of a (b)(3) class whether common questions predominate and whether a class action is superior to other methods of adjudication. Some courts now require a party requesting class certification to present a "trial plan" that describes the issues that likely will be presented at trial, a step that often requires better knowledge of the facts and available evidence than can be gleaned from the pleadings and argument alone. Wise management of the discovery needed to support the certification decision recognizes that it may be most efficient to frame the discovery so as to reduce wasteful duplication if the class is certified or if the litigation continues despite a refusal to certify a class. See the Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

Quite different reasons for deferring the decision whether to certify a class appear if related litigation is approaching maturity. Actual developments in other cases may provide invaluable information on the desirability of class proceedings and on class definition. If the related litigation involves an overlapping or competing class, indeed, there may be compelling reasons to defer to it.

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not delayed beyond the needs that justify delay. Class litigation must not become the occasion for long-delayed justice. Class members often need prompt relief, and orderly relationships between the class action and possible individual or other parallel actions require speedy proceedings in the class action. The party opposing a proposed class also is entitled to a prompt determination of the scope of the litigation, see *Philip Morris v. National Asbestos Workers Medical Fund*, 214 F.3d 132 (2d Cir. 2000). The object of Rule 23(c)(1)(A) is to ensure that the parties act with reasonable dispatch to gather and present information required to support a well-informed determination whether to certify a class, and that the court make the determination promptly after the question is submitted.

Subdivision (c)(1)(B) 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 under Rule 23(e) when the notice of certification is combined with a notice of settlement.

Subdivision (c)(1)(C), which permits alteration or amendment of an order granting or denying class certification, is amended to set the cut-off point at final judgment rather than "the decision on the merits." This change avoids any possible ambiguity in referring 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 determination of liability might seem a decision on the merits, but it is not a final judgment that should prevent further

consideration of the class certification and definition. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible in the same way as the concept used 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.

Subdivision (c)(1)(D) is new. It takes one step toward addressing the problems that arise when duplicating, overlapping, or competing class actions are filed in different courts. It is difficult to obtain firm data on the frequency of multiple related filings. Some information is provided by Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal Districts: Final Report to the Advisory Committee on Civil Rules*, 14-16, 23-24, 78-79, 118-119 (Federal Judicial Center 1996). But less rigorous evidence demonstrates that some types of claims may generate two or more attempts to seize control of a dispute by filing competing class actions in different courts. This competition is regulated in three ways by these amendments. New subdivision (g) protects the power of a federal court to make an orderly determination whether to certify a class, and to protect orderly control of a class once certified. Subdivision (e)(5) limits the ability of other courts to approve a class-action settlement that has been once rejected. This subdivision (c)(1)(D) deals with events after a federal court has refused to certify a class.

The advantages of precluding relitigation of the same class-certification issue can be important. Most immediately, the very process of litigating the issue can be prolonged and costly. As with other issues, one full and fair opportunity to litigate should suffice. In addition, certification of a class often affects pursuit of the claims in important ways. The cost of litigating against a class, and the risk of enormous consequences, may force settlement of disputes that would not be settled in other environments. The mere anticipation of certification may exert similar pressures; successive exposure to possible certification — and especially the prospect of multiple exposures to possible certification — may force surrender, perhaps even in the action that first seeks certification.

It might be hoped that the judge-made doctrines of res judicata will develop to regulate successive attempts to win certification of the same class. Ordinary res judicata traditions, however, pose several obstacles. Many of the obstacles are illustrated by *J.R. Clearwater Inc. v. Ashland Chemical Co.*, 93 F.3d 176 (5th Cir.1996). The federal court denied class certification and refused to allow dismissal without prejudice. While the federal action remained pending, the same lawyer asked a state court to certify essentially the same class with a different class member as representative. The court of appeals affirmed a refusal to enjoin the state proceeding, finding that denial of certification is not "final" for preclusion purposes, in part because there is no sufficient opportunity for appellate review before final judgment in the underlying action. In addition, the denial of certification rested on discretionary matters not suited to preclusion; the Texas class-action rule was modeled on Rule 23, but state judges might employ different forms of discretion. Similar views are expressed, drawing from the Clearwater decision, in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litigation*, 134 F.3d 133, 145-146 (3d Cir.1998): a denial of class certification is not a "judgment" sufficiently final to support preclusion or application of the exception that permits a federal court to enjoin a state proceeding to protect or effectuate a federal judgment, and the law of the state court presented a certification question different from the Rule 23 question.

These obstacles of traditional theory, grounded in traditional individual litigation, are not persuasive in the context of contemporary class-action litigation. The lack of "finality" is in part redressed by the potential opportunity for interlocutory appeal of a certification refusal under Rule 23(f). The finality requirement, moreover, has been mollified by recognizing that a judgment may be sufficiently final to support preclusion even though it is not final for appeal purposes and cannot be tested by present appeal. The question is whether there has been an adequate opportunity to be heard and whether the determination is sufficiently final in the context of the unfinished proceeding

to justify preclusion. The leading decision, *Lummus v. Commonwealth Oil Refining Co.*, 297 F.2d 80, 89-90 (2d Cir.1961), certiorari denied 368 U.S. 986, has generated a growing body of preclusion decisions. See *18 Federal Practice & Procedure: Jurisdiction § 4434.*

The element of discretion that informs many class certification decisions likewise should not defeat any opportunity for preclusion. A denial of certification may rest not on an open-ended exercise of discretion but on clear findings, supported by thorough litigation, that make class certification inappropriate. The adversary of the potential class deserves protection against repeated exposure to the burdens imposed by one thorough litigation of the certification issue.

A more conceptual obstacle to preclusion also might be found in the theory that there is no "privity" between the person who fails to win class certification and another person who later seeks certification of the same class. The class member who attempted to win certification, however, may have provided fully adequate representation on the certification issues. Preclusion of putative class members limited to the sole question whether the class should be certified is as worthy as any other instance of class-member preclusion by adequate representation.

Yet another difficulty may seem to arise from personal jurisdiction concepts. Whatever the reach of personal jurisdiction over absent class members following certification of a plaintiff class, it is difficult to articulate the grounds for asserting jurisdiction over persons who have no other contact with the forum that refuses to certify the putative class. The court found the lack of personal jurisdiction so apparent as to be resolved with only brief discussion in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litigation*, 134 F.3d 133, 140-141 (3d Cir.1998). But an assertion of personal jurisdiction solely for the purpose of precluding repeated attempts to win certification of the same class after it has been once rejected, leaving class members free to pursue the merits of their claims in other ways — including differently defined class actions — is not untoward with respect to any person who has significant contacts with the United States. Preclusion, moreover, does not apply even to certification of the same class by a court in a state that applies different tests for certification.

Subdivision (c)(1)(C) establishes a limited opportunity for preclusion that balances these competing concerns. The most important limit is that preclusion attaches only when directed by the court that denies certification. Absent express direction, the denial of certification is without prejudice to the right of others — or perhaps even the once-rejected suitor — to seek certification. One reason for refusing to direct preclusion may be a belief that the certification question has not been presented with as much force as might be. Inadequate presentation of the certification issue by one would-be representative should not bar a more effective representative from making a second attempt if the first court believes that appropriate. Other reasons may reflect a host of possible considerations that may make the first court an unsuitable forum for a class that might well be better certified by a different court. One illustration would be a class dominated by questions of state law better resolved in a state court. A similar but more complex illustration would arise when a federal court, bound by the choice-of-law principles of the forum state, concludes that a state or federal court in a different state would be free to make a choice of law that better supports class litigation.

Beyond the court's discretion, a second limit arises from the grounds for denying certification. Preclusion can be directed only if certification is denied for failure to satisfy the prerequisites of Rule 23(a)(1) or (2), or for failure to satisfy the standards of Rule 23(b)(1), (2), or (3). A refusal to certify because the would-be class representative's claims or defenses are not typical of class claims or defenses, or because the would-be representative will not fairly and adequately protect the interests of the class, does not preclude another representative from seeking class certification.

A more important intrinsic limit on certification preclusion is established by the rule that a difference of law or change of fact defeats preclusion. Changes of fact may include better

information about the factors that led to the initial refusal to certify. Changes of law most commonly arise from differences between procedural systems — even a state that has adopted a class-action rule expressed in the same words as Rule 23 may interpret the words differently, establishing a change of law that defeats certification preclusion.

The policies that underlie Rule 23(c)(1)(D) apply as well when a federal court is asked to certify a class that a state court has refused to certify. A federal rule cannot require that a state-court ruling be given greater effect than the state court wishes, and cannot establish a rule that directs a state court to decide whether a refusal to certify should preclude certification by another court, state or federal. But a federal court should consider carefully the reasons that led the state court to refuse certification. A federal court also may protect itself against efforts by a disappointed litigant to set one court against another in repetitive pursuit of the same certification issue.

Proposed Rule 23(c)

Notice

(2) (A)(i) When ordering certification of a class action under Rule 23, the court must direct appropriate notice to the class. The notice must concisely and clearly describe in plain, easily understood language:

- the nature of the action,
- the claims, issues, or defenses with respect to which the class has been certified,
- the right of a class member to enter an appearance through counsel if the member so desires,
- the right to elect to be excluded from a class certified under Rule 23 (b)(3), and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(ii) In any class action certified under Rule 23 (b)(1) or (2), the court must direct notice by means calculated to reach a reasonable number of class members.

(iii) In any class action ~~maintained~~ certified under ~~subdivision~~ Rule 23(b)(3), the court ~~shall~~ must direct to class ~~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) 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.~~

Committee Note

The first change made in Rule 23(c)(2) is to require notice in Rule 23(b)(1) and (b)(2) class actions. The former rule expressly required notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) cannot request exclusion, but have interests that should be protected by notice. These interests often can be protected without requiring the exacting efforts to effect individual notice to identifiable class members that stem from the right to elect exclusion from a (b)(3) class.

The direction that class-certification notice be couched in plain, easily understood language is added as a reminder of the need to work unremittingly at the enormously difficult task of communicating with class members. The brutal fact is that it is virtually impossible to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure itself raise the barriers high. In some cases these barriers may be reduced by providing an introductory summary that briefly expresses the most salient points, leaving full expression to the body of the notice. The Federal Judicial Center has undertaken to create sample models of clear notices that provide a helpful starting point, but the responsibility to "fill in the blanks" remains challenging. The challenge will be increased in cases involving classes that justify notice not only in English but also in another language because significant numbers of members are more likely to understand notice in a different language.

Extension of the notice requirement to Rule 23(b)(1) and (b)(2) classes justifies applying to those classes, as well as to (b)(3) classes, the right to enter an appearance through counsel. Members of (b)(1) and (b)(2) classes may in fact have greater need of this right since they lack the protective alternative of requesting exclusion.

Subdivision (c)(2(A)(ii) requires notice calculated to reach a reasonable number of members of a Rule 23(b)(1) or (b)(2) class. The means of notice should be designed to reach a reasonable number of class members, as determined by the circumstances of each case. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950): "[N]otice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all * * *." Notice affords an opportunity to protect class interests. Although notice is sent after certification, class members continue to have an interest in the prerequisites and standards for certification, the class definition, and the adequacy of representation. Notice supports the opportunity to challenge the certification on such grounds. Notice also supports the opportunity to monitor the continuing performance of class representatives and class counsel to ensure that the predictions of adequate representation made at the time of certification are fulfilled. These goals justify notice to all identifiable class members when circumstances 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 distribution. But when individual notice would be burdensome, the reasons for giving notice often can be satisfied without attempting personal notice to each class member even when many individual class members can be identified. Published notice, perhaps supplemented by direct notice to a significant number of class members, will often suffice. In determining the means and extent of notice, the court should attempt to ensure that notice costs do not defeat a class action worthy of certification. The burden imposed by notice costs may be particularly troublesome in actions that seek only declaratory or injunctive relief.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(A)(iii) notice requirements must be satisfied as to the (b)(3) class.

Tab III

Proposed Rule 23(e)

Proposed Rule 23(e)

Settlement Review

(e) Settlement, Voluntary Dismissal, ~~or~~ and Compromise.

(1) (A) A class member who sues or is sued as a representative of a class may, with the court's approval, settle, voluntarily dismiss, or compromise the action or all or part of the class claims, issues, or defenses.

(B) The court must direct notice in a reasonable manner to all class members of a proposed settlement, voluntary dismissal, or compromise of the class claims, issues, or defenses.

(C) The court may approve a settlement, voluntary dismissal, or compromise of ~~the~~ *class* claims, issues, or defenses ~~of a certified class~~ only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The court may direct the parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a copy or a summary of any agreement or understanding made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) *[Pre-March 12 version, edited for style]* In an action certified under Rule 23(b)(3), the Rule 23(e)(1)(A) notice must state terms on which class members may elect to be excluded from the class, but the court may for good cause refuse to allow an opportunity to request exclusion if class members had an earlier opportunity to request exclusion.

*(3) **[Alternative no-burden version]** In an action previously certified as a class action under Rule 23(b)(3), the Rule 23(e)(1)(A) notice may state terms that afford class members a second opportunity to request exclusion from the class.*

(4) (A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise.

(B) An objector may settle, voluntarily dismiss, or compromise the objections only with the court's approval.

(5) A refusal to approve a settlement, voluntary dismissal, or compromise on behalf of a

class that has been certified precludes any other court from approving substantially the same settlement, voluntary dismissal, or compromise unless changed circumstances present new issues as to the fairness, reasonableness, and adequacy of the settlement.

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). Subdivision (e)(1)(A) 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." The requirement of court approval is made explicit for pre-certification dispositions. The new language introduces a distinction between voluntary dismissal and a court-ordered dismissal that has been recognized in the cases. Court approval is an intrinsic element of an involuntary dismissal. Involuntary dismissal often results from summary judgment or a motion to dismiss for failure to state a claim upon which relief can be granted. It may result from other circumstances, such as discovery sanctions. The distinction is useful as well in determining the need for notice as addressed by paragraph 1(B).

The court-approval requirement is made explicit for voluntary pre-certification dismissals to protect members of the described class and also to protect the integrity of class-action procedure. Because class members may rely on the class action to protect their interests, the court may direct notice of the dismissal to alert class members that they can no longer rely on the class action to toll statutes of limitations or otherwise protect their interests. As an alternative, the court may provide an opportunity for other class representatives to appear similar to the opportunity that often is provided when the claims of individual class representatives become moot. Special difficulties may arise if a settlement appears to include a premium paid not only as compensation for settling individual representatives' claims but also to avoid the threat of class litigation. A pre-certification settlement does not bind class members, and the court cannot effectively require an unwilling representative to carry on with class representation. Nor is it fair to stiffen the defendant's resolve by forbidding payment of a premium to avoid further subjection to the burdens of class litigation. One effective remedy again may be to seek out other class representatives, leaving it to the parties to determine whether to complete a settlement that does not conclude the class proceedings.

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e), but makes it mandatory only for settlement, voluntary dismissal, or compromise of the class claims, issues, or defenses. Notice is required both when the class was certified before the proposed settlement and when the decisions on certification and settlement proceed simultaneously — the test is whether the settlement is to bind the class, not only the individual class representatives. The court may order notice to the class of a disposition made before a certification decision, and may wish to do so if there is reason to suppose that other class members may have relied on the pending action to defer their own litigation. Notice also may be ordered if there is an involuntary dismissal after certification; one likely reason would be concern that the class representative may not have provided adequate representation.

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise of a class action. The factors to be considered in determining whether to approve a settlement 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. But if there are no factual disputes that require consideration of oral testimony, the

hearing requirement can be satisfied by written submissions.

Subdivision (e)(1)(C) also states the standard for approving a proposed settlement. The proposed settlement must be fair, reasonable, and adequate. The court, further, must make findings that support the conclusion that the settlement meets this standard. The findings must be set out in detail to explain to class members and the appellate court the factors that bear on applying the standard: "The district court must show that it has explored these factors comprehensively to survive appellate review." *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir.2000).

The seemingly simple standard for approving a settlement may be easily applied in some cases. A settlement that accords all or nearly all of the requested relief, for example, is likely to fall short only if there is good reason to fear that the request was significantly inadequate.

Reviewing a proposed class-action settlement often will not be easy. Many settlements can be evaluated only after considering a host of factors that reflect the substance of the terms agreed upon, the knowledge base available to the parties and to the court to appraise the strength of the class's position, and the structure and nature of the negotiation process. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir.1998). Any list of these factors must be incomplete. The examples provided here are only examples of factors that may be important in some cases but irrelevant in others. Matters excluded from the examples may, in a particular case, be more important than any matter offered as an example. The examples are meant to inspire reflection, no more.

Many of the factors reflect practices that are not fully described in Rule 23 itself, but that often affect the fairness of a settlement and the court's ability to detect substantive or procedural problems that may make approval inappropriate. Application of these factors will be influenced by variables that are not listed. 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 sacrifice of recoveries that are important to individual 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.

Recognizing that this list of examples is incomplete, and includes some factors that have not been much developed in reported decisions, among the factors that bear on review of a settlement are these:

(A) a comparison of the proposed settlement with the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;

(B) the probable time, duration, and cost of trial;

(C) the probability that the class claims,issues, or defenses could be maintained through trial on a class basis;

(D) the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other facts that bear on the ability to assess the probable

outcome of a trial and appeal on the merits of liability and individual damages as to the claims, issues, or defenses of the class and individual class members;

(E) the extent of participation in the settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master;

(F) the number and force of objections by class members;

(G) the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under (A);

(H) the existence and probable outcome of claims by other classes and subclasses;

(I) the comparison between the results achieved for individual class or subclass members by the settlement or compromise and the results achieved — or likely to be achieved — for other claimants;

(J) whether class or subclass members, or the class adversary, are accorded the right to opt out of the settlement;

(K) the reasonableness of any provisions for attorney fees, including agreements with respect to the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;

(L) whether the procedure for processing individual claims under the settlement is fair and reasonable;

(M) whether another court has rejected a substantially similar settlement for a similar class; and

(N) the apparent intrinsic fairness of the settlement terms.

Apart from these factors, settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal an effort to homogenize conflicting interests of class members and with that demonstrate the need to redefine the class or to designate subclasses. Redefinition of the class or the recognition of subclasses is likely to require renewed settlement negotiations, but that prospect should not deter recognition of the need for adequate representation of conflicting interests. This lesson is entrenched by the decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Paragraph (2). Subdivision (e)(2) authorizes the court to direct that settlement proponents file copies or summaries of any agreement or understanding made in connection with the settlement. This provision does not change the basic requirement that all terms of the settlement or compromise must be filed. It aims instead at related undertakings. 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, division of fees among counsel, the freedom to bring related actions in the future, discovery cooperation, or still other matters. The reference to "agreements or understandings made in connection with" the proposed settlement is necessarily open-ended. An agreement or understanding need not be an explicit part of the settlement negotiations to be connected to the settlement agreement. Explicit agreements or unspoken understandings may be reached outside the settlement negotiations. Particularly in substantive areas that have generated frequent class actions, or in litigation involving counsel that have tried other class actions, there may be accepted conventions that tie agreements reached after the settlement agreement to the settlement. The functional concern is that the seemingly separate agreement may have influenced the terms of the settlement by trading away possible advantages for

the class in return for advantages for others. This functional concern should guide counsel for the settling parties in disclosing to the court the existence of agreements that the court may wish to inquire into. The same concern will guide the court in determining what agreements should be revealed and whether to require filing complete copies or only summaries. Filing will enable the court to review the agreements as part of the review process. In some circumstances it may be desirable to include a brief summary of a particularly salient separate agreement in the notice sent to class members.

The direction to file copies or summaries of agreements or understandings made in connection with a proposed settlement should consider the need for some measure of confidentiality. Some agreements may involve work-product or related interests that may deserve protection against general disclosure. One example frequently urged relates to "back-end opt-out" agreements. A defendant who agrees to a settlement in circumstances that permit class members to opt out of the class may condition its agreement on a limit on the number or value of opt-outs. It is common practice to reveal the existence of the agreement to the court, but not to make public the threshold of class-member opt-outs that will entitle the defendant to back out of the agreement. This practice arises from the fear that knowledge of the full back-out terms may encourage third parties to solicit class members to opt out.

Paragraph (3). Subdivision (e)(3) creates an opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are announced, subject to the court's power to defeat the opportunity *for good cause*. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic Rule 23(b)(3) opportunity to request exclusion applies without further complication. Paragraph (3) creates a second opportunity for cases in which there has been an earlier opportunity to request exclusion that has expired by the time of the settlement notice.

This second opportunity to request exclusion reduces the forces of inertia and ignorance that may undermine the value of a pre-settlement opportunity to request exclusion. A decision to remain in the class is apt to be more carefully considered and is better informed when settlement terms are known.

The second opportunity to request exclusion also recognizes the essential difference between disposition of a class member's rights through a court's adjudication and disposition by private negotiation between court-confirmed representatives and a class adversary. No matter how careful the inquiry into the settlement terms, a settlement does not carry the same reassurance of justice as an adjudicated resolution. Objectors may provide important support for the court's inquiry, but attempts to encourage and support objectors may prove difficult. An opportunity to request exclusion after the terms of a proposed settlement are known provides a valuable protection against improvident settlement that is not provided by an earlier opportunity to request exclusion and that is not reliably provided by the opportunity to object. The opportunity to opt out of a proposed settlement may afford scant protection to individual class members when there is little realistic alternative to class litigation, other than by providing an incentive to negotiate a settlement that — by encouraging class members to remain in the class — is more likely to win approval. 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; in such actions, the decision of most class members to remain in the class may provide added assurance that the settlement is reasonable. 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.

Exclusion from the class provides a protection quite different from the protection that arises from objecting to a proposed settlement. The objector remains in the class and receives the benefits of class procedure, including the benefits of the settlement if it survives the objections in some form. The objector also is bound by the class judgment if there is one. Exclusion from the class leaves the former class member free to seek relief by some other form of litigation, but cuts off participation in further class proceedings and any class judgment that may emerge.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Members of a (b)(1) or (b)(2) class may seek protection by objecting to certification, the definition of the class, or the terms of the settlement.

[pre-March 12 version: Although the opportunity to request exclusion from the class after settlement terms are announced should apply to most settlements, paragraph (3) allows the court to deny this opportunity if there has been an earlier opportunity to request exclusion and there is good cause not to allow a second opportunity. Because the settlement opt-out is a valuable protection for class members, the court should be especially confident — to the extent possible on preliminary review and before hearing objections — about the quality of the settlement before denying the second opt-out opportunity. Faith in the quality and motives of class representatives and counsel is not alone enough. But the circumstances may provide particularly strong evidence that the settlement is reasonable. The facts and law may have been well developed in earlier litigation, or through extensive pretrial preparation in the class action itself. The settlement may be reached at trial, or even after trial. Parallel enforcement efforts by public agencies may provide extensive information. Such circumstances may provide strong reassurances of reasonableness that justify denial of an opportunity to request exclusion. Denial of this opportunity may increase the prospect that the settlement will become effective, establishing final disposition of the class claims.

The parties may negotiate settlement terms conditioned on waiver of the second opportunity to request exclusion, but the court should be wary of accepting such provisions.*]*

[Possible alternative version if (e)(5) does not include the "for good cause" limit: The decision whether to allow a second opportunity to request exclusion is confided to the court's discretion. The decision whether to permit a second opportunity to opt out should turn on the court's level of confidence in the extent of the information available to evaluate the fairness, reasonableness, and adequacy of the settlement. Some circumstances may present particularly strong evidence that the settlement is reasonable. The facts and law may have been well developed in earlier litigation, or through extensive pretrial preparation in the class action itself. The settlement may be reached at trial, or even after trial. Parallel enforcement efforts by public agencies may provide extensive information. The pre-settlement activity of class members or even class representatives may suggest that any warranted objections will be made. Other circumstances as well may enhance the court's confidence that a second opt-out opportunity is not needed.

The decision whether to allow a second opportunity to request exclusion may at times be influenced by factors in addition to an initial appraisal of the apparent quality of the settlement. The court may fear strategic behavior by attorneys not involved in the class action. Some settlements have been followed by requests for exclusion, and even by campaigns designed to encourage class members to request exclusion, that seem motivated by the desire to pursue independent dispositions that build on the values established by the class-action settlement and that yield attorney fees greater than those available under the settlement.]

Notice of the second opportunity to opt out should not be made provisional. The court should decide whether to exclude the second opportunity before sending out notice of the settlement. It would be unseemly to hold out the exclusion opportunity and then to force those who prefer exclusion to remain in the class.

An opportunity to request exclusion after settlement terms are known, either as the initial opportunity or a second opportunity, may reduce the need to provide procedural support to objectors. Class members who find the settlement unattractive can protect their own interests by opting out of the class. Yet this opportunity does not mean that objectors become unimportant. It may be difficult to ensure that class members truly understand settlement terms and the risks of litigation, particularly in cases of much complexity. If most class members have small claims, moreover, the decision to request exclusion is more a symbolic protest than a meaningful pursuit of alternative remedies.

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement. Objections may be made as an individual matter, arguing that the objecting class member should not be included in the class definition or is entitled to terms different than the terms afforded other class members. Individually based objections almost inevitably come from individual class members, but are not likely to provide much information about the overall reasonableness of the settlement unless there are many individual objectors. Objections also may be made in terms that effectively rely on class interests; the objector then is acting in a role akin to the role played by a court-approved class representative. Class-based objections may be the only means available to provide strong adversary challenges to the reasonableness of the settlement — the parties who have presented the agreement for approval may be hard-put to understand the possible failings of their own good-faith efforts.

A class member may appear and object without seeking intervention. Many courts of appeals, however, have adopted a rule that recognizes standing to appeal only if the objector has won intervention in the district court. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456 (7th Cir. 1997). An objector who wishes to preserve the opportunity to appeal is well advised to seek intervention.

The important role played by objectors may justify substantial procedural support. The parties to the settlement agreement may provide access to the results of all discovery in the class action as a means of facilitating appraisal of the strengths of the class positions on the merits. If settlement is reached early in the progress of the class action, however, there may be little discovery. Discovery in — and even the actual dispositions of — parallel litigation may provide alternative sources of information, but may not. If an objector shows reason to doubt the reasonableness of the proposed settlement, the court may allow discovery reasonably necessary to support the objections. Discovery into the settlement negotiation process should be allowed, however, only if the objector makes a strong preliminary showing of collusion or other improper behavior. An objector who wins changes in the settlement that benefit the class may be entitled to attorney fees, either under a fee-shifting statute or under the "common-fund" theory.

The need to support objectors may be reduced when class members have an opportunity to opt out of the class after settlement terms are set. The opportunity to opt out may arise because settlement occurs before the first opportunity to request exclusion from a (b)(3) class, or may arise when a second opportunity to opt out is afforded under Rule 23(e)(3).

The important role that is played by some objectors must be balanced against the risk that objections are made for strategic purposes. Class-action practitioners often assert that a group of "professional objectors" has emerged, appearing to present objections for strategic purposes unrelated to any desire to win significant improvements in the settlement. 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. It has not been possible to craft rule language that distinguishes the motives for objecting, nor that balances rewards for solid objections with sanctions

for unfounded objections. Courts should be vigilant to avoid practices that may encourage unfounded objections. Nothing should be done to discourage the cogent objections that are an important part of the process, even when they fail. But little should be done to reward an objection merely because it succeeds in winning some change in the settlement; cosmetic changes should not become the occasion for fee awards that represent acquiescence in coercive use of the objection process. The provisions of Rule 11 apply to objectors, and courts should not hesitate to invoke Rule 11 in appropriate cases.

Subdivision (e)(4)(B) requires court approval for settlement, voluntary dismissal, or compromise of objections to a class-action settlement. This requirement applies only if the objection has been filed or made in open court. General expressions addressed to the court but never formally presented may be abandoned without need for formal approval.

Approval under paragraph (4)(B) may be given with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector is unfair because of factors that distinguish the objector from other class members. Greater difficulties arise if the objector has protested that the proposed settlement is not fair, reasonable, or adequate as to the class. Such objections augment the strategic opportunity for obstruction, and purport to represent class interests. Resolution of the objections on terms that modify the settlement as it applies to other class members requires court approval under subdivision (e)(1). The objections instead may be surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement. In some situations the court may fear that other potential objectors have relied on the objections already made and seek some means to replace the defaulting objector. In most circumstances, however, an objector should be free to abandon the objections, and the court can approval withdrawal of the objections without elaborate inquiry.

Quite different problems arise if settlement of an objection provides the objector alone terms that are more favorable than the terms generally available to other class members. An illustration of the problems is provided by *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir.1999). 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 or subclass definition that lumped all together. Different terms, however, may reflect the strategic value that objections can have. So long as an objector is objecting on behalf of the class, it is appropriate to impose on the objector a fiduciary duty to the class similar to the duty assumed by a named class representative. The objector may not seize for private advantage the strategic power of objecting. The court should approve terms more favorable than those applicable to other class members only on a showing of a reasonable relationship to facts or law that distinguish the objector's position from the position of other class members.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

Paragraph (5). Subdivision (e)(5) deals with the preclusion consequences of refusal to approve a proposed settlement. The refusal to approve precludes any other court, state or federal, from approving substantially the same settlement unless changed circumstances change the reasonableness calculation. Substantial sameness is shown by close similarity of terms and class definition; closely similar terms applied to a substantially different class, or to individual claims, do not fall within the rule. The preclusion applies only when a class has been certified. Absent the protection of class interests that arises from the certification decision, the class should not be bound. A court that is not prepared to certify a litigation class thus may find that preclusion is denied because the inadequacy of a proposed settlement forces it to deny certification of a class for that settlement. Other courts, however, should remain reluctant to approve the rejected settlement without showings of changed

circumstances that would defeat preclusion when it applies under this rule.

Preclusion is defeated when changed circumstances present new issues as to the reasonableness, fairness, and adequacy of a proposed settlement. 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 asked to consider a changed circumstances argument 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 should be honored.

Appellate courts may find it difficult to enforce preclusion when a trial court has found substantial changes in settlement terms or in surrounding circumstances. But trial courts will be alert to protect themselves against merely cosmetic changes in settlement terms or arguments based on insubstantial changes of circumstances. The preclusion principle established in new subdivision (e)(5) should prove sturdy at the trial-court level.

This federal rule does not speak directly to the freedom of a federal court to consider a settlement that has been rejected by a state court. A state that prefers to allow more or less freedom to reconsider should be able to control the consequences of its own proceedings. But even if applicable state rules allow free reconsideration, a federal court should be reluctant to encourage the "shopping" of a rejected settlement by de novo reconsideration. There should be a strong presumption against approval of the same settlement without a showing of changed circumstances.

IV

Tab IV

Proposed Rule 23(g)

Proposed Rule 23(g)

Overlapping Classes

Strong Form

(g) **(1)** When a class member sues or is sued as a representative of a class, the court may — before deciding whether to certify a class or after certifying a class — enter an order directed to any member of the proposed or certified class respecting the conduct of litigation in any other court that involves the class claims, issues, or defenses on findings that show that:

(A) the other litigation will interfere with the court's ability to achieve the purposes of the class litigation,

(B) the order is necessary to protect against interference by other litigation, and

(C) the need to protect against interference by other litigation is greater than the class member's need to pursue other litigation.

(2) In lieu of an order under Rule 23(g)(1), the court may stay its own proceedings to coordinate with proceedings in another court, and may defer the decision whether to certify a class notwithstanding Rule 23(c)(1)(A).

(3) The court may consult with other courts, state or federal, in determining whether to enter an order under Rule 23(g)(1) or (2).

Limited to Restraining Other Class Actions [But not state-wide class-actions]

(g) **(1)** When a class member sues or is sued as a representative party on behalf of all, the court may — before deciding whether to certify a class or after certifying a class — enter an order directed to any member of the proposed or certified class that prohibits filing or pursuing a class action in any other court that involves the class claims, issues, or defenses [,but the court may not prohibit a class member from filing or pursuing a state-court action on behalf of persons who reside or were injured in the forum state and who assert claims that arise under the law of the forum state].

Committee Note *(Strong Rule Version)*

Class actions exist to address disputes that involve too many parties to support resolution by means of ordinary joinder rules. The purpose is to frame a single proceeding that can achieve a uniform, just, and efficient determination of the entire controversy. The involvement of multiple parties, however, threatens fulfillment of this purpose. Whether from different visions of class interests or from less lofty motives, recent experience has shown many instances of duplicating, overlapping, competing, and successive class actions addressed to the same underlying controversy. Literally dozens of class actions may be filed in the wake of well-publicized mass torts involving large numbers of potential victims and staggering potential recoveries. To the extent that these

actions are filed in federal court, great help is found in the pretrial consolidation procedures directed by the Judicial Panel on Multidistrict Litigation. The authority recognized by Rule 23(g) does not extend to orders that seek to direct relationships between class members and the Judicial Panel. Rationalization of the competing actions has proved more difficult, however, when some are filed in state courts.

Subdivision (g) addresses the need to establish the authority of a federal class-action court to maintain the integrity of federal class-action procedure. The first condition is stated in subdivision(g)(1)(A): the court must find that other litigation will interfere with the court's ability to achieve the purposes of class litigation. Integrity of the procedure demands that the court have the opportunity to determine whether to certify the class in the orderly way contemplated by Rule 23(c)(1)(A), free from competing proceedings in other tribunals that may undermine the opportunity for certification. Another court, for example, may certify a class and approve a settlement on terms that do not protect class interests as effectively as this class action might have done. Once a class has been certified, the federal court can protect class interests only if it can regulate related litigation by class members. Special occasions to protect the federal action may arise when a (b)(1) or (b)(2) class presents pressing needs to achieve uniformity of obligation and to ensure equality among class members. In any class action, the distractions, burdens, and conflicting orders that may be imposed by parallel actions can impede or even block effective preparation and ultimate disposition of the federal class action. It is not only that it can be unfair to the adversary of a putative class to defend multiple proceedings, but also that the need to respond to multiple proceedings may impede fully effective response in any of them.

The power to direct orders to class members respecting the conduct of related litigation is limited during the pre-certification stage to members of the proposed class. After certification the power is limited to members of the certified class; a former member who has opted out of a Rule 23(b)(3) class is no longer subject to this power.

The power to regulate related litigation by class members should be exercised with care. This need is emphasized by subdivision (g)(1)(B) and (C): the need to protect against interference by other litigation must be greater than the class member's need to pursue other litigation. There are many reasons, including many that are common rather than special, that may weigh strongly in favor of permitting other actions to proceed.

Particular care must be taken when the court has not yet certified a class action. There may never be certification of a class that would be thwarted by parallel litigation. Even if a class is eventually certified, the definition of class membership and class claims, issues, or defenses may be quite different from the proposal advanced in the initial complaint. A member of a merely potential federal class, moreover, may have no connection to the court other than membership in the proposed class; the assertion of personal jurisdiction to regulate litigation elsewhere may impose significant burdens on the right to seek relief from the order.

Great care also is required in regulating other litigation that is not framed by class-action procedure. Individual class members may find it wise to file actions that protect against inadvertent loss of the temporary protection the class allegations provide against statutes of limitations. Individual class members may have urgent needs for relief, and may be able to proceed to judgment in other courts far faster than it is possible to provide relief in the class action. Other actions may be well advanced and ready for trial. It may be important to allow some actions to proceed to litigated judgments as a means of allowing the underlying claims to mature, providing important information for the certification decision and development of any class action that may be certified.

The sources of law involved in the class action and other actions also must be considered. There are powerful reasons for asserting federal control of claims that lie in exclusive federal subject-matter jurisdiction. The federal interest in closing off litigation of state-law claims in state

courts, on the other hand, may often be slight. But even in state-law cases, a federal court may be concerned to protect against the consequences of pursuing claims arising out multistate events in many independent actions. There even may be reason to prefer a single federal action that, although bound by forum-state choice-of-law principles, advances the prospect of a coherent choice-of-law process. Mixed concerns arise in cases that involve both state and federal law.

The decision whether to attempt regulation of other litigation by class members thus requires pragmatic judgment, informed by careful appraisal of the actual challenges in managing the federal class action and full knowledge of the opportunities and dangers created by parallel litigation. There is no room for any simplistic assumptions that the federal class action must always come first.

Proceedings in nonjudicial tribunals may at times interfere with effective management of a federal class action in ways similar to proceedings in other courts. The federal court must be careful to honor the substantive right to arbitrate, but may in special circumstances order a stay of arbitration proceedings. Administrative proceedings may generate similar challenges.

The power recognized by subdivision (g)(1) may be limited by constraints of comity and limits on personal jurisdiction when parallel litigation is pending in the courts of another country. Personal jurisdiction may be uncertain as to class members who are not citizens of the United States, and such class members raise as well the greatest concerns of comity.

Subdivision (g)(2) confirms the balancing weight of deference to other courts. The decision whether to certify a class is heavily influenced by the existence of parallel litigation involving class members. Particularly when there are numerous other actions, or when one or more aggregated actions embrace many potential class members, it may be better to put aside the ordinary Rule 23(c)(1)(A) direction that a class certification decision be made [as soon as possible]. The question is not one of abstention, nor shirking the obligation to exercise established subject-matter jurisdiction. The problem is to define the best use to be made of federal class-action litigation in the particular setting. Class disposition is properly deferred — and ultimately denied — if better disposition is promised by proceedings in other federal courts or the courts of the states or another country.

The decision whether to defer to other courts may be assisted by considering the factors enumerated in *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 817-820. A class action has much in common with the multiparty adjudication of water rights involved in the *Colorado River* action, and with the direct analogy to actions brought in the form of in rem proceedings. It is important to consider "the desirability of avoiding piecemeal litigation" and "avoiding the generation of additional litigation through permitting inconsistent dispositions of property." The relationships among class claims may be "highly interdependent," and even when all class members share the same interests in the same proportion it may be important to establish a "comprehensive system" for a single, consistent, efficient, and fair adjudication. The federal court may offer the best opportunity to satisfy these needs, and may exercise the power established by Rule 23(g) to achieve them. But a state court, or a set of state courts, may be in a better position to serve the interests that might be met by a federal class action. Subdivision (g)(2) reflects a federal policy, akin to the federal submission to state water-rights adjudication in the *Colorado River* case, that justifies deference to state adjudication in such circumstances by staying federal proceedings. Deference instead may take the form of an ordinary determination that in light of other pending actions, certification of a federal class is inappropriate under the prerequisites of Rule 23(a) or the standards of Rule 23(b). Rule 23(g) is not needed for such rulings.

Subdivision (g)(3) confirms the propriety of a tactic that has often worked well. Judges confronted with parallel litigation have resorted to the most obvious and direct means of working out effective coordination by talking to each other. "[W]e see nothing wrong with members of the federal and state judiciary trying to coordinate where their cases overlap. Coordination among

judges can only foster the just and efficient resolution of cases." In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions, 148 F.3d 283, 345 (3d Cir.1998). There has been some uneasiness, however, arising from the lack of any official authorization for communications that frequently are unofficial and ex parte. This rule authorizes this means of rationalizing overlapping and perhaps competitive litigation in two or more courts. When feasible, the cooperating judges should provide a means for the parties to be heard on the best means of coordination. Ordinary adversary procedures may not always be feasible, however, and the actual process of decision can properly be as confidential as the deliberations of any multi-member court.

Committee Note *(Limited to other class actions)*

Class actions exist to address disputes that involve too many parties to support resolution by means of ordinary joinder rules. The purpose is to frame a single proceeding that can achieve a uniform, just, and efficient determination of the entire controversy. The involvement of multiple parties, however, threatens fulfillment of this purpose. Whether from different visions of class interests or from less lofty motives, recent experience has shown many instances of duplicating, overlapping, competing, and successive class actions addressed to the same underlying controversy. Literally dozens of class actions may be filed in the wake of well-publicized mass torts involving large numbers of potential victims and staggering potential recoveries. To the extent that these actions are filed in federal court, great help is found in the pretrial consolidation procedures directed by the Judicial Panel on Multidistrict Litigation. The authority recognized by Rule 23(g) does not extend to orders that seek to direct relationships between class members and the Judicial Panel. Rationalization of the competing actions has proved more difficult, however, when some are filed in state courts.

Subdivision (g) addresses the need to establish the authority of a federal class-action court to maintain the integrity of federal class-action procedure against the risk of competing class filings. Integrity of the procedure demands that the court have the opportunity to determine whether to certify the class in the orderly way contemplated by Rule 23(c)(1)(A), free from competing proceedings in other tribunals that may undermine the opportunity for certification. Another court, for example, may certify a class and approve a settlement on terms that do not protect class interests as effectively as the federal class action might have done. Once a class has been certified, the federal court can protect class interests only if it can regulate related litigation by class members. Special occasions to protect the federal action may arise when a (b)(1) or (b)(2) class presents pressing needs to achieve uniformity of obligation and to ensure equality among class members. In any class action, the distractions, burdens, and conflicting orders that may be imposed by parallel class proceedings can impede or even block effective preparation and ultimate disposition of the federal class action. It is not only that it can be unfair to the adversary of a putative class to defend multiple proceedings, but also that the need to respond to multiple proceedings may impede fully effective response in any of them.

The competition between overlapping class actions may take forms that present particularly persuasive occasions for regulation. The most persuasive reasons demonstrated in published decisions arise when a proceeding in another court threatens to disrupt an imminent class-action settlement. The disruption may be direct, as when another court is asked to withdraw some class members from the certified class or to bar specific settlement terms. See, e.g., *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir.1993); *In re Corrugated Container Antitrust Litigation, Three J Farms, Inc. v. Plaintiffs' Steering Committee*, 659 F.2d 1332 (5th Cir.1981). The disruption also may be indirect, as when another court is asked to participate in a "reverse auction" through which alternative class representatives bargain with the class adversary for terms less favorable to the class but more beneficial to them. Even when there is no impending settlement to protect, overlapping class actions may be mutually stultifying, defeating the ability of any court to achieve the purposes of class litigation. Any decision to regulate relations between the actions must take account not only

of priority in filing and certification, but also the progress of each action toward judgment, differences in class definitions that may support accommodations that make sense of parallel proceedings, comparative advantages in administering the underlying substantive law, and other factors that may be unique to the particular situation.

The power to direct orders to class members respecting the conduct of related litigation is limited during the pre-certification stage to members of the proposed class. After certification the power is limited to members of the certified class; a former member who has opted out of a Rule 23(b)(3) class is no longer subject to this power.

The power to regulate related class proceedings should be exercised with care. There are many reasons, including many that are common rather than special, that may weigh strongly in favor of permitting other actions to proceed.

Particular care must be taken when the court has not yet certified a class action. There may never be certification of a class that would be thwarted by parallel litigation. Even if a class is eventually certified, the definition of class membership and class claims, issues, or defenses may be quite different from the proposal advanced in the initial complaint. A member of a merely potential federal class, moreover, may have no connection to the court other than membership in the proposed class; the assertion of personal jurisdiction to regulate litigation elsewhere may impose significant burdens on the right to seek relief from the order.

The sources of law involved in the class action and other actions also must be considered. There are powerful reasons for asserting federal control of claims that lie in exclusive federal subject-matter jurisdiction. The federal interest in closing off litigation of state-law claims in state courts, on the other hand, may often be slight. But even in state-law cases, a federal court may be concerned to protect against the consequences of pursuing claims arising out multistate events in many independent actions. There even may be reason to prefer a single federal action that, although bound by forum-state choice-of-law principles, advances the prospect of a coherent choice-of-law process. Mixed concerns arise in cases that involve both state and federal law.

[The only situation that supports a categorical ordering of the relationship between federal class-action litigation and overlapping state class-action litigation arises with a true "state-wide" class. The authority to restrain state-court class proceedings recognized by subdivision (g)(1) is limited by the exception for a class of persons who reside or were injured in the forum state and who assert claims that arise under the forum state's law. Failure to satisfy the condition that the claims be governed by the forum state's law ousts the exception, but does not mean that a federal court should discount the fact that a state-court class is limited to persons who reside or were injured in the forum state. There may be good reasons to defer to state resolution of such class claims, carving them out of a broader federal class, even when some issues are better governed by the laws of other states. The need to invoke the laws of other states is likely to arise when there are multiple defendants, and is particularly likely in resolving disputes among the defendants.]

The decision whether to attempt regulation of related class proceedings thus requires pragmatic judgment, informed by careful appraisal of the actual challenges in managing the federal class action and full knowledge of the opportunities and dangers created by parallel litigation. There is no room for any simplistic assumptions that the federal class action must always come first.

V

Tab V

Proposed Rule 23(h)

Proposed Rule 23(h)

Class Counsel Appointment

(h) **Class Counsel.**

(1) **Appointing Class Counsel.**

(A) Unless a statute provides otherwise, when a member of a class sues or is sued as a representative party on behalf of all, the court must appoint class counsel in any order granting class action certification.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(2) **Appointment procedure.**

(A) The court may allow a reasonable period after the commencement of the action for attorneys seeking appointment as class counsel to apply.

(B) In appointing an attorney class counsel, the court must consider counsel's experience in handling class actions and other complex litigation, the work counsel has done in identifying or investigating potential claims in this case, and the resources counsel will commit to representing the class, and may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. The court may direct potential class counsel to provide information on any such subject and to propose terms for attorney fees and nontaxable costs. The court may also make further orders in connection with selection of class counsel.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(i).

Committee Note

Subdivision (h). Subdivision (h) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Yet until now the rule has said nothing about either the selection or responsibilities of class counsel. This subdivision recognizes the importance of class counsel, states their obligation to represent the interests of the class, and provides a framework for selection of class counsel. It also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class at the time it certifies a class. Class counsel must be appointed for all classes, including each subclass if the court certifies subclasses.

Ordinarily, the court would appoint class counsel at the same time that it certifies the class. As a matter of effective management of the action, however, it may be important for the court to designate attorneys to undertake some responsibilities during the period before class certification. This need may be particularly apparent in cases in which there is parallel individual litigation, or those in which there is more than one class action on file. In these circumstances, it may be desirable for the court to designate lead or liaison counsel during the pre-certification period.

Paragraph (1)(A) does not apply if "a statute provides otherwise." This recognizes that pertinent provisions of the Private Securities Litigation Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.), contain specific directives about selection of a lead plaintiff and the retention of counsel. This subdivision does not purport to supersede those provisions, or any similar provisions of other legislation.

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The class comes into being due to the action of the court in granting class certification, and class counsel are appointed by the court to represent the class. The rule thus defines the scope and nature of the obligation of class counsel, an obligation resulting from the court's appointment and one that may be different from the customary obligations of counsel to individual clients. See American Law Institute, Restatement (Third) of the Law Governing Lawyers, § 128 comment d(iii) (2000); Bash v. Firstmark Standard Life Ins. Co., 861 F.2d 159, 161 (7th Cir. 1988) ("conflicts of interest are built into the device of the class action, where a single lawyer may be representing a class consisting of thousands

of persons not all of whom will have identical interests or views").

For these reasons, the customary rules that govern conflicts of interest for attorneys must sometimes operate in a modified manner in class actions; individual class members cannot insist on the complete loyalty from counsel that may be appropriate outside the class action context. See Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 584, 589-90 (3d Cir.), cert. denied, 528 U.S. 874 (1999) (adopting a "balanced approach" to attorney-disqualification motions in the class action context, and noting that the conflict rules do not appear to have been drafted with class action procedures in mind and that they may even be at odds with the policies underlying the class action rules); In re Agent Orange Product Liability Litigation, 800 F.2d 14, 19 (2d Cir. 1986) ("the traditional rules that have been developed in the course of attorneys' representation of the interests of clients outside the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation"); In re Corn Derivatives Antitrust Litigation, 748 F.2d 157, 164 (3d Cir. 1984) (Adams, J., concurring); see also Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 1176 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979) ("when a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class to rest exclusively with the named plaintiffs").

At the same time class counsel are appointed, class representatives are also designated to protect the interests of the class. These individuals may or may not have a preexisting attorney-client relationship with class counsel, but appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel, who is appointed by the court. See Maywalt v. Parker & Parsley Petroleum Co., 67 F.3d 1072, 1078-79 (2d Cir. 1995). In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel has the obligation to determine whether settlement would be in the best interests of the class as a whole. Approval of such a settlement, of course, depends on the court's review under Rule 23(e).

Until appointment as class counsel, an attorney does not represent the class in a way that makes the attorney's actions legally binding on class members. Counsel who have established an attorney-client relationship with certain class members, and those who have been appointed lead or liaison counsel as noted above, may have authority to take certain actions on behalf of some class members, but authority to act officially in a way that will legally bind the class can only be created by appointment as class counsel.

Before certification, counsel may undertake actions tentatively on behalf of the class. One frequent example is discussion of possible settlement of the action by counsel before the class is certified. Such pre-certification activities anticipate later appointment as class counsel, and by later applying for such appointment counsel is representing to the court that the activities were undertaken in the best interests of the class. By presenting such a pre-certification settlement for approval under Rule 23(e) and seeking appointment as class counsel, for example, counsel represents that the settlement provisions are fair, reasonable, and adequate for the class.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it is intended to provide a framework for

appointment of class counsel in all class actions.

In a plaintiff class action the court would ordinarily appoint as class counsel only an attorney who has sought appointment. For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (2)(B) is included. Other attorneys seeking appointment as class counsel would ordinarily have to file a formal application detailing their suitability for the position.

The court is not limited to attorneys who have sought appointment in selecting class counsel for a defendant class. The authority of the court to certify a defendant class cannot depend on the willingness of counsel to apply to serve as class counsel. The court has a responsibility to appoint appropriate class counsel for a defendant class, and paragraph (2)(B) authorizes it to elicit needed information from potential class counsel to inform its determination whom to appoint.

The rule states that the court should appoint "an attorney" as class counsel. In many instances, this will be an individual attorney. In other cases, however, appointment will be sought on behalf of an entire firm, or perhaps of numerous attorneys who are not otherwise affiliated but are collaborating on the action. No rule of thumb exists to determine when such arrangements are appropriate; the objective is to ensure adequate representation of the class. In evaluating such applications, the court should therefore be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure. One possibility that may sometimes be relevant to whether the court appoints a coalition is the alternative of competition for the position of class counsel. If potentially competing counsel have joined forces to avoid competition rather than to provide needed staffing for the case, the court might properly direct that they apply separately. See In re Oracle Securities Litigation, 131 F.R.D. 688 (N.D. Cal. 1990) (counsel who initially vied for appointment as lead counsel resisted bidding against each other rather than submitting a combined application, and submitted competing bids only under pressure from the court).

Paragraph (2)(A) provides that the court may allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The purpose is to permit the filing of competing applications to afford the best possible representation for the class, but in some instances deferring appointment would not be justified. The principal example would be actions in which a proposed settlement has been negotiated before the class action is filed, justifying prompt review of the proposed settlement under Rule 23(e). Except in such unusual situations, the court should ordinarily defer the appointment for a period sufficient to permit competing counsel to apply.

This provision should not often present difficulties; recent reports indicate that ordinarily considerable time elapses between commencement of the action and ruling on certification. See T. Willging, L. Hooper & R. Nimiec, Empirical Study of Class Actions in Four Federal District Courts 122 (Fed. Jud. Ctr. 1996) (median time from filing of complaint to ruling on class certification ranged from 7 months to 12.8 months in four districts studied). Moreover, the court may take account of the likelihood that there will be competing applications, perhaps reflecting on the nature of the action or specifics that indicate whether there are likely to be other applicants, in determining whether to defer resolution of class certification. All of these factors would bear on when a class certification decision is "practicable" under Rule 23(c)(1).

Paragraph (2)(B) articulates the basic responsibility of the court in selecting class counsel -- to appoint an attorney who will assure the adequate representation called for by paragraph (1)(B). It identifies three criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court's duty, the listing also informs counsel seeking appointment about the topics on which they need to inform the court. As indicated above, this information may be included in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (2)(B) or about any other relevant topic. For example, the court may direct counsel seeking appointment as class counsel to inform the court about any agreements they have made about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate whether they represent parties or a class in parallel litigation that might be coordinated or consolidated with the action before the court. Such coordination might make it unnecessary for the court to resort to the measures authorized by Rule 23(g), which might be more intrusive.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. As adoption of Rule 23(i) recognizes, attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may be often be a productive technique of dealing with these issues. Paragraph (2)(C) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful in selecting class counsel or to provide criteria for an order under paragraph (2)(C), the court need not consider it in all class actions. But the topic is mentioned in the rule because of its frequent importance, and courts may often find it useful to direct counsel to provide such information.

Full reports on a number of the subjects that are to be covered in counsel's submissions to the court may often reveal confidential information that should not be available to the class opponent or to other parties. Examples include the work counsel has done in identifying potential claims, the resources counsel will commit to representing the class, and proposed terms for attorney fees. In order to safeguard this confidential information, the court may direct that these disclosures be made under seal and not revealed to the class adversary.

In addition, the court may make orders about how the selection process should be handled. For example, the court might direct that separate applications be filed rather than a single application on behalf of a consortium of attorneys. In appropriate cases, the court may direct that competing counsel bid for the position of class counsel. See Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 202 n.6 (3d Cir. 2000) ("This device [bidding for class counsel] appears to have worked well, and we commend it to district judges within this circuit for their consideration.").

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. The fact that a given attorney filed the instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. The resources counsel will commit to the case must be appropriate to its needs, of course, but the court should be careful not to limit consideration

to lawyers with the greatest resources.

If, after review of submitted applications for class counsel appointment, the court concludes that no applicant is satisfactory, it may reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

Paragraph (2)(C) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or a method of monitoring class counsel's performance throughout the litigation. See Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 201-02 n.6 (3d Cir. 2000); Report of the Federal Courts Study Committee 104 (1990) (recommending provision of advance guidelines in appropriate cases regarding such items as the level of attorney involvement that will be compensated). Ordinarily these provisions would be limited to tentative directions regarding the potential award of attorney fees and nontaxable costs to class counsel. In some instances, however, they might affect potential motions for attorney fees by other attorneys. For example, if other counsel who sought appointment as class counsel had done work preparing the case that would likely inure to the benefit of the class in the event of a judgment or settlement in the favor of the class, that could be addressed in the order appointing class counsel even though these attorneys were not selected for that position. Any such award would ultimately have to be sought in a motion under Rule 23(i), but the order appointing class counsel could provide an initial framework for such later consideration of attorney fees.

The court also might find it helpful to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action. Courts that employ this method have found it an effective way to assess the performance of class counsel. It may also facilitate the court's later determination of a reasonable attorney fee, without having to absorb and evaluate a mountain of records about conduct of the case that would have been more digestible in smaller doses. Particularly if the court has directed potential class counsel to provide information on agreements with others regarding fees at the time of appointment, it might be desirable also to direct that class counsel notify the court if they enter into such agreements after appointment. Because such reports may reveal confidential information, however, it may be appropriate that they be filed under seal.

The rule does not set forth any hearing or finding requirements regarding appointment of class counsel. Because appointment of class counsel is ordinarily a feature of class certification, and therefore may be subject to an immediate appeal under Rule 23(f), district courts should ensure an adequate record of the basis for their decisions regarding selection of class counsel.

VI

Tab VI

Proposed Rule 23(i)

Proposed Rule 23(i)

Attorney Fees Awards

(i) **Attorney Fees Award.** In an action certified as a class action, the court may award reasonable attorney fees and related nontaxable costs authorized by law or by agreement of the parties as follows:

(1) **Motion for Award of Attorney Fees.** A claim for an award of attorney fees and related nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time directed by the court. Notice of the motion must be served on all parties and, for motions by class counsel, given to all members of the class in a reasonable manner.

(2) **Objections to Motion.** A class member or a party from whom payment is sought may object to the motion.

(3) **Hearing and Findings.** The court must hold a hearing and find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) **Reference to Special Master or Magistrate Judge.** The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

Committee Note

Subdivision (i). Subdivision (i) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. See RAND Institute for Civil Justice, Class Action Dilemmas, Executive Summary 24 (1999) (stating that "what judges do is the key to determining the benefit-cost ratio" in class actions, and that salutary results followed when judges "took responsibility for determining attorney fees"). Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision provides a framework for fee awards in class actions. It is designed to work in tandem with new subdivision (h) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for

an eventual fee award, or for monitoring the work of class counsel during the pendency of the action. In cases subject to court approval under Rule 23(e), that review process would ordinarily proceed in tandem with consideration of class counsel's fee motion.

Subdivision (i) applies to "an action certified as a class action." This is intended to include cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). As noted below, in these situations the notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself. Deferring the filing of class counsel's fee motion until after the Rule 23(e) review is completed would therefore usually be wasteful.

This subdivision does not undertake to create any new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who sought appointment as class counsel but were not appointed, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. See, e.g., Gottlieb v. Barry, 43 F.3d 474 (10th Cir. 1994) (fee award to objectors who brought about reduction in fee awarded from settlement fund); White v. Auerbach, 500 F.2d 822, 828 (2d Cir. 1974) (objectors entitled to attorney fees for improving settlement). Other situations in which fee awards are authorized by law or by agreement of the parties may exist. For example, counsel representing clients in other actions who effect coordination with the class action might thereby make unnecessary the more drastic remedies available under Rule 23(g) and justify a fee award by contributing to the successful resolution of the class action. See Kahan & Silberman, The Inadequate Search for "Adequacy" in Class Actions, 73 N.Y.U. L. Rev. 765, 778 (1998).

This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, including some subject to a fee-shifting statute. See, e.g., 7B C. Wright, A. Miller & M. Kane, Fed. Prac. & Pro. § 1803 at 507-08. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. See generally A. Hirsch & D. Sheehey, Awarding Attorneys' Fees and Managing Fee Litigation (Fed. Jud. Ctr. 1994). In particular, there is some variation among courts about whether in "common fund" cases the court should use the lodestar or a percentage method of determining what fee is reasonable. See Powers v. Eichan, 229 F.3d 1249 (9th Cir. 2000) (district court did not abuse its discretion by using percentage method); Goldberger v. Integrated Resources, Inc., 209 F.3d 43 (2d Cir. 2000) (in common fund cases the district court may use either the lodestar or the percentage approach); Johnson v. Comerica Mortgage Corp., 83 F.3d 241, 244-46 (8th Cir. 1996) (district court has discretion to select either percentage or lodestar approach); Camden I Condominium Ass'n v. Dunkle, 946 F.2d 768 (11th Cir. 1991) (percentage approach is supported by "better reasoned" authority). Ultimately the courts may conclude that a combination of methods -- lodestar and percentage -- should be employed in a blended manner to provide the best possible assessment of a reasonable fee. The rule does not attempt to resolve the question whether the lodestar or percentage approach, or some blending of the two, should be viewed as preferable, leaving that evolving determination of the courts.

Although the rule does not attempt to supplant caselaw developments on fee measurement, it is premised on the singular importance of judicial review of fee awards to the healthy operation of the class action process. Ultimately the class action is a creation of equity for which the courts bear a special responsibility. See 7B Fed. Prac. & Pro. § 1803 at 494 ("The court's authority to reimburse the parties stems from the fact that the class action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts."). "In a class action, whether the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper." Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1328 (9th Cir. 1999); see also In re Cendant Corp. PRIDES Litigation, ___ F.3d ___, 2001 WL 276677 (3d Cir. 2001, March 21, 2001) (referring to "the special position of the courts in connection with class action settlements and attorneys' fee awards"). Accordingly, "a thorough review of fee applications is required in all class action settlements." In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation, 55 F.3d 768, 819 (3d Cir. 1995), cert. denied, ___ U.S. ___ (1995). Indeed, improved judicial shouldering of this responsibility may be a key element in improving the class action process. See RAND, Class Action Dilemmas, supra, at 33 ("The single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society.").

Courts discharging this responsibility have focused on a variety of factors. Indeed, in many circuits there is already a recognized list of factors the district courts are to address in deciding fee motions. Without attempting to list all that properly might be considered, it may be helpful to identify some that are often important in class actions.

One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. See RAND, Class Action Dilemmas, supra, at 34-35. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. "Coupon" settlements may call for careful scrutiny to verify the actual value to class members of the resulting coupons. If there is no secondary market for coupons, and if there are significant limitations on using them, a substantial discount may be appropriate. It may be that only unusual circumstances would make it appropriate to value the settlement as the sum of the face value of all coupons. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. Blanchard v.

Bergeron, 489 U.S. 87, 95 (1989) (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or declaratory relief").

Courts also regularly consider the time counsel reasonably expended on the action -- the lodestar analysis. Even a court that initially uses a percentage approach might well choose to "cross-check" that initial determination with consideration of the time needed for the action. Similarly, a court that begins with a lodestar approach may also emphasize the results obtained in deciding whether the resulting lodestar figure would be a reasonable award. The attorney work to be considered under this factor would include pre-appointment efforts of attorneys appointed as class counsel. This analysis would ordinarily also take account of the professional quality of the representation.

Any objections submitted pursuant to paragraph (2) should also be considered. Often these objections would shed light on topics addressed by the other factors. Sometimes objectors will provide additional information to the court. Owing to the court's special duty for supervising fee awards in class actions, however, it has been held that the absence of objections does not relieve the court of its responsibility for scrutinizing the fee motion. See Zucker v. Occidental Petroleum Corp., 192 F.3d 1323, 1328-29 (9th Cir. 1999) ("This duty of the court exists independently of any objection.").

The risks borne by class counsel are also often considered in setting an appropriate fee in common fund cases. In some cases, the probability of a successful result may be very high, making any enhancement of the fee on this ground inappropriate. But when there is a significant risk of nonrecovery, that factor has sometimes been important in determining the fee, or in interpreting the lodestar as a cross-check on the fee determined by the percentage method.

Any terms proposed by counsel in seeking appointment as class counsel, and any directions or orders made by the court in connection with appointing class counsel, should also weigh on an eventual fee award. The process of appointing class counsel under Rule 23(h) contemplates that these topics will often be considered at that point, and the resulting directives should provide a starting point for fee motions under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: "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." The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. "Side agreements" regarding fees provide at least perspective pertinent to other factors such as the contingency of the representation and financial risks borne by class counsel. These agreements may sometimes indicate that others are reaping a windfall due to a substantial award while class counsel are not significantly compensated for their efforts. If that appears to be true, the court may have authority to make appropriate adjustments.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. The court-awarded fee will often not be the only fee earned by class counsel or by other attorneys in connection with the action. Class counsel may have fee agreements with individual class members, while other class members may have fee agreements with their own lawyers. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments were necessary as a result. In other circumstances, the court might determine that fees called for by contracts between class members and other lawyers would either deplete the funds remaining to pay class counsel, or deplete the net proceeds for class members, in ways that call for adjustment.

Courts have also referred to the awards in similar cases for aid in determining a reasonable fee award. See, e.g., In re Cendant Corp. PRIDES Litigation, ___ F.3d ___, 2001 WL 276677 (3d Cir., March 21, 2001) (including chart of attorney fee awards in cases in which common fund exceeded $100 million).

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. These charges can sometimes be considerable. They may often be suitable for initial prospective regulation through the order appointing class counsel. See Rule 23(h)(2)(C). If so, those directives should be a presumptive starting point in determining what is an appropriate award. In any event, the court ought only authorize payment of nontaxable costs that are reasonable. The court need not insist that counsel exist in the most barebones of manners, but should avoid underwriting a luxury enterprise.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), but owing to the distinctive features of class action fee motions the provisions of this subdivision control disposition of fee motions in class actions. As noted above, this includes awards not only to class counsel, but to any other attorney who seeks an award for work in connection with the class action.

The court should direct when the fee motion should be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would ordinarily be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). It may, however, be sensible in some such cases to defer filing of some supporting materials until a later date. In cases litigated to judgment, the court might also want class counsel's motion on file promptly so that notice to the class under this subdivision can be given. If other counsel will seek awards, a different schedule may be appropriate. For example, if fees are sought by an objector to the proposed settlement, or by an objector to a fee motion, it is important to allow sufficient time after the ruling on the objection for the fee motion to be filed.

Besides service of the motion on all parties, notice to the class "in a reasonable manner" is required with regard to class counsel's motion for attorney fees. Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. As noted above,

in cases in which settlement approval is contemplated under Rule 23(e), the notice regarding class counsel's fee motion ordinarily would be combined with notice of the proposed settlement, and the provision regarding notice to the class is parallel to the requirements for notice under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense while assuring that a suitable proportion of class members are likely to be apprised to the fee motion.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties -- for example, nonsettling defendants -- may not object because they have no sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection, but it would usually be important to set one. If a class member wishes to preserve the right to appeal should an objection be rejected, it may be necessary for the class member to seek to intervene in addition to objecting. For those purposes, an objection would ordinarily have to be made formally by filing in court, rather than by letter to counsel or the court.

The court may allow an objector discovery relevant to the objections. In determining whether to allow such discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. See Rule 26(b)(2). One factor in determining whether to authorize discovery would be the completeness of the material submitted in support of the fee motion. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information. Unlimited discovery is not a usual feature of fee disputes. See In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litigation, 56 F.3d 295, 303-04 (1st Cir. 1995).

Paragraph (3). Whether or not there are formal objections, the court is to hold a hearing on the fee motion, but that hearing might in some instances be on the submitted papers. See Sweeny v. Athens Regional Medical Ctr., 917 F.2d 1560, 1566 (11th Cir. 1990) ("[T]he more complex the disputed factual issues, the more necessary it is for the court to hold an evidentiary hearing."). In order to permit adequate appellate review, the court must make findings and conclusions under Rule 52(a). See In re Cendant Corp. PRIDES Litigation, ___ F.3d ___, 2001 WL 276667 (3d Cir., March 21, 2001) ("the cases make clear that reviewing courts retain an interest -- a most special and predominant interest -- in the fairness of class action settlements and attorneys' fee awards"); Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 196 (3d Cir. 2000) ("it is incumbent upon a district court to make its reasoning and application of the fee-awards jurisprudence clear, so that we, as a reviewing court, have a sufficient basis to review for abuse of discretion").

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. If a master is to be used to assist in resolving the basic question whether an award should be made to certain moving parties, the appointment must be made under Rule 53. If the court needs assistance in compiling or analyzing detailed data to determine a reasonable award, this option is available. See Report of the Federal Courts Study Committee 104 (1990) (recommending consideration of using magistrate judges or special masters as taxing masters). In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process would entail.

VII-A

TAB VII
A
RULES ENABLING ACT QUESTIONS

MEMORANDUM

ENABLING ACT AUTHORITY FOR ADDRESSING OVERLAPPING CLASS ACTIONS

Introduction

Draft Civil Rules 23(c)(1)(C), 23(e)(5), and 23(g) address the problems that arise when management of a federal class action is affected by parallel actions growing out of the same basic dispute. The parallel actions may be individual actions by or against class members, class actions, or actions that aggregate multiple claims on some other basis. They may lie in state courts or other federal courts. Coordination of actions pending in federal courts has been substantially facilitated by pretrial consolidation under 28 U.S.C. § 1407. Coordination is more difficult when some of the related actions are pending in state courts.

The Ad Hoc Working Group on Mass Torts undertook a study of the problems that arise from overlapping actions concerning "mass torts." The Report provides an impressive picture of the situation in one area of practice, but recognized that practices may be different in litigation that grows out of different subject matters. Perhaps more importantly, it recognized that practice is continually evolving at a rapid pace. The exact state of present practice cannot be defined with precision. The lack of fully detailed information, however, does not defeat useful general description.

The simplest statement is that in some areas the effective management of federal class actions is seriously affected by overlapping, duplicating, and at times competing, litigation. If the underlying dispute generates claims that support meaningful individual litigation, individual actions can present a problem. Individual claims may be pursued individually or in aggregations based on basic party joinder rules. The form of individual litigation may mask the underlying reality that in some settings a single law firm may represent hundreds or even thousands of clients and pursue their claims in ways that amount to large-scale aggregation. Whether or not individual actions are feasible, competing class actions also are brought. Competing class actions may generate incredible inefficiencies in discovery, although the potential problems often are reduced by the informal cooperation of pragmatic judges who understand the need to ameliorate the formal rules of jurisdiction and procedure. A greater concern is that competing class actions may devolve into competitions for judgment, whether or not abetted by one or more courts. The most particular concern is that this competition will lead to settlement on terms that do not effectively protect class interests.

One response to these concerns is reflected in various bills framing federal legislation to deal with class actions in state courts. Legislative approaches to these problems are welcome. Great care will be required, however, to avoid the temptation to legislate in terms that sweep too much into federal courts without adequate opportunity for case-specific adjustment of the relationships between federal and state courts. Some problems will

be better addressed by state courts than by federal courts. Care also is required to remember that addressing state-court class actions is not alone sufficient. All forms of litigation, in both federal courts and state courts, must be considered.

Rule 23 Drafts

The Rule 23 drafts embody approaches that focus on the particular problems that parallel litigation poses for effective management of federal class actions. Rule 23(c)(1)(C), by attaching limited preclusive effect to a denial of class certification, reduces the dilution of control that results when another court is asked to certify the same class. Rule 23(e)(5) addresses the problem that arises when rejection of an inadequate settlement is "shopped" by asking another court to approve substantially the same settlement for substantially the same class. Rule 23(g) seeks to preserve the ability to proceed in an orderly way to determine whether to certify a class and, if a class is certified, the ability to manage the class to achieve the goals of uniformity, fairness, and efficiency that underlie class-action procedure. The method adopted by Rule 23(g) is to recognize the power of the federal class-action court to control the litigating conduct of class members in other tribunals. There is no automatic rule, nothing as severe as the "automatic bar" raised by initiation of bankruptcy proceedings. Instead, the court is to make case-specific determinations based on the actual needs and opportunities of a class action in relation to other proceedings. The outcome may be a stay of the federal action. And cooperation with the judges of other courts is directly encouraged.

The advantages of these draft rules are described in somewhat greater detail in the draft Committee Notes. This memorandum addresses the question whether the Rules Enabling Act, 28 U.S.C. § 2072, confers authority to adopt such rules. The question of authority reflects relationships between federal courts and state courts that must be considered with the utmost sensitivity even apart from issues of authority.

Enabling Act — General Supreme Court Interpretation

Section 2072(a) grants authority "to prescribe general rules of practice and procedure." Section 2072(b) limits this authority, requiring that "[s]uch rules shall not abridge, enlarge or modify any substantive right." There are additional limits. The power to make rules of practice and procedure is the power to make rules for the exercise of subject-matter jurisdiction established by statute, and "is not an authority to enlarge that jurisdiction * * *." *U.S. v. Sherwood*, 312 U.S. 584, 589-590 (1941). The statute, moreover, cannot delegate authority beyond the limits on Congress's authority to regulate federal procedure. Congressional regulation of federal judicial procedure originates in the Article III definition of judicial power and the Article I authority to establish federal courts, supplemented by the "necessary and proper" clause. See *Hanna v. Plumer*, 380 U.S. 460, 469-474 (1965). The implication of the *Hanna* opinion is that Congress meant to delegate all of its own power to the Supreme Court through the Enabling Act. This implication is confirmed in *Burlington No. R.R. v. Woods*, 480 U.S. 1, 5 (1987): A Federal Rule [Appellate Rule 38] that speaks to a question "must * * * be applied if it represents a valid exercise of Congress' rulemaking authority, which originates in the Constitution and has been bestowed on this Court by the Rules Enabling Act."

The Rule 23 drafts present several issues along these dimensions. The most pressing issues arise from the Rule 23(g) authority to control the litigating behavior of class members outside the federal class-action court. One simple illustration can be used to frame the questions. Rule 23(g) would authorize a federal court to restrain members of a proposed or certified class from pursuing litigation in another court on a claim involved in the class proceeding. It must be asked whether this authority is a rule of procedure; whether, although a rule of procedure, it abridges or modifies a

"substantive right"; and whether it effects an impermissible expansion of federal subject-matter jurisdiction.

The questions whether a rule is indeed a rule of procedure and whether it impermissibly affects a substantive right may well collapse into a single question. The leading case is *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13-14 (1941). It is not possible to provide a definitive restatement of an opinion so prominent and so evocative. The setting is remembered by all lawyers. Sibbach, injured in an accident in Indiana, brought suit in a federal court in Illinois. The court ordered a physical examination under Civil Rule 35, and [mistakenly] imposed a contempt sanction under Civil Rule 37 for refusing to comply with the order. It was assumed that if the judicial act of ordering physical examination of a party is a matter of substantive law, the order would be authorized by the law of Indiana where the accident occurred. Sibbach thus conceded that Rule 35 is a rule of procedure, and argued only that Rule 35 nonetheless abridged or modified the right not to be subjected to a court-ordered examination. The Court — noting that Sibbach "admits, and, we think, correctly that Rules 35 and 37 are rules of procedure" — rhetorically translated this argument into an argument that the claimed right, although not "substantive," must be protected because "important" or "substantial." The Court rejected this test as one that would "invite endless litigation and confusion worse confounded. The test must be whether the rule really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted." The Court went on to reject the argument that Rule 35 effected "a major change of policy." The Enabling Act itself established a "new policy" — "that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth."

Academics are given to making light of the seemingly tautological statement that "the test must be whether the rule really regulates procedure." The Court indeed barely purported to apply that test, pointing out only that Sibbach had conceded, "we think[] correctly," that Rule 35 is procedural. But the full context of the opinion does more. It seems to say that § 2072 authorizes rules that affect substantial and important "rights" so long as the purpose is to serve the "speedy, fair and exact determination of the truth." This purpose may also be expressed in the terms of the Court's own Civil Rule 1, looking for "the just, speedy, and inexpensive determination of every action."

The most important elaboration of the *Sibbach* test was provided in *Hanna v. Plumer*, 380 U.S. at 472-474. The Court there stated:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carried with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

The Court concluded in terms that seem to say that Congress used § 2072 to delegate all of its power to the Court:

> To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the

Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.

(Recall the more explicit statement quoted above from the *Burlington Northern* opinion: "Congress' rulemaking authority * * * has been bestowed on this Court by the Rules Enabling Act.")

Three more recent Supreme Court opinions address the reach of the Enabling Act in the context of Civil Rule 11 disputes. In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990), the Court referred to "the Rules Enabling Act's grant of authority [to] streamline the administration and procedure of the federal courts." In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 551-554 (1991), the Court rejected dissenting arguments that a Rule 11 attorney-fee sanction violated the Enabling Act as a new rule on liability for attorney fees and as a federal law of malicious prosecution. Rule 11 is designed to deter baseless filings and curb abuses. The Enabling Act is not violated by the incidental effect on substantive rights. *Willy v. Coastal Corp.*, 503 U.S. 131, 136-139 (1992), upheld imposition of Rule 11 sanctions for filings made in a case that eventually was held to fall outside federal subject-matter jurisdiction. The Constitution authorizes Congress to enact laws regulating the conduct of federal courts. The concern to maintain orderly procedure justifies the requirement that those who practice in federal court "conduct themselves in compliance with the applicable procedural rules" until there is a final determination whether there is subject-matter jurisdiction.

Semtak Internat. Inc. v. Lockheed Martin Corp., 2001 WL 182650 (Feb. 27), the Supreme Court's most recent opinion, provides little additional guidance, either in what it says or in the nature of the Enabling Act question it avoids. A federal diversity court in California invoked the California statute of limitations to dismiss an action "on the merits and with prejudice." The plaintiff then brought an action on the same claim in a Maryland state court, seeking the shelter of the longer Maryland limitations period. The state court concluded that the federal judgment precluded the action, applying federal law. The Supreme Court held that California claim-preclusion rules govern the effect of the federal judgment. In reaching that conclusion, it interpreted the Civil Rule 41(b) provision that a dismissal "operates as an adjudication upon the merits." Rule 41(b) is "ensconced in rules governing the internal procedures of the rendering court itself." "[I]t would be peculiar to find" that it governs the preclusion effect that other courts must give a federal judgment. At this point, the Court added the observation that Enabling Act questions would arise from an interpretation of Rule 41(b) that establishes an independent rule of claim preclusion. If a California court would allow an action in another state following dismissal under the California statute of limitations, reading Rule 41(b) to preclude an action in a different state "would seem to violate" the direction that a Civil Rule may not abridge, enlarge, or modify a substantive right. This observation addresses a distinctive question. Federal diversity courts are bound to apply state limitations law to state-created claims, and to choose the law of the state that would be chosen by the forum state. If California courts would apply California limitations law only for the purpose of barring a remedy in a California state court, a federal court applies it only for the same purpose. An attempt to magnify the effect of the California statute through Rule 41(b), to serve no apparent federal procedural purpose or need, would indeed seem to violate § 2072(b). There is no useful analogy to proposed Rule 23(g). [The Court addressed a second Enabling Act question in a footnote. As interpreted, a Rule 41(b) dismissal with prejudice bars filing the same action in the same federal

court. But an Enabling question would arise even then if a state court would dismiss only without prejudice to refiling the same action. The Court chose not to address this question either. The question is not likely to arise with a limitations dismissal. It could easily arise in other circumstances — one obvious illustration would be failure to satisfy a precondition to suit. In that setting dismissal should bar relitigation of the question whether the precondition must be satisfied, but should not bar relitigation after the precondition is satisfied. Again, the possible questions are far removed from proposed Rule 23(g).]

Enabling Act — Rule 23

There is little specific guidance to help interpret the scope of the Enabling Act in relation to Rule 23. It seems to be accepted that Rule 23 itself is generally within Enabling Act authority. Accepting that assumption carries a long way in examining provisions that help to make class actions more effective, fair, and efficient. A few scattered reflections are noted here, leaving the more detailed questions for the final section.

The Enabling Act was noted in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 629 (1997), to support the proposition that Rule 23 must be construed to honor the Enabling Act limit that a Civil Rule must not abridge substantive rights. It also is noted that since 1966, "class-action practice has become ever more 'adventuresome' as a means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one. * * * 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." 521 U.S. at 617-618. This recognition of the purposes of class actions may provide some support for amendments designed to support better fulfillment of those purposes.

Ortiz v. Fibreboard Corp., 119 S.Ct. 2295 (1999), provides similar references to the Enabling Act. The limit that bars abridgment of substantive rights by Rule was said to "underscore[] the need for caution" in interpreting Rule 23. The Court noted the argument that the settlement, by compromising full individual recoveries, abrogated state law rights. The argument was seen to present "difficult choice-of-law and substantive state-law questions" that need not be resolved, apart from noting the tension between the settlement "and the rights of individual tort victims at law." This observation was followed immediately by suggesting that it is best to keep "limited fund practice under Rule 23(b)(1)(B) close to the practice preceding its adoption, "[e]ven if we assume that some such tension is acceptable under the Rules Enabling Act." 119 S.Ct. at 2314. The Court went on to notice further implications for the Seventh Amendment right to jury trial and the due process right of each individual to have his own day in court. 119 S.Ct. 2314-2315. The jury trial concern focused on the nature of a mandatory settlement class, which by avoiding any trial necessarily avoids jury trial. The day-in-court concern, if pushed very far, would undermine any mandatory class, a result the Court clearly did not intend. These concerns nonetheless stand as a warning that enthusiasm for the advantages of class litigation must be tempered by recognition of the sacrifices it may entail. Finally, toward the close of the opinion the Court relied on the Enabling Act in a manner similar to the Amchem opinion — courts are bound to honor Rule 23 as adopted, and should seek to change it through the orderly processes of the Enabling Act rather than through de facto amendment by interpretation. 119 S.Ct. at 2322.

Two other Supreme Court cases may provide some tangential perspective. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116-125 (1968), rejected the view that decisions before adoption of amended Civil Rule 19 in 1966 had established a federal "substantive law" of party joinder that could not be affected by Rule. Rule 19 takes account of substantive rights in the process of determining mandatory party joinder questions. So it may be understood that Rule 23 takes account of substantive rights — as indeed it must — in determining whether to certify a class. So too, the effects on substantive rights must be calculated in determining how to respond to the threats that other litigation may pose to realization of the purposes of class-action litigation. The 1966 Rule 19 amendments, indeed, were deliberately coordinated with the 1966 Rule 23 amendments — Rule 23(b)(1) in many ways reflects the same concerns as Rule 19(a), written for situations better approached wholesale than retail.

The decision in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) dealt with the effects of a state class-action judgment, and had no occasion to deal with the Enabling Act. But the effect recognized for class-action procedure is so momentous as to deserve comment. The class representatives settled not only state-law claims but also federal securities law claims that fell into exclusive federal subject-matter jurisdiction. The Court ruled that the full faith and credit statute, 28 U.S.C. § 1738, compels a federal court to honor the preclusion effects of the settlement judgment as measured by state law. The class representatives had no real-world relationship whatever with most class members, and without certification of a class action could not have done anything to affect class members' rights. Recognition of their status as class representatives by a court that lacked any authority to adjudicate the federal claims, however, conferred on them authority to dispose of class members' rights by a private agreement later confirmed by the state court. This conclusion at least allows state courts to place a very — on some views an astonishingly — high value on the efficiencies of class-based adjudication.

Finally, an Enabling Act challenge to the very institution of class-action settlement has been summarily rejected in recent federal litigation. *In re: The Prudential Ins. Co. of America Sales Practices Litigation*, 962 F.Supp. 450, 561-562 (D.N.J.1997), affirmed 148 F.3d 283, 324 (3d Cir.1998). The argument that the settlement necessarily abridged or modified state-law rights was transformed by the district court into the response that Rule 23(e) approval of a settlement "merely recognizes the parties' voluntary compromise of their rights." The court of appeals affirmed "for the reasons outlined by the district court."

Application to Draft Rules

The proposition that these authorities support Enabling Act authority to adopt the proposed Rule 23 amendments is easily stated, but difficult to evaluate with assurance. The testing example put at the outset remains sufficient: Can Rule 23 be framed, as proposed subdivision (g) would do, to authorize a federal court to support a proposed or certified class by directing class members to stay proceedings on individual claims or in a competing class action?

The starting point is simple. Rule 23 is a rule of procedure, validly adopted under § 2072. The purpose of draft Rule 23(g) is to support the procedural goals of Rule 23. A federal court, if it certifies a class, is acting within the framework of a general procedural rule to create a legal construct — the class — that can fulfill the reasons for its creation only if protected against the intrusion of

other litigation. The reason for creating the class is to achieve, with as much efficiency as possible, a fair and uniform disposition with respect to all class members. Competing litigation may make this task more difficult, and in some circumstances may thwart it completely. Fulfillment of the procedure, and effective implementation of the jurisdictional authority that supports resort to federal procedure, require that the class be protected in much the same way that a court is authorized to protect the res that supports in rem jurisdiction. (The analogy to in rem litigation is particularly persuasive with respect to a (b)(1)(B) class created to ensure equitable division of a limited fund.) When the effect of an order directed to a class member is to enjoin state-court proceedings, the order is necessary in aid of the federal court's jurisdiction within the meaning of the anti-injunction act, 28 U.S.C. § 2283.

The procedural character and purpose of the draft rule bring it within the *Sibbach v. Wilson* test. The rule "really regulates procedure," and such effect as it has on substantive rights is legitimated by that character. It readily meets the elaboration of this test provided in the *Burlington Northern* opinion, where the Court repeated the *Hanna v. Plumer* understanding that a rule that falls in the uncertain area between substance and procedure is valid if it is arguably capable of classification as procedural. The Court went on to recognize that the purpose of developing "a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision [barring abridgement of a substantive right] if reasonably necessary to maintain the integrity of that system of rules." 480 U.S. at 5-6. Proposed Rule 23(g) is necessary to maintain the integrity of federal class-action procedure.

Similar considerations support the other Rule 23 proposals. If another court can certify a class that has been denied certification by a federal court, the authority to make a wise certification decision is undermined. The prospect that another court may certify the class may impel a federal court to grant a certification that otherwise would be withheld, believing that it is better to maintain control of a dubious class than to stand by helpless while another court pursues the same class to judgment. Even more obviously, the federal court's effective power to reject a proposed class-action settlement as inadequate or unfair is held hostage to the prospect that the parties can simply shop the country for a court willing to bless the same settlement.

These arguments seem compelling so far as they address relationships among different federal courts. They have great force even as to relationships between federal courts and state courts. But the wisdom of adopting a rule that touches highly sensitive relationships between federal and state courts is not resolved by the conclusion — if it is accepted — that the rule is authorized by the Enabling Act. Decision must depend on the severity and persistence of the threats competing litigation poses to fulfillment of Rule 23's purposes. In judging these threats, it also is appropriate to take account of the proposed remedy. None of the draft rules would impose a rigid limit on state-court action, nor even a detailed and nuanced but prescribed regulation. Instead, federal-court discretion is recognized. A federal court acting under draft Rule 23(g) can allow state court proceedings to continue, can stay its own proceedings, and may confer with state judges to achieve the best practicable accommodation. Draft Rule 23(c)(1)(C) allows the court to leave the way open for another court to certify the class it has rejected. Even the refusal to approve a proposed class

settlement can be followed under draft Rule 23(e)(5) by another court's approval if warranted by changed circumstances.

VII-B

TAB VII
B
SECTION 2283 QUESTIONS

Effective pursuit of a class action may require that the class-action court be able to stay proceedings in competing actions. As among federal courts, this need can be served by adding provisions to Civil Rule 23. As between a federal court and state courts, on the other hand, restrictions arise both from general concepts of comity and from the specific strictures of 28 U.S.C. § 2283. These Notes seek to frame the question, not to provide an exhaustively researched answer.

I. The Statutes

The general authority to issue an injunction is confirmed by 28 U.S.C. § 1651(a), the All Writs Act: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This general authority is limited by § 2283 with respect to injunctions directed at proceedings in a state court: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

It is common to say that the exceptions in § 2283 are read narrowly. That statement should not be taken at full face value. The possible bearing of the exceptions for injunctions authorized by Act of Congress or necessary in aid of a federal court's jurisdiction — and a more general limit on § 2283 — are explored below after a brief look at the general view of Rule 23 injunctions. There is no apparent reason to consider further the exception that allows an injunction to protect or effectuate a judgment. Res judicata injunctions are authorized after final judgment without any need to rely on special characteristics of class actions. The special needs of a class judgment may affect the exercise of injunction discretion, but do not seem necessary to support injunction authority.

II Rule 23 Injunctions in General

The works that review use of injunctions to protect orderly disposition of a federal class action against encroachment by state litigation generally take a restrictive view of the effects of § 2283. A detailed statement of the proposition that an injunction is most likely to be available to protect an imminent opportunity to achieve settlement of the class action is provided in Marcus & Sherman, Complex Litigation 368-372 (3d ed. 1998). A markedly pessimistic view is taken in Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 1798.1, p. 435: "[T]o date all the courts of appeals that have ruled on the applicability of the statute in the class action context have refused to authorize injunctions of coordinate state actions in order to protect the federal class action before them." A more optimistic view is

taken, more as a matter of principle than as a matter of authority, in 17 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction 2d, § 4425, pp. 531-533 & n. 11: "A good argument can be made that * * * it should be permissible for a federal court to enjoin state proceedings that would interfere with efficient disposition of a federal class action." And a decidedly encouraging view is urged in Weinstein, Note, Avoiding the Race to Res Judicata: Federal Antisuit Injunctions of Competing State Class Actions, 2000, 75 N.Y.U.L.Rev. 1085.

These views rest on the present form of Rule 23. They do not address the question whether Rule 23 can be cast in a form that provides greater support for invoking both the general § 1651 authority to issue injunctions necessary or appropriate in aid of the jurisdiction that supports a class action and also the specific § 2283 exception that permits an injunction necessary in aid of the federal court's jurisdiction.

III In Aid of a Revised Rule 23 Jurisdiction

Civil Rule 23 can be framed to authorize injunctions that support orderly, efficient, and fair development of a class action. Draft Rule 23(g) does that. The question is whether express authority provided by a court rule can affect application of § 2283.

The § 2283 question is interdependent with the question of Enabling Act authority. If there is Enabling Act authority to add an antisuit injunction provision to Rule 23, it is because the provision is part of the very construct of a class action. The new rule provision helps to define what it is that a federal court is doing when it contemplates certification of a class and then when it certifies a class. If it is decided that the Enabling Act authorizes the provision, the first step has been taken toward integrating the provision with § 2283.

One of the next steps is easy. Section 2283 does not apply to an injunction against proceedings that have not yet been filed. E.g., *Dombrowski v. Pfister*, 380 U.S. 479, 484 n. 2 (1965). A Rule 23 antisuit injunction provision can authorize restraints that bar filing future actions, even if it can do nothing more. That authority may be useful in itself.

The remaining steps explore two exceptions: whether clarification of the class-action concept can support an antisuit injunction as necessary in aid of the underlying jurisdiction, and whether a Civil Rule 23 injunction counts as one expressly authorized by Act of Congress.

The in-aid-of-jurisdiction argument is straight-forward. In rather open-ended dictum, the Supreme Court has stated that this exception — along with the exception for protecting a federal judgment — allows federal relief where "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line R.Co. v. Brotherhood of Locomotive Engineers*, 298 U.S. 281, 295 (1970). Those words do not mean all that they might; in the ordinary setting of two parallel in personam actions, a federal court cannot simply say that a state proceeding is impairing its flexibility to decide the case and enjoin the state proceeding. Not even the prospect that victory by the state court in the race to judgment will preclude further federal proceedings will support an injunction. But these words suggest that there is room to build on the equally well-settled rule that a federal court that has in rem jurisdiction of property can enjoin a state proceeding that threatens to interfere with control of the property.

The in-rem analogy is most persuasive if a federal class is viewed as something akin to a thing in the jurisdiction of the federal court. This "entity" view of a federal class is developed in the memorandum on Enabling Act authority. To the extent that Rule 23 revisions clarify the practical concept of a class that has evolved with the startling transformation of class-action practice since 1966, the very act of making rules amendments provides added support for the in-rem analogy.

Very slight added support may be found in *Battle v. Liberty National Life Ins. Co.*, 11th Cir.1989, 877 F.2d 877, 882. The circumstances do not permit much reliance on the court's use of in-rem concepts. The district court entered a class-action judgment in 1978, involving a class of about 1,000,000 burial insurance policyholders, and retained jurisdiction to implement the decree. In 1985 it enjoined state-court class actions that sought to win added relief on the theory that the federal judgment was not valid to bind class members. Affirming the injunction, the court of appeals

relied in part on the rule that state proceedings may be enjoined to protect or effectuate a federal judgment. But it also relied on the rule that an injunction may be issued when necessary in aid of federal jurisdiction. Distinguishing the rule that parallel in personam proceedings are not to be enjoined, it said that "it makes sense to consider this case, involving years of litigation and mountains of paperwork, as similar to a res to be administered." This statement was immediately followed by quoting the district court's observations about the need to protect the federal settlement and judgment, but it does offer a sound description of the in-rem analogy. (In *Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir.1993) the Eleventh Circuit repeated the Battle opinion's view "that a lengthy and complicated class action suit is the virtual equivalent of a res to be administered." The court affirmed an injunction that barred a state court class action seeking to adopt a congressional redistricting plan different from the plan enforced by the final judgment and injunction earlier entered by the federal court. The in rem analogy is interesting, but does not play any significant role in the court's decision.)

Similar use of the in-rem analogy can be found in other cases. *In re Baldwin-United Corp.*, 2d Cir.1985, 770 F.2d 328, 337, upheld an injunction against state proceedings. The injunction issued after the court had tentatively approved settlements in 18 of 26 class actions pending before it, and while settlement negotiations were continuing in the other 8. "The existence of multiple and harassing actions by the states could only serve to frustrate the district court's efforts to craft a settlement in the multidistrict litigation before it." "[T]he need to enjoin conflicting state proceedings arises because the jurisdiction of a multidistrict court is 'analogous to that of a court in an in rem action or in a school desegregation case, where it is intolerable to have conflicting orders from different courts.'" The class action proceeding was "so far advanced that it was the virtual equivalent of a res over which the district court required full control."

Rather greater support can be found in a case that moves beyond the in-rem analogy to announce a general principle that a federal court can enjoin state proceedings that threaten the federal court's control of its own orderly procedure. Many of the things said in *Winkler v. Eli Lilly & Co.*, 7th Cir.1996, 101 F.3d 1196, 1201-1203, are clear and helpful. The district court had managed consolidated pretrial proceedings involving claims arising from the use of Prozac. The lead counsel appointed in the consolidated proceedings settled a Kentucky state-court action where he also was lead counsel. The settlement was reached shortly before submission to the jury, and the parties initially denied having reached any settlement. The state judge became suspicious and launched an inquiry that was barred by prohibition from the intermediate court of appeals. Meanwhile lead counsel withdrew from the federal proceedings. After most of the consolidated actions were remanded, plaintiffs who had been involved in the federal consolidation sought discovery in various state courts of the settlement arrangements in the Kentucky action. The federal court enjoined the discovery. In the end the injunction was reversed because the federal court had not inquired into the nature of the settlement agreement — without learning at least in camera about the nature of the settlement, there was no basis for the injunction. But the court said in clear terms — characterized as a holding — that § 2283 did not prohibit the injunction. "[T]he question is whether a federal court has the authority to issue an injunction to protect the integrity of a discovery order." In rem jurisdiction is not necessary to support an injunction as one necessary in aid of federal jurisdiction. The in-aid-of-jurisdiction principle has been "extended * * * to consolidated multidistrict litigation,

where a parallel state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation." More generally, the court approved a suggestion by Professor Redish that a federal court should have power to enjoin a concurrent state proceeding that might render nugatory the exercise of federal jurisdiction. Indeed, the policies of federalism and comity embodied in § 2283 "include a strong and long-established policy against forum-shopping." Section 1407, by authorizing pretrial consolidation, creates a policy of control that is intended to prevent predatory discovery and "to conserve judicial resources by avoiding duplicative rulings." There is more in this vein; the summary statement is this:

> [W]e hold that the Anti-Injunction Act does not bar courts with jurisdiction over complex multidistrict litigation from issuing injunctions to protect the integrity of their rulings, including pre-trial rulings like discovery orders, as long as the injunctions are narrowly crafted to prevent specific abuses which threaten the court's ability to manage the litigation effectively and responsibly.

This principle can be transferred readily to the class-action setting. If anything, the purpose of class-action procedure provides greater support because it is broader than the limited purposes of § 1407 consolidation which gathers in only cases from federal courts.

One potential limit of the in-aid-of-jurisdiction theory deserves note. *Amalgamated Clothing Workers v. Richman Brothers*, 1955, 348 U.S. 511, ruled that this exception does not authorize a federal court to enjoin state-court proceedings that arguably are preempted by exclusive NLRB authority. Even if the state-court injunction against labor activities was preempted by federal protection of those activities, a federal court does not have "jurisdiction to enforce rights and duties which call for recognition by the Board. Such non-existent jurisdiction therefore cannot be aided." 348 U.S. at 519. This ruling has been extended by most lower federal courts to mean that a federal court cannot enjoin a state-court proceeding simply because the dispute lies in exclusive federal judicial jurisdiction. 17 Federal Practice & Procedure, Jurisdiction 2d § 4425, pp. 538-539. It might be urged that denial of authority to protect exclusive federal subject-matter jurisdiction entails denial of the less necessary authority to protect effective federal procedure in cases of concurrent jurisdiction. Protection of effective federal procedure, however, is not a matter of less necessity. To the contrary, protection of exclusive jurisdiction is little different from protection of concurrent jurisdiction. Parallel in personam actions among private parties can proceed; if necessary, exclusive federal authority might be protected by denying preclusive effect to a state judgment, although that conclusion may well be denied. State proceedings that interfere with the federal court's ability to manage its own proceedings, on the other hand, can be enjoined. The cases described above — and here, most particularly, the several cases recognizing antisuit injunction authority to protect imminent settlement of a concurrent-jurisdiction federal class action — show as much.

In combination, then, the in-aid-of-jurisdiction injunction power recognized by § 1651 and the parallel exception in § 2283 provides some support for the Rule 23(g) proposal that would expressly authorize litigation-controlling orders directed at members of a prospective or certified federal class.

IV Expressly Authorized by Act of Congress

The § 2283 exception that permits an injunction "expressly authorized by Act of Congress" is not quite as precise as it may seem. The leading illustration may be *Mitchum v. Foster*, 1972, 407 U.S. 225, 237-238. The Court ruled that 42 U.S.C. § 1983 is an Act of Congress that expressly authorizes injunctions against state proceedings. Section 1983 does this by providing "an action at law, suit in equity, or other proper proceeding for redress." That language does not match any obvious standard of express authorization. But the Court announced that "[t]he test * * * is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." Section 1983 embodies the policy that federal courts should protect federal rights against intrusion by any branch of state government, including state courts.

Proposed Rule 23(g) surely meets the "expressly authorized" part of the § 2283 exception. The question remains whether it qualifies as authorized by an "Act of Congress."

Some slight guidance might be found in the opinion in *Piambino v. Bailey*, 5th Cir.1980, 610 F.2d 1306, 1331. Reversing an injunction against distributing funds from an escrow fund established by a California judgment, the court said that the general provisions of Rule 23(d) do not establish the exception. The test of the Mitchum decision is not met: "Rule 23(d) is a rule of procedure and it creates neither a right nor a remedy enforceable in a federal court of equity." It would indeed be surprising to find express authorization in the general terms of Rule 23(d).

The more difficult question addressed by this brief statement is whether a Civil Rule can ever qualify as expressly authorized by Act of Congress. This is the point at which the question of Enabling Act authority returns. In some ways the question may seem almost circular. The Enabling Act is an Act of Congress. It provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." A Civil Rule provision that legitimately implements Enabling Act authority may seem to fit. It is the Enabling Act that expressly authorizes the rule that expressly authorizes stays and like orders addressed to members of a federal class. The supersession provision simply underscores the status of Enabling Act rules as the equivalent of Acts of Congress. In some sense, a rule becomes as if part of the Enabling Act itself.

Of course the reliance on the Enabling Act simply returns the question to Enabling Act authority. There is no logical way out of the circle. If the Enabling Act authorizes Civil Rule provisions that authorize antisuit "injunctions," then the § 2283 exception should be read to apply. But the broader anti-injunction policy of § 2283, drawn from deeply rooted concepts of comity and federalism, must be considered in determining whether proposed Rule 23(g) really is a rule of practice and procedure, and really does not impermissibly abridge, enlarge or modify any substantive right.

V Supersession

Rather than the terms of § 2283, reliance may be placed on the Enabling Act's supersession provision: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." This approach again depends on the initial conclusion that proposed Rule 23(g) regulates procedure and does not abridge, enlarge, or modify any substantive right. It also depends on the conclusion that the rule does not impermissibly enlarge federal-court jurisdiction.

The tie between Enabling Act validity and supersession is apparent. An invalid rule does not supersede a valid statute. Little elaboration is required. Some help may be found, however, in *Henderson v. U.S.*, 1996, 517 U.S. 654. The Suits in Admiralty Act, enacted in 1920, waives sovereign immunity and requires that the plaintiff "forthwith" serve process on the United States Attorney. At the time of the Henderson litigation, Civil Rule 4(j), enacted by Congress in terms different from those recommended by the Supreme Court, allowed 120 days for service and further provided for additional time by court order. With authority from a court order, Henderson made service 148 days after filing. The Court concluded readily that "forthwith" embraces a period "far shorter than 120 days," much less 148 days. Rule 4(j), however, was held to supersede the statute. Initially, the Court ruled that the time for service was not so much a condition of the immunity waiver as to limit subject-matter jurisdiction, or as to be "substantive." Then it asked whether the "forthwith" requirement "is * * * a rule of procedure superseded by Rule 4." The Court observed that it was among other provisions that "have a distinctly facilitative, 'procedural' cast. They deal with case processing, not substantive rights or consent to suit." Rule 4 likewise is "a nonjurisdictional rule governing 'practice and procedure' in federal cases * * *." The conflict between a statutory rule of procedure and a Civil Rule was then readily resolved — Rule 4 supersedes the earlier and inconsistent statute. (There is a modest ambiguity in the opinion. The Court addressed as a "preliminary issue" the question whether supersession is affected by the fact that Rule 4(j) "was enacted into law by Congress as part of the Federal Rules of Civil Procedure Amendments Act of 1982." This issue was resolved by accepting the acknowledgment of the United States that "a Rule made law by Congress supersedes conflicting laws no less than a Rule this Court prescribes." The Court then quoted the United States brief statement that § 2072 provides the best evidence of congressional intent regarding the interaction of Rule 4(j) with other laws. 517 U.S. at 668-669. Later, however, the Court referred to § 2072(b) as the source of supersession. 517 U.S. at 670. It is proper to read the opinion to invoke § 2072(b), not the more general rule that a later statute supersedes an earlier statute.)

The "jurisdiction" question in some ways seems easy. There is substantial authority that § 2283 does not limit subject-matter jurisdiction, but operates only to limit the injunction remedy. See 17 Federal Practice & Procedure 2d, § 4422, p. 514. To that extent, a rule that qualifies a remedial limit does not expand jurisdiction. And there is little force to the possible argument that federal jurisdiction is enlarged by an injunction that, by ousting state-court jurisdiction, effectively transforms a statutory grant of concurrent federal jurisdiction into an unauthorized assertion of exclusive federal jurisdiction. The injunction is simply an exercise of established jurisdiction, such as occurs in any other situation where an antisuit injunction is proper because a § 2283 exception applies or because § 2283 itself does not apply.

The supersession approach may not be as simple as these arguments make it seem. The federalism policies that have become embodied in the lore and practice of § 2283 are important, whether or not they are in some meaningful sense "jurisdictional." Even accepting the important procedural goals that are advanced by authorizing a federal court to establish control of a class action by controlling state-court litigation by class members, a clash of values remains. The anti-injunction policies must be weighed in measuring the validity of proposed Rule 23(g) as a rule of practice and procedure, in the same way that jurisdictional concerns are weighed despite the failure of § 2072(b)

to say anything about abridging, enlarging, or modifying federal jurisdiction. The arguments that Rule 23(g) is valid are powerful and should prevail. But use of the Enabling Act to supersede § 2283 may seem over-reaching to some. For that reason, it is wise to rely as well on the exceptions stated in § 2283. The in-aid-of-jurisdiction exception is clearly independent of supersession concerns. Reliance on the "Act-of-Congress" exception, on the other hand, is interdependent with the supersession approach. If a valid injunction rule is expressly authorized by Act of Congress, it prevails both because of the § 2283 exception and because of supersession.

DATE: April 4, 2001

FROM: Shira A. Scheindlin,
Chair, Special Masters Subcommittee

TO: Civil Rules Committee

SUBJECT: Proposed Changes for Rule 53

The attached draft of revised Rule 53 represents the Subcommittee's proposed rule change. This draft is substantially different from the draft the full Committee reviewed at its October meeting. This version takes into account the very helpful comments made by the Committee at that meeting. The revised Rule is unanimously recommended - - with one qualification. At least one Subcommittee member is not enthusiastic about the revised Rule, but supports it as far preferable to the current Rule 53, unless we are prepared to abolish special master practice entirely. Overall, this draft is endorsed by the Subcommittee, and is submitted now for your final action.

I. BACKGROUND

The current version of Rule 53 is out of date. Practice has overtaken the Rule. Masters are rarely appointed to undertake trial functions, which is the focus of the current Rule. Rather, masters are now appointed to perform a wide variety of pretrial and post-trial functions, including settlement, and to assist in formulating and enforcing complex decrees. Rule 53 does not reflect these realities, and does not provide any guidance or establish any control. In support of the Subcommittee drafting efforts the Federal Judicial Center recently completed a study of the use of special masters. *See Willging, Hooper, Leary, Miletich, Reagan, & Shepard, Special Masters' Incidence and Activity,* FJC 2000. The Report found that masters are frequently appointed for pretrial or postjudgment purposes; that the reach of Rule 53 to cover these areas is uncertain; and that most judges do not cite any authority when appointing a special master. The two areas that generated the most concern were (1) the selection process; and (2) ex parte communications by the master.

As noted, the current Rule focuses almost exclusively on the appointment of trial masters. In jury actions, a reference is warranted when the action is "complicated". In non-jury actions, a reference is warranted upon the showing of an "exceptional condition". The October Subcommittee proposal maintained this dichotomy. Based on the Committee's response, use of a master in a jury case has now been eliminated.

The proposed Rule has also been simplified and shortened. The current draft, as opposed to the October version, eliminates much of the detailed requirements for selection, orders of

appointment, delineation of powers, and review of orders. This draft is far more general in tone, providing a framework for the use of masters in civil litigation, rather than micro-managing the ability of courts to make such appointments. Broad guidance and flexibility are the twin goals. The bulk of the proposed rule changes address the elimination of masters in jury trials, the requirement that masters who hold trial proceedings be required to report their findings, the explicit recognition of the propriety of appointing masters to conduct pretrial functions, guidance on the selection and appointment of a master, standards for review of a master's orders or recommendation, and fixing and allocating a master's compensation.

II. ANALYSIS

The proposed rule is divided into nine sections. I will describe each briefly, flagging areas that may warrant further debate.

Appointment 53(a):

When should an appointment be made? When consented to by the parties; to conduct proceedings in non jury trials if warranted by exceptional conditions or the need to perform an accounting or resolve difficult damage computations; and to perform duties that [clearly?] cannot be performed by a judicial officer of the district. QUESTIONS: (1) Can the parties consent to the use of a trial master in a jury case? (2) Must the Court appoint a master because the parties consent? (3) Do we need the word "clearly" before "cannot be performed by a judicial officer in 53(a)(1)(C)?

What, if any, are the limitations on appointments? A master must not have a relationship to the parties, counsel, action or court that would require disqualification under 28 U.S.C. § 455, unless the parties consent. QUESTION: Should the parties be permitted to consent to waive the statutory disqualification applicable to judicial officers?

What should be the master's relationship to the appointing court? A master cannot appear before the appointing judge during the course of the appointment. QUESTION: Should the master's firm be similarly restricted?

What should the court consider before appointing a master? Cost to the parties, and possible delay. NOTE: The Subcommittee has eliminated a section that required the master to be qualified by virtue of "training, experience and temperament".

Order Appointing Master 53(b):

Do the parties have a right to notice and an opportunity to be heard prior to any appointment? Yes, the proposed rule requires both and invites the parties to suggest candidates

for appointment.

What should the order appointing a master include? It must direct the master to proceed with "all reasonable diligence" and include identifying information (name, address and telephone number); the master's duties; when the master can communicate ex parte with the court or the parties; the procedures for reviewing a master's orders; the procedures for the master's compensation. The rule notes that the order may be amended at any time upon notice to the parties. NOTE: The Subcommittee has eliminated a subsection requiring that the order specify the date of the first meeting, the dates of required reports and the date by which the assignment should be completed. QUESTION: The Subcommittee has eliminated the requirement that the master post a bond. Do you agree?

When is the order effective? After the order is issued and the master has filed an affidavit stating that there are no conflicts of interest.

Master's Authority 53(c):

What authority does the master have? To "regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties" including: set and give notice of meetings and hearings; proceed in the absence of any party who fails to appear; and hold hearings. NOTE: This is a substantial simplification of the current Rule.

Hearings 53(d):

What may a master do, or not do, at a hearing? If a master is authorized by the appointing order to hold a hearing, the master may compel, take and record evidence. The master may enforce any noncontempt sanction against a party provided by Rules 37 and 45, but may only recommend a contempt sanction against a party and sanctions against a nonparty. NOTES: (1) This is a substantial simplification of the current Rule; (2) The October version specified additional functions including: placing witness under oath, examining witnesses, ruling on admissibility, and making a record of evidence admitted or excluded. All of these are included in the broad language of 53(d). QUESTION: Should any of these be included in this version?

Master's Orders 53(e):

A master must file his or her order and promptly serve a copy on each party. The clerk must enter such orders on the docket.

Master's Reports 53(f):

If the appointing order requires a report, a draft of such report *may be* circulated to counsel for their comments. Reports must be filed, together with any exhibits and transcripts of proceedings, and served on all parties (unless directed otherwise by the court). QUESTIONS: (1) Should *may be* be *must be?* (2) Should the court be permitted to direct that the report *not* be served? (3) Do we still need the shaded material at the end of the Advisory Committee Note ("ACN") referring to matters learned outside the scope of the reference? NOTE: The October draft did not permit the court to direct that the Report not be served.

Action on Master's Order, Report or Recommendations 53(g):

What action must the court take with respect to reviewing a master's work? It must afford the parties an opportunity to be heard and *may* receive evidence in hearing an objection or otherwise reviewing the order. In the absence of an objection (which must be made no later than 20 days after service) or sua sponte review (notice of which must be given no later than 20 days after service) the master's order, report or recommendation becomes the court's action. The 20 day limit may be shortened or lengthened by the court.

How may the court act on the master's work? It may adopt or affirm it, modify it, wholly or partly reject or reverse it; or resubmit it to the master with instructions.

What is the reviewing standard for findings of fact or recommendations? Clearly erroneous, unless the appointing order calls for de novo review OR the parties stipulate that the master's findings will be final. QUESTION: Should the parties be permitted to so stipulate?

What is the reviewing standard for questions of law? De novo, unless the parties stipulate that the master's decision will be final. QUESTION: Should the parties be permitted to so stipulate?

What should be the reviewing standard for reviewing other acts, such as those involving procedural discretion? NOTES: The current draft poses a choice: (1) court must decide this question in its appointing order; OR (2) abuse of discretion. The ACN discusses three alternatives -- the third being not to address this issue at all. QUESTION: Which do you prefer?

Compensation 53(h):

How should the master's compensation be fixed? By the court before or after judgment based on terms set in the appointing order, but the court may amend this after notice and an opportunity to be heard. How should the funds be paid? By a party or parties or from a fund or subject matter within the court's control. How should the court allocate compensation? After considering the nature and amount of the controversy, the means of the parties, the extent to

which any party is more responsible than other parties for the reference. QUESTION: Is the means of a party a proper consideration?

Application to Magistrate Judge 53(i):

When should a Magistrate Judge be appointed as a master? When the order appointing a Magistrate Judge refers to this rule and only for duties that cannot be performed in the capacity of magistrate judge and only in exceptional circumstances. QUESTION: Is the last clause necessary?

Master's Duties: NOTE: This section has been eliminated. The October draft listed fifteen distinct duties. This "laundry list" spelled out the types of duties the court could consider assigning to masters such as "(1) mediate or otherwise facilitate settlement" "(2) formulate a disclosure or discovery plan; supervise disclosure or discovery;" "(4) hear and determine []pretrial motions, except [listing eight exceptions];" etc. QUESTION: Does anyone miss this laundry list?

RULE 53. MASTERS

(a) **APPOINTMENT.**

(1) A court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and recommend findings of fact in an action to be tried by the court if appointment is warranted by

(i) some exceptional condition, or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) perform duties that ~~[clearly]~~ cannot be performed adequately by an available district judge or magistrate judge of the district.

(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent to appointment of a particular person.

(3) A master cannot, during the period of the appointment, appear as an attorney before the judge who made the appointment.

(4) In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) **ORDER APPOINTING MASTER.**

(1) **Hearing.** The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment.

(2) **Contents.** The order appointing a master must direct the master to proceed with all reasonable diligence and must state:

(A) the master's name, business address, and numbers for telephone and other electronic communications;

(B) the master's duties and any limits on the master's authority under Rule 53(c);

(C) the circumstances in which the master may communicate ex parte with the court or a party;

(D) the time limits, procedures, and standards for reviewing the master's orders and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).

(3) Amendment. The order appointing a master may be amended at any time after notice to the parties.

(4) Effective Date. A master's appointment takes effect:

(A) on the date set by the order, and after

(B) the master has filed an affidavit that there are no conflicts of interest prohibited by Rule 53(a)(2).

(c) MASTER'S AUTHORITY. Unless expressly limited by the appointing order, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties, including authority to:

(1) set and give notice of reasonable dates and times for meetings of the parties, hearings, and other proceedings;

(2) proceed in the absence of any party who fails to appear after receiving actual notice under Rule 53(c)(1), or — in the master's discretion — adjourn the proceedings; and

(3) hold hearings under Rule 53(d).

(d) HEARINGS. Unless the appointing order expressly directs otherwise, when a master is authorized to conduct a hearing the master may exercise the power of the appointing court to compel, take, and record evidence. The master may enforce against a party any noncontempt sanction provided by Rule 37 or Rule 45, and may recommend to the court a contempt sanction against a party and sanctions against a nonparty.

(e) MASTER'S ORDERS. A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

(f) MASTER'S REPORTS. A master must report to the court as required by the order of appointment. Before filing a report, the master may provide a draft to counsel for all parties and receive their suggestions. The master must:

(1) file the report;

(2) promptly serve a copy of the report on each party unless the court directs otherwise; and

(3) file with the report any relevant exhibits and a transcript of any relevant proceedings and evidence.

(g) **ACTION ON MASTER'S ORDER, REPORT, OR RECOMMENDATIONS.**

(1) **Time and Hearing.**

(A) A master's order, report, or recommendations become the court's action unless the court takes a different action on its own initiative or on timely objection by any party.

(B) A party may file objections, and the court may give notice of review on its own initiative, no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.

(C) The court must afford an opportunity to be heard and may receive evidence in acting under Rule 53(g)(1)(A).

(2) **Action.** In acting on a master's order, report, or recommendations, the court may:

(A) adopt or affirm it;

(B) modify it;

(C) wholly or partly reject or reverse it; or

(D) resubmit it to the master with instructions.

(3) **Fact Findings or Recommendations.** The court may set aside a master's fact findings or recommendations for fact findings only if clearly erroneous, unless:

(A) the order of appointment provides for de novo decision by the court, or

(B) the parties stipulate that the master's findings will be final.

(4) **Legal questions.** The court must decide de novo questions of law raised by a master's order, report, or recommendations, unless the parties stipulate that the master's disposition will be final.

[(5) **Discretion.** *Alternative 1.* The court must establish standards for reviewing other acts or recommendations of a master by order under Rule 53(b)(2)(D).]

[(5) **Discretion.** *Alternative 2.* The court may set aside a master's ruling on a matter of procedural discretion only for an abuse of discretion.]

(h) **COMPENSATION.**

(1) **Fixing Compensation.** The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and opportunity to be heard.

(2) **Payment.** The compensation fixed under Rule 53(h)(1) must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) **Allocation.** The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(i) **APPLICATION TO MAGISTRATE JUDGE.** A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule. A court may appoint a magistrate judge as master only for duties that cannot be performed in the capacity of magistrate judge and only in exceptional circumstances. A magistrate judge is not eligible for compensation ordered under Rule 53(h).

COMMITTEE NOTE

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform pretrial and post-trial functions. A study by the Federal Judicial Center documents the variety of responsibilities that have come to be assigned to masters. See Willging, Hooper, Leary, Miletich, Reagan, & Shapard, *Special Masters' Incidence and Activity* (FJC 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, and clarifies the provisions that govern the appointment and function of masters for all purposes. The core of the original Rule 53 remains. Rule 53 was adapted from equity practice, and reflected a long history of discontent with the expense and delay frequently encountered in references to masters. Public judicial officers, moreover, enjoy presumptions of ability, experience, and neutrality that cannot attach to masters. These concerns remain important today.

The new provisions reflect the need for care in defining a master's role. It may prove wise to appoint a single person to perform multiple master roles. Yet separate thought should be given to each role. Pretrial and post-trial masters are likely to be appointed more often than trial masters. The question whether to appoint a trial master is not likely to be ripe when a pretrial master is appointed. If appointment of a trial master seems appropriate after completion of pretrial proceedings, however, the pretrial master's experience with the case may be strong reason to appoint the pretrial master as trial master. Nonetheless, the advantages of experience may be more than offset by the nature of the pretrial master's role. A settlement master is particularly likely to have played roles that are incompatible with the neutral role of trial master, and indeed may be effective as settlement master only with clear assurance that the appointment will not be expanded to trial master duties. For similar reasons, it may be wise to appoint separate pretrial masters in cases that warrant reliance on a master both for facilitating settlement and for supervising pretrial proceedings. There may be fewer difficulties in appointing a pretrial master or trial master as post-trial master, particularly for tasks that involve facilitating party cooperation.

SUBDIVISION (a)

District judges bear initial and primary responsibility for the work of their courts. A master should be appointed only in restricted circumstances. Subdivision (a)(1) describes three different

standards, relating to appointments by consent of the parties, appointments for trial duties, and appointments for pretrial or post-trial duties.

CONSENT MASTERS. Subparagraph (a)(1)(A) authorizes appointment of a master with the parties' consent. Courts should be careful to avoid any appearance of influence that may lead a party to consent to an appointment that otherwise would be resisted. Freely given consent, however, establishes a strong foundation for appointing a master. But party consent does not require that the court make the appointment; the court may well prefer to discharge all judicial duties through its district judges and magistrate judges.

TRIAL MASTERS. Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions. The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement in Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference "shall be the exception and not the rule" is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

Subparagraph (a)(1)(B)(ii) carries forward the approach of present Rule 53(b), which exempts from the "exceptional circumstance" requirement "matters of account and of difficult computation of damages." This approach is justified only as to essentially ministerial determinations that require mastery of much detailed information but that do not require extensive determinations of credibility. Evaluations of witness credibility should only be assigned to a trial master when justified by an exceptional condition.

The use of masters in jury cases is abolished. Former Rule 53(b) authorized appointment of a master in a jury case. Rule 53(e)(3) directed that the master could not report the evidence, and that "the master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury." This practice intrudes on the jury's province with too little offsetting benefit. If the master's findings are to be of any use, the master must conduct a preliminary trial that reflects as nearly as possible the trial that will be conducted before the jury. This procedure imposes a severe dilemma on parties who believe that the truth-seeking advantages of the first full trial cannot be duplicated at a second trial. It also imposes the burden of two trials

to reach even the first verdict. The usefulness of the master's findings as evidence is also open to doubt. It would be folly to ask the jury to consider both the evidence heard before the master and the evidence presented at trial, as reflected in the longstanding rule that the master "shall not be directed to report the evidence." If the jury does not know what evidence the master heard, however, nor the ways in which the master evaluated that evidence, it is impossible to appraise the master's findings in relation to the evidence heard by the jury.

The central function of a trial master is to preside over an evidentiary hearing. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master may often need to conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials. This authority is omitted from Rule 53(a)(1)(B). The person who takes the evidence should work through the determinations of credibility, no matter what standard of review is set by the court. In special circumstances a master may be appointed under Rule 53(a)(1)(C) to take evidence and report without recommendations. Such circumstances might involve, for example, a need to take evidence at a location outside the district — a circumstance that might justify appointment of the trial judge as a master — or a need to take evidence at a time or place that the trial judge cannot attend. Improving communications technology may reduce the need for such appointments and facilitate a "report" by combined visual and audio means.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an evidentiary hearing. Courts occasionally have appointed judicial adjuncts to perform a variety of tasks that do not fall neatly into any traditional category. A court-appointed expert witness, for example, may be asked to give advice to the court in addition to testifying at a hearing. Or an appointment may direct that the adjunct compile information solely for the purpose of giving advice to the court. If such assignments are given to a person designated as master, the order of appointment should be framed with particular care to define the powers and authority that shape these relatively unfamiliar trial tasks. Even greater care should be observed in making an appointment outside Rule 53.

PRETRIAL AND POST-TRIAL MASTERS. Subparagraph (a)(1)(C) authorizes appointment of a master to perform pretrial or post-trial duties in terms that are not as demanding as the "exceptional condition" limit on appointing a trial master. Appointment is limited to duties that cannot be performed adequately by an available district judge or magistrate judge of the district. This standard reflects a strong preference to provide case management and decision by public judicial officers. This standard recognizes, however, that public judicial resources are limited; that some litigation poses complicated issues better defined or resolved by a person with specialized training and experience; and that it is unfair to the parties in other cases to lavish limited judicial resources on a small number of actions that — justifiably or perhaps not justifiably — demand extensive judicial involvement.

Magistrate Judges. Particular attention should be paid to the prospect that a magistrate judge may be available to respond to high-need cases. United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(b)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge. A magistrate judge is an experienced judicial officer who has no need to set aside nonjudicial responsibilities for master duties; the fear of delay that often deters appointment of a master is much reduced. There is no need to impose on the parties the burden of paying master fees when a magistrate judge is available. A magistrate judge, moreover, is less likely to be involved in matters that raise conflict-of-interest questions.

The statute specifically authorizes appointment of a magistrate judge as special master. § 636(b)(2). In special circumstances, it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). These advantages are most likely to be realized with trial or post-trial functions. The advantages of relying on a magistrate judge are diminished, however, by the risk of confusion between the ordinary magistrate judge role and master duties, particularly with respect to pretrial functions commonly performed by magistrate judges as magistrate judges. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53. Subdivision (i) requires that appointment of a magistrate judge as master be justified by exceptional circumstances.

A court confronted with an action that calls for judicial attention beyond the court's own resources may request assignment of a district judge or magistrate judge from another district. This

opportunity, however, does not limit the authority to appoint a special master; the search for a judge need not be pursued by seeking an assignment from outside the district.

Despite the advantages of relying on district judges and magistrate judges to discharge judicial duties, the occasion may arise for appointment of another person as pretrial master. Absent party consent, the most common justifications will be the need for time or expert skills that cannot be supplied by an available magistrate judge. An illustration of the need for time is provided by discovery tasks that require review of numerous documents, or perhaps supervision of depositions at distant places. Post-trial accounting chores are another familiar example of time-consuming work that requires little judicial experience. Expert experience with the subject-matter of specialized litigation may be important in cases in which a judge or magistrate judge could devote the required time. At times the need for special knowledge or experience may be best served by appointment of an expert who is not a lawyer. In large-scale cases, it may be appropriate to appoint a team of masters who possess both legal and other skills.

Pretrial Masters. The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. Reflections of the practice are found in such cases as *Burlington No. R.R. v. Dept. of Revenue*, 934 F.2d 1064 (9th Cir. 1991), and *In re Armco*, 770 F.2d 103 (8th Cir. 1985). This practice is not well regulated by present Rule 53, which focuses on masters as trial participants. A careful study has made a convincing case that the use of masters to supervise discovery was considered and explicitly rejected in framing Rule 53. See *Brazil, Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 ABF Research Journal 143. Rule 53 is amended to confirm the authority to appoint — and to regulate the use of — pretrial masters.

Pretrial masters should be appointed only when needed. The parties should not be lightly subjected to the potential delay and expense of delegating pretrial functions to a pretrial master. Ordinarily public judicial officers should discharge public judicial functions. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. Appointment of a master risks dilution of judicial control, loss of familiarity with important developments in a case, and duplication of effort. At the extreme, broad and unreviewed delegations of pretrial responsibility can run afoul of Article III. See *Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir. 1992); *In re Bituminous Coal Operators' Assn.*, 949 F.2d 1165

(D.C.Cir. 1991); *Burlington No. R.R. v. Dept. of Revenue*, 934 F.2d 1064 (9th Cir. 1991). The risk of increased delay and expense is offset, however, by the possibility that a master can bring to pretrial tasks time, talent, and flexible procedures that cannot be provided by judicial officers. Appointment of a master is justified when a master is likely to substantially advance the Rule 1 goals of achieving the just, speedy, and economical determination of litigation.

A wide variety of responsibilities have been assigned to pretrial masters. Settlement masters are used to mediate or otherwise facilitate settlement. Masters are used to supervise discovery, particularly when the parties have been unable to manage discovery as they should or when it is necessary to deal with claims that thousands of documents are protected by privilege, work-product, or protective order. In special circumstances, a master may be asked to conduct preliminary pretrial conferences; a pretrial conference directed to shaping the trial should be conducted by the officer who will preside at the trial. Masters may be used to hear and either decide or make recommendations on pretrial motions. More general pretrial management duties may be assigned as well. With the cooperation of the courts involved, a special master even may prove useful in coordinating the progress of parallel litigation.

Post-Trial Masters. Courts have come to rely extensively on masters to assist in framing and enforcing complex decrees, particularly in institutional reform litigation. Current Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes. The constraint of subdivision (a)(1)(C) limits this practice to cases in which the master's duties cannot be adequately performed by an available district judge or magistrate judge of the district.

It is difficult to translate developing post-trial master practice into terms that resemble the "exceptional condition" requirement of original Rule 53(b) for trial masters in nonjury cases. The tasks of framing and enforcing an injunction may be less important than the liability decision as a matter of abstract principle, but may be even more important in practical terms. The detailed decree and its operation, indeed, often provide the most meaningful definition of the rights recognized and enforced. Great reliance, moreover, is often placed on the discretion of the trial judge in these matters, underscoring the importance of direct judicial involvement. Experience with mid- and late Twentieth Century institutional reform litigation, however, has convinced many trial judges and appellate courts that masters often are indispensable. The rule does not attempt to capture these competing considerations in a formula. Reliance on a master is inappropriate when responding to

such routine matters as contempt of a simple decree; see *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1096-1097 (3d Cir. 1987). Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC*, 478 U.S. 421, 481-482 (1986). Among the many appellate decisions are *In re Pearson*, 990 F.2d 653 (1st Cir. 1993); *Williams v. Lane*, 851 F.2d 867 (7th Cir. 1988); *NORML v. Mulle*, 828 F.2d 536 (9th Cir. 1987); *In re Armco, Inc.*, 770 F.2d 103 (8th Cir. 1985); *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 111-112 (3d Cir. 1979); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737 (6th Cir. 1979); *Gary W. v. Louisiana*, 601 F.2d 240, 244-245 (5th Cir. 1979). The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system. The master in the *Pearson* case, for example, was appointed by the court on its own motion to gather information about the operation and efficacy of a consent decree that had been in effect for nearly twenty years. A classic example of the need for — and limits on — sweeping investigative powers is provided in *Ruiz v. Estelle*, 679 F.2d 1115, 1159-1163, 1170-1171 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983).

Other duties that may be assigned to a post-trial master may include such tasks as a ministerial accounting or administration of an award to multiple claimants. Still other duties will be identified as well, and the range of appropriate duties may be extended with the parties' consent.

It may prove desirable to appoint as post-trial master a person who has served in the same case as a pretrial or trial master. Intimate familiarity with the case may enable the master to act much more quickly and more surely. The skills required by post-trial tasks, however, may be significantly different from the skills required for earlier tasks. This difference may outweigh the advantages of familiarity. In particularly complex litigation, the range of required skills may be so great that it is better to appoint two or even more persons. The sheer volume of work also may favor the appointment of more than one person. The additional persons may be appointed as co-equal masters, as associate masters, or in some lesser role — one common label is "monitor."

EXPERT WITNESS OVERLAP. This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. To be effective, a court-appointed expert witness may need court-enforced powers of inquiry that resemble the powers of a pretrial or post-trial master. Beyond some uncertain level of power, there must be a separate appointment as a master. Even with a separate

appointment, the combination of roles can easily confuse and vitiate both functions. An expert witness must testify and be cross-examined in court. A master, functioning as master, is not subject to examination and cross-examination. A master who provides the equivalent of testimony outside the open judicial testing of examination and cross-examination can be dangerous and can cause justifiable resentment. A master who testifies and is cross-examined as witness moves far outside the role of ordinary judicial officer. Present experience is insufficient to justify more than cautious experimentation with combined functions.

SUBDIVISION (a)(2), (3), AND (4). Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. A lawyer, for example, may be involved with other litigation before the appointing judge or in the same court, directly or through a firm. The rule prohibits a lawyer-master from appearing before the appointing judge as a lawyer during the period of the appointment. The rule does not address the question whether other members of the same firm are barred from appearing before the appointing judge; caution, however, demands at least that special reasons should be found before appointing a master whose firm is likely to appear before the appointing judge. Other conflicts are not enumerated, but also must be avoided. For example, a lawyer may be involved in other litigation that involves parties, interests, or lawyers or firms engaged in the present action. A lawyer or nonlawyer may be committed to intellectual, social, or political positions that are affected by the case.

Apart from conflicts of interest, there is ground for concern that appointments frequently are made in reliance on past experience and personal acquaintance with the master. The appointing judge's knowledge of the master's abilities can provide important assurances not only that the master can discharge the duties of master but also that the judge and master can work well together. It also is important, however, to ensure that the best possible person is found and that opportunities for this public service are equally open to all. Suggestions by the parties deserve careful consideration, particularly those made jointly by all parties. Other efforts as well may prove fruitful, including such devices as consulting professional organizations if the master may be a nonlawyer.

SUBDIVISION (b)

The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and authority. Care must be taken to make

the order as precise as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms of the appointment. To the extent possible, the notice should describe the master's proposed duties, time to complete the duties, and compensation. Often it will be useful to engage the parties in the process of identifying the master, inviting nominations and review of potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement.

Present Rule 53 reflects historic concerns that appointment of a master may lengthen, not reduce, the time required to reach judgment. Rule 53(d)(1) directs the master to proceed with all reasonable diligence, and recognizes the right of a party to move for an order directing the master to speed the proceedings and make the report. Today, a master should be appointed only when the appointment is calculated to speed ultimate disposition of the action. New Rule 53(b)(2) reminds court and parties of the historic concerns by requiring that the appointing order direct the master to proceed with all reasonable diligence.

Rule 53(b)(2) also requires precise designation of the master's duties and powers. There should be no doubt among the master and parties as to the tasks to be performed and the allocation of powers between master and court to ensure performance. Clear delineation of topics for any reports or recommendations is an important part of this process. It also is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties. And experience may show the value of describing specific ancillary powers that have proved useful in carrying out more generally described duties.

Ex parte communications between master and court present troubling questions. Often the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that would not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court address the topic in the order of appointment.

Similarly difficult questions surround ex parte communications between master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule does not provide direct guidance, but does require that the court address the topic in the order of appointment.

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guides to control total expense. The order of appointment should state the basis, terms, and procedures for fixing compensation. When there is an apparent danger that the expense may prove unjustifiably burdensome to a party or disproportionate to the needs of the case, it also may help to provide for an expected total budget and for regular reports on cumulative expenses. The court has power under subdivision (h) to change the basis and terms for determining compensation, but should recognize the risk of unfair surprise to the parties.

The provision in Rule 53(b)(3) for amending the order of appointment is as important as the provisions for the initial order. New opportunities for useful assignments may emerge as the pretrial process unfolds, or even in later stages of the litigation. Conversely, experience may show that an initial assignment was too broad or ambitious, and should be limited or revoked. It even may happen that the first master is ill-suited to the case and should be replaced. Anything that could be done in the initial order can be done by amendment.

SUBDIVISION (c)

Subdivision (c) is a substantial simplification of the provisions scattered through present Rule 53. The most important delineation of a master's authority and duties is provided by the Rule 53(b) appointing order. Rule 53(c) supplements the appointing order by describing, in a nonexclusive way, the most general powers that are important in many settings.

SUBDIVISION (d)

The subdivision (d) provisions for hearings are dramatically reduced from the extensive provisions in current Rule 53. This simplification of the rule is not intended to diminish the authority that may be delegated to a master. Reliance is placed on the broad and general terms of subdivision (c).

It is made clear that the contempt power referred to in present Rule 53(d)(2) is reserved to the judge, not the master.

SUBDIVISION (e)

Subdivision (e) provides that a master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing or other means as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

SUBDIVISION (f)

Subdivision (f) restates the provisions of present Rule 53(e)(1). The report is the master's primary means of communication with the court. The nature of the report determines the need to file relevant exhibits, transcripts, and evidence. A report at the conclusion of unsuccessful settlement efforts, for example, often will stand alone. A report recommending action on a motion for summary judgment, on the other hand, should be supported by all of the summary judgment materials. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report against public access — a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Such circumstances may even justify denying access to the report by the parties, although this step should be taken only for the most compelling reasons. Sealing is much less likely to be appropriate with respect to a trial master's report.

A master may learn of matters outside the scope of the reference. Rule 53 does not address the question whether — or how — such matters may properly be brought to the court's attention. Matters dealing with settlement efforts, for example, often should not be reported to the court. Other matters may deserve different treatment. If a master concludes that something should be brought to the court's attention, ordinarily the parties should be informed of the master's communication.

SUBDIVISION (g)

The time limits for seeking review of a master's order, or objecting to — or seeking adoption of — a report, are important. They are not jurisdictional. The subordinate role of a master means that although a court may properly refuse to entertain untimely review proceedings, there must be power to excuse the failure to seek timely review. The basic time period is lengthened to 20 days because the present 10-day period may be too short to permit thorough study and response to a complex report dealing with complex litigation.

The clear error test, carried forward from present Rule 53(e)(2), provides the presumptive standard of review for findings of fact. The "clearly erroneous" phrase is as malleable in this context

as it is in Rule 52, and in applying this test account may be taken of the fact that the relationship between a court and master is not the same as the relationship between an appellate court and a trial court. A court may provide a more demanding standard of review in the original order of appointment; if it does not, the order should be amended to provide more searching review only for compelling reasons. Special characteristics of the case that suggest more searching review ordinarily should be apparent at the time of appointment, and action at that time avoids any concern that the standard may have been changed because of dissatisfaction with the master's result. In addition, the parties may rely on the standard of review in proceedings before the master. A court may not provide for less searching review without the consent of the parties; clear error review marks the outer limit of appropriate deference to a master. Parties who wish to expedite proceedings, however, may stipulate that the master's findings will be final.

Absent consent of the parties, questions of law cannot be delegated for final resolution by a master.

Apart from factual and legal questions, masters often may make determinations that, when made by a trial court, would be treated as matters of procedural discretion. {*Alternative 2:* These matters are reviewed for abuse of discretion, although a master's discretion often will be due less deference than an appellate court would owe to a trial court.} {*Alternative 1:* The rule does not catalogue these matters or attempt to suggest more specific standards of review. The court must, for the guidance of the parties and master, establish standards for specific topics in the order appointing the master. The standard of review set in the appointing order may not foresee all questions, however, or may appear inappropriate when review is actually undertaken. The court has power under subdivision (c)(3) to amend the standard initially set.} {*Alternative 3:* This alternative is to drop all of paragraph (g)(5) from the text of the rule. The Committee Note would say: No standard of review is set for these rulings. The court may set standards of review in the order appointing the master, see Rule 53(b)(2)(D), or may face the issue only when it arises. If a standard is not set in the order appointing the master, a party seeking review may ask the court to state the standard of review before framing the arguments on review.}

SUBDIVISION (h)

The need to pay compensation is a substantial reason for care in appointing private persons as masters. The burden can be reduced to some extent by recognizing the public service element of the master's office. One court has endorsed the suggestion that an attorney-master should be

compensated at a rate of about half that earned by private attorneys in commercial matters. See *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979). Even if that suggestion is followed, a discounted public-service rate can impose substantial burdens.

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. Many factors, too numerous to enumerate, may affect the allocation. The amount in controversy may provide some guidance in making the allocation, although it is likely to be more important in the initial decision whether to appoint a master and whether to set an expense limit at the outset. The means of the parties also may be considered, and may be particularly important if there is a marked imbalance of resources. Although there is a risk that a master may feel somehow beholden to a well-endowed party who pays a major portion of the fees, there are even greater risks of unfairness and strategic manipulation if costs can be run up against a party who can ill afford to pay. The nature of the dispute also may be important — parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case.

The basis and terms for fixing compensation should be stated in the order of appointment. The court retains power to alter the initial basis and terms, after notice and opportunity for hearing, but should protect the parties against unfair surprise.

SUBDIVISION (i)

This subdivision carries forward present Rule 53(f). It is changed, however, to emphasize that a magistrate judge should be appointed as a master only when justified by exceptional circumstances. See the discussion in subdivision (a).

RULE 53. MASTERS

(a) APPOINTMENT.

(1) A court may appoint a master only to:

(A) perform duties consented to by the parties; *(new)*

(B) hold trial proceedings and recommend findings of fact in an action to be tried by the court if appointment is warranted by

(i) some exceptional condition *(b)*, or

(ii) the need to perform an accounting or resolve a difficult computation of damages; *(b)* or

(C) perform duties that ~~[clearly]~~ cannot be performed adequately by an available district judge or magistrate judge of the district.*(new)*

(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent to appointment of a particular person. *(new)*

(3) A master cannot, during the period of the appointment, appear as an attorney before the judge who made the appointment. *(new)*

(4) In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay. *(expense is new; (d) had extensive diligence provisions)*

(b) ORDER APPOINTING MASTER.

(1) Hearing. The court must give the parties notice and an opportunity to be heard before appointing a master. *(new)* A party may suggest candidates for appointment.*(new)*

(2) Contents. The order appointing a master must direct the master to proceed with all reasonable diligence *(new)* and must state:

(A) the master's name, business address, and numbers for telephone and other electronic communications; *(new)*

(B) the master's duties and any limits on the master's authority under Rule 53(c); *(c)*

(C) the circumstances in which the master may communicate ex parte with the court or a party; *(new)*

(D) the time limits, procedures, and standards for reviewing the master's orders and recommendations; *(new)* and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h). *(new)*

(3) Amendment. The order appointing a master may be amended at any time after notice to the parties. *(new)*

(4) Effective Date. A master's appointment takes effect:

(A) on the date set by the order, and after

(B) the master has filed an affidavit that there are no conflicts of interest prohibited by Rule 53(a)(2). *(new)*

(c) MASTER'S AUTHORITY. Unless expressly limited by the appointing order, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties, including authority to:

(1) set and give notice of reasonable dates and times for meetings of the parties, hearings, and other proceedings; *(d)(1)*

(2) proceed in the absence of any party who fails to appear after receiving actual notice under Rule 53(c)(1), or — in the master's discretion — adjourn the proceedings; *(d)(1)* and

(3) hold hearings under Rule 53(d). *(c)*

(d) **HEARINGS.** Unless the appointing order expressly directs otherwise, when a master is authorized to conduct a hearing the master may exercise the power of the appointing court to compel, take, and record evidence. The master may enforce against a party any noncontempt sanction provided by Rule 37 or Rule 45, and may recommend to the court a contempt sanction against a party and sanctions against a nonparty. *(c), (d)(2)*

(e) **MASTER'S ORDERS.** A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket. *(new)*

(f) **MASTER'S REPORTS.** A master must report to the court as required by the order of appointment.*(e)(1)* Before filing a report, the master may provide a draft to counsel for all parties and receive their suggestions.*(e)(5)* The master must:

(1) file the report; *(e)(1)*

(2) promptly serve a copy of the report on each party unless the court directs otherwise; *(e)(1)* and

(3) file with the report any relevant exhibits and a transcript of any relevant proceedings and evidence. *(e)(1)*

(g) **ACTION ON MASTER'S ORDER, REPORT, OR RECOMMENDATIONS.**

(1) Time and Hearing.

(A) A master's order, report, or recommendations become the court's action unless the court takes a different action on its own initiative or on timely objection by any party. *(new)*

(B) A party may file objections, and the court may give notice of review on its own initiative, no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.*(e)(2)*

(C) The court must afford an opportunity to be heard and may receive evidence in acting under Rule 53(g)(1)(A).*(e)(2)*

(2) **Action.** In acting on a master's order, report, or recommendations, the court may:

(A) adopt or affirm it;

(B) modify it;

(C) wholly or partly reject or reverse it; or

(D) resubmit it to the master with instructions. *(e)(2)*

(3) **Fact Findings or Recommendations.** The court may set aside a master's fact findings or recommendations for fact findings only if clearly erroneous,*(e)(2)* unless:

(A) the order of appointment provides for de novo decision by the court, *(new)* or

(B) the parties stipulate that the master's findings will be final.*(e)(4)*

(4) **Legal questions.** The court must decide de novo questions of law raised by a master's order, report, or recommendations, unless the parties stipulate that the master's disposition will be final. *(new)*

[(5) **Discretion.** *Alternative 1.* The court must establish standards for reviewing other acts or recommendations of a master by order under Rule 53(b)(2)(D).] *(new)*

[(5) **Discretion.** *Alternative 2.* The court may set aside a master's ruling on a matter of procedural discretion only for an abuse of discretion.] *(new)*

(h) COMPENSATION.

(1) **Fixing Compensation.** The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and opportunity to be heard. *(new)*

(2) **Payment.** The compensation fixed under Rule 53(h)(1) must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control. *(a)*

(3) **Allocation.** The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.*(new)*

(i) **APPLICATION TO MAGISTRATE JUDGE.** A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule. A court may appoint a magistrate judge as master only for duties that cannot be performed in the capacity of magistrate judge and only in exceptional circumstances. *(much changes (f) and (1))* A magistrate judge is not eligible for compensation ordered under Rule 53(h).*(a)*

Rule 53. Masters

The text of current Rule 53 is redistributed so thoroughly that it is not feasible to show the changes by the customary underlining and overstriking. This version strikes out the passages that were deleted as unnecessary. The remaining provisions are followed by italicized references to the corresponding provisions in the new draft. The corresponding provisions may differ substantially, at times nearly reversing the present rule. The draft also includes many provisions that have no close analogue in the present rule.

(a)Appointingment and Compensation. The court in which any action is pending may appoint a special master therein.*(a)(1)* ~~As used in these rules, the word "master" includes a referee, an auditor, an examiner, and an assessor.~~ The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; *(b)(2)(E), (h)* provided that this provision for compensation shall not apply when a United States magistrate judge is designated to serve as a master *(i)*. ~~The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.~~

(b) Reference. ~~A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated~~; in actions to be tried without a jury, save in matters of account and of difficult computation of damages *(a)(1)(B)*, a reference shall be made only upon a showing that some exceptional condition requires it.*(a)(1)(B)* Upon the consent of the parties, a magistrate judge may be designated to serve as a special master without regard to the provisions of this subdivision *(i)(reverses direction)*.

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

(d) Proceedings.

(1) *Meetings.* ~~When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides,~~ the master shall forthwith set a time and place for the first meeting of their parties or their attorneys ~~to be held within 20 days after the date of the order of reference and shall~~

~~notify the parties or their attorneys.~~*(c)(1)* ~~It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report.~~*(cf. (b)(2))* If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.*(c)(2)*

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

(3) *Statement of Accounts*. ~~When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.~~

(e) Report.

(1) *Contents and filing*. The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing.*(f)* In an action to be tried without a jury, unless otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits.*(f)(3)* Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.*(f)(2)*

(2) *In Non-Jury Actions*. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous.*(g)(3)* Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. ~~Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d).~~*(g)(1)(b)* The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.*(g)(2)*

~~(3) *In Jury Actions.* In an action to be tried to a jury the master shall not be directed to report the evidence.*(b)(9)(A)* The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.~~

(4) *Stipulation as to Findings*. ~~The effect of a master's findings is the same whether or not the parties have consented to the reference; but,~~ when the parties stipulate that a master's

findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.*(g)(3)(b)*

(5) *Draft report*. Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.*(f)*

(f) Application to Magistrate Judges. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.*(i)*

6

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 later 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 did not command time for discussion until the October 2000 meeting. The October discussion is summarized in the final pages of the October Minutes.

The Criminal Rules Advisory Committee earlier took up the time-for-requests issue and published for comment a revised Criminal Rule 30 that would provide for 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. In August 2000 the Criminal Rules Committee again published its proposal, as an item separate from the comprehensive style revision of all the Criminal Rules. (The published version includes a new final sentence: "When the request is made, the requesting party must furnish a copy to every other party.") This committee decided in October that if Rule 51 changes are proposed, it is important to conform common provisions to the language of Criminal Rule 30 to the extent possible.

The Criminal Rules Committee, having waited for a while to coordinate with the Civil Rules, has now gone ahead. That action may reduce any need to address Civil Rule 51 in conjunction with Criminal Rule 30, although it also may suggest that the time has come to face at least the time-of-requests issue. Anecdotal evidence suggests that many judges require that requests be submitted before trial, disregarding the apparent ban in Rule 51. If we are to face this issue, however, it may be helpful to decide whether to confront all of Rule 51 at any time in the proximate future. 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. The October discussion produced several revisions in the draft, and set the stage for further discussion and a possible recommendation for publication at the April 2001 meeting.

The Ninth Circuit Beginning

In the wake of its review of local rules, the Ninth Circuit Judicial Council 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. The October deliberations examined the rule as a whole and carried the discussion forward to the next meeting.

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 instruct, and there is a duty to instruct 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.

Reading the text of Rule 51 is difficult with respect to the request and objection requirements. It is not possible as to the "plain error" doctrine. Many circuits recognize a "plain," "clear," or "fundamental" error doctrine that allows reversal despite failure to comply with Rule 51. This doctrine is not reflected at all in the text of Rule 51, but is explicit in the general "plain errors" provision of Criminal Rule 52. The contrast between Criminal Rule 52 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 Rule 51 draft goes beyond clarification of the relationship between requests and objections and express adoption of the "plain error" standard. Subdivision (b)(1) requires the court to inform the parties of all instructions, not only action on requests, before instructing the jury and before jury arguments. Subdivision (b)(2) recognizes the practice of instructing the jury "at any time after trial begins." Subdivision (b)(4), set out in brackets to reflect some ambivalence in the October discussion, deals with supplemental instructions. Subdivision (c)(2) elaborates on the time for objections. Subdivision (d)(2) seeks to articulate the principle that an objection is not required if "the court made it clear on the record that [a] request had been considered and rejected."

The draft omits a feature that seemed to be rejected by a clear majority during the October discussion. The October discussion draft provided that a party may take advantage of requests and objections made by another party, so long as the self-same issue was argued. This provision failed in face of the argument that each party should be required to do something explicit to indicate adoption of requests or objections made by another party.

The draft also omits a provision that has been identified but never discussed. 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? So: "A party may — and on order of the court must — file written requests that the court instruct the jury * * *."

Rule 51: April 4, 2001 draft

Rule 51. Instructions to Jury; Objection; Plain Error

(a) Requests.

(1) A party may, at the close of the evidence or at an earlier reasonable time that the court directs,[1] file and furnish to every other party[2] written requests that the court instruct the jury on the law as set forth in the requests.

(2)[3] After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and

(B) with the court's permission file untimely[4] requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments related to the instructions;

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[1] This locution parallels Criminal Rule 30, but is not quite the same. Criminal Rule 30 puts it as "an earlier time that the court reasonably directs." Present Civil Rule 51 also uses the "court reasonably directs" phrase. This version emphasizes the reasonableness of the time, not of the direction.

[2] The requirement that copies be furnished to other parties is taken from Criminal Rule 30. It was suggested, without action, in the earlier Rule 51 materials.

[3] This paragraph could be deleted and covered in the Note. It was included because of strong requests made during the first full committee discussion. The Note would be a slightly rewritten — and perhaps condensed — version of the final two paragraphs in the section on "requests."

[4] "Untimely" is added to dispel any implication that permission is required if the court has not set an earlier time for submitting requests.

(2) give the parties an opportunity to object on the record and out of the jury's presence to the proposed instructions and actions on requests before the instructions are delivered and before final jury arguments related to the instructions; and

(3) may instruct the jury at any time after trial begins and before the jury is discharged.

(c) Objections.

(1) A party may object on the record to an instruction or the failure to give an instruction, stating distinctly the matter objected to and the grounds of the objection.

(2) An objection is timely if:

(A) a party that has been informed of an instruction or action on a request under Rule 51(b)(1) objects under Rule 51(b)(2); or

(B) a party that has not been informed of an instruction or action on a request under Rule 51(b)(1) objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Forfeiture; Plain Error. A party may assign as error:

(1) a mistake in an instruction actually given if that party made a proper objection under Rule 51(c);

(2) a failure to give an instruction if that party made a proper request under Rule 51(a), and — unless the court made it clear on the record that the request had been considered and rejected — also made a proper objection under Rule 51(c); or

(3) a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1) or (2).

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. Additions also are made to cover some practices that cannot now be anchored in the text of Rule 51.

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 court may, if it wishes, further support these purposes by informing the parties before trial of its action on their requests and other proposed instructions. It seems likely that the deadline for pretrial requests will often be connected to a final pretrial conference.

The close-of-the-evidence deadline may come before trial is completed on all potential issues. Trial may be formally bifurcated or may be sequenced in some less formal manner. The close of the evidence is measured by the occurrence of two events: completion of all intended evidence on an identified phase of the trial and impending submission to the jury with instructions.

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. Even if there is no unanticipated evidence, a party may seek to raise or respond to an unanticipated issue that is suggested by court, adversary, or jury. 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 and not disputed by the parties. Courts need not insist on pretrial requests in all cases. Even if the request time is set before trial or early in the trial, subdivision (a)(2)(A) permits requests after the close of the evidence to address issues that could not reasonably have been anticipated at the earlier time for requests set by the court.

Subdivision (a)(2)(B) expressly recognizes the court's discretion to act on an untimely request. 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. This indulgence must be set against the proposition that an objection alone 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 or the earlier time directed by the court. The most important consideration in exercising the discretion confirmed by subdivision (a)(2)(B) 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. And if the instructions are given after arguments, the parties may have framed the arguments in terms that did not anticipate the instructions that came to be given.

Instructions. Subdivision (b)(1) requires the court to inform the parties, before instructing the jury and before final jury arguments related to the instruction, of the proposed instructions as well as the proposed action on instruction requests. The time limit is addressed to final jury arguments to reflect the practice that allows interim arguments during trial in complex cases; it may not be feasible to develop final instructions before such interim arguments. It is enough that counsel know of the intended instructions before making final arguments addressed to the issue. If the trial is sequenced or bifurcated, the final arguments addressed to an issue may occur before the close of the entire trial.

Subdivision (b)(2) complements subdivision (b)(1) by carrying forward the opportunity to object established by present Rule 51. It makes explicit the opportunity to object on the record, ensuring a clear memorial of the objection.

Subdivision (b)(3) reflects common practice by authorizing instructions at any time after trial begins and before the jury is discharged. Preliminary instructions may be given 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. Supplemental instructions may be given during jury deliberations, and even after initial deliberations if it is appropriate to resubmit the case for further deliberations. The present provision that recognizes the authority to deliver "final" jury instructions before or after argument, or at both times, is included within this broader provision.

Objections. Subdivision (c) states the right to object to an instruction or the failure to give an instruction, carrying forward the requirement that the objection state distinctly the matter objected to and the grounds of the objection. The provisions on the time to object make it clear that it is timely to object promptly after learning of an instruction or action on a request when the court has not provided advance information as required by subdivisions (b)(1). The need to repeat a request by way of objection is mollified, but not discarded, by new subdivision (d)(2).

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. 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. But 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. 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 that an error not preserved under Rule 51 may be reviewed in exceptional circumstances. 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. The language adopted to capture these decisions in subdivision (d)(3) is borrowed from Criminal Rule 52. The advantages of using familiar language should not disguise the phenomenon that plain error is more likely to be found in a criminal prosecution than in a civil action. The government may share a greater responsibility for correct jury instructions in a criminal prosecution than is fairly attributed to the winning party in a civil action.

The court's duty to give correct jury instructions in a civil action is shaped by at least four factors.

The factor most directly implied by a "plain" error rule is the obviousness of the mistake. Obviousness 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. Obviousness also depends on the way the case was presented at trial and argued.

The importance of the error is a second major factor. Importance 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. A sufficiently important error may justify reversal even though it was not obvious. The most likely example involves an instruction that was correct under law that was clearly settled at the time of the instructions, so that request and objection would make sense only in hope of arguing for a change in the law. If the law is then changed in another case or by legislation that has retroactive effect, reversal may be warranted.

The costs of correcting an error reflect a third factor that is affected by a variety of circumstances. 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.

Notes on Brooklyn Conference

[The following notes do not purport to provide a complete recounting of the comments made at the Oct. 27, 2000, mini-conference at Brooklyn Law School on discovery of computer-based materials. Rather, they were prepared several weeks after the event from the Special Reporter's notes to preserve some thoughts for possible future reference as the consideration of these issues continues.]

The conference began with greetings from Judge John Carroll, chair of the Discovery Subcommittee, and introductions by all participants including brief descriptions of their experiences in dealing with the issues on which the conference focused.

Introductory Presentations

Special Reporter Marcus then explained that the conference was convened because many lawyers had told the Advisory Committee during its study of discovery generally that this sort of discovery had become a major new concern, and that it was a subject the Committee should examine. These reports led to two types of reactions. First, one could say that the complaints closely resembled the sorts of objections that had been heard about broad discovery for the last quarter century -- that it required a very large amount of effort to uncover materials that proved almost entirely unimportant. Second, one could see distinctive features of these materials that suggested there could be a need for special treatment. Certainly the statements that 30% to 40% of organizational "documentary" information never is put in hard copy form suggests the great (and probably growing) importance of electronic information. The amount of information, and the growing ability to access it, are truly astounding. And different types of information may be available in electronic form, such as "embedded data."

All of this means that there could easily be a need for special rule provisions. Having already received an introduction to these issues at its March 27, 2000, mini-conference in San Francisco, the Subcommittee was focusing this time on whether it should promptly begin to draft specific proposals for amendments to the Civil Rules to deal with these issues. The materials for this conference included mock-ups devised by the Special Reporter to show what some kinds of proposals might look like, but the Subcommittee had not actually begun to discuss any specific ideas for amendment. Thus, nothing was clearly on the table or off the table; the questions for discussion were (1) whether the Subcommittee should begin now to draft proposed amendments, and (2) if so, what directions would be promising and which should be avoided.

Molly Treadway Johnson of the Federal Judicial Center then gave a preliminary report about ongoing research the Center is doing for the Committee on issues raised regarding computer-based discovery. The research has not focused primarily on frequency of such events, as it is expected that the frequency will rise in coming years. Instead, the objective will be to assist in answering the question whether these problems are qualitatively different from other discovery issues and how they have been addressed.

To date the main effort that has been undertaken was a Web-based survey of magistrate judges about these issues. About 80% of all magistrate judges are on the listserve that was used, and all were urged to go to the page on which the questionnaire could be found and to provide information even if they had not yet encountered this form of discovery. Initially only 28% had responded, which was a lower response rate than usual in surveys of judges done by the Center. Of those who responded initially, 75% had experience with this form of discovery. The Center then send hard-copy follow-up inquiries to those who did not respond to find out why they did not respond, and got a much better response rate -- around 60% of all magistrate judges.

Of respondents, around 60% have some experience with these discovery issues. The type of litigation in which it has arisen most frequently is individual employment litigation; general commercial litigation was second, and patent and trademark litigation ranked third on the list of litigation types in which this sort of discovery had come to the attention of magistrate judges. Regarding issues that magistrate judges had encountered, about 70% of respondents with experience were aware of hiring of computer forensic experts for this purpose, about half had encountered privilege waiver, on-site inspection, cost-sharing for retrieval, or spoliation, and about one-third had seen issues of preservation of electronic material or shared costs regarding formatting of materials.

Against that background, the Center was shifting focus to the next phase of the project -- a case study. It asked responding magistrate judges to indicate whether they were aware of any cases that might serve this purpose. About 20 cases were suggested, and the Center had examined them and narrowed its focus to about seven to ten of these cases. Johnson invited participants in the conference to suggest other cases of which they were aware for inclusion in the study.

Ken Withers of the Federal Judicial Center brought the participants up to date on developments this year in technology that bear on these issues. His views are set forth in more detail in an article of his published in the online law review put out by the magistrate judges, the federal courts law review. His views can also be found at www.kenwithers.com/articles/miniconf_____/bileta. More detailed information should be sought from these sources.

Developments continue apace. Perhaps the most significant is the introduction of integrated software tools that obviate expertise that was necessary two years ago to recover data. Now we are seeing the "deskilling of discovery" as many can easily be trained to do the tasks that were formerly done only by the expert few. The speed and capacity for mirror-image capture has increased greatly. A few months ago, it would take about 20 minutes to capture that data on a laptop; now it is possible to capture 400 megabytes (40 laptops) per minute. These developments may show that it will soon be much easier to take steps to preserve all evidence.

Searching also has speeded up. Processor speed still seems to be doubling every 18 months or so, and it is now possible to give every file a unique identifier so that one should soon

be able to do a search that eliminates duplicates. Coupled with file identifiers that identify the subject, key word filtering, and the capacity to view images on screens, the process of reviewing large amounts of data may become much easier for lawyers soon.

The picture is far from rosy, however; the growing storage capacity means that there is ever more data to search. Processor speed may be continually behind the growing storage capacity. The variety of devices on which data can be (and is) stored has multiplied. Hand-held devices, which have become very popular, are an example. Reacting to these developments, companies have appeared with software that supposedly make electronic materials disappear, but the efficacy of these efforts is dubious. The ABA-Price Waterhouse survey of corporate attorneys indicates that most attorneys believe their corporate clients are ill-equipped to face discovery.

A final challenge is to overcome the deficiencies of word searching in locating most relevant materials. A 1985 study indicated that word searching actually produced only a low success rate in identifying such materials, although attorneys believed it was much more successful. There are no breakthroughs to report on this subject. The forensic computer experts with whom Withers has communicated about developments urge that an early meeting of people in their field is the best way to chart a successful discovery program, but that would turn in the first instance on hiring such people, itself an expensive proposition.

It was asked why there are retained experts since many parties should have in-house experts; the answer was that in-house experts often don't know enough about how to preserve. An illustration is Gates Rubber v. Bando, in which in-house experts allowed material to be lost. It was also observed that a word search only has about a 30% reliability.

Panel I

Thomas Allman offered the perspective of a large corporate party, and reported that he had talked with many corporate general counsels about these problems. Many of them are very concerned and favor "simple normative solutions."

There are two types of key problems. First, the unlimited scope of discovery creates traps for the unwary, and thereby risks distortion of justice. Ken Withers' comments illustrate why discovery of this sort of material is different. Second, the existing case-by-case approach does not allow large organizations to plan in advance. Pre-litigation planning is critical but cannot be done in a reliable way.

This sort of discovery really is different. It is more intrusive. With a hard copy contract, one would have only the final document. Now, on can find all previous drafts, all e-mails about the contract (including those that were deleted), and other related peripheral items. The focus should be on the things that are actually used and actually accessed, so ordinary dredging to find all the other stuff is unwarranted. He doesn't dispute having access to those items on a showing

of good cause, even if that includes items that were deleted. Regarding backup tapes, he notes that Ken Withers suggested that technical advances might mean that there was "no excuse not to preserve" these. He doesn't see it that way; it is unfair to take this attitude at the corporation's expense, or to assume that the re-use of backup tapes is inherently bad. The duty of preservation is not sufficiently clear in the current body of law. The sample retention letter from counsel included in the materials for the conference is almost the same as the one used by his company. That letter would be a good starting point for defining what has to be done, and providing that definition would be very helpful.

David Boies identified three kinds of data: (1) databases that contain information accumulated by an organization and stored for later use by the organization; (2) electronic records that relate to the creation of papers such as word processing files on interim drafts of documents eventually created in final; (3) electronic messaging, which is never intended to be put in hard copy form.

All three types, he explained, have four differences from hard copy materials. Three of these differences are merely matters of degree. The differences are:

(1) There is an illusion of intimacy with e-mail, which seems to strike many users as somewhat like a diary.

(2) The volume of these materials is very large. These materials are very easily created. The ability to forward e-mail messages is an example of the ease of proliferation. But this is a matter of degree. For example, in about 1950 IBM probably had about 200,000 documents. By 1970 it had around 5 million. Now even a small company has millions of e-mails. Yet in litigation a trial attorney won't use more than 100 documents (maybe 1000 in an extraordinary case). As result of this increase in volume, the mind begins to boggle. "You are never going to get everything, and you don't need to. 30% may be o.k., if that includes 80% of the important material." By then you have more than you will use at trial.

(3) Retrieval is more difficult due to volume.

(4) Recoverability of "discarded" or superseded items is a qualitatively different feature of this sort of material. In the past discarding papers in the ordinary course of business meant that there was a natural limit on how much of certain things could be found. With the greater durability of computerized materials there is a much greater ability to retrieve things thought to have disappeared.

James Esseks explained that he worked in a small firm that mainly does employment discrimination cases from the plaintiff's side. He spends about half his time on small cases and about half on large cases.

He is inclined to think that the discovery differences presented by these materials are a matter of degree rather than kind. He believes most companies he opposes in litigation have regular protocols for handling this material. Although he is aware of the capacity to retrieve deleted materials, he has never asked for that to be done, and is not certain what the predicate would be for such a request. Perhaps steps taken to destroy relevant materials would suffice, or failure to stop deletion that occurs in the ordinary course.

The problem that has stymied him on occasion is coping with material provided in electronic form that he cannot access. Repeatedly he has found that he cannot open the files. In one case he had to retain an expert for this purpose. He says that companies give him a CD ROM disk with each page as a separate file, which is the equivalent of a page-by-page printout of the material. Sometimes it appears that companies have paid a computer expert to scramble the materials before production. These tactics have served to hide the ball.

Greg Joseph does not think word searches will supplant familiar and time-consuming methods of reviewing materials. For one thing, one needs to create a system for doing a word search, and that takes time and money. Then it doesn't pick up enough of what you want. For example, in one case he had to print out and review in hard copy all the e-mails to determine which were pertinent. This sort of thing raises issues that can be dealt with under current Rules 26(b)(2) and (b)(1), not new rules. The ABA Guidelines (included in the packet of materials for the San Francisco meeting) were not intended to become rules.

For another thing, it is never possible to agree on how a word search should be done if it is a collaborative process. He has never been able to reach agreement on these details.

Retention can be a nightmare. For example, assume that a company has 200,000 employees with e-mail. If you say "Freeze everything" you will soon find that the cost of doing that can be very large, like $200,000 per month. His experience is that the way to proceed is to identify the 20 or 30 people who may have pertinent information and tell them to save their material. He can't see how a rule can clarify such a fact-specific undertaking. With the proliferation of devices (like his Palm Pilot), he can't see a rulemaking response to these problems that would be helpful.

The biggest problem is the privilege problem, but that also can't be solved by a rule change.

Anthony Tarricone said that in the personal injury suits he handles he has the same sorts of concerns. He is cautious about fixing something in stone today because the changes wrought by the computer may be as profound as the invention of the printing press.

The basic goal is the same as with hard copy materials -- to get at the truth. The same sort of dump truck problems can arise with electronic materials as with hard copy materials. In his experience, lawyers on the other side often act in bad faith. But the dimensions of the data

involved are different in has cases compared to mega-cases. Even complex aviation cases are not on a level with IBM v. Microsoft.

Alteration of records is a regular concern. Nowadays most medical records are kept on computer, and he has seen cases in which the printed versions made at different times said different things about white blood cell counts and the like. The situation presented in the movie The Verdict would be very different today.

In his experience, most lawyers don't look hard enough for electronic data. In deposition, it often comes out that witnesses did not try to compile electronic data because nobody asked them to. Sometimes it is produced on disks, but that does not mean that it is searchable. To date, however, he has never retained an expert because the cost of doing that would be too great. He would ordinarily not discuss the form of production before it happens, but simply wait to "see what we get."

The duty to preserve must depend on the circumstances. It should not apply only from the date of filing suit, but it is difficult to say in a general way how longs things should be retained. The Boeing 747, for example, is said to have an "infinite" useful life. How long should design information on the plane be retained? It should at least be clear (as the 6th Circuit said in Remington) that one can't just "blindly destroy" materials. He would caution against a rigid rule. In the Firestone tire litigation, for example, there was a need to go back more than three years, so that looking to the filing of the complaint would not be suitable there.

Anne Weismann sees two major concerns with electronic discovery, burden and cost. Serious consideration should be given to shifting cost, which the party producing is now assumed to have to pay.

She has worked on Alexander v. FBI, which early included enormous hard copy discovery. Early on there were directives within the agency to search the computers, and that was easier than hard copy searching. The White House actually has an electronic filing system. But devising a word search led to much disagreement, and certainty about such matters is not possible. Finally the judge ruled on the search that had to be done, and even though it was fairly broad it produced very few additional documents beyond what had already been produced.

A special problem developed because of a computer glitch on incoming e-mails to the White House. Then they had to go to the back-up tapes. It was necessary to develop unique software to do this sort of search, and there was a two week evidentiary hearing on these questions. This effort will cost nearly $12 million. Yet it seems likely that it will yield virtually no further useful documents.

It was also necessary to search hard drives. When employees leave the White House, their hard drives are put on servers. But some are unreadable. It may be necessary to get an outside entity to assist, but that would raise problems of privilege waiver.

If any change is made, it should focus in part on when the cost burden should shift.

* * * * *

This observation prompted a general discussion of the utility of cost-shifting and rule changes about that subject. It was suggested that this is primarily a problem in the one-way case in which one side essentially has no significant amount of information because otherwise the parties work it out by themselves. The problem was said to be the same with paper and electronic data, and Rule 26(c)(2) is sufficient for the job. The Texas experience was invoked as showing that a rule can reduce problems. But caution was urged on the ground that this could force lawyers to refuse to take cases because the clients can't pay for such efforts.

The discussion shifted to retention of data. One lawyer suggested that the only reason for destroying electronic data is to eliminate possibly embarrassing things. There is no storage cost explanation under current technology. The real cost is reconstruction of deleted materials, so cost actually weighs in favor of retention, not destruction. This observation prompted an objection that cost is still a major factor, to which the response was that backup tapes are "dinosaurs" because there will soon be very inexpensive storage capacity.

A plaintiffs' lawyer observed that this is a "very fundamental" question -- what should be saved. This could have an impact on rulemaking. If deleted materials were excluded from discovery that could give a stamp of approval to inappropriate deletion. The starting point should be to see what efforts were made to preserve.

One response was that there are plenty of statutes already about duties to preserve certain materials. For example, there is the Federal Records Act. Within those sorts of limitations, "We need to be able to delete what we don't use." Another lawyer reported on a case in which the cost of saving backup tapes mounted to $100,000 per month. A company may have 400 to 500 active cases at any given time. If all electronic data must be separately preserved as of the start of each of these the burden could be enormous.

Discussion shifted to privacy issues. It was noted that e-mail has replaced conversation, and there was never an expectation or intent to preserve casual conversations for all time. Indeed, most voice mail messages also are stored in digital form, and could be subject to similar discovery efforts. But it was observed that the there no genuine dichotomy between e-mail and other materials. E-mail is used for formal communications somewhat frequently, and should not be viewed as somehow of lower dignity. Indeed, it may be crucial to employment and sexual harassment cases. But voice mail discovery, though theoretically possible, seems not to have been pursued.

Panel II

Lorna Schofield (ABA Section of Litigation) began by pointing out that the ABA has no official position on whether the rules should be changed. Technology is changing fast, so any rules that warrant consideration should employ only general principles and avoid specifics that might become obsolete, such as reference to specific forms of storage.

The idea behind the ABA Discovery Standards was to have something for topics not addressed by the rules, and they were not adopted with the thought that they would be codified. At the general level, one can see some propositions that were clear:

(1) Electronic data is included within the scope of discovery. Although the rules are not precisely clear (except Rule 26(a)(1)), the problem is not with the rules but with behavior of some lawyers. The problem was that some attorneys ignore electronic data, and the ABA standard therefore makes it clear that this is included.

(2) There should be a principle of reasonableness. With sophisticated counsel, you don't need to rely on the specifics of the rules. If opposing counsel is not sophisticated, the next best thing is a judge who has thought about these issues. Presently, however, some judges are not sophisticated. The main problem areas that arise are (a) the duty to preserve without "going crazy" about that, and (b) the duty to unearth deleted materials.

(3) Cost bearing: If discovery imposes "special expenses," the party seeking the discovery should pay those. It must be emphasized that this was not a consensus position in the Section. It was very divisive, and it is not clear how the Section would come out.

If there is an area for change, it would be to set a starting point for the duty to preserve. In addition, the idea of early discussion of these problems appears promising. Technology may change, so rules keyed to one set of technological problems may not serve if those change. But the parties can talk about the existing technological problems and achieve helpful results.

Greg Arenson (N.Y. St. Bar Ass'n): He mainly represents plaintiffs in antitrust cases. No changes in the rules are needed. Rules 26(b)(2) and (c) provide the tools courts need. Of members of the Executive Committee of his Section, maybe two or three have had debates about these issues, but most have not yet had to focus on these problems. His cases are not two-way cases, but he recognizes that sharing of costs may be appropriate with legacy data. A general directive to be reasonable would not be helpful. The basic ideas are already in Rule 26(b)(2).

He has seen heroic efforts in play. In one case a company had to rehire a former employee who was the only one who could make an old computer work so that it could get the data off it. Economic issues could drive the handling of these problems. But of the 25 members of the Executive Committee of his Section, only two or three had hired experts.

Regarding spoliation, the duty should not await a request for the materials. Consider the problem with PSLRA -- no discovery is allowed for some time. You can't await the first request or the first meeting. It should be keyed to the filing of the action.

He has sympathy for the problems experienced by corporations that want clearer guidance on document retention and related matters. But there is nothing that can be done about those problems at the rulemaking level.

The main point he wanted to close with is that changes to the rules are not needed. Perhaps some other form for advice would be appropriate, like some form of guidelines, but not rule changes.

Joseph Zammit (ABCNY Federal Courts Committee): The consensus of his committee is "healthy skepticism" about changing the rules. The burden rests on those who argue that there really is a problem, and that if so it can be solved by rule changes. The reasons are basically twofold: (1) Technology is changing, and a rule will be obsolete before it completes the process of adoption; and (2) The issues are case-specific. Cost-shifting, for example, depends on a lot of circumstances.

There are major risks of unforeseen consequences of any rule change. Issues of privacy, for example, may exist in connection with a variety of sources of information beyond e-mail. Many people have personal information on their hard disks at work. Already there are concerns about the practice of operators of Web sites to collect personal information users of the sites. Discovery could compound these types of problems.

In his view, expanding the Rule 16 conference is not necessary. Discussion of these topics is implicit in the current rules where justified by the circumstances of the case. Moreover, tinkering with the current rules will interfere with efforts to make a judgment about how they are working.

Bill McCormack (Amer. Coll. of Trial Lawyers Fed. Cts. Comm.): The College is at the "exploratory level" on these issues. One school of thought is that the current rules are providing an adequate way to handle problems that arise. The current discussions of possible changes may provide insights that will assist in using the current rules, but that does not mean there is a reason for changing the rules. Another view is that these problems may become more widespread, and then changes would be appropriate. Some in this camp have looked at the Texas rule and think it is a good starting point because it gives a notion of reasonableness.

Against that background, it can be said the certain problems recur with Committee members:

(1) Issuance of ex parte preservation orders is too common, and can be a strategic device to put a party behind the eight ball. Being served with a complaint is not a total surprise, but it is

surprising to have a preservation order served simultaneously. This leads to a requirement that the order be vacated.

(2) Inadvertent spoliation is also a large concern. This problem is partly due to the point we have reached (or not reached) on the learning curve. In an ordinary case there is no crisis in document production at the outset. But the attorneys then have little idea of electronic programs, and without a norm on how to deal with spoliation it can be weeks before there is a suitable focus on electronic materials. By then things have been deleted, and the case becomes a spoliation case with attention shifting to backup tapes.

Paul Merry (Nat. Employment Lawyers Ass'n): NELA has no formal position, but it has had conversations about these issues. He is surprised, in light of those discussions, that the Federal Judicial Center's statistics show that these issues arise often in employment cases.

The initial inclination is against a rule change. It would be good to get the case before the judge for supervision. Despite that inclination, it might be desirable to consider some rules. The absence of rules means that the situation is volatile, and counsel may feel that it is essential to seek an order. A rule could spare the court the resulting effort. Preservation is obviously important, but the desirability of adopting rules depends on the desirability of the rules themselves. In connection with that, concentrate on speed and volatility, which are distinctive features of this material. The cost of retrieving will change. The rule should specifically provide for preservation, and not just that the parties discuss this topic. Regarding accessibility, it is important that the form of production ensure that the material is actually usable. Issues of privilege and privacy could be improved by carefully crafted rules. Cost-sharing, however, is more difficult. Here a rule change would have very great consequences.

In summary, it is important to keep in mind the need for many parties, particularly plaintiffs in cases like employment cases, to prove the state of mind of adverse parties. This discovery can be crucial to that effort.

Jim Michalowicz (PLAC): He is not a lawyer, but his job is dealing with these problems. At DuPont, he is responsible for responding to discovery requests. The mantra is Desperately Seeking Deleted Documents. DuPont has 40 to 50 e-mail setups across the country. When a discovery request comes in, the general protocol is to find that people involved and identify their server. In addition, the question of backup tapes often arises. Replacing backup tapes costs money, and usually they produce very little new information. As a ballpark figure, he estimates that the cost of the ordinary reviews is $1,000 to $1,400 per account before the lawyers get involved to review for relevance and privilege (which obviously costs more money). There is no risk at all on requesters; all the risk rests on the producing party.

Harold Richman (ATLA): ATLA has not yet taken a formal position on these questions, but he can express some thoughts and concerns that some members of ATLA share. First, anything that would restrict access to court should examined with great care. Cost shifting raises

very serious concerns with ATLA, which sees it as raising risks of shutting the courthouse door to many. In addition, it seems that the rules as currently written are adequate; don't "micromanage" this area of discovery. A major concern is the swing to electronic storage of medical records, with even bedside computer terminals. Sometimes hospitals claim that proprietary information would be disclosed if they released some data.

Panel III

Hon. Robert Collings: The three-year lag time to get a rule change into effect counsels against changes in view of the velocity of technology changes. Under present conditions, he is not in favor of rules regarding preservation or cost-shifting. In the next three years the balance may change so that conclusion should be reexamined.

Although there is no need for current change, some ideas merit some consideration. A better definition than is presently provided in Rule 26(a)(1) regarding initial disclosure could be helpful. He has not encountered the issue in his courtroom, but as an attorney he would welcome an improvement. A lot of lawyers are not yet aware of the extent of materials that are in electronic form, so guidance from the rules would be helpful.

In addition, highlighting in Rule 26(f) might be a good idea, but it is not clear that adding references to electronic discovery to Rule 16(b) would also be helpful. The reason for thinking about a change to Rule 26(f) is that many attorneys are not aware of these issues and the need to consider them. There should be no need to go to the judge if the lawyers negotiate them out. Putting the topic into Rule 26(f) therefore might be helpful. It might offer some particular aid on the problem of inadvertent spoliation; dealing with this up front is a good idea. At present lawyers say they are in the dark on what to do. A monograph from the FJC might be a good way to do this.

In sum, the rule amendment process is not needed, but some modest changes might be helpful.

Hon. Jacob Hart: "Less is more." The fact changes can be made is not a reason to make them. When the photocopier came into general use, the discovery rules were not amended to respond to it. The rules now vest the court with discretion, and he has no problem dealing with this form of discovery under the current rules. There is no significant risk of miscarriages under the current rules. For example, he can't believe any judge would buy the argument that an e-mail is not a document even if the rule language is not as clear as it might be on the subject. The same is true of heroic efforts to unearth deleted materials. That would not routine in any courtroom under the current rules.

This would a particularly inopportune time for more rule changes. On December 1 we will start operating under amended Rule 26(b)(1), which is designed to focus discovery more. That should be allowed to have its effect. The new version of Rule 26(a)(1) removes the

argument that might have been made under the 1993 version that deleted e-mails had to be included.

It also seems philosophically wrong to raise electronic materials above others and suggest that this form of discovery is uniquely expensive. Regarding Rule 26(f), he has been surprised by the paucity of disputes about electronic discovery. There will sometimes be problems with bringing back deleted materials, but requiring good cause is the likely attitude of judges without a rule provision.

Bottom line: "I would not change a word of these rules."

Hon. Lewis Kaplan: He joins the chorus -- the best thing to do is absolutely nothing. He has only once had an issue regarding electronic discovery in his court, and he detects no groundswell for change among his colleagues in the S.D.N.Y. He is also not aware of a significant body of caselaw evidencing a need to act on this problem. It is true that, as a "matter of pure intellectualism," Rule 34 could be worded differently. But he is convinced nobody would today say that a "data compilation" is not included under the current rule. He disagrees with suggestions to add to Rule 26(f). This provision is already a cost-building thing, and there is no reason to make it worse. The lawyers will go through the motions. Rule 16, in turn, already has sufficient provisions for all. Existing law has sufficient provisions regarding preservation of electronic materials, like all materials.

There are a couple of areas that he believes warrant mention. First, reconstructing deleted materials raises pretty tricky problems. Allowing parties to have discovery of servers to retrieve things might raise ticklish questions. For instance, what if the server is shared by others like journalists and the discovery would probe their messages as well? Second, his experience in practice included clients with databases with fields that included highly sensitive material. Who should pay to develop software to separate this data out?

Despite these areas of concern, given a choice of trying to address them and doing nothing, "I wouldn't touch [changing the rules] with a ten-foot pole."

Hon. John Koeltl: I would not change the rules; making changes can cause other problems. It is hard to come up with the correct terminology, particularly since it won't apply until three years hence. So the rulesmakers should adopt the Hippocratic Oath -- First, do no harm. The overwhelming majority of cases don't require attention to electronic materials, and writing rules for that problem will result in unnecessary spinning of wheels.

The problem of resurrecting the history of a document is a good example. If a case turns on that, drafts may be important. We do deal with discovery questions about this sort of thing, and there is no reason to turn your back on information that may be important. Under the current rules, the court will ask how much it costs and who should bear that cost. There is no generally applicable rule that would help.

Regarding changing the definition of a document in the rules, that may be a good idea, but he can't imagine that a judge would actually see electronic materials as beyond the rule. In his district a local rule includes electronic or computerized data compilations as within discovery.

The suggestion that the rules provide for the form of production may be a desirable idea. If the information is in electronic form, it should be so produced. There is sufficient flexibility in the rules now to deal with the problem of producing an electronic version that won't work.

The idea of changing Rule 26(f) or Rule 16(b) seems to propose something that is not necessary. Both rules already have broad catch-all provisions. Lawyers should be able to deal with these questions on their own without further prompting from the rules. There is no need to set these out as specific subjects of consideration.

Regarding preservation, he questions the idea of providing in the rules for preservation of electronic materials when there is nothing in the rules about hard copy materials. The issues are similar, and drafting a rule to take account of the substantive rules regarding record retention will be difficult. At bottom, this is a substantive issue that bears on conduct regulated by the substantive law.

* * * * *

Discussion then followed indicating that all four judges felt that the current rules provided sufficient tools to deal with the costs of electronic discovery. It was noted that people don't organize the files in their computers in a way that can easily be sorted for relevance. In any event, answers to these sorts of questions usually vary depending on the circumstances of the given case. Whatever sort of materials one is considering, there is a need for common sense in organizing a search for relevant materials. You don't search the entire corporation to answer the question "Who sold this car?" In general, document requests start out very broad, and the lawyers then negotiate a narrower actual production.

One of the lawyers said that he was reassured by hearing the views of the judges, but still feels that the rules could do a service by providing a normative standard on what the duty to preserve should be. In addition, it should be possible for the rules to prescribe that ordinary discovery requires production of "that which is readily available in the ordinary course of business." Outside this room, he observed, not all judges approach things as reasonably as these judges.

On the problem of legacy data, there were cautions about writing a rule that addresses a problem that might be changed by technological developments.

On preservation orders, it was noted that they may operate differently than with hard copies. Hard copies end up as a "pile of paper," but many electronic databases change every day. That, indeed, is one of their purposes -- to keep complete and current information. There is a real

question then about what should be preserved. Perhaps a rule should require payment for preserving things created after the litigation commences.

Recap on views

The conference concluded with a survey of the views of the participants about possible amendment of the rules. On the general question whether any amendments should be pursued at present, 10 said their preference would be for the Committee to do nothing. Four said that they thought the "low impact" changes to Rules 26(f) and 16(b) should be pursued, and five thought that more aggressive amendments should be pursued. Individual participants were also asked to express their views, and they responded as follows:

Lawyer no. 1: Make no changes. Making changes to solve problems of expression would cause problems. With the Federal Rules of Evidence, for instance, a change to define data compilations would have required changes in eight places. Also, to put preservation provisions into the rules only as to electronic materials would raise a negative pregnant about provisions regarding other discovery materials.

Lawyer no. 2: There is no need for changes. The Rules can't infringe on the spoliation rules.

Lawyer no. 3: I'm really on the fence, trying to find a rule of reasonableness. I fear the Rules process is not the way to get there. I'm intrigued about cost-shifting, however. The one that I would find most troubling would be to adopt a rule about document preservation. Don't drive business practices by litigation.

Lawyer no. 4: I favor a rule of reason regarding the duty to produce and regarding preservation. Avoid anything that turns on technology, which is subject to change.

Lawyer no. 5: I am a little more in favor of addressing a couple of narrow issues: First, the form of production deserves attention. This is not a problem with hard copy materials. With electronic materials, maybe the party seeking discovery should be allowed to designate the manner of production providing that this can be "readily done." Second, a rule might be developed about recoverability (not spoliation). This also is a problem particular to electronic material. The right way to do it is probably to make the party seeking this material pay for the cost of dredging it up.

Lawyer no. 6: There is no need to change the rules. The problems are only questions of degree, not of kind. I'm concerned about any change in the timing of the duty to preserve. Existing law says that the duty starts earlier than some proposals that have been mentioned, and it should not be weakened.

Lawyer no. 7: Cost-bearing for searching backup tapes should be adopted, and for having to search for deleted materials. There is paranoia abroad right now concerning preservation of materials, and rule changes could sooth those who are now upset.

Lawyer no. 8: The rules are now adequate. Don't tinker. Above all, don't go in the direction of cost-shifting.

Lawyer no. 9: I am not in favor of any change.

Lawyer no. 10: I am not in favor of rule changes. I would highlight the privilege waiver problem, but that would be far too cumbersome to solve by rule amendments.

Lawyer no. 11: I too believe the current rules do the job. If a change is to be considered, I would focus on the Texas rule.

Lawyer no. 12: I am tending toward favoring a change, but a limited one.

Lawyer no. 13: I'm on the fence. Something needs to be done, but I am comforted that so many here think that the current rules are sufficient. The goal should be a standard of reasonableness for production. Do not make a change to Rule 26(a)(1) about these problems, or write a particular form of production into the rule. It might be good to let the party seeking discovery ask for production in a certain form, but don't prescribe one in the rules.

Judge no. 1: No changes are needed. If changes are considered, think about making a party that wants paper versions of electronic materials pay the cost.

Judge no. 2: No changes.

Judge no. 3: Also oppose changes. If there is reason to tinker, consider addressing the problem of residual or legacy data. A starting point is that there is no duty to produce this material absent a court order.

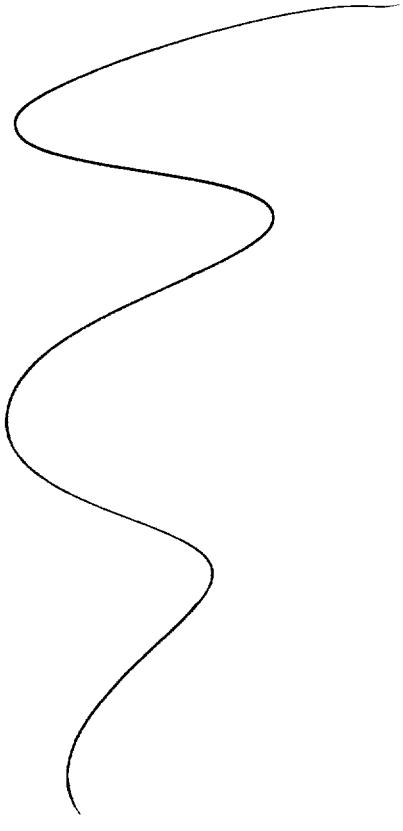
Judge no. 4: In general not enthusiastic about the possibility of rule changes. Perhaps a change to Rule 26(f) would be helpful.

Supplemental

Agenda

Book

Materials



Federal Judicial Center
Research Division

memorandum

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To: Advisory Committee on Civil Rules
From: Tom Willging
Date: April 11, 2001
Subject: Three Memos

The following are three memos to the Advisory Committee, all of which are relevant to the proposed class action rules.

The first is a short report on diversity class actions in federal court during FY2000, as requested by Judge Levi. These data are presumably relevant to any proposals dealing with overlapping and competing classes (Rules 23(c)(1)(C), 23(e)(5), and 23(g) in the last round of drafts).

The second presents data on appointment of counsel and review of fees, derived from the Center's 1996 empirical study. These data are relevant to proposed Rule 23(h) and (i) in the last draft.

The third presents findings and a report on future plans relating to the class action notice project. This report is directly relevant to the plain language terms of proposed Rule 23(c).

I look forward to seeing you on the 23rd.

Attachments

Federal Judicial Center
Research Division

memorandum

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To: Advisory Committee on Civil Rules

From: Tom Willging TW

Date: April 11, 2001

Subject: Data on number of diversity class actions

Judge Levi asked if the Center could develop statistics on the number of class actions that rely on diversity of citizenship as the alleged basis for federal jurisdiction. We created a reliable database for class action activity in the federal courts during Fiscal Year 2000 and found that there were 5,041 class actions filed in the federal courts during that period. Of those, 634 (13%) were based on diversity of citizenship. In other words, approximately one in eight FY2000 class actions was based on diversity of citizenship.[1] We attempted to obtain similar data for years prior to FY2000, but found that we could not rely on those data. Therefore, we are unable to address whether FY2000 data are typical or whether any trends can be detected.

The origin of these class actions may be of interest. As the following table shows, a minority of them originated as class actions in the federal district in which they were found. Of the 634 diversity cases, 289 (46%) had been removed from state courts, 32 (5%) had been transferred to the district court by the Judicial Panel on Multidistrict Litigation, and 11 (2%) had been transferred from another federal district. The balance were either original proceedings in the federal district court (40%) or cases that had been reinstated or reopened (7%) in that district.

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[1] We created this database of class actions by combining cases identified as class actions in the Administrative Office statistics with cases identified as class actions by CourtLink, a commercial service (successor to MarketSpan) that has created a database of federal docket sheets obtained through Public Access to Court Electronic Records (PACER) files. To be included in our database, a case had to be flagged as a class action in either the AO or the CourtLink database.

The AO records a case as a class action if the cover sheet accompanying the filed action had a box checked indicating the case is a class action under F.R.C.P. 23 and if that check is included in the electronic record supplied by the clerk to the Administrative Office (or if the case is reported at closing to have dealt with a motion for class certification). CourtLink identifies class action cases by searching the docket sheet for the phrases "similarly situated" or "representative of the class" following the plaintiffs' names, or by searching for the phrase "class action complaint" among the first three or four docket entries. The latter search term was added in October 1999.

About 54% of the diversity class actions were tort actions. The remainder were either contract actions (39%) or "other" actions (6%), a catch-all group that included actions based on state civil rights laws.

Table: Origin of Class Actions Based on Diversity of Citizenship, FY2000

Origin	*Number*	*Percentage*
Removed from a state court	289	46
Original proceeding in federal court	255	40
Reinstated or reopened in federal court	47	7
Multidistrict litigation transfer	32	5
Transferred from another district (non-MDL)	11	2
Total	634	100

Of the diversity class actions filed during FY2000, 251 (40%) had been terminated by the end of FY2000. Of course, these class actions with early terminations are unlikely to be typical of class actions that have a longer life span. Of those early terminations, 91 (36% of the terminations; 14% of the filings) had been terminated by a remand to state court and 44 (18% of the terminations; 7% of the filings) had been terminated by an MDL transfer. All that one can safely say about the terminations is that at least 21% of the diversity class actions filed during FY2000 terminated by a remand to a state court or a transfer by the Judicial Panel on Multidistrict Litigation to another federal district.

The above data provide a direct and recent answer to Judge Levi's query. I wish we could have obtained more information about past years.

Federal Judicial Center
Research Division

memorandum

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To: Advisory Committee on Civil Rules

From: Tom Willging TOM

Date: April 11, 2001

Subject: Data on selection of counsel and attorneys' fees in class actions

Summary. The following data appear to be relevant to the proposed amendment to Rule 23 to establish procedures for appointing counsel and reviewing fee applications in class actions. Using published data from the Center's 1996 study of class actions, we found that courts rarely used competitive bidding to select counsel, that median attorney-fee awards ranged from 27% to 30%, and that courts generally used the percentage-of-recovery method to calculate fees. Using unpublished data from the same study, we found that judges generally did not appoint counsel in class actions. Appointments took place in approximately one in five cases. Cases in which appointments occurred were distinctly different from cases without appointments. Differences revolved around the nature of suit, the likelihood of surviving a motion to dismiss, the likelihood of being certified as a class action, the remedy sought (injunctive relief versus damages), the likelihood of creating a settlement fund, and the likelihood of having an application for attorneys' fees.

In relation to the proposed amendment to Rule 23 dealing with appointment of attorneys for a class and procedures for reviewing fee applications, the following information may be useful. In our 1996 study conducted for the Advisory Committee [Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, *Empirical Study of Class Actions in Four Federal District Courts* (Federal Judicial Center 1996)], we examined 407 cases filed as class actions in four federal districts that were terminated between July 1, 1992 and June 30, 1994.[1] We found, in our published report, that:

- in one case in N.D. Cal., the court used competitive bidding to calculate attorneys' fees (Fig. 71). This represents approximately 1% of the 107 monetary settlements included in the study and fewer than 1/4 of 1% of the 407 cases in the study;

[1] Note that the districts (N.D. Cal., S.D. Fla., N.D Ill., and E.D. Pa.) were chosen because of their level of class action activity, not randomly. The data in this study describe a snapshot of activities in those courts and are not presented as representative of national class action activity.

- the attorney fee-recovery ratio (gross settlement amount divided by attorneys' fee awards) "infrequently exceeded the traditional 33.3% contingent fee rate." (p. 69 and Figs. 67-68) In the four districts we studied, median attorney fee awards ranged from 27% to 30% of the gross monetary settlement (not including the value of any nonmonetary features and not including cases with exclusively nonmonetary relief);

- in three of the four districts studied, judges used the percentage of recovery method of calculating attorneys fees in class action settlements far more frequently than the lodestar method; in the other district (E.D. Pa.) judges used the lodestar method slightly more often than the percentage of recovery method (pp. 71-72 and Fig. 71); and

- fee-recovery rates as a percentage of the monetary settlement differed little in relation to the method for calculating fee awards; regardless of the method used, median awards in the four districts fell within the same 27% to 30% range described above (p. 72 and Fig. 68).

To assist the Advisory Committee and the Third Circuit Task Force on Selection of Class Counsel, we recently examined unpublished data extracted from the database created in conducting the above study. These data show that

- most class actions did not involve judicial selection of counsel (beyond a judge's expressly or implicitly ratifying representation of a newly certified class by counsel who filed the case). Judges took action to appoint lead, liaison, or committees of counsel in 78 (19%) of the 407 cases in the database (20% in E.D. Pa., 11% in S.D. Fla., 19% in N.D. Ill., and 25% in N.D. Cal.).

- A majority (60%) of the 78 cases in which judges appointed lead counsel or a steering committee to represent the class were securities cases. Another 30% were divided equally among labor cases (e.g., Fair Labor Standards Act or ERISA) and a catchall category of "other (federal) statutory actions." Although civil rights cases accounted for 26% of all class actions, such cases accounted for 6% of the cases in which judges appointed counsel to represent the class. A sprinkling of other case types were found among the 78 cases.

In general, the 78 cases in which the court selected class counsel appear to have been distinctly different from class actions in which the court did not appoint counsel. Note that all of the following differences are statistically significant. For example

- 18% of the cases in which the court selected counsel had a motion to dismiss granted and the entire complaint dismissed, while 50% of the cases without appointed counsel had such action taken;
- 95% of the cases in which the court selected counsel resulted in certification of a class, while 37% of the cases without selected class counsel had a class certified;
- 16% of the cases in which the court appointed counsel were seeking certification of a (b)(2) class to obtain injunctive relief, while 52% of the cases in which the court did not appoint counsel sought such a class;
- in 85% of the cases court-appointed counsel sought an opt-out (b)(3) class, while in 43% of the cases non-appointed counsel sought an opt-out (b)(3) class;
- similarly, in 11% of the cases in which it had appointed counsel, the court certified a (b)(2) class seeking injunctive relief, while in 38% of the cases in which it had not appointed counsel the court certified such a class;
- in 79% of the cases in which it appointed counsel, the court certified an opt-out (b)(3) class, while in 34% of the cases in which it had not appointed counsel, the court certified such a class;
- 90% of the cases in which the court appointed counsel resulted in a settlement proposal, while 33% of the cases without selected class counsel produced a settlement proposal;
- 77% of the cases in which the court appointed counsel produced a settlement fund, while 9% of the cases without selected class counsel produced such a fund;
- 74% of the cases in which the court appointed counsel involved an application from counsel for reimbursement of attorneys' fees and expenses while 19% of the cases without selected class counsel included an application for fees (probably because many of the latter cases did not lead to a common fund settlement).

In summary, cases in which counsel were appointed were far more likely to be securities class actions that survived motions to dismiss, that sought and obtained certification of a (b)(3) opt-out class rather than a (b)(2) class for injunctive relief, and that resulted in a settlement proposal which included a fund from which attorneys' fees could be paid. This is not to say that appointment of counsel caused those differences in outcomes. Indeed, any causal relationships may well work in the other direction. That is, differences in the cases as filed or as they developed through the pretrial process may have led the court to appoint counsel.

One theory is that courts appointed counsel—and counsel sought appointment—in cases that appeared to have sufficient merit to be likely to survive the litigation process and to have sufficiently high stakes to result in a settlement fund large enough to warrant administration of individual claims and to support payment of attorneys' fees. Using multiple regression analysis, we attempted to determine whether information available to the judge at the time of appointment might explain the appointments. Our primary data, however, mainly related to events that took place after the appointment and the analyses did not produce any compelling explanations of why judges appointed counsel in some cases and not in others. We found some indication that the distinction between requests for monetary relief and injunctive relief was a significant factor. When only injunctive relief was sought, such as in civil rights cases, class counsel typically was not appointed. Counsel was much more likely to be appointed when monetary relief was sought, such as in securities cases.

One might speculate that an experienced judge can intuitively recognize characteristics of cases that warrant appointment of counsel, but data from the 1996 study do not suffice to test that theory. For example, when a judge knows the amount of damages at stake in the litigation and the general viability of plaintiffs' legal theories and defendants' defenses, that judge might be able to surmise that law firms would be interested in bidding for the right to represent a class. Unfortunately, our data did not estimate the stakes in the litigation, and we were not always able to find information about the ultimate stakes, the gross amount of the settlement.

One might also speculate that a common sense factor—whether there was competition for appointment of class counsel—might drive the process. Again, our 1996 study did not focus on this aspect of the appointment, leaving us without data to test this common sense observation. Without the appearance of multiple law firms in a case and the possibility of competing applications to represent a class, a judge seeking to invoke the bidding process would have to take active steps to bring the auction process to the attention of likely bidders. Some judges might find that taking such actions is not in keeping with their conception of the judicial role and might limit use of bidding to cases in which competition is evident.

Speculation aside, our data show distinct differences between cases in which counsel are appointed and those in which they are not. Our analyses show that the primary indicators of appointment were whether the cases sought monetary relief in a context like securities litigation. Seeking injunctive relief in a civil rights context appears to have counterindicated an appointment.

Federal Judicial Center
Research Division

memorandum

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To: Advisory Committee on Civil Rules
From: Tom Willging and Bob Niemic
Date: April 11, 2001
Subject: Report on Class Action Notices

This memorandum summarizes the Center's activities to date on drafting illustrative class action notices and includes recommendations for lawyers involved in drafting class action notices. The memo also describes our plans to refine the notices and post them on an Internet site for public use and comment.

Background

At the request of the Subcommittee on Class Actions, the Center has developed two hypothetical illustrative notices of proposed class action settlement (including notice of right to exclusion and hearing). We created these notices by selecting the best notices we could find, rewriting them in plain language, restructuring their format, pilot testing them for comprehension, having them evaluated by a lawyer/linguist for readability, and presenting them to four focus groups. The attached notices, which are works-in-progress, are identical to the notices included with the materials for the Advisory Committee's March meeting. We include them again for your convenience.

During the summer of 2001 and in advance of the publication of any proposed changes in Rule 23(c), we propose to put revised versions of the illustrative notices on an Internet site that can be linked to the Rules Support Office's Internet site, if the Advisory Committee so chooses. If linked, the notices then would be readily available for use and comment by practitioners and others during the rulemaking process and afterwards.

Lawyer-linguist's recommendations

Professor Lawrence M. Solan of Brooklyn Law School, a lawyer with a Ph.D. in linguistics, reviewed earlier drafts of the illustrative notices and suggested ways to enhance the "plain language" effect that is our goal. His review included:

- analyzing how sections are organized–for overall ordering and for tacit statements of hierarchy in the ordering of claimants' options;
- checking to see that the formatting is easy to read and that statements that call for action are highlighted; and

- reviewing the length of sentences and use of passive voice, nominalized verbs, and other modes of expression that may decrease comprehension.

Professor Solan made recommendations such as the following:

- use topic headings (he agreed with our suggestion that the headings be in question form);
- rearrange materials to correspond more exactly with section headings; and
- use the personal "you" rather than third person references to "claimants."

Focus group findings and recommendations

The Federal Judicial Center conducted four focus groups in February and March, 2001. Nicole Yakatan of Yakatan Focus Group Moderation and Market Research moderated the four focus groups and prepared a written report with detailed findings.

Ms. Yakatan recruited focus group participants from a wide range of non-managerial occupations in the Baltimore metropolitan area. Participants had at least a high school education and no more than a college degree. Each focus group contained six to nine participants. We designed this research to be qualitative, not statistical; hence, the number of participants was limited.

During the focus group process, we explored reactions to notices (similar to those attached to this memo) and asked about changes that might improve comprehension and motivation. We tested the outside packaging, inside layout, organizational structure, and language of the notices. We also tested comprehension aids such as a chart listing claimants' options, a question-and-answer format for the notice text, and color-coded response forms.

Participants examined two different hypothetical class action notices, one about exposure to asbestos-containing products and the other about claims of fraud in the purchase of stock. We tested shorter summaries of the notices as well, presenting them either before or after the full notices.

We found that improvements need not be limited to converting the notice to plain language. Our experience with the focus groups indicates that comprehension of class action notices can be significantly improved through deliberate changes in language, organizational structure, formatting, and presentation of the notice. Even small changes in the format and presentation of the notice, such as using a cover letter or caption or colored forms, appeared to increase a reader's motivation to read and understand the notice.

Our examination of the attitudes about and comprehension of the notices and summaries illustrated broad acceptance of the structure and content of the material we presented. We observed that when people playing the role of prospective class members received a class action notice, their own attitudes and perceptions about class action lawsuits, attorneys, and even justice appeared to influence comprehension. Such factors appeared to drive the way people approach the issues of whether and how to read a notice.

Most of the focus group participants displayed a very general knowledge of class action lawsuits. At the same time, most participants were relatively unfamiliar with class action notices. Their preconceived notion was almost totally negative; they expected to find wordy legalese that would be very

difficult, if not impossible, for them to understand. Because participants were not eager to tackle any type of legal document and because they said they are flooded daily with "junk mail," a threshold challenge is to get potential class members to open and read a class action notice.

Our experience with these four focus groups illustrated the importance of presenting a professional-looking package: a standard white, flat envelope, ideally with a logo and postage stamps. We learned that most participants reacted negatively to what might be called junk mail lingo on the envelope, such as "You may be entitled to ...." Generally, participants seemed to prefer direct declarations of the envelope's contents such as "Notice of Proposed Class Action Settlement." Participants said that a U.S. District Court return address would motivate them to open the envelope more than would an attorney's return address or a return address using the term "Class Action Administrator." We should note, however, that part of the motivation to open a notice from the court arose out of fear of the consequences of not opening it.

Another challenge is to convince people to read and act on the class action notice rather than throw it away. A first impression must simultaneously persuade readers that they have a stake in the class action and that they will be able to comprehend the notice. One of the most significant findings from the focus group process is that a short summary of the class action was not a panacea for motivation or comprehension. In fact, most prospective class members expressed a preference for more complete information, as long as it is readable and not excessively long. The notices tested appeared to succeed on those counts, primarily as a result of the following elements:

- Non-legal, plain language throughout,
- A concise opening page making specific points,
- Detailed table of contents,
- Question-and-answer format,
- Summary chart of important information, and
- Color-coded response forms.

Each focus group participant was given either a full 9-10 page class action notice or a 3-4 page summary of the notice to read first. They then answered a few written questions about the content before group discussion of the document. Participants then received either a full notice or a summary—whichever one they had not yet seen—for comparison. We observed uneasiness with legal documents regardless of the first document presented. Most people perceived the notice and summary to be "long" or "complicated" and wanted to set it aside to read later. Estimates of time needed to study the document were basically the same whether it was the summary or the full notice.

Comprehension of the topic was slightly more accurate with the full notice. More importantly, however, generally readers greatly preferred using the full notice to the summary, finding it easier to peruse and understand, despite being longer. Many factors, including the complexity and emotional weight of the subject (e.g., asbestos versus corporate stocks) appeared to affect participants' understanding of and approach to the notice.

Based on the findings from the four focus groups, we present the following recommendations to lawyers involved in drafting class action notices:

- Use standard flat or business envelopes and strive for a professional-looking presentation. Use the U.S. District Court return address on the outside envelope whenever possible. If an envelope teaser is used, a direct description of envelope contents, i.e. "Notice of Proposed Class Action Settlement," appears to have worked best and to have been least likely to be confused with junk mail.
- A formal appearance and positive first impression seems extremely important. The cover letter or opening page deserves particular attention. This first page should definitely inform recipients that they are not being sued and that they have a stake in the matter. Information about how to contact someone for further information should probably also appear on this page, along with key dates or a reference to the "Summary Chart of Important Information." If possible, the first page might benefit from use of "letterhead" or an official logo (especially of the U.S. District Court) to lend credibility.
- Readers valued highly having a table of contents in a question-and-answer format. They also found highlighted and shaded text boxes, "WARNINGS", and cross references useful. Using a large (but not "unprofessional") font throughout seemed likely to increase users' acceptance.
- The summary chart was composed of five columns, outlining: 1) the action to be taken, such as filing a claim or exclusion form (with cross references to the relevant portions of the full text of the notice), 2) the appropriate form to file (by color and name), 3) any deadline for filing, 4) the consequence of each action, and 5) forms that may be filed in conjunction with each other. Participants referred to the summary chart often, using it as both a comprehension check and reminder. This chart appears to help clear up confusion about what a prospective class member must do to respond to the class action.
- Participants found the color-coded response forms to be an important component of facilitating understanding of the notice. Participants found colors to be an easy way to understand what the forms are and how they are to be used. Color-coded forms also seemed to make the document less intimidating.
- Listing a contact person, telephone number, and Internet site in the notice's opening page and perhaps in more than one place (e.g., the cover letter and the summary chart) gives readers confidence that they can pose questions without consulting a lawyer. Many participants preferred to speak to a person immediately about the notice.

In summary, mailings that use the structure, language, format, style, and other methods illustrated in the notices we tested appear likely to result in high levels of comprehension and compliance among potential class members. Of course, not all comprehension problems have been resolved. Further refinement remains possible, particularly in descriptions of compensation, objections, and exclusion.

Future plans: further revisions to the plain language notice

We also plan to give further attention to the aspects described in the paragraphs below.

One area of consistent confusion is that of compensation to class members. In each focus group there was a lack of initial consensus as to what plaintiffs will receive in a settlement. After the first two of our four focus groups, we revised the notices to address the concerns participants raised about this point, but further attention seems necessary. Along similar lines, some focus group participants harbored a concern that participating in a class action will cost them money.

Confusion also remains around the concept of excluding oneself from the class and the consequences of that action. While many people do understand this critical idea, it is very important to stress continually the differences between "doing nothing" with a class action notice and active self-exclusion from the class action. Some people do not clearly comprehend the distinction between the two. For example, many did not grasp that once you exclude yourself from the class, you will have no further role to play in that particular lawsuit, i.e. attending the hearing or objecting to the terms. They envision filing an individual lawsuit in which their attorney shows up at the class action hearing. They are unclear about how an individual suit differs from a class action against the same company or how a second class of opt-outs might be formed.

Others realize the consequences of "doing nothing," but argue the "legality" of being barred from bringing a later suit if you do not respond to the class action notice. The "WARNING" which reads "What happens if you do nothing?" should be altered slightly to give more emphasis to the word "not" in the sentence, "If you do nothing, you will not receive the monetary benefits of the proposed settlement."

Objections tend to be confusing for prospective class members as well. They are unsure what types of objections they could have and whether objecting will affect their status as a participant. In the first focus group, we asked participants what they would do if they wanted to participate in the class action but disagreed with the attorneys' fees. One responded, "In a class action you have no choice what their fees are...(I would) do absolutely nothing because I don't think there's anything that could be done." Eventually, participants figured out they could object on these grounds, but it is not intuitive to them. Clearer explanations on the response forms themselves are probably warranted.

Future plans: survey to compare original and revised notices

We plan to survey groups of stock owners to compare the comprehension of our "plain language" notice with the comprehension of the original notice, that is the notice that was the best of the stock notices we reviewed but that was not subject to our "plain language" revisions. Given funding limitations, we plan to locate these stock owners by using lists voluntarily provided by investment clubs identified through the Internet, rather than contracting with a survey research company.

Promulgating illustrative notices

Finally, after we make the changes to the notices suggested by the focus group process and our survey research, we plan to post the notices on an Internet page. We expect to do so by the end of June and hope to have this Web site available in time for the Advisory and Standing Committees to consider cross-referencing it in any Standing Committee Request for Comment on any relevant proposed changes to Rule 23(c). The illustrative notices could then provide a

basis for practitioners to comment on the implications of requiring a plain language notice in Rule 23.

Attachments

United States District Court
for the Northern District of State

John Smith and Mary North, on behalf of themselves and
all others with similar claims,
Plaintiffs

v.

XYZ Corporation,
Defendant

Civil Action No. 00-1234

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT, RIGHT TO EXCLUSION, AND HEARING

To: All persons who have been exposed to asbestos fibers in Xbestos, XYZinsulation, and any other products of XYZ Corporation at any time.

Read this notice carefully. You may be entitled to share in the settlement proceeds of a class action lawsuit. Your rights to money and other benefits may be affected.

This is <u>not</u> a lawsuit against you. You are <u>not</u> being sued.

Why did you receive this notice?

This notice has been sent to you because you may be a member of a group of individuals–a "class"–for whom a proposed settlement with defendants has been reached. If the proposed settlement is approved by the court, you may be eligible for money and other benefits, unless you decide to exclude yourself from the class. This notice will help you answer the following questions:

1. What is a class action?

A class action is a lawsuit in which one or more persons sue on behalf of other persons who have similar claims. The persons included in this group are called the "class." The settlement of a class action lawsuit determines the rights of the entire class except for those who choose to exclude themselves from the class (see section 6c below). For this reason, the settlement of a class action must be approved by the judge. Those class members who do not exclude themselves from the class may submit a claim (see section 6a below) and receive payment of money and other benefits. They may also remain in the class, but object to the terms of the settlement (see section 6b below).

WARNING: If you are a member of the class and you do not exclude yourself or file a claim, then you will not share in the settlement proceeds and you may also be barred from pursuing your own case against the defendants for the claims that are the subject of this lawsuit.

2. Who are the parties in this class action?

The plaintiffs in this lawsuit are John Smith and Mary North. John Smith was employed as a construction worker and alleges that he used products of the XYZ Corporation that contained asbestos fibers during the course of his employment from 1972 to 1998. Mr. Smith alleges that he has incurred personal injuries (lung cancer and asbestosis) as a result of his exposure to XYZ Corporation's products and he seeks damages for loss of earnings, medical expenses, pain and suffering, and punitive damages. Ms. North is a homeowner whose home was insulated with products manufactured by XYZ Corporation. She alleges that her exposure to these products has increased her risk of developing cancer or other diseases and she seeks damages to pay for the medical costs of monitoring her health. On January 11, 1999, they filed this lawsuit as a class action against XYZ Corporation, the defendant. Plaintiffs filed the lawsuit as a class action to assert their own individual claims and to represent a class of persons who have similar claims.

3. Are you a member of the class?

By order of October 4, 2000, Judge Jane Jones decided that the lawsuit can proceed as a class action for settlement purposes only on behalf of a class consisting of anyone who:

- has been exposed to asbestos fibers in Xbestos, XYZinsulate, and any other products of XYZ Corporation at any time.
- is not an officer or director of XYZ Corporation or a member of the immediate family of an officer or director of XYZ Corporation, and
- does not exclude themselves from the class.

You are a member of the class if you are in the group described in the first bullet and not in any of the groups identified in the second and third bullets.

4. What is this lawsuit about?

Plaintiffs claim that defendant produced building insulation materials and other products with knowledge that the asbestos fibers contained in those products posed a danger to the health and safety of anyone exposed to them. Plaintiffs claim that defendant negligently manufactured and marketed such dangerous products and that defendant willfully disregarded the health and safety of those exposed to its products. Defendants vigorously deny these claims.

Prior to the settlement the defendant sought to dismiss the case on the grounds that it was filed after the legal time limit (the statute of limitations) had expired and that the plaintiffs' initial papers failed to present a legally sufficient claim. Judge Jones denied requests to dismiss the case and has allowed the parties to explore the factual basis for their claims and defenses by examining witnesses and documents that might be relevant to those claims and defenses. The parties developed a large amount of information about the claims and defenses, including information from other cases dating back to the 1980s. Plaintiffs

asked the judge to decide that the case should proceed as a class action. Before the judge ruled on that request, the parties announced this settlement. Based on the facts discovered and the risks involved in a trial, attorneys for the class concluded that the proposed settlement is fair, reasonable, and adequate, and that it serves the best interests of class members.

5. What does the proposed settlement provide?

On September 10, 2000, the parties in the lawsuit arrived at a proposed settlement of the lawsuit. The proposed settlement requires Judge Jones's approval. The terms of the proposed settlement are summarized below. The full settlement terms are contained in a settlement agreement dated October 4, 2000. Judge Jones preliminarily approved that settlement and authorized that this notice be sent to the class. You can obtain a copy of the settlement agreement by calling 1-800-555-xxxx, writing to Herman Green, Esq. at P.O. Box 6226, Any Town, US 12345, or visiting www.xxxxx.com on the Internet.

5a. What is the settlement fund?

In the proposed settlement, defendant has agreed to create a settlement fund in the amount of $300,000,000.00 plus whatever interest accrues after the fund is created. Up to $24,010,000.00 (8% of the settlement funds), will be used to pay attorney fees and expenses, the costs of administering the settlement, and special payments to the class representatives (see section 5b below). The amount remaining, at least $275,990,000.00, will be distributed to class members who submit valid claims. Whatever interest that accrues on the settlement fund after it is created will be distributed in the same way as the fund.

The settlement fund of $300,000,000.00 will be divided into two funds that will provide benefits to class members who submit valid claims (claimants). The Injury Compensation Fund will consist of $200,000,000.00 (see section 5c(1) below), which will be used to create a trust to compensate claimants for personal injuries arising out of the use of defendant's asbestos products. The Medical Monitoring Fund will consist of $70,000,000.00 (see section 5c(2) below) to compensate claimants for the costs of determining whether or not they have an asbestos-related disease.

5b. What fees and expenses will be deducted from the settlement fund?

The attorneys for the class intend to ask the judge to award them fees for their services in representing the class in this lawsuit, in an amount not to exceed $18,000,000.00 (6% of settlement fund), plus accrued interest. This amount would be paid from the settlement fund.

The attorneys for the class also intend to ask the judge to award them no more than $1,500,000.00 (0.5% of settlement fund) plus accrued interest to reimburse them for expenses they incurred in conducting this lawsuit. This amount would be paid from the settlement fund, based on proof of these expenses submitted by the attorneys for the class.

The settlement also calls for the two class representatives, John Smith and Mary North, to receive special payments of $5,000.00 each, for a total of $10,000.00. The settlement agreement also provides that the costs of administering the notice to class members would be paid out of the settlement fund. The estimated cost of administering the notice is $4,500,000.00, which is 1.5% of the settlement fund.

An award of attorney fees of $18,000,000.00, an award of expenses of $1,500,000.00, costs of administration of $4,500,000.00, and special payment to class representatives of $10,000 would be, in total, $24,010,000.00 which would be 8% of the settlement fund The judge may award less than $24,000,000.00

The defendants have agreed not to oppose the above applications for fees and expenses.

5c. What can you expect to receive under the proposed settlement?

5c(1). Benefits based on personal injuries. Payments from the Injury Compensation Fund described in section 5a will be based on medical diagnosis of specific injuries that scientists have found to be associated with exposure to asbestos fibers.

Type of Injury	Minimum Payment	Maximum Payment	Average Payment
Mesothelioma	$10,000	$100,000	$20,000-$30,000
Lung Cancer	$5,000	$43,000	$9,000-$15,000
Other Cancer	$2,500	$16,000	$4,000-$6,000
Non-Malignant	$1,250	$15,000	$3,000-$4,000

To qualify for a payment, each claimant must submit a statement from a physician with a description of the claimant's current medical condition, including a diagnosis in one of the above categories. In addition, each claimant must submit all medical records relating to the treatment of that injury, a signed release permitting the administrators of the fund to obtain claimant's medical records, and records indicating lost earnings resulting from the medical condition. The administrator will then assign a value to the claim based on the severity of the injury, medical expenses, and lost earnings.

If a claimant accepts the administrator's proposed award, it is then fixed at that amount. If the claimant disagrees with the proposed award, he or she may ask for arbitration, which will be conducted according to the rules of the American Arbitration Association. A claimant's acceptance of the arbitrator's award will determine the amount to be paid. If the claimant disagrees with the arbitrator's proposed award, he or she may file an action in court seeking damages, but punitive damages (that is, damages designed to penalize a defendant for intentional misconduct) may not be sought.

The number of claims for payment from the $200,000,000.00 Injury Compensation Fund is uncertain. To make sure that the fund does not get used up before some claims are filed, claims will initially be paid at one-half the value established by the administrator, arbitrator, or judge. If there are sufficient funds available after five years, the remaining payments will be made in whole or in part. For further information on payment of claims, you may request a copy of the settlement agreement, as indicated at the beginning of section 5 above.

5c(2). Medical monitoring benefits.

Payments from the Medical Monitoring Fund will be based on proof of exposure to asbestos-containing products manufactured by XYZ Corporation. Payments will consist of reimbursement for medical expenses incurred in testing for the presence of asbestos disease. For future medical monitoring expenses, claimants should contact the Claims Administrator (see section 10, below for information) and request information about medical facilities in your area that will conduct tests and bill the Medical Monitoring Fund. In lieu of reimbursement for your medical expenses, you may submit a claim with proof of exposure to an XYZ product and receive payment of $1,000.00 to cover expenses of testing for asbestos disease.

6. What are your options?

If you are a member of the class (see section 3 above), you have the following options. You may:

- file a claim (see section 6a below)
- object in writing to the proposed settlement (see 6b below)
- file a claim and object in writing to the proposed settlement

- exclude yourself from the class (see section 6c below)
- do nothing (see section 6d below)

For any of the above options, you may, but do not need to, hire an attorney to represent you.

The sections that follow identify the consequences of pursuing each option.

6a. What happens if you file a claim?

If you are a class member and you complete and mail a valid claim form (**BLUE FORM**) by June 1, 2001, and if the judge approves the proposed settlement, you will receive the benefits of that settlement as described in this notice (see section 5 above). In exchange for receiving the benefits of the settlement, you will be barred from bringing a lawsuit against the defendant based on exposure to any of defendant's asbestos products.

How do you file a claim?
To be eligible to participate in the distribution of the settlement fund, you must complete and sign the enclosed BLUE FORM and mail and postmark it by June 1, 2000.

If you file a claim attorneys for the class will act as your representatives. Attorney fees and expenses for those attorneys will be paid by the defendants as part of the settlement fund. You may, however, if you wish, remain a member of the class, and hire an attorney of your own choosing to represent you in this matter. If you hire your own attorney, however, you will be responsible for paying your own attorney's fees and expenses under whatever fee arrangement you make with your attorney. Your attorney does not have to be admitted to practice before the United States District Court for the Northern District of State.

6b. What happens if you object to the proposed settlement?

If you are a class member and do not exclude yourself by June 1, 2001 (see section 6c below), you may object to, or comment on, the proposed settlement, by mailing the enclosed Objection Form (**GREEN FORM**) along with a written statement to the court in the manner described below. The written statement should contain any reasons you believe support your objections or comments. For example, you may wish to discuss any of the following subjects:

- whether the proposed settlement is fair, reasonable, and adequate
- whether the proposed settlement should receive court approval
- whether the class should be certified or redefined
- whether John Smith and Mary North and their attorneys adequately represent the class
- whether the applications for attorney fees and expenses are reasonable
- whether such applications should receive court approval
- any other aspect of the proposed settlement or the payment and distribution process for the proposed settlement.

Judge Jones will consider your objections or comments in deciding whether to approve the proposed settlement. She may agree with you but, even if she does not, your claim will not be affected because you made an objection or comment

Note: Even if you file a comment or objection, you still must file a claim if you want to share in any settlement the court may approve

If you object to the proposed settlement, how do you tell the court?

If you want to object to the proposed settlement, you must complete the **GREEN FORM** and attach a written statement in the manner described in this box. If you mail a written statement postmarked by April 1, 2001, you may appear at the hearing described below, but you do not have to appear. Your written statement should indicate whether you intend to appear at the hearing. Your written statement will be considered whether or not you appear at the hearing. Your written statement must identify the name and case number of this lawsuit (that is, Smith. v. XYZ Corporation, No. 00-1234), your name and address, and the name and address of any attorney you might hire to represent you in this lawsuit (see section 8 below). You must sign and date your statement.

Attorneys for the class and attorneys for the defendants will have an opportunity to file a response to any objections or comments that are filed and to ask you (or your attorney, if you have one) questions if you file an objection or comment and you decide to appear at the hearing.

6c. What happens if you exclude yourself from the class?

If you exclude yourself from the class by filing an Exclusion Form (**PURPLE FORM**), you will not share in the proposed settlement (see section 5 above).

If you exclude yourself from the class by filing a **PURPLE FORM**, you may pursue, on your own or as a member or representative of another class (if there is one), whatever claims you may have against the defendant. You may do this by hiring an attorney or by representing yourself. If you do this, you should not expect any financial benefit from the proposed settlement, the attorneys for the class, or the class representatives.

Note: If you bring or participate in another lawsuit, you will have to prove your claim in that lawsuit.

How do you exclude yourself from the class?

To exclude yourself from the class, you must complete and sign the enclosed **PURPLE FORM** and mail and postmark it by April 1, 2001.

6d. WARNING: What happens if you do nothing in response to this notice?

If you do nothing, you will not receive the financial benefits of the proposed settlement. If you do nothing and the judge approves the proposed settlement, you will also be barred from bringing a lawsuit against the defendant based on exposure to any of defendant's asbestos products. If you do not want to be barred from bringing such a lawsuit, consider excluding yourself. If you want to receive the benefits of the settlement, consider filing a claim.

7. Do you need to hire your own attorney?

With respect to hiring an attorney, your options are:

a. do nothing and the judge will consider you to be represented by the attorneys for the class;

b. file an claim as described above and the judge will consider you to be represented by the attorneys for the class.

c. hire an attorney to represent you at your own expense; or

d. represent yourself.

If you decide on either of the last two choices above, you or your attorney will have to file an Appearance Form (**ORANGE FORM**) as described below.

How do you or your attorney enter an appearance in this lawsuit?

If you hire your own attorney, to participate in the hearing your attorney must complete the enclosed **ORANGE FORM** and mail and postmark it by April 15, 2001.

8. Will there be a hearing in court about this proposed settlement? Should you attend the hearing?

On April 15, 2001 at 9am, Judge Jones will hold a hearing on the settlement in courtroom # 5 in the Federal Courthouse located at 75 Main Street, Any Town, US. The purpose of the hearing is to determine whether the proposed settlement is fair, reasonable, and adequate, and deserves court approval. Judge Jones will also consider the application(s) of attorneys for the class for attorney fees and expenses. You may attend the hearing if you wish but you are not required to attend. Instead of attending the hearing, you may if you wish send the judge a written statement of objections or comments as described above in section 6b.

If you attend the hearing and if you have filed a written statement as described above, you or your attorney will be entitled to briefly state your objections to, or comments on, the proposed settlement. Your written statement will be considered whether or not you appear at the hearing. You may be asked questions at the hearing as stated above.

9. How will the settlement fund be distributed?

Judge Jones will appoint a claims administrator who will distribute the settlement fund. Each claim will be reviewed by the claims administrator under the supervision of attorneys for the class. Together, they will decide the extent to which your claim satisfies the terms for eligibility as described in the settlement agreement. You will be eligible to receive a part of the net settlement fund only if you are a class member and either (a) present proof that you have an asbestos-related disease and show the medical expenses and lost earnings you have incurred, or (b) file a claim for medical monitoring benefits.

The claims administrator will notify you in writing if your claim has been rejected in whole or in part and will give you the reasons for any such rejection. You will have thirty days after that to correct any deficiencies in your claim.

As described above, the terms of the proposed settlement call for defendants to create two settlement funds, one for $200,000,000.00 to compensate claimants for asbestos disease claims and one for $70,000,000.00 to support medical monitoring claims. The remaining $30,000,000.00 will be allocated to attorney fees and expenses and the costs of administering the settlement. In addition to any benefit they may receive based on personal injuries or medical monitoring, the class representatives, John Smith and Mary North, will each receive a payment of $5,000.00 for serving as class representatives, for a total payment to class representatives of $10,000.00. If Judge Jones approves the proposed settlement, up to $24,010,000.00 will be awarded as attorney fees, expenses, the costs of administering the settlement to date, and special payments to the two class representatives. Whatever interest that accrues on the settlement fund after it is created will be distributed proportionately with the distributions described in this paragraph

If Judge Jones approves the proposed settlement, each eligible class member who submits a valid claim for the Injury Compensation Fund will receive a payment in the form of a check determined according to the process described in section 5c(1) above. The amount of each check will be based on the type of disease and the amount of medical expenses and lost earnings The initial payment will consist of one-half of the amount determined by the claims administrator, arbitrator, or judge. The timing of the initial payment will depend on the time needed to obtain and process the information that describes the claim. If funds are available, all or part of the balance will be paid in five years

Each eligible class member who submits a valid claim for the Medical Monitoring Fund will receive a payment in the form of a check determined according to the process described in section 5c(2) above. The claims administrator expects to distribute medical monitoring fund checks within six months of the judge's action on the proposed settlement.

10. Where can you get additional information?

This notice provides only a summary of matters regarding the lawsuit. The documents and orders in the lawsuit provide greater detail and may clarify matters that are described only in general or summary terms in this notice. The settlement agreement dated October 4, 2000 may be of special interest. If there is any difference between this notice and the settlement agreement, the language of the settlement agreement controls. Copies of the settlement agreement, other documents, court orders, and other information related to the lawsuit may be examined at www.xxxx.com on the Internet. You may also obtain a copy of the settlement agreement and other information by calling 1-800-555-xxxx.

You also may examine the court papers, the settlement agreement, the orders entered by Judge Jones, and the other papers filed in the lawsuit at the Office of the Clerk of the United States District Court for the Northern District of State at 75 Main Street, Any Town, US 10103 during regular business hours.

If you wish, you may seek the advice and guidance of your own attorney, at your own expense.

If you wish to communicate with or obtain information from attorneys for the class, you may do so by letter [or e-mail] at the address listed below. You should address any such inquiries concerning a claim—or other matters described in this notice—to either:

The Claims Administrator
P.O. Box 32453
Any Town, US 12345 Email: admin@xxx.com

or

Attorneys for the class
P.O. Box 1628
Any Town, US 12345 Email: classatt@xxx.net

The parties created the above sources specifically to provide information about this case. They welcome your calls, e-mails, or letters. Please do not call the judge or the clerk of the court.

Dated: October 4, 2001.

Attorneys for the Class
By order of the District Court

Jane Jones

Jane Jones
United States District Judge

Summary of Important Information

Date	Form	Deadline	If you file on time:
›ril 1, 2001	Exclusion Form **(PURPLE FORM)**	Deadline for excluding yourself from the class action	You will not share in the benefits of the settlement and will be free to pursue any claims you may have against the defendant.
›ril 1, 2001	Objection Form **(GREEN FORM)**	Deadline for court to receive a comment or objection	You may object to or comment on proposed settlement
›ril 15, 2001	Appearance Form **(ORANGE FORM)**	Deadline for entering an appearance	You may notify the court of your intention to appear at the hearing on the proposed settlement and, if you so choose, to be represented by your own attorney
.pril 15, 2001		Hearing	The judge will: • determine whether the proposed settlement is fair, reasonable, and adequate • consider attorney-fee and attorney-expense requests • allow time for you or your attorney to briefly state objections or to comment on the proposed settlement
une 1, 2001	Claim Form **(BLUE FORM)**	Deadline for filing a claim	You will: • be bound by the proposed settlement if it is approved • share in the settlement if your claim is valid, • be barred from suing defendant based on the alleged wrongdoing

United States District Court for the
Northern District of State

John Smith v. XYZ Corporation

Civil Action No. 00-1234

Summary of notice of proposed class action settlement, right to exclusion, and hearing

You have received this class action notice because our records show that you may have been exposed to asbestos fibers in products of XYZ Corporation. Plaintiffs (the "class") have brought a class action lawsuit against defendants ("XYZ Corporation") alleging that XYZ Corporation produced building insulation materials and other products with knowledge that the asbestos fibers contained in those products posed a danger to the health and safety of anyone exposed to them. Plaintiffs and defendant have decided to settle the case. The settlement must receive court approval to become effective. You may be entitled to money from the settlement fund if you have been exposed to asbestos fibers in Xbestos, XYZinsulate, or any other products of XYZ Corporation. You may qualify only if you do not exclude yourself from the class and you are not a defendant, an officer or director of XYZ Corporation, or a member of the immediate family of an officer or director.

Under the terms of the settlement, the defendant has agreed to create a settlement fund in the amount of $300,000,000.00 plus whatever interest is earned after the fund is created. The attorneys for the class are asking for $24,010,000.00 plus interest for their services, expenses, and cost of administering the settlement. The amount remaining, at least $275,990,000.00 (part going to the Injury Compensation Fund and part going to the Medical Monitoring Fund) will be distributed to class members who submit valid claims.

Payments from the Injury Compensation Fund described below will be based on medical diagnosis of specific injuries that scientists have found to be associated with exposure to asbestos fibers.

Type of Injury	**Minimum Payment**	**Maximum Payment**	**Average Payment**
Mesothelioma	$10,000	$100,000	$20,000-$30,000
Lung Cancer	$5,000	$43,000	$9,000-$15,000
Other Cancer	$2,500	$16,000	$4,000-$6,000
Non-Malignant	$1,250	$15,000	$3,000-$4,000

To qualify for a payment, each claimant must submit a statement from a physician with a description of the claimant's current medical condition, including a diagnosis in one of the above

categories. In addition, each claimant must submit all medical records relating to the treatment of that injury, a signed release permitting the administrators of the fund to obtain medical records, and records indicating lost earnings resulting from the medical condition. The administrator will then assign a value to the claim based on the severity of the injury, medical expenses, and lost earnings. You will have the right either to accept the administrator's finding, or to appeal it to an arbitrator or a judge.

We cannot know in advance exactly how many claims there will be for payment from the Injury Compensation Fund. To make sure that the fund does not get used up before some claims are filed, claims will initially be paid at one-half the value established by the administrator, arbitrator, or judge. If there are sufficient funds available after five years, the remaining payments will be made in whole or in part.

The Medical Monitoring Fund will consist of $70,000,000.00 to compensate claimants for the costs of determining whether or not they have an asbestos-related disease that may have resulted from their exposure to defendant's asbestos products. To qualify for payment, a claimant must present evidence of exposure to one or more of defendant's asbestos-containing products and must also present evidence of medical expenses incurred to test for the presence of asbestos-related disease. A minimum payment of $1,000.00 will be made to those who present evidence of exposure but do not, for any reason, have evidence of medical expenses.

You have four options:

1. **If you are satisfied with the terms of the settlement and want to participate in the class action**, you will need to complete and sign the enclosed Claim Form (**BLUE FORM**) and mail and postmark it by June 1, 2001. In exchange for receiving the benefits of the settlement, you will be barred from bringing a lawsuit against the defendant based on exposure to any of defendant's asbestos products.

2. **If you are not satisfied with the terms of the settlement and want to participate in the class action**, you can object to, or comment on, the proposed settlement by completing and signing the enclosed Objection Form (**GREEN FORM**) and mailing it along with a written statement postmarked by April 1, 2001 detailing the reasons you believe support your objection. For example, in your written statement of objection you may wish to discuss whether the proposed settlement is fair, reasonable, and adequate; whether the class representatives and their attorneys adequately represent the class; whether the attorney fees or expenses are reasonable; and any other aspect of the proposed settlement or the payment and distribution plan for the proposed settlement. U.S. District Judge Jane Jones will consider your objections or comments in deciding whether she will approve the proposed settlement.

Even if you file an objection, you still must file a claim if you want to share in any settlement the court may approve. Filing a claim does not affect your comment or objection.

3. **If you do not want to participate in this class action** you should exclude yourself from the class by completing and signing the enclosed Exclusion Form (**PURPLE FORM**) and mail and postmark it by April 1, 2001. If you do exclude yourself, you will not share in the proposed settlement. However, you will be free to pursue on your own as a member or

representative or member of another class (if there is one), whatever claims you might have against the defendant based on exposure to any of defendant's asbestos products.

4. **If you do nothing**, you will not receive the financial benefits of the proposed settlement. If you do nothing and the court approves the proposed settlement, you will also be barred from bringing a lawsuit against the defendant based on exposure to any of defendant's asbestos products.

On April 15, 2001 at 9am, Judge Jones will hold a **hearing** on the settlement in courtroom #5 in the Federal Courthouse located at 75 Spring Street, Any Town, US. The purpose of the hearing is to determine whether the proposed settlement is fair, reasonable, and adequate and, whether it deserves court approval. You may attend the hearing if you wish but you are not required to attend.

If you file a claim or if you do nothing in response to this class action you will be represented by the attorneys for the class. But, you are free to represent yourself or hire an attorney to represent you at your own expense. If you remain a member of the class and decide to hire an attorney or if you plan to appear at the hearing and represent yourself you will need to complete and sign the enclosed Appearance Form (**ORANGE FORM**) and mail and postmark it by April 15, 2001.

If Judge Jones approves the proposed settlement, a claims administrator will notify you in writing if your claim has been accepted or rejected and will give you the reasons for any such rejection. You will have thirty days after that to correct any deficiencies in your claim. Each eligible class member who submits a valid claim will receive a payment in the form of a check. The amount of each check will be based on the type of disease and the amount of medical expenses and lost earnings. The claims administrator expects to distribute the first set of payments within a year of Judge Jones' action on the proposed settlement.

This notice provides only a summary of matters regarding the lawsuit. If there is any difference between the terms of this notice and the settlement agreement, the language of the settlement agreement controls. Copies of the settlement agreement, other documents, court orders, and other information related to the lawsuit may be examined at www.xxxx.com on the Internet. You may also obtain a copy of the settlement agreement and other information by calling 1-800-555-xxxx. Please do not call the judge or the clerk of the court. If you wish to communicate with or obtain information from attorneys for the class, you may do so by letter [or e-mail] at the address listed below. You should address any such inquiries to either:

The Claims Administrator
P.O. Box 32453
Any Town, US 12345 Email: admin@xxx.com

or

Attorneys for the class
P.O. Box 1628
Any Town, US 12345 Email: classatt@xxx.net

BLUE FORM

United States District Court for the
Northern District of State

John Smith

v.

XYZ Corporation

Civil Action No. 00-1234

CLAIM FORM

Read carefully the enclosed "Notice of Proposed Class Action Settlement, Right to Exclusion, and Hearing" before you decide whether to fill out this form.

If you want to be eligible to participate in the distribution of the settlement fund, you must complete this form and mail and postmark it by June 1, 2001 to:

Claims Administrator
P.O. Box 32453
Any Town, US 12345

Section I. Identification (Please type or print)

Your name_____

Address _____

_____

Any Town, US, Zip Code _____

Telephone _____

Your e-mail address (if any)_____

Section II. Exposure to products of XYZ Corporation (Please type or print)

Dates of Exposure (e.g., employment dates, date of installation on home; attach records, if available)	Names of products of XYZ Corp. used or installed	Names of co-workers or installers of XYZ Corp. products (include statements, if available)

(Use additional sheets if necessary)

Section III. Summary of medical claims relating to products of XYZ Corporation (Please type or print) (For medical monitoring claims, go directly to section V.)

Diagnosis (attach physician's statement)	Total medical expenses to date (attach billing statements)	Anticipated future medical expenses (attach physician's statement)	Lost earnings to date (attach documents, such as tax returns, pay stubs)	Anticipated future lost earnings (attach information about age, occupation, and past earnings)

(Use additional sheets if necessary)

The diagnosis must include a statement by a physician who has examined and treated you, indicating the most specific diagnosis possible, the likely cause or causes of the condition, the date of onset, and the prognosis. To claim future medical expenses, you must include a statement from a physician describing future treatment plans and estimating their cost. Claims for lost earnings must include proof of earnings prior to any disability related to the diagnosis. Claims for future earnings should include information about your age, occupation, and a summary of earnings prior to the onset of your inability to work.

Section IV. Statement of additional claims, settlements, or payments.

In addition to the claims you are presenting in this form, you must provide information about any claims relating to the diagnosis presented in Section III that you have made to other companies or by direct claim whether in court cases, bankruptcy proceedings, or other proceedings:

Title or caption of proceedings (if any)	Name of company or number of companies	Type of proceeding (civil case, bankruptcy, direct claim)	Amount of settlement, judgment, or agreement to pay

Section V. Statement of medical monitoring claims.

Please check and complete one of the following two options:

_____(1) I have incurred medical and other expenses of $_____ in relation to determining whether or not I have an asbestos-related medical condition. I have attached receipts and other records supporting this claim.

_____ (2) I accept the defendant's offer to pay $1,000 for medical monitoring expenses.

I understand that by signing and mailing this Claim Form, if the proposed settlement is approved, I am agreeing to follow the claims procedure specified in the class action settlement. This means that I can only bring a lawsuit based on the alleged dangerousness or harmfulness of any product manufactured by XYZ Corporation if I have first presented a claim to the claims administrator and proceeded to arbitrate any dispute about the administrator's award. In exchange, I will receive any share of the settlement to which I may be entitled.

Your signature _____

Date: _____

GREEN FORM

United States District Court for the
Northern District of State

John Smith

v.

XYZ Corporation

Civil Action No. 00-1234

OBJECTION FORM

Read carefully the enclosed Notice of Proposed Class Action Settlement, Right to Exclusion and Hearing before you decide whether to fill out this form.

Please enter my objection to the proposed class action settlement in this case.

I (circle one) [will] [will not] appear at the hearing scheduled in this case for April 15, 2001 at 9:00 A.M. in the courtroom of Judge Jones, located at 75 Main Street, Any Town, US.

Your signature _____

Date: _____

Please type or print:

Your name _____

Address _____

_____

Any Town, US, Zip Code _____

Telephone _____

Your e-mail address (if any) _____

Remember to attach to this form your written statement detailing the reasons you are objecting to the proposed settlement.

(Please turn over for addresses)

Please send this form and your written statement by prepaid first-class mail by April 1, 2001 to:

Clerk of the United States District Court for the Northern District of State
P.O. Box 6226
Any Town, US 12345

You must at the same time send a copy of the objection form and the written statement to the lead attorney for the class:

Herman Green, Esq.
P.O. Box 1628
Any Town, US 12345

and to defendant's attorney:

John Simmons, Esq.
835 Peach Street
Suite 950
Any Town, US 12345

PURPLE FORM

United States District Court for the
Northern District of State

John Smith

v.

XYZ Corporation

Civil Action No. 00-1234

EXCLUSION FORM

Read carefully the enclosed "Notice of Proposed Class Action Settlement, Right to Exclusion, and Hearing" before you decide whether to fill out this form.

If you want to exclude yourself from the class, you must complete this form and mail and postmark it by June 1, 2001 to:

Claims Administrator
P.O. Box 32453
Any Town US 12345

I have received the "Notice of Proposed Class Action Settlement, Right to Exclusion, and Hearing," dated October 4, 2000 and do NOT wish to remain a member of the plaintiff class certified in the case of Smith v. XYZ Corporation, Civil Action No. 00-1234, in the United States District Court for the Northern District of State.

(Additional information and signature line are on the back of this form.)

I understand that by signing and mailing this form:

- I will not receive any of the monetary benefits of the proposed settlement as described in the "Notice of Proposed Class Action Settlement, Right to Exclusion, and Hearing;"

- I will not be represented in this action as a class member if the proposed settlement is not approved; and

I may pursue, at my own expense, whatever claims I may have against any of the defendant. I understand that I would have to prove any claim I might file, and that any claim would be subject to any defenses defendants may have.

Your signature _____

Date: _____

Please type or print:

Your name _____

Address _____

_____

City, State, Zip Code _____

Telephone _____

Email (if any) _____

ORANGE FORM

United States District Court for the
Northern District of State

John Smith

v.

XYZ Corporation

Civil Action No. 00-1234

APPEARANCE FORM

[redacted]

Please enter my appearance as counsel[1] for _____, who is a member of the class in the case captioned above.

I (circle one) [will] [will not] appear at the hearing scheduled in this case for April 15, 2001 at 9:00 A.M. in the courtroom of Judge Jones, located at 75 Main Street, Any Town, US.

Your signature _____ (To be signed by counsel or by the class member if the class member does not have his or her own attorney)

Date: _____

Please type or print your name and address or that or your attorney:

Your name _____

Address _____

_____

City, State, Zip Code _____

Telephone _____ E-mail address (if any) _____

Please mail and postmark by April 1, 2001 to:

Clerk of the United States District Court for the Northern District of State
P.O. Box 6226
Any Town, US 12345

[1] If you are an individual representing yourself, leave this line blank.