ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, D.C.
January 22-23, 2002

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
JANUARY 22-23, 2002

1. Public Hearing on Proposed Amendments to Rules 23, 51, and 53

2. Public Meeting — Opening Remarks of Chair

3. **ACTION** — Approval of Minutes of April 23-24, 2001, and October 23-24, 2001, Committee Meetings

4. Revised Rule 23 and Committee Notes

   - Consolidated Text of Rule 23 and Committee Note as Published for Comment

   - Summary of Comments on Proposed Amendments to Rule 23

5. Draft Report of Committee on Administration of the Bankruptcy System on Recommendations of National Bankruptcy Review Commission Pertaining to Mass Tort Future Claims

6. Pending Agenda Topics

   - Proposed new Rule 5.1 governing constitutional challenges to federal or state statutes
   - Proposed page limitation on briefs filed with court
   - Proposed new Rule 62.1 authorizing a district court to issue an advisory ruling indicating that it would grant a motion to alter, amend, or vacate a judgment that is pending on appeal, if the action were remanded to it
   - Proposed amendments to Rule 15 to allow relation back if defendant had no information concerning the identity of the party
   - Proposed amendments to Admiralty Rules separating forfeiture provisions from traditional admiralty provisions
   - Proposed clarification of "person" as used in the rules
   - Proposed reconsideration of amendments to Rule 56

7. Next Committee Meeting

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

April 23-24, 2001

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

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

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

RULES PUBLISHED FOR COMMENT: AUGUST 2000 AND FEBRUARY 2001

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

Rule 7.1: Corporate Disclosure

Rule 7.1 was published in tandem with nearly identical proposals to amend Appellate Rule 26.1 and adopt a new Criminal Rule 12.4. Development of Rule 7.1 was spurred by two sets of newspaper articles that explored several incidents in which a federal judge had inadvertently acted in a case, often in a preliminary administrative way, in which disqualification would have been indicated had full information about the identity of the parties been brought home to the judge. Members of Congress who have particular interests in the federal judiciary believe it would be desirable for the judiciary to act to reduce the risk of such events. Within the Judicial Conference structure, the Committee on Codes of Conduct has primary responsibility for interpretation and development of the Code of Conduct for United States Judges. The Codes of Conduct Committee believes that the best response would be to adopt disclosure provisions modeled on Appellate Rule 26.1 in the Bankruptcy, Civil, and Criminal Rules. Working under the coordinating direction of the Standing Committee, proposed amendments of Appellate Rule 26.1 and new Civil Rule 7.1 and

Criminal Rule 12.4 were developed and published for comment. The Bankruptcy Rules Committee did not publish a rule, preferring to take additional time to study the possibility that the distinctive characteristics of bankruptcy practice might require different provisions.

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

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

Concern that the minimal requirements of Rule 26.1 may not suffice was paired with a strong sense that there is no reason why different disclosure requirements are appropriate in different sections of the country. Uniform disclosure requirements are appropriate within a national court system. Enhanced uniform disclosure requirements, however, must be closely tied to expert familiarity with the practical opportunities for meaningful disclosure. It is not possible to require disclosure in every case, of all parties and attorneys, of each item of information that might conceivably require disqualification. Nor is it possible for a judge to assure a thorough review of all of the information that would be required for every case that in some way, however fleetingly, comes to the judge for action. The pragmatic judgments that must be made about disclosure are likely to change over time as electronic information systems continue to improve. The best reservoir of information about real disclosure needs and experience is the Judicial Conference Codes of Conduct Committee. The Codes of Conduct Committee must take the lead in prescribing any successful disclosure requirements that may prove feasible.

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

be permissible, but that the Judicial Conference might in the future promulgate added disclosure requirements through Rule 7.1 that would supersede local rules.

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

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

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

Another reaction was that the "legality" of recognizing and enforcing the effects of future Judicial Conference action through the Enabling Act process is an unanswered question. This tactic seems appropriate as to interstitial questions of the sort addressed by the present Civil Rules

provisions that rely on Judicial Conference action. And in reality, sophisticated disclosure rules are likely to emerge only through other Judicial Conference committees, not the rules committees.

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

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

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

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

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

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

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

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

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

Rules 54, 58: Separate Judgment Document

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

The approach suggested by the Appellate Rules Committee works best if it is integrated with the Civil Rules. Appellate Rule 4 integrates appeal-time periods with the disposition of timely post-judgment motions in the district court. The Civil Rules set the times for making these motions by reference to the entry of judgment. Untold grief would flow from an Appellate Rules provision that cuts off appeal time if it remained possible to make post-judgment motions in the district court after

the close of appeal time. The published proposals to amend Civil Rule 58 and Appellate Rule 4(a)(7) were an integrated response to this problem.

The first part of amended Rule 58, Rule 58(a)(1), restates the separate document requirement but lists exceptions. A separate document is not required for an order disposing of five enumerated categories of post-judgment motions, beginning with a motion for judgment as a matter of law. These are the motions that suspend appeal time under Appellate Rule 4(a)(4), but the provision in Rule 58(a)(1) is broader. Appeal time is suspended only if the motion is timely; Rule 58(a)(1) does not require that the motion be timely. There are other minor distinctions as well. These differences arise from the conclusion that the demonstrated difficulties in achieving compliance with a separate-document requirement counsel against unnecessary complication. The proposal conforms to the general current view that an order disposing of such motions does not require a separate document, but avoids the many complications that may surround that conclusion. An order denying a new trial, for example, may in some circumstances be appealable — if so, it is a judgment and present Rule 58 requires a separate document.

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

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

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

on the civil docket under Rule 79(a)." The effect of the 60-day period is to defuse the appeal time bombs by triggering Appellate Rule 4 60 days after judgment is entered in the civil docket, notwithstanding lack of a separate document.

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

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

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

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

Discussion of the 150-day cap proposal began with a suggestion that no cap should be established — appeal time, and the time for post-judgment motions, should begin only when a separate document is provided. Dean Schiltz responded that the Appellate Rules Committee's judgment is that the "time bombs" do explode, and cause mischief. If the cap is set at 150 days, the

minimum appeal-time period of 30 days gives a total of 180 days to appeal. In comparison to the rules that apply when there is no notice of the judgment at all, the 150-day cap is generous.

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

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

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

The effort to escape the untoward consequences of the rule 58 attempt to define entry of judgment for all Civil Rules purposes could be put at risk if new Rule 58(b) is revised to encompass all situations in which a Civil Rule refers to entry of judgment. A quick survey shows that at least the following Rules refer to entry of judgment: 26(a)(1)(D); 49(b); 55(c); 55(e); 64; 68; 69(b); 71A(i)(2); 71A(j); 77(c); and Admiralty Rules B(2) and C(5). Many of these rules do not present any obvious difficulties. Some do raise interesting questions. Rule 69(b), for example, governs the immunity of a collector or other officer of revenue, or an officer of Congress "when a judgment has been entered." Is it conceivable that there will be a period of 150 days after entry on the civil docket without a separate document during which the protections established by Rule 69(b) do not apply? Rule 71A(i)(2) provides that before entry of any condemnation judgment vesting the plaintiff with title, the action may be dismissed in whole or in part, without an order of the court. Is dismissal without court order available for 150 days after entry in the civil docket without a separate document? The purpose of the Rule 58 revision has been only to integrate the Civil Rules motions time limits with the Appellate Rules time provisions. The lessons learned in working toward this purpose are that the attempt to establish a general definition of "judgment" in Civil Rule 54(a) is thoroughly unsatisfactory. It would be a mistake, without good reason, to run the risks of adopting a generalized definition of entry of judgment.

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

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

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

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

Finally, a style change has seemed desirable in the wake of the Appellate Rules Committee meeting. Many of the comments on the Rule 58 and Appellate Rule 4 proposals revealed that even people who have engaged with these rules for substantial parts of their professional lives do not understand what they mean now, and do not understand the ways in which the proposals would change the present meaning. One small and easily corrected reflection is found in the compact drafting of Rule 58(b)(2). The Appellate Rules Committee approved a suggestion that Rule 58(b)(2) be redrafted to say the same thing as the published draft, with more words but also with more clarity. The committee agreed that Rule 58(b)(2) be restyled to read as follows:

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

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

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

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

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

Rule 81(a)(2)

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

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

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

Admiralty Rule C

On December 1, 2000, amendments of Admiralty Rule C took effect. The amendments were designed to better meet the differences between forfeiture practice and maritime practice. They were transmitted by the Supreme Court to Congress in April 2000. One week after the Supreme Court transmitted the changes, Congress enacted legislation that revises civil forfeiture practice. The new legislation differed in a number of minor details from the new rules. Because the new rules took effect after the legislation, they technically supersede the legislation. There was no intent, however, to supersede the legislative provisions — the amended rules were crafted and recommended to the Supreme Court long before the legislation was adopted.

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

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

RULE 23: CLASS ACTIONS

Rule 23(c)(1)

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

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

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

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

A committee member supplemented these observations by saying that after years of uncertainty whether the Rule 23 project will result in any changes beyond the adoption of Rule 23(f), it is welcome to find this well-conceived package of proposals. The changes made in response to consideration of the package in March are particularly impressive.

Judge Rosenthal then presented the proposals for the Subcommittee. She noted that the proposals represent an effort to capture what we learned from reaction to the 1996 proposals, from

the empirical studies, and from the ongoing work of the committee and Subcommittee. The proposals are integrated, but they are not necessarily interdependent — many parts can stand independently if other parts are found wanting.

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

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

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

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

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

Judge Rosenthal began detailed presentation of the Rule 23 changes with Rule 23(c)(1)(A). This proposal advances again the 1996 proposal to change the requirement that a certification decision be made "as soon as" practicable to a requirement that it be made "when" practicable. The change conforms the rule to the reality of practice. The best practice is emphasized in the Committee Note: the court and parties should take as much time as may be needed to support a thoughtful certification decision, but no more. There does appear to be some confusion in bench and bar as to the proper extent of merits-related discovery during the pre-certification stage. The Note seeks to address this topic, noting that the court must understand the nature of the dispute likely to be presented in order to determine what issues may be common to the class, whether the representatives are typical of the class, whether the representatives will prove adequate and without disabling conflicts with and among class members, and whether — for purposes of Rule 23(b)(3) — the common issues predominate and class litigation is superior. The Note ends with the summation that

the parties should act with reasonable dispatch to gather and present the information needed, and the court should make the determination promptly.

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

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

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

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

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

within a group that had seemed to be a coherent class, or may show other reasons to modify the class definition. Again, the rule change is consistent with common practice.

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

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

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

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

Certification preclusion may be a good idea, but it "feels like legislation." Perhaps it should be left for action by Congress.

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

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

The observation that publication for comment brings benefits, but also implies some measure of endorsement, was renewed. If there is not a legal basis for preclusion, we should not accomplish it by confiding to the discretion of the trial court. Often the discretion will be exercised without opportunity for appellate review.

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

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

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

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

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

limited by the proposal, addresses new needs that require new theories based in class-action theory. This is a policy decision to adapt preclusion policy to new needs.

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

Draft Note material was prepared to describe the obstacles that may thwart development of certification preclusion by judicial decision. 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.

The lack of the "finality" component of traditional res judicata theory 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 in its own terms 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.

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

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

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

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

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

This statement of the problem was found persuasive by another member, who concluded nonetheless that the answer should be found in legislation. Congressional response to like problems is shown by the aftermath of the 1995 Private Securities Litigation Reform Act. The 1995 act led

many lawyers to file actions in state courts. Congress responded in 1998 with new legislation designed to force most of this litigation into federal courts. The committee bears the responsibility to decide how confident it is that this proposal will work, and whether Enabling Act authority extends this far.

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

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

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

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

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

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

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

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

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

Rule 23(c)(2)

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

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

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

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

Rule 23(e)

Rule 23(e) is aimed at enhancing judicial review of proposed class-action settlements. The need for searching review has been urged repeatedly throughout the committee's consideration of Rule 23. It was stated frequently during the testimony and comments on the 1996 proposals. Its importance has been stressed in much academic literature, building on the perception that once class representatives and class adversaries join together in urging approval the court often lacks the vigorous adversary presentation needed to test the settlement. The RAND study further supports this advice. The Rule 23(e) proposal also is the one that has been longest before the committee and Subcommittee, and has been most frequently revised.

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

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

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

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

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

The purposes of paragraph (1) are clear. The first is to make it clear that a party who advances class allegations is assuming a responsibility that cannot be abandoned unilaterally. An attempt to dispose of individual claims on terms that do not affect the class still must be approved

by the court. Approval may be given readily if there is no reason to be concerned about effects on members of the putative class. The action may have been filed and pursued in a manner that drew no attention and was not likely to engender reliance by anyone else. There are many good reasons why early exploration of the action may demonstrate that it does not justify the burdens entailed by further pursuit as a class action. Court approval can be given readily, without substantial burden on the court or parties.

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

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

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

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

These purposes have been readily approved in earlier discussions. It has proved difficult, however, to devise a clear expression in rule language. The central distinction is between settlements that would affect class members by way of res judicata and settlements that do not legally affect class members. The original drafts drew this distinction by referring to a disposition that would "bind" class members. That term was thought by some to be too informal, too much lacking in received technical definition, to be used in a formal rule. Substitutes were sought. The problem is made complicated by the risks of referring only to settlement of the claims, issues, or defenses of a "certified class." It is very common practice to consider certification at the same time as a settlement is presented for approval. It is common to react to these combined events by provisionally

certifying the class for purposes of considering the settlement, provisionally approving the settlement, and providing notice to class members. The limited provisional certification may or may not be read into a reference to a certified class. It is possible, moreover, that some other device will be found — Rule 23 does not speak to the provisional certification tactic, and alternative approaches might take on a still more uncertain status.

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

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

It was noted that voluntary dismissals may be triggered by a variety of circumstances. A (b)(2) action for an injunction, for example, might be met by the defendant's agreement to provide the requested relief without need for adjudication. It was further noted that a voluntary dismissal may be without prejudice, but also may be with prejudice.

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

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

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

(A) A person who sues or is sued as a representative of a class may settle, voluntarily dismiss, compromise, or withdraw all or part of the class claims, issues, or defenses[,] only with the court's approval.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

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

This proposal was approved.

Rule 23(e)(2)

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

Rule 23(e)(3)

Proposed Rule 23(e)(3), which creates a "settlement opt-out," is another response to the difficulties that beset judicial review of class-action settlements. The committee has been told for many years, in many ways, that review may be stymied by cooperation of the parties, the lack of forceful objectors, and even by the court's own incentives to approve the settlement and conclude the litigation. The initial drafts that sought to provide support for objectors encountered considerable cynicism, based on the experience that objectors may be motivated by strategic desire rather than concern for protecting the class. The settlement opt-out is an alternative form of protection for class members and information for the court. Many cases already provide an opportunity to opt out at the time of settlement because a (b)(3) class is certified for the first time incidental to settlement review. The new provision applies only to (b)(3) classes and makes a difference only if an earlier opportunity to request exclusion has expired by the time the settlement is proposed for review. The number of opt-outs will give the court some indirect information on the desirability of the settlement.

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

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

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

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

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

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

Rule 23(e)(4)

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

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

recognizing and paying off the strategic value of even very weak objections. The effort was abandoned in favor of a simple court-approval requirement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> **(4) (A)** Any class member may object to a proposed settlement, voluntary dismissal, or compromise that the court must approve under Rule 23(e)(1)(C).

(B) An objector may withdraw an objection made under Rule 23(e)(4)(A) only with the court's approval.

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

Rule 23(e)(5)

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

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

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

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

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

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

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

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

It was argued that if disapproval is rare, and if careful work will be done before concluding that disapproval is required, the court that disapproves a settlement will write a careful explanation of its action. The explanation will have persuasive force. We do not need to add preclusive force to address the rare event — initial disapproval is rare, and the prospect that it will be followed by approval in another court is still more rare.

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

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

It was agreed that we should ask two questions separately: Is settlement preclusion a good idea? If it is a good idea, is it one that should be pursued through the Enabling Act process? The

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

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

Rule 23(g)

Proposed Rule 23(g) is an attempt to address the problems of overlapping and competing class actions in terms more general than the specifically targeted provisions for certification preclusion and settlement preclusion. There is a felt need to establish some means of addressing overlapping and competing class actions. Fulfillment of the purposes of Rule 23 demands no less. Multiple actions can defeat any opportunity to achieve an efficient, uniform, and fair resolution of class claims by any court. The entire purpose of a (b)(1) class is to protect class members against the effects of litigation in their absence, or to protect a class adversary against inconsistent adjudications. Realization of the purposes of a (b)(2) injunction class may demand comparable protection against competing actions. Similar concerns attach to (b)(3) classes, albeit with reduced force.

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

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

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

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

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

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

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

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

The strong form was explained as most needed in mass-tort settings. In mass torts extensive individual litigation is possible. Often litigation that takes the form of individual actions is in reality aggregated through the processes that bring a small number of lawyers to represent thousands of clients. Such coordinated actions can pose problems as acute as parallel actions that are pursued in class-action form. Multiple competing actions, including thousands in individual form, have been filed in every "drug recall" case. Some states have mechanisms for consolidation that concentrate all cases in a single state in a single state court; other states lack such mechanisms and may have actions pending in many different courts. In the fen-phen litigation an attempt was made to coordinate discovery in all actions. One effect of the individual actions is that lawyers with many clients opt the clients with strong claims out of the class, leaving the clients with weak claims in the class. The strong claims are then settled for "full contingent fees." It is sensible to pursue the non-

class actions; the present systems works well when everyone cooperates, but that does not always happen. Outside the mass-tort area, this problem seems less acute.

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

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

A different perspective on the strong form was offered by asking whether it is possible for a court, early in the litigation, to gather the information needed to determine whether it is necessary to protect the class proceeding against interference by individual actions and to determine that the need for protection is greater than the need to continue the separate actions. The pre-certification order is more important with respect to competing class actions, and easier to frame.

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

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

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

It was asked whether subdivision (g) is severable from the rest of the Rule 23 proposals. It was answered that it is severable, but that it is important. It would be good to publish at least the soft version for comment. The strong version addresses a problem that is serious when it does occur; it

is not clear how often the problems in fact do occur. Much will depend on future developments of class-action practice in the mass tort area.

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

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

Rule 23(h)

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

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

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

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

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

The deletion of the formal application requirement entails reframing paragraph (2)(B). Rather than speaking to what an application must include, it now addresses the matters the court must consider — experience, work done on the claims, and resources to be committed — and permits consideration of any other matter pertinent to counsel's ability to fairly and adequately represent class interests. The court may direct potential class counsel to provide information on any of these matters. The court also may direct that aspirants for appointment as class counsel propose terms for attorney fees and nontaxable costs. The Committee Note recognizes the need for confidentiality as to much of the information that may be required.

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

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

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

Rule 23(i)

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

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

Subdivision (i)(1) resolves several old issues. One is the time for a fee motion. The draft provides for a motion "under Rule 54(d)(2), subject to the provisions of this subdivision." The

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

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

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

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

Thomas Willging described three memoranda prepared on behalf of the Federal Judicial Center for the committee. One describes the number of diversity class actions. The overall data on the number of class-actions in this memorandum were derived by methods that defeat comparison to the data available for earlier years — the seemingly sharp increase may reflect only the differences in the methods used. The second provides data on attorney appointment and fees drawn from the data base for the 1996 study of class actions; the information is limited by the questions asked in that study. For example, it was assumed that every certification implies appointment of a class attorney. The project to develop model class-action notices is nearing completion. The notices for securities actions will be tested further by using volunteers from 17 investment clubs. The notices will be posted soon on the FJC web site.

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

RULE 53: SPECIAL MASTERS

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

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

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

The first question was whether a trial master can be appointed in a jury case with the consent of the parties. It was observed that in California there is a "pro tem judge" system under which lawyers act as judges in jury trials; the resulting judgment is appealed through the normal appeal process. It was instantly agreed that Rule 53 should not provide in any circumstance for entry of a final district court judgment by a master, subject to review only in an appellate court and not the district court. But it also was agreed that the consent provision of draft Rule 53(a)(1)(A) would allow the parties to consent to use of a trial master in a jury case. The consent might function as a waiver of jury trial on the issues tried to the master; even then, as with any consent appointment, the district court retains discretion to refuse the appointment. The Committee Note should be clear that party consent does not require appointment of a master in a jury case or any other. It is conceivable that parties might consent to appointment of a master whose "findings" are to be read to the jury as evidence, conforming to the practice envisioned by present Rule 53(e)(3). This course seems most likely in a case in which at least one party wants a jury, but all parties believe that one or more issues will test the limits of jury comprehension.

It was noted that a special master was used in the litigation that grew out of claims against former Philippines President Marcos for murder, "disappearances," and other wrongs. The master

was appointed as an expert witness under Evidence Rule 706, and was available for cross-examination. The depositions on which the master relied were provided to the jury. The jury was instructed that they were free to accept, modify, or reject the master's evaluation of damages, and could make their own determination.

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

It was suggested that one reason to consent to appointment of a trial master in a jury case is that the parties want to get away from a particular judge.

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

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

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

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

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

that litigation can progress more efficiently or more rapidly with the appointment of a special master should not suffice. "We should not use Rule 53 to expand the role of the judiciary."

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

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

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

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

In response, it was suggested that these changes would raise the bar too high. The draft rule is based on an examination of existing practices and seeks to confirm them. It looks at the question from the perspective of the particular court, and takes a pragmatic view. By asking whether an "available judge" can perform the proposed duties, it forgoes an inquiry into the possibilities that might emerge from the most efficient use of all the judges in a particular court. If local assignment practices mean that a judge who has some time available need — and will — not help out in the case of another judge, that judge is not "available."

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

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

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

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

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

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

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

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

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

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

It was asked whether there should be a "default" provision governing ex parte communications between the master and either parties or the court. Proposed Rule 53(b)(2)(C) says only that the appointing order should state the circumstances in which the master may communicate ex parte with the court or a party. But this direction may be overlooked, or unforeseen circumstances may arise. In response, it was noted that the Federal Judicial Center study found that ex parte communication issues were a common source of uncertainty in special master cases. The desirability of ex parte communications is a complicated question because of the wide variety of functions served by masters. A settlement master, for example, may be able to function only if ex parte communications with the parties are allowed; it may be useful to permit as well ex parte communications with the court about the obstacles to settlement. A master reviewing discovery documents for privilege may find ex parte communications important. In other circumstances ex parte communications may be undesirable. A default provision would either be complicated or risk wrong results. It was agreed that no attempt should be made to draft a default provision.

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

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

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

The first question addressed to subdivisions (c) and (d) was what is meant by the reference to a "hearing." Presumably there are many events before a master that could be characterized as hearings, but that do not entail taking evidence. It would be odd to apply the power to compel evidence to a "hearing" on many routine matters. It was urged that it would be better nonetheless

not to refer to an "evidentiary" hearing — that these questions can be addressed in the appointing order, commonly on the basis of "boilerplate" provisions that will be supplied by the parties.

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

It was observed that there must be discretion to determine what items become part of the public record. A public record cannot be made of everything done by a master — some of the master's functions will be too sensitive for that. A settlement master, for example, may need highly confidential information about the parties' positions — and some of the information may be in writing. A master investigating compliance with a decree may be in a similar position. In framing a rule provision for this topic, the Note should state the need to protect confidential information. It is difficult to express these concerns simply in a provision that addresses "filing." Rule 5(e) says that filing "shall be made by filing [papers] with the clerk of court, except that the judge may permit the papers to be filed with the judge." If we mean to permit "filing" with a master, we will need to integrate the Rule 53 provision with Rule 5(e). One approach would be to have the order appointing the master set the terms on which information provided to the master goes into the record. Or a more general term could be adopted, and the Note could say that the judge should consider whether to include record-keeping directions in the order of appointment. Or the rule could say that the master must retain all things submitted to the master.

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

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

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

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

Added discussion led to the suggestion that all of these proposals would add unnecessary detail to Rule 53. It was asked whether there is any problem — "are masters losing things"? A response was that masters do not always keep good records.

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

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

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

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

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

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

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

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

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

Subdivision (g)(5) sets out two alternatives for addressing review of a master's procedural orders; the draft Note suggests a third alternative — to say nothing in the rule, but to address the problem in a few Note sentences. The Subcommittee believes that it would be desirable to publish for comment at least one of the two express alternative provisions. The first alternative would direct that the order appointing the master establish standards for reviewing "other acts or recommendations." The second alternative would allow the court to set aside a ruling on a "matter of procedural discretion" only for abuse of discretion. Support was expressed for the second

alternative, but with some uncertainty as to what might be meant by a "matter of procedural discretion." It was agreed that it would be better to refer to "procedural matters."

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

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

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

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

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

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

RULE 51

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

Consideration of this question led to the question whether the time has come to revise Rule 51 to say clearly what it has come to mean in practice. Lawyers of the highest ability, for instance,

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

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

Subdivision (a)(2) supplements (a)(1) by allowing requests at the close of the evidence in two circumstances. First, subparagraph (A) permits requests on issues that could not reasonably have been anticipated at an earlier time for requests set under (a)(1). This provision recognizes that despite the value of pretrial requests, trials hold many surprises. Witness testimony is not always as anticipated. New issues may be injected even when the testimony is what was expected; pleading amendments are allowed at trial. A reasonable failure to foresee these surprises should not defeat the opportunity to request instructions. Second, subparagraph (B) recognizes the court's discretion to permit untimely requests despite failure to satisfy the standards of subparagraph (A). Courts frequently permit tardy requests now, and are more inclined to do so when the request raises an important issue. The most compelling reason for accepting a tardy request appears when the request goes to a matter of plain error that would require reversal even if there were no request at all, but less compelling reasons may suffice.

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

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

It was suggested that paragraph (2) should be deleted. It is not necessary to describe the circumstances that justify supplemental requests after the deadline set for initial requests. Courts will allow later requests when there is good cause. It was responded that it is better to address this question in the rule, and that the test should be more specific than "good cause." But it was asked

what does it mean to look to issues "that could not reasonably have been anticipated"? Is this setting up a malpractice trap that could be avoided by a more flexible provision?

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

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

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

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

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

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

Subdivisions (b), (c), and (d) were described together because they are interrelated. They separate out matters that are run together in present Rule 51: instructions (b); objections (c); and forfeiture (d). The provisions for instructions in (b) first require the court to inform the parties of

its proposed instructions and action on instruction requests before instructing the jury and before final arguments related to the instructions. This requirement expands on present practice by requiring that the parties be informed not only about action on their requests but also about instructions on matters that have not been the subject of any request. It also separates the time provisions. The parties always must be informed before instructions are given — if interim instructions are given, this event may occur well before final arguments. The relationship to arguments is framed in terms of final arguments related to the instructions, recognizing that there may be interim arguments and that it may not be feasible to require the court to formulate the actual jury instructions before the issue is submitted to the jury. A plaintiff, for example, may be allowed to deliver an interim argument to help guide the jury as it listens to the evidence before the defendant has even begun its own presentation. The court may have no reason to instruct the jury at that point or to frame final instructions that will be given later.

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

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

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

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

recognize a plain error exception, and the Seventh Circuit has refused to allow review for plain error for this reason.

Discussion of these provisions began with an endorsement of the (d)(2) provision that forgives the requirement that a request be supplemented by an objection. The theory that underlies the need for both request and exception draws both from the language of present Rule 51 and also from pragmatic concerns. It has been recognized that making a request does not invariably ensure that the court will carefully review the request; a reminder by objection may correct a misunderstanding or inadvertence. A more common phenomenon is that the court seeks to give the substance of a request in clearer or less tendentious language, but loses something in the translation; an objection is important to point out the changed meaning. The circumstances of the trial court's action on a request, however, may make it clear that these purposes have been served. Many appellate opinions have reviewed issues raised only by a request when the record makes it clear that the trial court had considered the request and had deliberately rejected the arguments advanced on appeal. At the same time, other opinions seem to insist on a seconding objection even in circumstances where no purpose is served.

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

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

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

agreed that the Committee Note should point out that present Rule 51 requires both request and objection.

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

ELECTRONIC DISCOVERY

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

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

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

NEXT MEETING

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

Respectfully submitted,

Edward H. Cooper, Reporter

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 22-23, 2001

The Civil Rules Advisory Committee met on October 22 and 23, 2001, at the University of Chicago Law School. The meeting was attended by Judge David F. Levi, Chair; Judge John L. Carroll; Justice Nathan L. Hecht; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Professor Myles V. Lynk; Hon. Robert D. McCallum, Jr.; Judge H. Brent McKnight; Judge Lee H. Rosenthal; Judge Thomas B. Russell; Judge Shira Ann Scheindlin; and Andrew M Scherffius, Esq. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter. Judge Anthony J. Scirica, Chair; Charles J. Cooper, Esq.; Dean Mary Kay Kane; Judge J. Garvan Murtha; Judge Thomas W. Thrash, Jr.; and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker attended as liaison member from the Bankruptcy Rules Committee. Members of the Judicial Conference Federal-State Jurisdiction Committee who attended included Judge Frederick P. Stamp, chair; Judge Loretta A. Preska; Judge Jack B. Schmetterer; and Justice Linda Copple Trout. Judge Jed S. Rakoff, a memeber of the Committee on Administration of the Bankruptcy System, also attended. Peter G. McCabe, John K. Rabiej, and James Ishida represented the Administrative Office. Mark Braswell and Karen Kremer were additional Administrative Office participants. Thomas E. Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Observers included Lorna G. Schofield (ABA); Francis Fox (American College of Trial Lawyers); Thomas Moreland (ABCNY); Marcia Rabiteau, Esq.; Alfred W. Cortese, Jr.; Jonathan W. Cuneo (NASCAT); and Christopher F. Jennings. The moderators and participants in the several panel discussions are listed separately with each panel.

The agenda of the meeting included a memorandum from Judge Levi summarizing actions by the Standing Committee in June 2001, and a memorandum describing new subjects that are being carried forward on the agenda for consideration at future meetings. The discussion agenda of the meeting was devoted entirely to a conference arranged by the Committee to provide advice about proposals to amend Civil Rule 23 that were published in August 2001 and also about proposals that were held back from publication.

Judge Levi opened the conference by expressing the thanks of the Advisory Committee to all who were attending and participating in the conference, and to the University of Chicago Law School for hosting the conference.

Judge Levi noted that consideration of Rule 23 has been an important task for the Committee, commanding serious attention on a sustained basis for more than a decade. If improvements are indicated, there is an opportunity to contribute to the public weal. The conference brings together a group of lawyers, judges, and scholars representing diverse views to offer their best thinking on the current state of practice and the current proposals. In addition to the conference participants, the representatives of bar groups carry forward the valued tradition of participating in Committee work. Finally, it must be noted that Judge Rosenthal put in much hard work to assemble the conference with a good balance of experts who bring the perspectives of a wide variety of experiences.

Dean Saul Levmore welcomed the conference to the Law School.

Professor Marcus presented a brief summary of the historic development of Rule 23. If adopted, the published proposals will be the second time that Rule 23 has been modified in a significant way. Rule 23 "was not a big deal" when it was adopted in 1938; Judge Clark's explanations of the new rules to the bar were devoted much more to other topics — Rule 12(b) practice commanded fifteen times as much attention, and Rule 14 impleader practice commanded twice as much attention. All that changed with the 1966 amendments. Professor Kaplan said that the revision was designed to correct some artificial artifacts in the original rule, and to look to the mechanics of its operation. It is not clear what they expected, but within ten years a holy war was being fought over Rule 23(b)(3). The war abated somewhat, and for a time some observers thought the day of class actions was disappearing. Class actions have proved resurgent.

As compared to the continual work that regularly revised the discovery rules, the Advisory Committee deliberately refrained from considering Rule 23, adhering to a Judicial Conference policy that regarded Rule 23 revision as a topic for legislation. In 1991, however, the Judicial Conference — acting in response to a report by the ad hoc committee on asbestos litigation — suggested that consideration would be proper. Proposals addressed to class certification issues were published in 1996, but only the interlocutory appeal provisions of Rule 23(f) emerged from that round of the process. Today's proposals carry forward one thrust from 1963 because they address not the criteria for certification but the mechanics of the class-action process.

Judge Rosenthal added her welcome to the conference. She noted that her visits to the Law School always invoke memories of the uncertainty and inadequacy that students feel as they begin to study the law. Similar feelings may be appropriate as we approach Rule 23. The several successive panels will aid consideration of these many proposals.

Panel 1: Precertification Case Management

The moderator for the first panel was Judge Frank H. Easterbrook. Panel members included John H. Beisner, Esq.; Allen Black, Esq.; Robert Heim, Esq.; Edward Labaton, Esq ; Diane M. Nast, Esq.; and Judge Sam. C. Pointer, Jr.

The proposals to amend Rule 23(c)(1) begin with a proposal to change the demand for certification as "[a]s soon as practicable" to "at an early practicable time." An earlier version of this proposal, which would have demanded certification "when practicable," was rejected by the Standing Committee in 1997. The Standing Committee was concerned that delay in certification could lead to one-way intervention. The parties, moreover, need to know the stakes of the litigation. But the recent Seventh Circuit decision in the Szabo case reflects the fact that to be able to apply the Rule 23 certification criteria a judge needs to know what is the substance of the dispute. The pleadings alone do not do it — a plaintiff cannot establish the conditions for certification by mere assertion. The current proposal is based on the premise that it is sound to take the needed time to uncover the substance of the dispute, but not to indulge discovery on the merits or decision on the merits.

It was noted that the proper time for the certification decision has been a question. The Manual for Complex Litigation Second observed long ago that time is needed to explore how the case will be presented; that means discovery into the merits. Some judges were allowing this discovery even in the 1970s. Since the Second Edition was published in the early 1980s, there has been a steady progression in this direction. If this change of language were to be the only change in Rule 23, it would not be worth the effort; it conforms to better present practice, and the gradual evolution will continue with continuing education. But if Rule 23 is to be changed, this change is probably a good one.

This observation was tied to the observation that the amendment proposals fail to address the question of settlement classes, or Rule 23 alternatives for mass torts.

Another panel member spoke from the plaintiff's view. The change to certification "at an early practicable time" likely will have no effect. "As soon as" practicable gives more than ample latitude. The *Szabo* opinion makes this abundantly clear. There are no situations where district courts have been constrained by the present language. The Committee Note, indeed, says that the intent is to preserve current practice. And there is a risk of unintended consequences: more pre-certification activity will be encouraged. Courts should not allow more discovery than needed for the certification decision. More important still, it is a mistake to codify the Federal Rules of Civil Procedure, to fine-tune the Rules in a fruitless effort to make them more perfect. The Rules are not a Code. Rule 23(c)(1) works; why add new words?

The same panel member stated that notice in (b)(1) and (b)(2) classes can be given now. The proposal calling for notice to a "reasonable number" of class members is odd.

The requirement of plain notice language also adds nothing; plain language is sought now.

More generally, the Rules should be written in broad terms, leaving much flexibility to district judges. The Rules should deal with the large issues. The 1966 changes got rid of "spurious" class actions; the changes have worked. We should not hamstring judges with more detailed rules now. The Advisory Committee should look to the philosophy of the 1938 rules: avoid details such as those that would be established by the plain-language requirement, the requirement of notice in (b)(1) and (b)(2) classes, or certification "at an early practicable time." Simple rules are best. Explanation can go into the Manual for Complex Litigation.

There is a real problem with fitting mass torts into Rule 23; perhaps they deserve a separate rule.

The next panel member spoke from a defense view. The change to certification "at an early practicable time" "is a close call, though I favor it." There has been a substantial change in district-court practice in the last five or six years, prompted by appellate demands that a record be established on the certification decision. The FJC study documents the change. One reason to revise the rule is to support publication of the Committee Note, which does an excellent job of alerting district courts to "the tensions," although it could be improved in some ways. At least some

discovery is needed in most cases to support the certification decision. The question is how much discovery — there should be an adequate record, but no more discovery than needed for that. The Note encourages trial courts to play an active role in determining how much discovery is needed for the certification decision. That is good.

A rule change also may drive out some lingering vestiges of practice that allow certification on the pleadings with minimal or no discovery. Some local rules still require a certification determination within a defined and short period such as 90 days — a period that expires before disclosures need be made or discovery can even begin. And some courts still want to decide on certification before entertaining motions under Rule 12(b)(6) or Rule 56. The change also will serve as a good example to state courts: if there is no big problem in federal courts, there is in some state courts. Just a few years ago, some courts in Alabama were certifying classes on a "drive-by" basis; Alabama has dealt with this practice, but other states are doing strange and unwise things.

But the proposal carries forward the present rule statement that certification is "conditional." The word should be deleted. Certification is supposed to be "for keeps."

Another lawyer observed that the "at an early practicable time" provision reflects the practice today. Practice has changed. In 1976, there was de minimis discovery to support the certification decision, or none at all. There has been a progressive movement; it may have carried too far into discovery on the merits in some cases. The Committee Note helps this. The Seventh Circuit Szabo decision is a clear statement. Class-action discovery does relate to the merits, most obviously when it seeks to identify the issues that actually will be tried, but it may be carried too far. The Committee Note may help; the proposed language is, as it is characterized, "fastidious."

The same lawyer identified other issues. (1) Rule 23 should address discovery from "absentee" class members. This problem is not much addressed in reported decisions. But experience as a plaintiffs' lawyer shows that such requests are presented. Courts do have the power to address the issue, but a Rule would help. There is a concern with relationships between the class attorney and class members as clients. (2) There may be a problem with discovery of the notice plan. It would be better to provide for automatic review of the notice plan in a nonadversarial setting as part of the case-management plan. (3) "Trial plans" have been requested by courts in the last few years. This can be a good idea if it is kept down to a brief, four- or five-page outline. But it is too much when, as in one recent case, it extends to fifty pages. The Note refers to trial plans; that is a good thing.

A defense lawyer said that the "at an early practicable time" change "is more than angels dancing on pins." The underlying principle is salutary; the rule change may be important. The Note carefully lays out what is, and what is not, intended. The Note deals adequately with the risk of unintended consequences. It tells the judge not to delay too long. The change says that courts now generally take the time required to make a well-informed decision. The trial plan is a good idea. The trial plan should look carefully at what issues are assertedly common, and how they will be proved. More importantly, it should look at what individual issues will be left at the end of the class trial, and

at how they will be proved. The early 5th Circuit Bluebird case is good: you have to look down the road to what proofs will be used to prove what. If there is a lot of proof to be taken after the class trial, we need to ask whether the class trial is worthwhile.

The idea of submitting draft class notice with the trial plan is a good one. The notice often shows issues not reflected in the plan, including problems with choice of law and jury trial, and is important simply by identifying the persons to whom notice is to be directed.

There is a real question whether any notice can be effective unless it is directed individually to class members as a letter from the court.

Important questions that will be reserved for other discussions include settlement classes and overlapping classes.

Another plaintiffs' lawyer thought there is no need to change to certification at an early practicable time. The change is not advisable. Courts have plenty of flexibility under the "as soon as practicable" formulation, and have been using it wisely. At times the certification decision is postponed "to the very back end." In one recent litigation the FTC wanted to finish its discovery on the merits before certification was addressed in parallel private litigation; that worked out well. The Note will not deflect wrangling over what the change means. Publishing the Note without changing the language of the Rule might be helpful.

The same lawyer observed that appointing class counsel at the time of class certification "is way too late." Class counsel is needed to undertake pre-certification discovery, and to argue for certification. Someone has to be in charge. This helps the court: you only have to deal with one person.

The "plain language" requirement is one that no one will argue with. This is a far more real and difficult problem than the timing of the certification decision. Almost every notice is unintelligible to the ordinary person. Ten, twelve, or fifteen pages of single-spaced fine-type print are simply not going to be read. You need a way to get people to look at it. Lawyer-drafted notices are far too dense, far too complete; the lawyer needs "to cover his rear end." In one recent case the notice was completely incomprehensible; an attempt to draft a summary ballooned from a couple of reasonably clear paragraphs to six pages. Plain language has been achieved only when the judge writes the notice. The rule might focus on asking the judge to write the notice, or else on appointment of someone — preferably not a lawyer — to write it.

It was observed that the emphasis on the Committee Note is interesting. In some ways the Note is longer and more interesting than the Rule, and at times it even contradicts the Rule. But is this a sound way to revise a Rule? The response was that it depends on whether there is a need to amend the Rule. As to the time of certification, there is no need — the operative word in both present and proposed versions is "practicable." The risk of unintended consequences should prevail. A different response was that it is indeed wise to write the Rules in general terms, but that generality reduces the level of guidance. The Note does give guidance. There is real value in the Notes and

the function they serve. A still different response was that the Advisory Committee should contribute its good ideas to the Manual for Complex Litigation, rather than propound elaborate Committee Notes. The Manual provides the details, and works pretty well. And a judge suggested that judges generally do not seem much persuaded by Committee Notes. Another judge (not on the panel) observed that the Manual does not seem to be mentioned in the Committee Notes. The Notes are sprinkled with observations that a judge may do this, or a judge may do that. Rather than explain what the Rules mean, these Notes are written like the Manual. Some consideration should be given to relying on the Manual as the "real bible"; the Notes could be shortened by incorporating references to the Manual. (It was pointed out by a panel member that the Notes do indeed refer to several sections of the Manual at one point.) A lawyer said that he has lots of experience with judges who are not familiar with the Manual, but that at least some judges do look to the Committee Notes for guidance. Without the Notes, it will be hard for judges to follow the change from "as soon as practicable" to "at an early practicable time." A professor not on the panel added the observation that a recent study of the 2000 discovery amendments shows that judges are using the Committee Notes extensively.

A judge in the audience observed that the Seventh Circuit *Szabo* decision allows the court to treat a certification motion in the same way as a 12(b)(1) motion, allowing the parties to gather fact information necessary to determine whether to certify. The Second Circuit, however, has rejected a similar approach. The rule change and Note will allow more leeway in what can be considered in making the certification decision. The Note, however, is somewhat Janus-faced.

The panel was asked whether it is possible to do what the Note advises — permit enough discovery to inform the certification decision without full discovery on the merits? Some attorneys believe that the final event will be either trial or else a certification decision that is immediately followed by settlement. There are a lot of cases where this is true now under the "as soon as practicable" direction. One defense lawyer said that it can be done, and has been done. It may not be universally possible, but it works. The extent of discovery needed to decide on certification will vary from case to case. A plaintiff lawyer agreed that it can be done, although it is a difficult thing. The court does need a sense of what the proof will be at trial: was there a conspiracy? Is it to be proved by providing evidence of each class member's transactions and inference, or is it to be proved by documents? If the parties can sit down with a judge who is informed, this can be worked out at an early Rule 16 conference. A judge said that certification-merits discovery cannot be done in all cases. When it can be done, it is not fruitful to battle over the issues whether discovery is for certification or only for the merits: often it is both. It is better to move on; the fighting is wasted when no class is certified. Another defense lawyer said that especially in (b)(3) classes, the certification dispute comes down to typicality; to adequate representation; and then to predominance and manageability. Common issues can always be found; the real question is what are the individual issues, how will they be proved, and how important are they. Discovery can focus on that, and can be a lot simpler than mammoth document discovery on the merits. A plaintiff lawyer disagreed: the defense lawyer is very good at defeating certification by shifting the focus to

individual issues, and by imposing the burden of discovery on the merits. Another plaintiff lawyer disagreed with that observation: it is proper to separate discovery to support an early certification decision so you know whether to do the mammoth merits discovery. Generally you can tell the difference.

A judge in the audience observed that the FJC study explored the use of 12(b)(6) and summary-judgment motions before the certification decision, and found a full spectrum of practice. Some courts were doing it. Others seemed to feel that the "as soon as" direction prohibited the practice. The "early time" change may not address the issue. The Note says that the court may not decide the merits first and then certify: does that mean that it cannot act on a 12(b)(6) or summary-judgment motion? There is an ambivalence here.

Another member of the audience asked whether the change will support another delaying tactic that lets defendants go after the representatives, and help defendants get merits discovery? A judge responded that the change in the Rule will not change practice.

Another audience member, speaking from a defense orientation, asked how many times must we go through consideration of certification in the same case: today there are multiple considerations of certification in each case, prompted by ongoing discovery. A judge responded that multiple considerations in the same case had not been his experience. A plaintiff lawyer on the panel said that in federal courts, there is one decision on certification in the case; multiple consideration may become a problem when there are parallel federal and state filings. A defense lawyer on the panel stated that MDL practice waits for federal court filings to accumulate, then provides on decision on certification for all. But there has been an uptick in trying to get certification by filing another case after certification is denied in the first case. And state cases are a bigger problem.

A different audience member suggested that given the proposed rule on attorney appointment, we might want to expedite the certification decision. We are hearing different voices from experience because different types of classes are different and are treated differently.

A panel member repeated the view that the certification decision should be final, not conditional.

Another audience member applauded the provision that would require some form of notice in (b)(1) and (b)(2) classes. But it is troubling to suggest that individual notice is not required for every identifiable class member; we should demand that. Still, we need not require as extensive notice as in (b)(3) classes. And we should make it clear that the defendant can be made to pay for the notice, or to include it in regular mailings to class members. And we should consider imposing notice costs on defendants in (b)(3) class actions. A panel member agreed that notice in (b)(1) and (b)(2) classes should be meaningful.

The same audience member suggested that the Committee should consider a softening of the requirement of notice to every identifiable member of a (b)(3) class. In some small-claims cases representative notice is enough. A panel member noted that the Committee in fact had considered

sampling notice, but abandoned the project in face of the difficulty of deciding in each case which members would not get notice.

A panel member observed that the Note, p. 49, says that notice in (b)(1) and (b)(2) classes supports an opportunity for class members to challenge the certification decision. This should not be what you have in mind. Change it.

A judge in the audience suggested that the proposed rules on attorney appointment and fees belong at an earlier point in the rule, in part because appointment is tied to certification. Rather than new subdivisions (g)and (h), they might be inserted before (e). A judge immediately responded that redesignating current Rule 23 subdivisions would complicate computer research inquiries for all future time. It was suggested that the appointment provisions might be included in the certification provisions of subdivision (c). A related suggestion was that "lead" counsel could be appointed before certification, to be presumptively class counsel. A panel member observed that under the PSLRA, the lead plaintiff is designated first, lead counsel is selected, and then the certification decision is made. Another panel member observed that courts now are handling appointment of class counsel as part of general pretrial management. Still another noted that the party opposing the class needs to know who can discuss discovery. An audience member stated that lead counsel has fiduciary responsibilities to the class from the moment of filing.

A panel member noted that the rules, including the discovery rules, emphasize the federal-state dichotomy: state cases proceed with alacrity into full merits discovery while the federal courts languish in limited certification discovery. That makes coordination of state and federal proceedings more difficult.

A committee member picked up the earlier references to the possibility of adopting a separate mass-torts rule, observing that the references had included a hint that an opt-in rule might be developed, and asked what such a rule might be? A panel member suggested that a mass-torts rule that does not involve a class might be useful, but could not describe what the rule might look like. During the early Committee consideration of Rule 23, a thorough revision was prepared that collapsed the 23(b) categories, provided an opportunity to limit the class to opt-ins, allowed a court to condition exclusion from a class on submission to claim preclusion or surrender of possible nonmutual issue preclusion, and supported sampling notice. This revision was withdrawn from consideration by the Standing Committee for fear of colliding with the contemporaneous debates over discovery reform. That model might be considered again.

A panel member noted that mass torts are very different from securities, antitrust, or consumer class actions. Different rules are needed. We are trying too hard to fit disparate forms of litigation into a single procedural bottle. There are sufficient needs of judicial economy to justify work on a mass-torts rule.

Another panel member suggested that perhaps the Committee — or Congress — should work toward a procedure that facilitates "judicial management of individual settlements." The procedure

would not be a class action, but a process to try to establish a method for settlement or resolution that does not depend on counsel alone in the way that class settlements do.

Panel 2: Attorney Selection

The moderator for the second panel was Chief Judge Edward R. Becker. The panel included Stanley M. Chesley, Esq.; Professor Jill E. Fisch; Sol Schreiber, Esq.; and Judge Vaughn R. Walker.

The panel discussion opened with the observation that the conference is being held for the benefit of the Rules Committees, to inform their judgment about the issues that have been raised surrounding revision of Rule 23.

The first question asked the panel to address the provisions of draft Rule 23(g)(1)(A) and (2)(A), requiring appointment of class counsel when a class is certified and permitting the court to allow a reasonable time to apply for appointment. Do these provisions belong in Rule 23? Are they helpful?

The first panelist said that generally the appointment provision is very important. It underscores the fiduciary obligation of counsel to the class, and the fiduciary obligation of the court to make sure that counsel discharges the duty to the class. But it is not necessary to qualify the appointment rule by the preface: "unless a statute provides otherwise." There is no conflict between the PSLRA and Rule 23(g): lead plaintiffs nominate class counsel, who does not become class counsel until approved by the court. If there is a difference between draft rule and statute, it is that the PSLRA provides a specific time line for appointing counsel — this is where the exception for statutory directions should be made.

The next question asked the panel observed that the Note, p. 72, refers to "lead" and "liaison" counsel. These references involve the time for appointing counsel. Should the Rule define these terms?

The panelist who first responded to this question thought it important to be careful about language. "Class counsel" often is used to refer to "lead counsel": the Note seems to refer to temporary class counsel. Liaison counsel is different still. The concept of lead counsel needs definition. In mass torts, lead counsel may represent individuals, and get individual fees at the end.

It was agreed that the Advisory Committee should not misuse terms that have accepted meanings. Insights into general usage are helpful.

Another panelist observed that the Manual for Complex litigation is not law. There is no statute defining "lead" or "liaison" counsel. You have to define the term if you use it. In response to a question, he stated that "lead" counsel has a fiduciary duty, just as does class counsel.

Another panel member suggested there is no problem. You can have class counsel before certification, from the moment the class claim is filed. You can have a court appoint, or the attorneys agree on, lead counsel before the class is certified. But if you are going to address this

topic in the Rule, you must recognize that someone has to do the job before certification. The attorneys should get the court to appoint lead or liaison counsel as soon as possible; the court has to address the question only if the attorneys cannot agree.

An audience member added that counsel also may organize by an "executive committee." Courts accept a lot of leeway in describing leadership arrangements. This leeway is important. The politics of the class-action bar are involved.

Another audience member observed that lead and liaison counsel are just subsets of class counsel, perhaps with different responsibilities.

Another member of the audience suggested that there is a difference if only one case is filed. The one who filed the case is it. If there are multiple filings, coordination is needed, which may take the form of lead or liaison counsel. In MDL proceedings you have to have lead or liaison counsel. All of these settings differ from one another. The Manual speaks to this. A related observation suggested that perhaps the Rule or Note should recognize the "common-benefit" lawyer.

The panel then was asked to consider draft Rule 23(g)(2)(B), which mandates that the court consider three factors in appointing class counsel, grants permission to consider other factors, and recognizes authority to direct applicants to propose terms for fees and costs. Subparagraph (C) further provides that the order appointing class counsel may include provisions for the fee award. Should any criteria for selecting counsel be listed?

The first answer was that there is nothing wrong with these criteria. They provide guidance. But the list may be too confining. Other matters that might be included are the absence of conflicts; side agreements; relationships with some class members; and — in the securities area — "pay to play." Such matters must be considered in the appointment decision. It is not clear that any list can include all the relevant factors. It would be better to frame the rule in more general terms: class counsel should be one who will fairly and adequately represent the class. The terms of appointment can reinforce the representation.

Another panel member opposed specificity in the rule. Courts need to have discretion. The class is the ward of the court. The judge should pick counsel as someone the judge can work with. Sound discretion is what we need.

Agreement was expressed by yet another panelist. The attempt to identify specific factors in the rule will cause courts to give those factors undue emphasis. Freedom for precedent to develop in subject-matter specific ways is better. Fee arrangements and experience are more important in some areas than others. "Client empowerment" also is important. The perspective should not be entirely judge-centered.

A caution was voiced by a fourth panel member. Not all judges have lots of class-action experience. It would be better to add more factors: the absence of conflict and side agreements are

good examples. The list of factors also provides guidance to lawyers. Getting to know the judge is not how it should work.

The panel then was asked whether the fee terms should be separate from appointment, as may be implied by the provision that simply grants permission to include fee provisions in the order of appointment?

The first panel response was that fee terms are important, especially in (b)(3) common-fund cases, and should not be separated from the appointment. In most damages cases the total recovery is split between class and counsel. Fee terms are central.

A second panel member noted that contention has surrounded the question whether fees should be made part of the selection process, or otherwise considered ex ante. The Third Circuit Task Force draft report reflects the contentions. There is room for continuing development. It is too early to bind judges by a rule. Problems arise from putting the judge into the position of weighing and comparing fee arrangements. But in some cases fee arrangements can properly play a role in selecting class counsel. This can be discussed in the Note without putting it into the rule as a selection criterion.

The first panel member rejoined that fees should be considered as part of the appointment in every case. It should be mandatory for all cases, including those in which there is no competition for appointment as class counsel.

A third panel member stated that "fees should depend on results, not auction." Many foolish bids will be made. Lawyers need to make in camera presentations to the judge in a bidding process; this is unfair to the defendant.

The fourth panel member said that appointment should not go to the low bidder. The lodestar approach should be discussed with class counsel, but "making it a nexus" is a mistake. Beauty contest presentations can be impressive even when counsel lacks the ability to carry out the impressive representations. An auction may precede quick settlement, yielding fees that are too high; or it may precede proceedings that drag on interminably, yielding fees that are too low. "May" will be read as mandatory. "We should not put the deal out front."

An audience member — who is a federal judge — expressed "less confidence in the omniscience of federal judges." It is a mistake to debate bidding now. The draft rule is supposed to be universal, applying to class actions that are quite dissimilar one to another. Many of the considerations expressed in the Note apply equally to securities actions; the Note should make it clear that the same factors weigh in approving the lead plaintiff's choice of counsel under the PSLRA. We avoid particulars in the text of the Federal Rules of Evidence; they belong better in the Committee Notes. The Notes are helpful to both judges and lawyers. We should not particularize in the text of the rules.

Another audience member asked what consideration has been given to the problem that arises when a judge has an "investment" in counsel — having chosen counsel, the judge develops an interest in ensuring that counsel achieves a good result for the class because the judge has selected counsel to do that. One panelist responded that even under present practice, counsel must be identified and approved. The language of the Rule does not aggravate the "investment" problem.

An audience member suggested that it would be good to have counsel appointed by a judge who is not going to be responsible for managing the case. The bidding process typically goes in stages: first many contestants make preliminary presentations, then a few finalists are selected and make serious presentations.

Another audience member asked how far the draft rule is written to be enforced by appellate courts. A response was that it is written for district judges. But it also requires creation of a record that will support review. It is not clear whether the connection between appointment and class certification would support a stand-alone Rule 23(f) appeal, but it does not seem likely that courts of appeals will be eager to permit appeals from counsel-appointment orders. The question was then pursued: why have a rule if it is not going to be enforced?

A different audience member suggested that draft Rule 23(g)(2)(C) should be made mandatory. In ordinary practice an agreement on fees at the beginning of the representation is deemed essential as a matter of professional responsibility. If the fee basis is not resolved until the case is finished, there is a fight between the class and class lawyers to divide the pie.

Still another audience member voiced approval of the ex ante approach. But the role of the criteria for appointment listed in draft Rule 23(g)(2)(B) is unclear: is this a manual for the district judge? A direction to counsel on how to conduct the beauty contest? A source of Rule 23(f) appeals? Why provide a check list?

Another question from the audience asked how the rule would work when there is only a single class action, with only one set of lawyers and no competing applicants: would the court be responsible for going out to find competing applicants? A panel member suggested that the rule only requires lawyers to provide the information.

A related question observed that the court might deny certification because the only interested counsel could not provide adequate representation. But this can be done now under Rule 23(a): is Rule 23(g) calculated to divide the adequate representation inquiry, focusing on the representative party through 23(a) and on class counsel through 23(g)?

The next question put to the panel was whether it is proper to appoint a consortium of attorneys as class counsel.

One panel member found this question similar to the question whether the court's task is to select an adequate attorney or instead is to somehow select the attorney best able to represent the class. Should the designated class counsel have authority to make all decisions about conduct of the

action? Does that include authority to farm out some of the work? However described, a de facto consortium may emerge as lead counsel brings in help from others. Some cases rule out appointment of a group of firms as lead counsel, but that approach may simply push the formation of the consortium out of sight, as lead counsel "makes deals" with others. The Note should recognize the reality of the need or desire for multiple fees; it is better not to drive underground the arrangements that are made.

A second panel member suggested that if there is not a consortium, the result will be "chaos on the plaintiffs' side" that harms the class and benefits the defendant. But the plaintiffs' bar has become much more sophisticated at working out these issues. Judges also have become more sophisticated. There never is a problem of involving too many lawyers; judges can control how much is paid in attorney fees. And this system does not exclude the novices and "little guys" from participation: they can be, and are, admitted to the consortiums.

Still another panel member said that in the real world, there is no problem. He further observed that the Manual for Complex Litigation is being revised even now.

The panel then was asked whether restrictions should be imposed on "side agreements" by class counsel outside the terms of appointment.

A panel member observed that one factor in deciding whom to appoint should be willingness to submit to regulation of side agreements. But there is no need to state this approach in the Rule or the Note. "Judges will develop good answers over time."

Discussion returned to Committee Notes in general terms. A panel member asked whether a Committee Note serves any purpose. Most lawyers do not know how to find them after a rule takes effect. Is a Note as binding as a rule? An audience member responded that commercial publishers produce annual rules books that include all the Committee Notes. The effect of a Note depends on which Supreme Court Justice you ask. Some, who do not believe in legislative history as an interpretive guide in any setting, would reject reliance on a Committee Note. But not all judges feel that way. And in any event a Note serves an educational function. A judge on the panel stated that he looks at Committee Notes all the time, but also observed that the draft Notes to the several Rule 23 proposals are too discursive. Much of what is in the drafts should be transferred to the Manual.

A judge in the audience added that the Enabling Act authorizes adoption of rules, not committee notes. The notes are Committee Notes, not notes of the Judicial Conference, the Supreme Court, or Congress. A Note cannot be adopted, or amended, without simultaneously amending the underlying rule through the full process. Any attempt to change a Note independently would be an invalid attempt to amend the rule without going through the full process.

A panel member observed that people seem to want guidance to the courts on the factors that may be considered in applying open-ended rules. One alternative would be to direct the courts to make findings in each case as to the factors that actually prompted a particular decision. The Notes

could then describe things that courts might want to consider, without attempting to confine courts to the list.

Another audience member observed that "Notes are not Rules." The present package has rule-like statements in the Notes that belong, if anywhere, in the rules.

The panel then was asked whether the "empowered plaintiff" notion of the PSLRA should inform the designation of counsel under proposed Rule 23(g) in other cases?

The first panel response was "yes and no." The Rules Committees can learn from institutional investors who do take a lead role (as in Cendant): they have interest and expertise, although limited to securities cases. They are learned in the criteria for selection of class counsel. Mass-tort victims, on the other hand, are not likely to provide sophisticated insights into the selection of class counsel.

Another panel member suggested that the "Unless a statute provides otherwise" preface to draft Rule 23(g)(1)(A) has been put in the wrong place. There are different models of the "empowered lead plaintiff." The PSLRA requires the court to appoint a lead plaintiff, who in turn is primarily responsible for making decisions for the class, including selection of class counsel. Although some courts view it differently, the lead plaintiff's selection is dominant, even though subject to court approval. This same model could work in antitrust and intellectual property litigation. It is not likely to work in other areas, such as consumer classes. But Rule 23(g) could be drafted in terms that leave room for client input into selection of class counsel. It seems better, however, to leave such matters for the Note. The same may be true for such questions as the court's authority to modify fee arrangements between a class representative and class counsel, or to second-guess the very selection of counsel.

Another panel member suggested that the PSLRA responded to specific real-world concerns. Much of the motivation may have been to "stop" securities litigation. Another part was concern that a "100-share plaintiff" not be responsible for cooperating in the self-selection of class counsel. But lawyers have got around the purpose. Sophisticated firms now "hustle state attorneys general and pension funds." If the "lead plaintiff" model is followed more generally, firms will arrange to "round up thousands of consumers" as clients to win the counsel-appointment race. One injured plaintiff should not have more voice than any other; the court should designate lead counsel.

The panel was then asked what should be the professional responsibility perspective on the proposition that the client has no role to play in selecting counsel?

A member of the audience observed that there are state rules on fees, fiduciary duties to clients, and selection of counsel. The Rule 23(g) draft may depart from these rules.

Another member of the audience suggested that in the real world what often happens is that a newspaper publishes a report that raises questions about the safety of a product. Dozens of product-liability class actions are then filed. Clients are accumulated by advertising on television

and in national-circulation newspapers. Class counsel have an interest in appointment on terms that set fees in advance. There are beauty contests on the defense side as well: clients assume attorney competence, and compare or negotiate financial terms.

A different audience member suggested that there will be "collusion among plaintiffs' counsel to avoid contests." When there is a fee negotiation for a contingent fee, events may require renegotiation. But it is not clear how this can be done. Consider the auction house pricefixing litigation. The auction for counsel appointment was won by a bid that measured fees as a share of the recovery above $400,000,000. Suppose it turned out that, after much hard work, the award was only $350,000,000: should the original terms be renegotiated?

Yet another audience member urged that there is a need to encourage lawyers who have clients to take them to lawyers who are better able to represent them. It is important to ensure that the class is represented by lawyers who are good, and who can bear the risk of investing heavily in developing a case that may fizzle out. It is adequate to set the fee terms as the amount that the court will award. A front-end agreement is an unattractive thing. Consider the Exxon-Valdez litigation, in which victorious plaintiff counsel have yet to receive anything after waiting eleven years.

The panel was then asked to consider the Note statements at pages 79-80, suggesting guidelines for fees or costs and suggesting that the court may want to monitor the performance of class counsel as the case develops. The Rule does not talk about monitoring. Should the Rule say something? Should the Note be expanded, or should these comments be deleted?

A panel member thought that the monitoring comment is fine. A court will consider monitoring requirements as part of the selection of counsel and as part of the terms of engaging counsel. Greater specificity would be futile.

Another panel member suggested a distinction between the ongoing conduct of litigation and the time spent and costs expended. The PSLRA should discourage monitoring of counsel's performance in the conduct of the litigation. An attempt by the court to monitor progress in developing the case against time expended would involve the court too deeply in counsel's work.

The first panel member added that lawyers have shown no interest in appointment of a master to provide monitoring during the progress of the case.

Another panel member asked who monitors defense counsel? What the defense does "drives what plaintiffs do." Judges in important class actions "keep tabs on things." They monitor the case, and can tell who is wasting time. Plaintiffs have no incentive to waste time; their efforts are to respond to the defense. When an action is brought against five, or ten, or fifteen companies the defendants retain national, regional, and local counsel. Local counsel look for things to do, contributing to waste work.

An audience member observed that Rule 23 is not the sole source of judicial monitoring authority in a class action. Excessive discovery efforts, for example, can be monitored through the

discovery rules as a matter of discovery management. Separately, she also observed that the Note says at page 80 that the court should ensure an adequate record of the basis for selecting class counsel; this statement should be put in the Rule.

A different audience member said that the rule used to be that the trial judge should not settle the case. Monitoring counsel's ongoing work for the class creates the same risk of involving the judge with the merits. The MDL process provides for monitoring. Why not put monitoring in the rule?

Yet another audience member suggested that "monitoring" has a variety of meanings. One meaning may refer to the need to limit discovery demands because the demanding party is able to impose externalities — this is good monitoring. In a class action, the concern is that the class cannot monitor its own lawyer. The lawyer's freedom from any engaged client can help or hurt the class. It is difficult to know how to provide monitoring that helps the class.

The panel's attention was directed to the draft Rule 23(g)(1)(B) statement that counsel must fairly and adequately represent the class. Should this be included in the rule? If it properly belongs, is this bare statement sufficient?

The first response was that the provision is a bit confusing, but is adequate to draw attention to the need to consider the arrangement between counsel and the individual class representative. A second panel member agreed. In mass torts, the Victims Compensation Act signed this September 22 provides a model that could be considered, with changes, for mass torts. The same panel member added the observation that a pre-certification order granting dismissal for failure to state a claim or granting summary judgment is not a ruling on the merits that binds the class; a second action may be brought, and is likely to be brought in state court.

The panel was asked to comment on the statement on page 73 of the draft Note that the rules on conflicts of interest may need to be adapted to the class-action setting.

A panel member responded that the draft Rule does not address conflicts of interest. The Note comment is a bit troubling. The meaning is not clear. The Committee should figure out whether they mean to tolerate conflicts that would not be accepted in other areas, or whether instead they mean to narrow conflicts rules by prohibiting conflicts that would be accepted outside a class-action setting.

An audience member urged that the Note statement should be retained. The Note provides a good discussion; the cases cited show why analysis of conflicts cannot be the same in class actions.

Another panel member said that it is dangerous to say that class members cannot insist on "complete fealty" of class counsel. The Note should say that the duty is owed to the whole class, not to individual class members.

Another audience member urged that rule should include the statement on page 74 of the Note that counsel appointed as lead counsel before class certification has preliminary authority to act for the class, even if not to bind the class.

Yet another audience member asked who monitors the defense? The client does. The Note suggests that it may be desirable to have class counsel report to the court under seal on the progress of the action. That is undesirable. It provides a one-sided source of information that may distort the court's understanding and approach to the case.

Panel 3: Attorney Fee Awards

The moderator for the third panel was Professor Thomas D. Rowe, Jr. Panel members included Judge Louis C. Bechtle; Lew Goldfarb, Esq.; Alan B. Morrison, Esq.; Professor Judith Resnik; Judge Milton I. Shadur; and Melvyn Weiss, Esq.

The discussion was opened with the observation that several questions can be addressed to draft Rule 23(h) on attorney fees. Consideration of fees is not completely separate from the draft Rule 23(g) provisions for appointing class counsel. First, do we need any rule at all? The Note says a lot of interesting things, but nothing on why the Committee feels there is a need for a rule. Second, if it is useful to have a rule, does the draft do anything more than to codify practice? Third, are there things that should be added to the draft rule? Fourth, the text of the draft rule is structural and procedural, and says nothing about criteria for determining the amount of an award. The Note, however, provides extensive comments on such criteria. Should these criteria be included in the Rule text? The Committee considered drafts that included criteria in the rule, but concluded that criteria should be relegated to the Note. A Note, however, persists until the Rule is changed: if the subject is in flux, should we run the risk that a list of criteria in the Note will become outmoded before it is possible to change the Rule? The discussion may be advanced by the fact that two panel members are also members of the Third Circuit Task Force on the Selection of Class Counsel.

The first panel member thought there is good reason to adopt a fee rule. The Note says that the rule addresses fee awards to lawyers other than class counsel. An unsuccessful rival for appointment as class counsel, "common benefit counsel," or objectors may be included. The Note also says that the choice between calculation by lodestar, percentage of recovery, or a blend of these approaches is left open. There is an emphasis on the tradition of equity. And a big list of factors is provided — actual outcome, risk factors, terms of appointment, fee agreements, and so on. We do need a rule, but in simplistic form. The simple rule will allow the Note material to become part of the federal jurisprudence. All judges will have the Note; it will bring uniformity. (But some of the Notes are too long, and there is a danger in citing cases.) The Note is a great resource. There are tons and tons of Rule 23 cases. A Rule saying that fees should be reasonable is not new; saying that class members can object is not new; and so on.

Another panel member thought the draft rule "a great step forward." It is important to have a Rule. For new practitioners, and even for established practitioners, the Rules should reflect where

we are now in practice, and provide a foundation for the next few years of growth. The Rule 23(g) notion that the judge picks the class lawyer reflects what many judges do; it is important to say it in the rule. The actors who are not much regulated are the judges. The premise of Rule 23(g) is that there is not much client control. Rule 23(g), however, does not require the judge to hold a hearing or make findings in designating class counsel; Rule 23(h) requires findings on fee awards, but not a hearing. Rule 23(f) is an illustration of courts of appeals waiting to provide supervision in class actions. We should use the Rule to impose more regulation on district judges as they shop for, and as they pay, class counsel. Fee setting after the fact is very difficult; it takes a lot of time. We should regulate it in advance to reduce the amount of time required later.

The same panel member continued by observing that we do not want an impression of judges fixing fees. For better or worse, "judges are not identified with money." We need the insulation of a rule that gives more guidance: (1) Class action appointment and compensation should be in one rule. (2) The rule should cover class-action counsel, and also common-benefit attorneys, lead counsel, and any attorney who confers benefits on the class. (3) Some information about fees should be included in the appointment process to make the after-the-fact chore easier. The judge could require counsel to use computer data-basing whenever fees will be calculated by using a lodestar or by using a lodestar as a cross-check. (4) A schedule for expenses could be set, perhaps by the Administrative Office as a general matter, regulating such things as fees for copying, nightly hotel charges, and the like. (5) The text of the rule should take account of client concerns: the judge should be described as a fiduciary for the class — the class has a role, but the judge also is responsible for taking account of client concerns.

A third panel member suggested that it is appropriate to address fee awards in the rule because the fee decision is the most important decision the judge makes in most class actions. Federal courts in general are moving toward appropriate resolutions, but state courts are not. The federal rules can help state courts, and slow the present rush of counsel to file in state courts "for clear sailing on fees." The principal problem is that there is no adequate basis for objectors to know the basis of the fee application in time to object; the time periods for disclosure and objecting often make informed objections impossible. The net recovery by the class is important. The amount requested should be in the notice to the class. The application should be available to class members for at least 30 days; a lot of money is involved, and the application may present complex issues. Often an objector has to fight counsel to get the documents. Any side deals should be disclosed in the fee application. There should be an opportunity for discovery. The Rule has evolved from a draft that required a hearing on a fee application to the present draft that simply permits a hearing — it would be better to say something to the effect that the court "shall ordinarily" have a hearing. It is too easy to shovel these issues under the table without a hearing. And the draft Rule 23(h)(4) provision for reference to a special master is too broad: it refers to issues related to the amount of the award. It would be better to refer to the need for an accounting or a difficult computation, as the proposed Rule 53 revision at page 120 of the publication book.

A fourth panel member found "no objection to having a rule like this in general." Indeed, it was a surprise to discover that Rule 23 does not already include such provisions. Courts generally know what to do, but "codification is OK." The abuses that have been seen, particularly in state courts, are being addressed. But the rule should not include language that will interfere with victims' access to the courts. Free access to court remedies "is one of the things that make our country great." Class-action accountability is an important deterrent, a valuable law-enforcement tool. We need to enable people to take risks to bring victims into court. So Wall Street firms have partners whose function is to woo clients. The business-getter shares firm profits, even if doing no significant legal work. The equivalent happens in the plaintiff litigation bar. The plaintiff client lawyer who cannot take on a litigation for one client alone takes the client to a class-action firm. It cannot be determined at the outset how much time the class-action firm will have to devote to the litigation, what risks it will have to take. Some matters are quite independent of the rational disposition of the litigation: a defendant, for example, may feel compelled to reject a present settlement that otherwise makes sense simply because the firm bottom line cannot absorb the cost, even though it is recognized that a much more expensive settlement three or four years later makes no sense apart from such bottom-line concerns. This phenomenon cannot be predicted. And the substantive law may change, making a case more difficult or impossible to win. Or everything may go according to reasonable predictions, but be followed by a great delay in getting paid. Draft Rule 23(h) does not take account of these realities.

This panel member continued by observing that the Note says at page 88 that the risks borne by class counsel are "often considered": why not "always"? There is an implication that it may be proper to refuse to consider this factor. And why does the draft Rule 23(h) say that a court "may" award a reasonable fee, rather than "must"? Of course a zero fee is reasonable if counsel is not successful. And the concern about a "windfall" can work both ways. The windfall may benefit client rather than counsel. The standard contingent fee is 1/3 of the recovery; anything less than that is to the client's advantage. Certainly anything less than 15% is a windfall to the client. Every case won by class counsel has to support many that "go nowhere" — thirty to forty percent of security actions are dismissed.

A fifth panel member began by observing that experience with more than 200 class actions in the last two years alone has failed to show even one in which a client sought out class-action counsel. There are two worlds of class actions. One involves interesting claims with real clients who actually oversee the litigation. But matters are different in the other world. Of the 200-plus actions in this two-year sample, only one had a fee dispute. These cases were put together by syndicates of class-action lawyers. They have a syndicate agreement; one of those agreements designated two lawyers to be responsible for hiring clients. And no one goes to federal court any longer; they go to state court. One recent client was the target of 30 similar class actions filed in different states, each claiming damages of $74,999 to defeat removal. Abuse of the class-action mechanism is a real problem.

Part of the problem is that there is no real client. Rule 23(h) serves a need. The defendant does not care what the class lawyer gets; they want a package that achieves maximum res judicata, and are concerned about the cost of the entire package. The judge should be given maximum autonomy to consider what the result is worth to the class and to society. High risk exists only because the lawyers make up the claims out of whole cloth. But the risk is reduced — by filing 20 or 30 actions, the risk of losing all of them is reduced greatly.

It is proper to say that the court "may," not "must," award a reasonable fee.

The sixth panel member, introduced as the clean-up hitter, observed that "Batting 6 is not clean-up hitter." The task is enormous. "One size does not fit all." Each perspective is legitimate from one perspective at least. The Rule 23(h) draft "is unexceptionable." It does a necessary job in straight-forward form. The requirement of making findings and conclusions should apply both in Rule 23(g) and Rule 23(h). But the reference to origins in equity are troubling; the length of the chancellor's foot should not make a difference.

The Rule and Note do not say anything about the idea that the fiduciary obligation extends to the class representative as well as class counsel.

It is "just not possible" for a judge in retrospect to determine the adequacy of a fee application. That has driven the recent use of bidding. Knowledgeable lawyers know more about the case than the judge when they come in; the judge, indeed, knows little about the case. In camera submissions of one side's view of the case are troubling. Application of lodestar analysis is difficult because it relies on hindsight, and also because it creates incentives to pad the bill.

Even when the ultimate decision is vested in the class representative — see the PSLRA — it is useful to have up-front presentations by counsel as part of the determination of who is the most adequate plaintiff.

Rule 23(h) is well-crafted, although the Note might be shortened a bit. One difficulty arises from the suggestion at pages 83 to 84 that an award may be made for benefits conferred on the class by an unsuccessful rival for appointment as class counsel. The unsuccessful applicant knowingly ran a risk, and it is rare for the unsuccessful rival to contribute to the result.

Finally, it is fiction to think that a one-third percentage fee is the norm. That share is drawn from long-ago origins in representation of individual plaintiffs in personal-injury litigation. There is no reason to suppose that it should apply to the quite different setting of contemporary class actions.

An earlier panel member then urged that the Rule should be forward looking. Multidisciplinary practice is upon us. "Counsel" fees include payments for banks, accountants, escrow agents, and others. "Lawyer entourage" expenses can be used to make money. The judge is paying money to a lot of entities and different professions. They may be providing necessary and high quality service, but the judge should seek to ensure that the least expensive means are followed.

Another panel member reiterated that side agreements to pay for promising not to object, or for withdrawing objections, should be made known. But we should recognize that there are real class actions to redress real wrongs.

A panel member responded that there is no problem with making side agreements known. Usually payment is for improving on the class settlement; we seek to have the court order payment to the objector.

An audience member suggested that it is difficult to know what percentage is appropriate when a percentage fee is set. It is particularly difficult to use a percentage fee when there is important equitable relief. A lodestar analysis may not suffice where there is risk, risk should be compensated. Lodestar relief, on the other hand, may be too much if it encourages elaborate structural relief that is in fact worth little to the class.

A panel member observed that the Supreme Court has ruled in the civil-rights statutory fee setting that a reasonable attorney fee may exceed the dollar amount of the judgment. "You should not commodify all value": there is a social utility in enforcing the law. One alternative worth considering is establishing authority for the Department of Justice to pursue important "consumer" actions; such a proposal, framed by Dan Meador, was in fact developed more than twenty years ago.

Another panel member suggested that in class actions that do not generate a common-fund recovery, defendants have a greater interest in the amount of any fee award and are much more likely to provide effective adversary contest of the amount. Draft Rule 23(h) applies in both the common-fund setting and other settings.

An audience member noted that the recent RAND study found cases where injunctive relief was assigned a dollar value after a presentation. In one case fees were based in large part on the injunction; the defendants negotiated with the plaintiff and joined in presenting the award proposal to the court. Objectors appeared; the eventual settlement directed much more of the benefits for the class, away from the class attorneys who negotiated the original deal. The financial incentives should be constrained without deterring useful class actions.

A panel member observed that there is another setting in which judges supply lawyers with clients. Lawyers are appointed for criminal defendants. Federal judges lobbied for creation of a panel system for private lawyers, a system that moves appointments away from focus on the individual lawyer and the attendant risk of patronage appointments. This model provides support at least for the proposal that the Administrative Office should establish guidelines for nontaxable costs.

Another panel member responded that Criminal Justice Act lawyers are paid inadequately. They accept appointments only for the trial experience. It would be a mistake to get the government into this.

An audience member suggested that in injunction cases, the defendant does not provide adversariness on attorney fees. The incentives are the same as in damages actions: the defendant trades off agreement on fees for a less effective and less costly injunction. Of course there are cases where the defendant promises to obey the law and a fee is appropriate. But the defendant is not making an adversary job of it on the fee application.

The panel member who offered the analogy to Criminal Justice Act attorneys agreed that the court faces a problem when the defendant agrees not to oppose a fee application up to a stated amount. A judge who tries to cut below the stated amount may get — indeed has been — reversed on appeal.

A panel member returned to the percentage-fee amount: If not one-third, what? The case law developed out of the fee arrangements made for representing an individual plaintiff. There is at least a semblance of a market for representing individuals. There is no market in the class-action setting: the judges have created it. They need to do a lot of work in determining what are the real investments and the real risks.

An audience member asked what is the trial court's responsibility as to class counsel or the class representative? It is not a "fiduciary" duty to the class: the judge who manages a class action cannot be a fiduciary to the class. The Committee Notes do not suggest the fiduciary role, and it is properly avoided. The judge's duty is to be a judge — to try to assure that counsel fulfills the fiduciary role. Fees create a conflict between counsel and the class; the judge has a judicial responsibility, not a fiduciary responsibility, to determine whether there has been an abuse.

The same audience member continued by observing that side agreements are a problem. If the total fee to a consortium is reasonable and fair, perhaps the court need not be concerned with the division within the group. There may be some "hard stuff" going on within the consortium, but the judge would be well advised to stay out of it.

A panel member agreed that it is not right to describe the judge as "fiduciary." But the judge does have an obligation to see that the fee is fair. And if the fee basis is to be the lodestar, or if a lodestar calculation is used as a cross-check, the judge needs to know about side agreements.

An audience member asked two questions. First, what is the nature of the notice of the fee motion to class members? How expensive will it be? At times it is the defendant who provides notice. We need more information on who is to provide notice and what the notice is to be. Second, the draft provides for objections to a fee application by a class member or by a party who has been asked to pay. Why should a class member be allowed to object if the fee is not coming out of a common fund?

A different panel member observed that most lawyers who negotiate settlements "are decent"; "judges do their jobs. Do not take away our weapons by requiring disclosure of side agreements." In the process of settling fifteen billion dollars of life insurance fraud cases, all of the lawyers were made happy in every case but one.

A panel member offered the view that it is important to equip clients and insulate judges. The judge is hiring and paying lawyers: if the judge is not a fiduciary, what is the judge? Still we can recognize that the judge is not to be more favorable to the plaintiff or defendant. A judge in the audience responded "then I have to be a judge.

At the conclusion of the panel discussion, Judge Levi described the first panel discussion for the next day. The 1996 Rule 23 proposals included a provision for settlement classes; fierce resistance appeared, including a strong objection by a large consortium of law professors. Part of the opposition arose from concern that abuses occur in the settlement process. The Committee turned its attention away from settlement classes toward strengthening the settlement process. Judge Schwarzer's article provided a solid foundation. One problem in judicial review of settlements often arises from a lack of adversariness. Another issue arises in (b)(3) classes as to the opportunity to opt out. When a proposed settlement and certification are considered at the same time, (b)(3) class members have an opportunity to opt out that is informed by knowledge of actual settlement terms. Even then, there is an inertia. But the class may be certified, and the opt-out period may expire, before there is a settlement agreement. The incentive to opt out is reduced when the decision must be made in a state of ignorance as to the consequences of remaining in the class or exiting. The Rule 23(e) proposal contains two versions of a second, or "settlement" opt-out for these cases. This settlement opt-out opportunity will be one of the important issues for discussion.

Professor Cooper summarized the issues to be addressed by three subsequent panels. The Committee has developed, but has not yet formally published for comment, proposals addressed to overlapping, duplicating, and competing class actions. The problems seem to be well managed as among federal courts, in large part thanks to the multidistrict litigation statute. When parallel class actions are filed in federal and state courts, coordination through the Judicial Panel on Multidistrict Litigation is not now possible. The panels will be asked to provide information on the nature and importance of such problems as may arise from multiple parallel findings. They also will be asked to discuss the question whether any problems that may deserve new solutions should be addressed by making new rules of procedure. The questions involved raise sensitive issues of federal-state relations, and might be better addressed by Congress. Even if rules solutions seem desirable, it must be decided whether effective rules are within the scope of the Rules Enabling Act and can be made consistent with the Anti-Injunction Act, 28 U.S.C. § 2283.

Panel Four: Settlement Review

The moderator for the fourth panel was Professor Jay Tidmarsh. The panel included John D. Aldock, Esq.; Professor John C. Coffee, Jr.; Kenneth R. Feinberg, Esq.; Gene Locks, Esq; Judge William W Schwarzer; and Brian S. Wolfman, Esq.

Discussion opened with the observation that present Rule 23(e) is quite short. The proposal is longer, but largely codifies existing practice. Draft Rule 23(e)(1)(A) makes explicit a requirement that the court approve voluntary dismissal even before certification. Draft Rule 23(e)(1)(B) requires notice to the class if a voluntary dismissal or settlement is to bind the class. Draft Rule 23(e)(1)(C)

requires a hearing and findings of fact, and also states a standard for approval. It may help to begin with these assumptions: Amchem and Ortiz are satisfied by the settlement; no more can be done; the Notes are fine; and the settlement-opt out will be confronted later. On those assumptions, is the proposal — that is, paragraphs (1), (2) [disclosure of side agreements], and (4) [objections] an improvement?

The first panel member observed that the proposal largely incorporates present practice. There are no major problems in it. The notice provision in (1)(B) is an improvement. It is proper to spell out a standard for approval. It is an improvement to require findings. But there are some problems with the Notes.

A second panel member agreed that what the proposal attempts is sensible. The stronger version of the settlement opt-out is better. But the proposal "does not address the current crisis." As so often happens, a proposed revision seeks to fight the wars of the past. The crisis is reflected in the hip-implant litigation. Clever attorneys are trying to create the functional equivalent of a mandatory, non-opt-out class. We need to address this in settlement review. "Fairness and adequacy" require non-discrimination. A matrix settlement will create disadvantages for some, who should be free to opt out. The fact that a majority of class members want a settlement does not justify giving the class an impregnable first lien, but only for all who remain class members by refusing to opt out. This creates a discrimination against those who opt out.

A third panel member suggested that the hip-implant ploy is brand new. "We should not fight a war before it starts." Generally the proposal "is a nice job in doing what the Committee is allowed to do: codify best practices." It would be desirable to be more daring. Express provision should be made for settlement classes; they are useful for the end game. Asbestos will go on for another 20 years "thanks to the fine work of the judiciary." The problem of reform efforts now is that defense counsel went too far in their efforts effectively to kill class actions by seeking such things as opt-in classes.

A fourth panel member thought the rule "a step forward, as a codification of practice with some additions." The proposal will help courts that do not see many classes, and that tend to see settlements in bipolar terms drawn from simpler litigation. It is difficult to believe that the lien ploy adopted in the hip-implant litigation will be approved; there is no need yet to think about shaping a rule to reject it. It would be better, however, to expand proposed (e)(3) so that a (b)(3) class member can always opt out of a settlement.

A fifth panel member suggested that if the proposal largely tracks and formalizes existing practice, it would be better to "leave it alone." Tinkering affects the mind-set of lawyers and judges; they look for reasons for the change apart from confirming present practice. The judges he works with do these things anyway. The changes will inhibit settlement. Judges will think there must be a reason for these changes, and will "put the brakes on." But if the proposal really promotes substantive change, it should be considered on the merits. But "merely to clarify and formalize" is not worth it. Requiring disclosure of side agreements is a mistake. Side deals often fuel settlement;

they will not remain secret. Judges will look into the deals. But you need empirical evidence that these deals are promoting unjust settlements.

The sixth panel member responded that side agreements should be disclosed, and should be disclosed early. Disclosure is particularly important when side agreements deal with fees, or effect settlements outside the class settlement. But there are some problems with the rest of the proposal. Why require approval of dismissal or withdrawal before certification? And why require notice in that setting — if a class is never certified, who is it that gets notice? And an attempt to list factors is a problem; the listed factors tend to become treated as the only factors, but the list may miss something. The requirement of approval to withdraw objections is new, and it is good; some objections are made "for not meritorious reasons."

The first panel member observed that the argument against expressing present good practice in an expanded rule assumes that all judges are experienced in handling class actions. It is in fact very useful to have a rule that reflects good practices as a guide to judges and lawyers.

The panel then was asked expressly to discuss the settlement opt-out.

The first response was that generally knowledge of a settlement provides a better basis for deciding whether to opt out. But we should not require a second opt-out opportunity in all (b)(3) classes. The first alternative, expressing a presumption in favor of the second opt-out, "will become required." The second alternative, which seeks to address the opportunity in neutral terms, is better. But it would be still better to address this question only in the Note. Notice is expensive, especially if it is to be delivered by newspapers or TV; the cost of notice in Amchem was between ten and twelve million dollars. The class action is an attorney vehicle; the idea that people worry about it is a dream. Notice to lawyers is important — the case is over, you need to decide whether to file an individual action. Opt-out campaigns "are political wars"; propaganda is unfurled by both plaintiff and defense lawyers. The second alternative is better. Remember that the fen-phen settlement had opt-out opportunities "every time you turned around," but it is a rare client who can afford "this lack of peace."

Another response was that in an ordinary case, "it's a pig in a poke before settlement." The ordinary class member does not have enough information at that point. A reasonable opt-out judgment can be made only when the terms of settlement are known. It would be better to allow the opportunity in all cases.

A third response was that the first alternative is better. It does include an escape clause. The class may have had notice of settlement terms during the first opt-out period, even though there was no formal agreement ready to be submitted for court approval. The first alternative, however, "maximizes consumer choice" of class members in the more general cases. Notice could be more modest. But it is better that this be in the text of the rule; we need it for judges who are new to class actions.

A fourth view was that the first alternative, strongly favoring settlement opt-outs, "is dangerously close to one-way intervention." The "good cause" standard for refusing a second opt-out is very vague; if it turns on the fairness of the settlement, that should be addressed in every case as a matter of settlement review anyway. The Note has it right: if the settlement terms themselves provide an opt-out opportunity, that is a factor favoring the fairness of the settlement. Informative notice is far more important at settlement than at the beginning; the Notes at least should speak to this point.

Another panelist favored the settlement opt-out. In the diet drugs litigation there were four opt-outs: (1) from the settlement; (2) when a class member tests positive in the medical monitoring program, opt-out is again possible even though there is no present injury; (3) if a class member develops a clinical condition, there is an opt-out; and finally, (4) there is an opt-out "if the company cannot pay at the end." At least one informed opt-out should be allowed; usually it is sufficient to provide this at the time of settlement.

The final panelist observed that in mass torts, the aggregate terms of a class settlement are made known; opt-out then is one thing. Or attention could be focused on opting out when each class member knows his personal award — it probably is wrong to permit deferral of the opt-out opportunity that long. Or attention could focus on the latent-claim class member who will not know "for 23 years" whether a presently known exposure in fact will result in injury; an opt-out then "would destroy most of these settlements." Opting out at the time the "aggregate deal" is announced is not so much of a problem.

One of the earlier panelists observed that he might disagree about the back-end opt-out, but that is not what is proposed here. Nor are we talking about all mass-torts problems. The diet drug settlement was done under pressure that improved the settlement because higher legal standards were imposed post-Amchem. It may be that a class is certifiable only if there is a back-end opt-out.

It was rejoined that it is dangerous to think of the opt-out only in terms of mass torts.

An audience member noted that the settlement opt-out would apply to antitrust and securities classes. There is a history of successful settlements without opt-outs in these areas. It is a mistake to write a general rule that applies to all types of class actions. Indeed it might make sense to treat classes that deal with small claims that cannot sustain individual litigation as mandatory classes.

A panel member said that these considerations support the second alternative as the better option. Settlement opt-outs make sense only in some cases. One difficulty is that money spent on notice comes out of the actual class relief. The "levels of notice" should be described in the Committee Note. Some should be in newsprint in the general fashion used for legal notices; and there should be notice to attorneys. The "mass buy" of television or newspapers of general nationwide circulation is not appropriate in many classes. And simple notice, if any, is most appropriate on the occasion of pre-certification dismissal.

An audience member asked what are we trying to fix? The problem of early notice arises when a class is certified for litigation. Mass-tort settlement classes negotiate opt-outs; it is proper for the Note to treat this as a factor in evaluating fairness. There is an issue in a small fraction of classes where there was early notice; the suggestion that there might be no notice is troubling. A response was that this suggestion is only that if settlement is anticipated, one notice will do it if the first opt-out period and notice are deferred until the settlement terms are known, or settlement efforts fall through.

Another panel member responded that fairness is protected by judicial review.

A different panel member observed that when class members are heterogeneously situated, you cannot have a settlement that is fair to everyone. Notice at the time of certification will be used to lock everyone in. There is no problem in securities litigation, because for years the parties have come in with settlement and certification at the same time. If certification and settlement are separated, the expensive notice should be deferred to the time of settlement.

A panel member urged that the Note should refer to the need to consider subclasses at the time of settlement review.

A further suggestion from a different panel member was that people should not be asked to decide on opting out before knowing what they will get, at least in personal injury cases. Notice at the time of the "aggregate agreement" is not good enough. The total available in Agent Orange sounded like a lot, but an intelligent opt-out choice could not be made on the basis of knowing that alone.

An audience member thought that the problems of notice and opting out should be put in the larger context of notice problems. The Eisen decision should be confronted directly. Notice and opt-out exist because unscrupulous class and defense counsel sell valid claims down the river. Small claimants do not need individual notice.

Another audience member observed that the parties can and often do negotiate multiple opt-outs; this approach may be required in mass torts. There is, however, no need for a rule to accomplish this. For securities and antitrust litigation, the first notice tells class members that they will be bound if they do not opt out. If you mandate opt-out after settlement, would you also mandate it after summary judgment is granted? After trial? The second opt-out proposal "turns the rule on its head"; it is like one-way intervention. This can be dealt with adequately in the way counsel negotiate. The settlement opt-out interferes with negotiating settlements.

Still another audience member urged that we remember history. Earlier Committee deliberations included a proposal to encourage objectors. The settlement opt-out, particularly in the weaker second alternative, is a lot better than fueling objections to every settlement. The Note, however, should be revised to make it clear that settlements are favored. The Note now does not say that, and indeed seems to have a hostile tone. We should begin the discussion by stating that settlement is favored.

A further comment from the audience was that from the defendant's view, finality is an important goal of settlement. There is a tension between the need for class members to base an opt-out decision on meaningful information and the defendant's ability to settle. Of course a "walk-away" can be negotiated for the defendant. But even then, the defendant knows that there will be some opt-outs, and that they will have to be paid; the first settlement is not complete, and provides a floor for negotiations with the opt-outs. The cost of notice is "an overlay." The more flexible version of the second alternative is a lot more sensible. Even then, settlement will be more difficult.

A different audience member suggested that notice cost is a red herring. Current law requires notice of settlement. This proposal simply requires that the notice include one more item, the right to opt out of the settlement. The first alternative for settlement opt-out is better, and perhaps the right to opt out should be even more strongly framed. Although the opt-out reduces the defendant's opportunity for global peace, it should be provided to support informed choice by class members.

A panel member responded that the quality of the notice is affected by including opt-out information; notice will be more expensive.

A different panel member rejoined that if we are precluding substantial damage claims, we should have good notice.

A Committee member observed that over the years, both plaintiffs and defendants have thought that this is an area where we can do some good. Fairness is a concern; we also need assurance of fairness for the court in the nonadversary setting of settlement review. One possibility is to appoint an objector; at least one participant in the discussions has favored that approach. Consideration of the court-appointed objector, however, generated much consternation. Trial and summary judgment are different from settlement; they were presented by adversaries and decided by the court.

A panel member responded that settlement classes are always adversarial — objectors, a co-defendant, or someone from the plaintiff's bar, does appear. The day-to-day problem is not the sweetheart settlement that no one objects to.

A different panel member objected that this observation applies only in the highly specialized mass-torts subfield. The FJC study found that 90% of the settlements reviewed were approved without objection and without change. Class settlements are fundamentally different from individual actions, where settlement is favored.

A panel member suggested that the "pig-in-a-poke" problem is most significant with small-claims classes. Class members have no stake at the beginning. The opt-out could lead to better recovery in another class, and even apart from that a 20% or 40% opt-out rate would tell the court something. The settlement opt-out is useful.

An audience member asked why we need the first opt-out, if the limitations period is extended to the second opt-out? And also asked why notice should be given of a pre-certification

dismissal that does not bind the class? A defendant who wants notice in such circumstances should pay for it.

A different audience member responded that the second notice might be more effective. The IOLTA cases say that clients have a property interest in pennies; class members have a property interest in small claims. Those who want global peace have an interest in the quality of the second notice. The problem is to ensure that settlement is adequate for the absentees. The first alternative, favoring settlement opt-out, "is a big improvement."

A panel member stated that the idea of a court-appointed objector "is horrible." "Any alternative is better." The best approach is to list an opt-out opportunity provided by the terms of settlement as a factor supporting the fairness of the settlement. The second, more flexible settlement opt-out in the rule is the next-best alternative. And there is no authority to do anything before certification: a defendant should not be forced to pay for notice because the plaintiff brought a bad case.

Another panel member stated that the only real choice is between the first and second alternative versions of the settlement opt-out. The court-appointed objector system would degenerate into a civil-service bureaucracy or a buddy system, a nightmare. Market forces are better. The language of the first alternative might be softened a bit: a settlement opt-out is required "unless the court finds that a second opportunity is not required on the facts of the case." This would be stronger, and better, than the second alternative.

A different panel-member view was that the parties should be fully informed in connection with settlement, but opt-out does not follow. We want defendants to be able to achieve global peace. There is a need to choose the lesser evil: is unfairness to class members so great? "I do not know the answer."

The panel was asked to identify any concerns they might have with the Committee Notes.

The first response found "some strange things" in the Notes. (1) The Note assumes the certification of settlement classes. They cannot be done any longer. (2) There is confusion about dismissal of individual claims without notice. (3) Individual premiums incident to settlement "are a real problem." (4) Notice in connection with involuntary dismissal is mentioned: why? (5) The Note can be greatly condensed. But the factors "are a good start"; it is better to have them in the Note than in a Rule.

The second response began by observing that we do not want the judge to be a fiduciary for the class, to be part of the strategy that causes the defendant to pay money. So page 54 refers to seeking out other class representatives when the original representative seeks to settle before certification; the present lawyers, or other lawyers, may seek out other representatives — the judge should not be involved. Page 68 is similar in suggesting that the court might seek some means to replace a defaulting objector; the court should not do that, but should instead provide a defined

period — perhaps 30 days — for other objectors to appear. Generally, the Notes should be shorter. The factors for reviewing a settlement are good and well stated. And citing cases helps.

A third response began by noting that proposed Rule 23(e)(1)(C) speaks only of "finding" that settlement is fair, reasonable, and adequate; the Note, page 55, requires detailed findings. The detailed findings requirement should be stated in the Rule. The settlement-review factors properly belong in the Note. Factor (I) needs "some tweaking": it should say explicitly that it looks to results for other claimants who press similar claims. The Note observes, page 65, that an objector should seek intervention in order to support the opportunity to appeal. Earlier, the Committee considered an explicit rule provision that would establish appeal standing without requiring intervention. It would be better to restore this provision; class-action practice is the one area of significant litigation where notice often goes to pro se parties who cannot be expected to reflect on such refinements as the opportunity to seek formal intervention in addition to the opportunity to present objections without intervening. Finally, page 67 refers to Rule 11 sanctions against objectors; it "comes across as a threat." "We should be creating a hospitable reception for objectors."

A fourth response began by referring to the draft Rule 23(e)(2) authority to direct that "side agreements" be filed. Some lead plaintiffs now ask attorneys to indemnify them against liability for costs. There may be a simple money buy-out of an objector. The Note should make it clear that these are examples of side agreements. Another shortcoming is that the "fairness" of a settlement is not defined. Is it the greatest good for the greatest number of class members, even though the settlement may be ruinous for some? The Note, if not indeed the text of the rule, should incorporate a notion of nondiscrimination. So the trick of imposing a lien on a defendant's assets only for the benefit of those who remain in the class, without opting out — this is subordination of one group to another, and unfair.

A fifth response suggested that the list of settlement factors should be expanded to refer to the effect of the settlement on pending litigation.

A member of the Standing Committee observed that a "back-end opt-out" is not likely to be provided in antitrust or securities litigation, and asked whether future mass-torts settlements will be approved if there is no back-end opt-out? A panel member responded that in personal injury cases, the risk of latent injury is a real problem. But if injury is apparent at the time of settlement, an informed initial opportunity to opt out after settlement terms are known is enough. Another panel member suggested that we should not use asbestos as an example for all cases. In many cases, the biological clock ticks faster — there is a predictable, and finite, number of downstream claims, with a latency period of two years, or four years, not twenty. Defendants can deal with this kind of "extended global peace." The back-end opt-out can be worked out. A third panel member said that in a large heterogenous mass-tort class, back-end opt-out can address the constitutional needs. But if the class is more cohesive, the Telectronics decision in the Sixth Circuit accepted the idea of settlement without back-end opt-out; it reversed only because the class rested on an unsupported limited-fund theory. A fourth response was that it would be a mistake to make a back-end opt out

a mandatory condition of settlement. A back-end opt-out was negotiated in Amchem pending appeal, anticipating a remand for further proceedings in the class action; the arrangement was defeated by the Supreme Court's actual disposition. The opt-out may not be needed if you know of the progression of the disease within a finite population.

An audience member said that the first sentence on Note page 55 says that notice may be given to the class of a disposition made before certification; it is not possible to give notice to a class that does not exist.

Panel 5: Overlapping and Duplicative Classes: The Extent and Nature of the Problems

Panel 5 was moderated by Professor James E. Pfander. Jeffrey J. Greenbaum, Esq., and Professor Deborah Hensler were presenters. Panel members included Fred Baron, Esq.; Elizabeth Cabraser, Esq.; William R. Jentes, Esq.; John M. Newman, Jr., Esq.; David W. Ogden, Esq.; and Lee A. Schutzman, Esq.

The panel was presented a set of questions: How often are overlapping and duplicating class actions filed? What function do they serve? Are they filed by the same lawyers, or do they result from races of competing lawyers? Can we identify subject-matters that typically account for this phenomenon? What eventually happens — do most of the actions simply fade away?

Professor Hensler began by suggesting that only a subjective answer can be given to the question whether there is a problem, and if so what is the problem. It is hard to agree. The RAND study began by interviewing some 70 lawyers on plaintiff and defense sides, including house counsel. What defendants call duplicating class actions, plaintiffs call competing class actions. Defendants complain of costs; plaintiffs talk of the race to the bottom as defendants settle with the greediest attorneys. Defendants offered lists of cases demonstrating duplication; plaintiffs described the deals made by competing attorneys. One plaintiff, for example, described being told by a defendant: "you don't understand how the game is played; I'll make the same deal with someone else."

Professor Hensler then described the in-depth study of ten cases, including six consumer classes and four mass-tort classes involving personal and property damages. Cases were selected from these areas because they seemed to be the areas generating problems; securities actions were in a state of flux at the time of the study, and were excluded for that reason. In four of these ten cases, the plaintiff attorneys who resolved the case filed in other courts, at times many other courts. In five, other attorneys filed in other courts. In only two were there no competing class actions; each of these two were cases involving localized harm and restricted classes. In at least one case, the judges got drawn into a competition to win the race to judgment: it became necessary to mediate between the judges. This is not close to being a scientific sample, but the course of these cases was consistent with what the lawyers said in interviews. The lawyers who filed in other courts did it to

preserve the chance to win certification if certification should be denied by the preferred court, or else to block others from filing parallel actions.

When other groups of attorneys filed parallel actions, operating independently, they often asked for compensation to withdraw their actions. The payments did not become part of the public record. The attorneys who took payment often asked for changes that improved class results, but this was not true in all cases. The presence of these csaes, often at different stages of development, affected the strategies of plaintiff counsel, and especially affected defendants who sought to negotiate in the most favorable case.

From the judicial perspective, competing actions increase public costs. But the costs are a "tiny fraction" of the total costs. From the defendant's perspective there are additional costs, but the defendants interviewed were not willing to say how much.

When settlement followed the joining of forces by plaintiffs, the plaintiff fee award was driven up because there were more attorneys claiming fees. This may be in part a cost imposed on defendants. But in reality, plaintiffs and defendants negotiate the total to be paid by the defendant; the fees come out of the plaintiff pot. It is not clear whether the total payment offsets this.

The more important consequences of parallel filings are these: First, there are increased opportunities for collusion between plaintiff and defendant attorneys. This is a particular risk in "consumer" classes where there is no client monitoring the attorneys. Many state judges have never seen a class action, and their instinct is to cheer, not to review, a settlement. Second, parallel findings provide a means for plaintiffs and defendants whose deal does not pass scrutiny to take the deal to another judge for approval. These consequences support the efforts to provide closer scrutiny of settlements and of fee deals.

Attorney Greenbaum began his presentation by observing that the "current crisis" is overlapping and competing classes. "The multi-headed hydra is with us; cut off one head and two more grow back." Yes, there is a problem; it is described, among other places, in a recent article by Wasserman in the Boston University Law Review. Courts also recognize the problem. And practitioners face it every day. Why has it developed?

Class actions are lawyer driven. They can be very lucrative. It is easier to copy an idea than to invent a new one. Lawyers who file an independent and parallel action may hope to wrest control of the litigation from those who filed first.

In a different phenomenon, the same lawyers may file in several courts, looking for certification, more rapid discovery, or other advantages deriving from the ability to choose among actions as one or another seems to develop more favorably. The Matsushita decision, by empowering state courts to dispose by settlement of exclusively federal claims, encourages such behavior.

There are three types of parallel filings: (1) Plaintiffs bring separate actions against each company in an industry — the plaintiffs and courts duplicate, but not the defendants. (2) The same lawyers sue in multiple courts for the same plaintiffs against the same defendants. (3) Different groups of lawyers bring multiple actions. These suits may be successive as well as simultaneous.

One problem is the tremendous cost of duplicating effort. Coordination of discovery is often worked out, but not always; the more actions that are filed by different attorneys, the more likely it is that at least one will involve an unreasonable attorney.

Another problem is that there is a lack of preclusion. Dismissal of one action for failure to state a claim, for example, does not preclude pursuit of a similar action. A denial of certification by one court does not preclude certification by another.

And of course there is a great pressure to settle, augmented by the burdens and risks of parallel actions.

An illustration is provided by litigation growing out of tax anticipation loans. The litigation generated twenty-two class actions, in the state and federal courts of eleven different states. For a period of ten years, the defendants had "great success"; none of the actions went to judgment. But finally a Texas court certified a class, and the case settled.

It is important to establish preclusion on the certification issue. One refusal to certify simply leads to another effort in a different court. And differences among state certification standards confuse the matter. Further confusion arises from "different levels of scholarship" among different judges. The plaintiffs eventually will find the most lenient forum. Even if you settle or win, preclusion questions remain — who is in the class? Was there adequate representation?

A plaintiff may find it easier to wreck the class by farming opt-outs when there are parallel actions pending.

The presence of competing actions forces a defendant to hold back money from any settlement, harming the plaintiff class.

And plaintiff lawyers complain that other plaintiff lawyers steal their cases.

The reverse auction is often discussed. "I have not seen it in practice, but there is an odor when the newest case is the one that settles."

From the court's perspective there is a burden, and they suffer from the perception that lawyers escape judicial supervision by going from one court to another. The result undermines the very purpose of class actions.

Panel discussion began with the observation that there was no apparent tension between the perspectives of academic Hensler and lawyer Greenbaum. They present a joint perception: they give an unqualified "yes" to answer the question whether overlapping class actions in state and federal courts are a sufficiently serious problem to justify Rule 23 amendments. In addition to the cases they

describe, Judge Rosenthal's memorandum to the Advisory Committee last April described another seven disputes that gave rise to parallel class actions, only two of which involved mass torts. A survey of litigation partners in this panel member's large firm turned up six more examples, only one of which involved a mass tort. "You will hear other examples."

The Manhattan Institute released a study in September 2001 that concentrated on Madison County, Illinois. The county population is some 250,000 people. Yet it is second only to Los Angeles County and Cook County in class-action filings in the last three years. Eighty-one percent of them were for putative national classes on claims that had no real nexus to Madison County. Why should this be? Madison County has a long history as a hotbed for plaintiffs. It began years ago as a favorable forum for FELA plaintiffs. Now they have found a much more fruitful project. One illustration is a class action involving Sears tire balancing, in an attempt to use the Illinois statute for consumers in all states.

The next panel member identified himself as an expert who litigates mass torts. By definition mass torts involve much duplication; victims file individual claims, as they have a right to do. That is his perspective on Rule 23. From that perspective, the question is whether there is a need to revise Rule 23. What are the perceived abuses? The principal abuse is collusion — when a mass tort occurs, the defendant wants global peace. There would be no problem if it were not for this propensity of defendants. They do not like Rule 23, except when they want to use it. Class actions should not be certified for mass torts. It is consumer cases that drive the problems. The proposals on overlapping classes must be dramatically offensive to state-court judges. We cannot by rulemaking solve the problems that arise from plaintiffs' quest for favorable courts. These proposals are not within the ambit of the Enabling Act; they cannot be done. Accordingly there is no need to worry about how they should be done.

A third panel member, speaking from a defense perspective, agreed that the desire to change Rule 23 is substantially driven by consumer claims. The 1998 Securities legislation is a model that deserves consideration. Some state claims have been excluded or federalized. State courts have been told this is a national problem to be addressed on a national basis. The 1995 PSLRA caused a migration to state courts; the 1998 SLUSA responded by limiting the role of state courts. The problem of overlapping class actions is real. In the most recent experience, the evils were demonstrated by a network of lawyers who undertook to file coordinated actions in each state, framing the actions in an effort to defeat removal. If successful, this tactic would eliminate any overlap between federal and state actions. The problem is fairness, not duplication. You have to win every point in every jurisdiction. Discovery, confidentiality, privilege are all at risk every time a state court rules: disclosure in any one action effects disclosure in all. Any focus on certification or settlement comes too late; fairness problems arise before that. And voluntary judicial cooperation is not a sufficient answer. Even as among federal courts, voluntary cooperation is no substitute for MDL processes. Under present procedures, appointment of a master to facilitate coordination is essential; the master's task, however, requires colossal effort.

The fourth panel member spoke from a plaintiff's perspective, based on experience in federal and state courts and in many different subject-matter fields. Unless we abolish state laws, we will have class actions in state courts. The Federal Rules cannot prevent that. Result-oriented rulemaking is a weak approach. The judge in federal court who does not wish to manage a class should not be able to prevent an able and willing judge from managing the same class. Nationwide business enterprise, moreover, generates nationwide classes. It would be futile to tell the manufacturer of a defective product that it should be sold only in the state where it is made. Overlapping classes arise in other fields for similar reasons. Antitrust actions may be filed in several states, for example, because state laws — unlike federal law — often permit suit by indirect purchasers. Plaintiffs, further, often seek statewide classes in state courts as an alternative to the national class that federal courts now discourage. To have the first court — a federal court — direct that there should be no class action in any court "will lead to no litigation, or to many chaotic individual actions." The concept of adding to Rule 23(b)(3) a factor to consider denial of class certification by another court as illuminating the predominance and superiority inquiry is fine; courts do this now, as they should, but a reminder does no harm. Another good idea is an express reminder to judges that it is proper to talk together across court lines; when this happens, coordination works out. But this works only if lawyers tell the judges that there are multiple actions. Defendants know of overlapping actions more often than plaintiffs do, but often do not raise the subject because they fear that plaintiff lawyers will coordinate their work and develop a stronger case. Many problems would be solved if defendants provided this information, and this duty should be recognized as a matter of professional responsibility. Finally, "preclusion is not the answer to collusion," but rather will exacerbate it.

The fifth panel member spoke from a defense perspective. Corporate counsel see a lot of consumer-type actions. And there are hybrids that involve products that have gone wrong, or that might go wrong. For the most part, mass torts are not certifiable. Overlapping classes have been around for at least 25 years. In 1975, the engine-interchange litigation generated many parallel actions, but these actions were "brought incidentally as a result of publicity." There was a different attitude — people believed such actions should be in federal court. This view continued through the 1980s. In the 1990s the phenomenon changed. It is a problem for the system. Rule 23 is a powerful tool. One class now pending against his client involves 40,000,000 people. Beginning with the GM pickup trial, lawyers have brought multiple actions as a weapon to coerce settlement. They often pick state courts in remote rural counties, hundreds of miles from the nearest airport. Legislation will be an important part of any package approaching these problems.

The final panel member spoke both from government experience defending class actions and from experience in private practice. The problem is a consequence of federalism. The United States as litigant has an advantage because actions against it come to federal court. Rule 23 is something that government litigants find valuable to resolve problems, to get a fair result. Typical actions are brought on behalf of federal employees. Rule 23 avoids a proliferation of litigation. This result should not be cut back. When cases can proceed in any of 50 state-court systems, "you lose a judge

vested with control of the situation." The incentives seem to be to gain advantage: the plaintiffs get multiple bites at the apple, and can impose high costs in order to encourage settlement. Defendants have an opportunity to look for a lawyer with whom they can make a "reasonable" deal. The slide of benefits from class to the plaintiff attorney can escape the judge's review and understanding. There is a risk of losing fairness to class members and deterrence.

An audience member asked about parallel litigation as a problem apart from class actions: should we have legislation for all forms of litigation, as perhaps a federal lis pendens statute written in general terms?

One of the presenters observed that "duplicative" litigation is a term used in many senses. The simple fact that events producing hundreds of victims may generate hundreds of individual actions has not been viewed as a problem by the Advisory Committee. So there are families of cases: plaintiffs win against one defendant, and then bring a similar action against another defendant. Again, the Advisory Committee has not viewed this as a problem. The nationwide class, commandeering the strength of the class action, is a distinctive problem: (1) Plaintiff attorneys can coordinate campaigns to press for settlement. (2) Competing classes generate a potential for collusion — this problem is recognized by lawyers, and is not a mere abstract concern of academics. Class actions generate "very powerful financial incentives." We must rely on judges to curb those incentives.

A panel member thought it a lot easier to justify a regimented approach in representative litigation, where the named representative's interest is submerged to the lawyer. But any solution cannot be framed narrowly in terms of "class actions" alone; Mississippi does not have a class-action rule, but achieves substantially similar results by other devices.

Another panel member observed that a plaintiff-perspective panel member had recognized that overlapping classes are a fact of life. The history of responses to multiple overlapping actions began with the electrical equipment pricefixing litigation forty years ago. The lawyers were told there was nothing that could be done about the overlap. But the federal judges created a coordinating committee that dealt with the problems. Discovery and trials were coordinated. The present proposals recognize the similar problems that exist today. State-court actions will remain.

The plaintiff-perspective panel member noted by the prior panel member suggested that there is an elegant solution. Judicial regulation is a need. More judges are involved. Rule 23, § 1407, and § 1651 can all be used. Judges can employ these tools cooperatively. A strict preclusion rule is far too restrictive of substantive and procedural rights. A good test of any solution is whether it makes all lawyers uncomfortable with the process: a fair and balanced solution should do that.

An audience member noted that the electrical equipment experience inspired the federal judges to go to Congress for a statute. There is a real question whether the Enabling Act can be used to preempt state law, or whether legislation is needed.

A judge asked from the audience what was the final outcome of the migration of the GM pickup litigation from federal court to the state courts of Louisiana. Panel members responded that the litigation was still pending. The parties agreed to a settlement that substantially enhanced the terms that had been rejected in the Third Circuit. The settlement was supported by the parties who had objected to the federal settlement. "Amchem findings" were made on remand in the state court. "There was no quick deal." But as soon as the settlement was signed, a dispute arose over its meaning; the question whether it requires the opportunity to develop a secondary market for sale of class members' rebate coupons has become a stumbling block. It was further noted that the litigation wound up in a small parish in Louisiana because there were more than 40 cases. Some state judges like class actions. The defendant view is that this was a power-play by plaintiffs. After some protest, the certification hearing was extended, but even then was held only three weeks after filing. The hearing was perfunctory, and followed by immediate certification.

Panel 6: Federal/State Issues

The moderator for Panel 6 was Professor Francis McGovern. Panel members included John H. Beisner, Esq.; Judge Marina Corodemus; Paul D. Rheingold, Esq.; Joseph P. Rice, Esq.; Professor Thomas D. Rowe, Jr.; and Chief Justice Randall T. Shepard. The subject was the "unpublished" proposals that would address overlapping, duplicating, competitive class actions.

The moderator observed that this is the "real world" panel. Discussion might begin by starting with "the bottom line," in the manner of reverse trifurcation. The strongest form of the unpublished proposals addressing parallel class actions, a potential "Rule 23(g)," would allow federal courts to seize control, excluding state litigation. This proposal might, as a practical matter, move mass torts to federal court. It could eliminate state class actions that do not conform to federal practice. Using a scale on which extreme approval is a 1 and extreme disapproval is a 10, how would each panel member vote?

The first panel member, representing a defense perspective, voted 1 with respect to the need for action. All of the proposals together rate a 3; there is a concern whether they are "doable." The need is to clarify which court deals with which class action.

A plaintiff-perspective lawyer voted 10. The next panel member abstained. Two more voted 4. The final member, again taking a plaintiff perspective, voted "10 twice": this cannot be done by rule, and should not be done by any means.

The panel was then asked to consider what is "unique": personal injury actions, medical monitoring, consumer fraud, antitrust, securities, in these terms: (1) It could be argued that we have federalism in all cases; class actions simply involve amplification of the amounts at stake. (2) An arguable concern of many people is that class members are not truly represented by the named representatives: class members lack knowledge, the process is not democratic, class members have no control. (3) We are not any longer talking about personal injury cases involving significant

present injury: the actions are for consumer fraud, medical monitoring, and the like, based on state law. A state national class works because opt-outs will not defeat it.

The first panel response was that what is unique about competing class actions is that they are "universal venue" cases: they can be filed in any state or federal court, nationwide. So this is different from individual plaintiff personal-injury cases. Second, the federalism issues are quite different: "This is reverse federalism." The Roto-Rooter case is an example: venue is set in Madison County, Illinois, for a nationwide class claiming a violation because the defendant's house-call employees are not all licensed plumbers. Venue was established on the basis of a set-up by plaintiffs who arranged for one visit to a customer in Madison County by an employee sent from Missouri. The attempt is to enable an Illinois judge to export the Illinois statute to govern events in all states.

Another panel member observed that this may not, does not, apply to mass torts. There are no dueling federal classes; they are swept together under § 1407. Nor has there even been a state class for actual injury; perhaps there have been for medical monitoring. The Advisory Committee has thought about developing an independent mass-tort rule. "One size Rule 23 does not fit all." A "Rule 23A" for mass torts would help.

The next panel member spoke to experience in New Jersey. The state courts have had centralized handling from the time of the early asbestos cases. The tendency has been to select the same county for coordinated proceedings. Judges in that county have built up expertise, and have two special masters for assistance. At present tobacco cases are pending there. Certification has been turned down in seven cases; they have been handled as individual actions. State courts can handle these cases. There are many manufacturers in New Jersey. The documents and individuals with knowledge are there. State courts can and do cooperate with federal courts. There have been some great experiences with particular federal judges, as Pointer and Bechtle. Not as much experience has developed with consumer-fraud actions, but when they arise there is an attempt to cooperate. One reason why plaintiffs go to state courts is because the Lexecon decision prevents trial in an MDL court.

The following panel member asked what is different about overlapping classes? First, the relationship between the lawyer and client is different from the relationship that courts normally rely on. This has serious consequences — ordinarily the lawyer in a class action has a greater financial stake than the client does. There is a much greater need for judicial oversight, even of settlements. (It may be noted that state courts often have to review and approve settlements of actions involving minors — there is a danger that even parents as representatives may not do the right thing.) Second, class actions are "different in the rules of engagement." A judge's first experience with a class action is quite different from the same judge's second experience. In my state, there is a special assignment system, and intensive training for the specialized judges who handle these cases. The difference between these specialized judges and federal judges "is not troubling."

Yet another panel member observed that the constitutional authorization for nationwide classes in state courts is part of the uniqueness. The Lexecon decision can be overruled by statute,

although not by rule. The Advisory Committee has been reluctant to take up the suggestion to develop a specialized mass torts rule because that seems to address a particular substantive area, rubbing against Enabling Act sensitivities. Special mass tort rules, however, are readily within the reach of Congress; the PSLRA is an illustration of a parallel effort. Finally, bringing state actions into federal MDL proceedings for pretrial handling would address the problem of continually relitigating the same issues, such as privilege, in many state courts. One useful approach is to think about creating new procedural rules within the framework of legislation.

The next panel member observed that he generally does not resort to class actions in mass torts. Rule 23 is a tool to resolve existing mass torts; problems arise when it is used to create mass torts. We are trying to make too much of Rule 23. One rule cannot be asked to cover consumer fraud, human rights, securities, and other fields. The overlapping class proposals are "biting off much more than § 2072 permits." To be sure, there are problems with duplicating class actions in mass torts. The MDL process does not fix the problems; it creates them. Many state actions are filed because the lawyers know a consortium will file a number of federal actions to provoke MDL proceedings that will be controlled by the federal attorney consortium. "MDL is a defense tactic." In one current set of actions, there is an MDL order that stops discovery in state actions, even though discovery has not even begun in the MDL proceeding.

An audience member asked about the seeming sensitivity to substance-specific rules: Rule 9(b) requires special pleading for fraud and mistake, so why not others? A panel member responded that we should be troubled by Rule 9(b).

The panel was then asked to consider the hypothesis that voluntary cooperation can work: the obstacles are "communication, education, and turkeys [referring to those who refuse to cooperate in sensible working arrangements]." Assume a personal injury drug case that involves present injuries, "known future injuries," and medical monitoring. MDL proceedings take more time than many state actions; how does a state judge deal with this?

One panel member stated that a state judge has developed a standard "MDL letter." The letter tells the MDL judge "who I am, what experience I have." It is supported by a web page with all the judge's opinions and orders, and also a hyperlink to the MDL judge. After that the state judge tries to contact the MDL judge to find whether committees have been formed, and whether this will be a cooperative venture. "As communication improves, liaison will get better."

The panel was asked what should happen if the MDL judge asks other courts to defer for a while?

A panelist, speaking from the plaintiff perspective, stated that he tries to persuade the state judge to proceed. Cooperation with the MDL judge takes time, and forces state attorneys to pay a tax for work by MDL counsel that the state attorneys do not want.

A second panelist, also speaking from the plaintiff perspective, said that communication among judges is proper if the purpose is to move the case along. It is not proper if the purpose is to delay proceedings and then to settle all claims.

A third panelist, speaking from a defense perspective, said that coordination has worked well on pure discovery issues in mass torts. These cases will not all be before one court.

The panel then was asked to suppose that there is "an outlier court consistently misbehaving": how do you deal with it on a voluntary basis? (Identification of these courts now proceeds not by states, but by specific counties in different states.)

The first panel response was that the outlier judge is the big risk to the role of state courts as viable contributors to resolving these large-scale actions. A variety of tools can be used by state appellate courts to deal with an outlier judge. Writs can be used "to rein in the judge who goes beyond the pale. Some of our law has been generated in this way. State supreme courts should not be oblivious to these risks." Such extraordinary intervention seems difficult to accomplish under standard precedent, but "new day makes new law." So one state case involved a judge on the brink of retirement "who got taken to the cleaners"; it took three appellate opinions, but eventually the problems were worked out with a better judge. In this field, a more managerial attitude is in order for state courts.

It was observed that an on-line education program is being developed to help state judges.

An audience member asked what is done about "outlier judges on the defense side"? A panel member suggested: "Change venue. Go someplace else." The audience member agreed: there are not that many judges who are favorable to plaintiffs, or even that many who take a balanced approach.

Another panel member suggested that the preclusion approach "will exacerbate forum shopping." Plaintiffs will try harder to get certification from a favorable court before it is denied by a hostile court.

The panel was asked to consider funding and appointment of counsel: should there be an override to compensate lead counsel for their work? Should lead counsel be permitted to sell the fruits of discovery?

The first panel response was that this is a big problem between state and federal courts. Following the Manual for Complex Litigation, interim appointments are properly made in a state action. For the most part, lawyer committees come to the state court already formed. New Jersey discovery is open: you can see it on paying the costs of copies. Assessments are not good. In a recent case that overlapped with a federal action, the question was worked out by permitting discovery to go on in the state action, on terms that avoided assessing lawyers for discovery work they do not use.

Another panel member asserted that multiple state filings are not used to defeat MDL proceedings. A different panel member responded that he has handled a number of cases where this has happened, but the MDL can invite cooperation and discovery. The first panel member observed that in the fen-phen litigation he had been forced to pay an assessment of 9% of the recovery — nearly 30% of his fee — for discovery he did not want.

The panel was asked whether this problem can be solved by the composition of the plaintiffs' committee. A panel member responded yes, but added that the problem is that MDL committees include lawyers who have no individual clients. They should not be on the committee. (But if all MDL cases are different, it's different.) This response was met by the observation that the problem with MDL proceedings is that there is no way to pay anyone. A solution is needed.

The panel was then asked to consider state certification of national classes.

A defense perspective was offered: in a pure class action, someone has to decide who is in charge of deciding whether it is to be a class action. If it is to be a class action, someone has to be in charge of managing it. There is no way to cooperate in managing two parallel classes. We need to eliminate competing classes. It is not persuasive to argue that different states may have different certification standards. When denial rests, for example, on the lack of predominating common issues, "it is close to a due process ruling. This should not be reconsidered" in another court.

The question was reframed: a state judge has to decide the cases presented. If a national class is filed, what do you do? talk to a federal judge?

A panel member replied that there is no one answer for all cases. Lawyers are very creative. "I have not been presented a national class" in state court. When there is overlap, "I pick up the phone." Coordinated discovery is possible, more so as communication is improved. In one recent case, a single Daubert hearing was held with one presentation that several courts could then use as the basis for each making their own particular rulings.

Another panel member said that in mass torts there is no problem of state courts certifying nationwide classes.

The final advice was that it helps to disaggregate the problem. The Advisory Committee should do this. It is important to understand what kinds of class actions present problems. Securities actions, for example, do not.

Panel 7: Rule-Based Approaches to the Problems and Issues

The moderator for Panel 7 was Professor Steven B. Burbank. The panelists included Professors Daniel J. Meltzer, Linda S. Mullenix, Martin H. Redish, and David L. Shapiro, and Judge Diane P. Wood.

The discussion was opened with the question whether amending the Federal Rules is a feasible approach to duplicating actions. Discussion should assume that the case has been made for change by some vehicle; the question is what vehicle is appropriate.

The first statement was that the conclusions advanced by the Reporter "do not warrant confidence." The legislative history of 1934 and 1988 shows that Congress intended to protect the allocation of power between the Supreme Court and Congress; protection of state interests was not a concern. The Supreme Court has labored under its own mistaken view that Congress meant to protect state interests. "The politics have changed since 1965" when Hanna v. Plumer was decided, as shown in the legislative history of Enabling Act amendments in 1988. These problems should be acknowledged. The memorandum supporting the nonpublished amendments suggests that the Enabling Act delegates to the Supreme Court all the power that Congress has to make procedural rules for federal courts. This is a "tendentious reading" of Supreme Court opinions, and the legislative record is clear that Congress did not want this. In like fashion, the memoranda seek to narrowly confine more recent decisions. The most important of these recent decisions is the Semtek case. The Semtek decision is not distinctive in the way the Reporter suggests; the Court was aware that "rules of preclusion are out of bounds." The original advisory committee refused to write preclusion into Rule 23; in 1946 a later advisory committee took preclusion out of Rule 14; the transcript of the oral argument in the Semtek decision shows that Justice Scalia believes that preclusion is outside § 2072. Attention also should be paid to the Grupo Mexicano case. Neither can a court rule define injunctive powers; the Committee Note to Rule 65 says that § 2283 is not superseded. Supersession of § 2283 is a bad idea.

A panel member asked about the broad interpretation of § 2072 repeated in the Burlington Northern decision? And what of Rule 13(a), which has preclusion consequences, or Rule 15(c) which affects limitations defenses by allowing relation back?

The response was that Rule 15(c) relation back "is a state-law problem"; Rule 15(c) is invalid for federal law purposes as well as state law. And Rule 13(a) does not itself state a rule of preclusion; preclusion arises from federal common law.

The question was pressed: if we think that Rule 15(c) is valid, should we reject the argued approach to § 2072? The response was no.

The first member began the formal panel presentations by observing that he had written an article urging the view that the class itself should be seen as the party and the client. Many of the nonpublished proposals are consistent with these views. Given enthusiasm with Rule 23, and the need for more supervision, it is distressing to be concerned with the certification-preclusion and settlement-preclusion drafts and the Enabling Act, etc. The certification-preclusion draft does not refer directly to preclusion, but the direction not to certify may exceed the Enabling Act even if the Supreme Court has all the power of Congress. Some rights may be enforceable only through a class action. A federal court can refuse to enforce rights this way; it should not be able to tell state courts not to enforce state rights this way. In any event, the policy and politics issues should be addressed

by Congress. There is, further, a constitutional problem: binding a class by preclusion is accepted. Refusal to certify may not include a finding that there is adequate representation — and the finding should be subject to attack. Besides, if the federal court says there is not a class, does not the bottom fall out of any foundation for preclusion? The member of the nonclass is a stranger to the litigation. The settlement-preclusion draft does not present a constitutional problem, but the Enabling Act problem is magnified: a state court may have a very different standard of what is fair and adequate.

The second panel member addressed the "lawyer preclusion" alternative draft that would bar a lawyer who had failed to win class certification from seeking certification in any other court, without barring an independent lawyer from seeking certification of the same class. Some background was offered first. First, overlapping classes present a problem that should be addressed by federal courts. They generate inefficiency, waste, and burdens of the sort we seek to avoid by other procedural devices such as supplemental jurisdiction, compulsory counterclaims, and nonmutual preclusion. They also encourage forum shopping, not the accepted choice for a single preferred forum but an invidious sequential forum shopping. And they magnify the in terrorem impact of litigation procedure by the impact of endless class actions; a defendant may win twenty class actions, but then lose everything in the twenty-first action pursuing the same claims. Competing classes also create a reverse-auction problem when they are filed by competing groups of lawyers rather than a coordinated group of friendly lawyers. Second is the question whether rules of procedure should be used to address these problems. The Enabling Act "is plenty broad enough." Burlington Northern gave a thinking person's version of the Sibbach test; a regulation of procedure can have an incidental impact on substantive rights. This is no strait-jacket on the rules process. Within this framework, the lawyer preclusion draft is paradoxically both the most revolutionary and the most narrow of the several alternatives. It is narrow because it recognizes the lawyer as the real party in interest, avoiding any need for concern about precluding the interests of the class itself. But it is a dramatic departure from private rights theory. And it may not be the most effective device.

Another panel member asked the lawyer-preclusion presenter about the effects of the Semtek decision on the understanding of Enabling Act power. The response was that the Semtek opinion "has some troubling off-hand dictum, introduced by 'arguably.'" The opinion should be read as it is presented — it is a construction of Rule 41(b).

The third panel member addressed the nonpublished Rule 23(g), which in various alternatives would authorize a federal court to enjoin a member of a proposed or certified federal class from proceeding in state court. One alternative would allow an injunction against individual state-court actions; the more restricted alternative would allow an injunction only against state-court class actions, and even then might exempt actions limited to a statewide class. Rather to her surprise, she concluded that the Enabling Act does not permit this approach. Over the years, it has seemed that the Advisory Committee has authority to do pretty much whatever it thinks wise. But this runs up against Enabling Act limits. Why? There is a problem with overlapping classes; there is a problem with reverse-auction settlements; and there are even duplicating mass-tort class actions. But the attempt to codify an exception to the Anti-Injunction Act by court rule transgresses the Enabling Act;

this point was made in the Committee Note to the original Rule 65. Congress will not like this attempted supersession. No case supports this approach either directly or by analogy. It is a stretch to suggest that because Rule 23 is procedural, we can do this to support the procedural goals of Rule 23. Nor is the idea of creating a procedural construct — the class — enough. There is a need to do this, but it cannot be done by rulemaking. That is so even though courts have made inroads on the Anti-Injunction Act by issuing injunctions designed to protect settlements. The argument that an Enabling Act rule fits within the Anti-Injunction Act exception for injunctions authorized by act of congress "is intriguing but too arcane." The better approach is to amend the Anti-Injunction Act to authorize these injunctions; the alternative of amending the Enabling Act to authorize the Rules Committees to do this also might work. Potentially workable legislative solutions include expanding the MDL process or removal. The chief impediment to legislation is political. A lawyer panel member this morning said he would oppose such legislation. Why borrow trouble?

The next panel member said that Professor McGovern is right: we should disaggregate in an effort to define which overlapping classes cause problems. For federal courts, the MDL process works. If a federal-question case is filed in state court, it can be removed. So the problem arises when some plaintiffs go to state court on state-law claims, while other plaintiffs take parallel claims to federal court, or — perhaps — when all plaintiffs go to state courts, but file duplicating and overlapping actions. "The state-law claims are the problem." The fact that the problem arises from state-law claims "should be a red flag." How far should a court rule, or a statute, tell state courts not to enforce state law as they wish? Another problem is the scope of state law: commonly the problem is stretching the law of one state out to the rest of the country. The choice-of-law aspects of the Shutts decision "may deserve more development." One part of the overlapping-class drafts suggests deference: the federal court can decide not to certify a class because another court has refused. There is no problem with that approach. And it would happen, although the federal court would need to know why certification was refused. If denial rested on a lack of adequate representation, further consideration in another action is proper. That of itself would be a significant change: as Rule 23 stands, a representative who satisfies its criteria is entitled to certification. A different proposal would adopt a "quasi-Rule 54(b) approach." This is surprising; it sweeps the new Rule 23(f) appeal procedure off the table for these cases. Allowing immediate appeal only from a denial of certification is unbalanced, and would lead to many interlocutory appeals. We should give the Rule 23(f) process a chance to develop. Finally, these approaches are "tinkering at the edges." The more fundamental proposals "are stopped by the Enabling Act and federalism."

This panel member was asked to respond to the observation that the Rule 54(b) analogy is relied on to establish preclusion, not to support appeal. The response was that "this is not clear." Nor can the judgment court determine the preclusion effect of its own judgment.

Another panel member asked about the risk of sweetheart settlement in state court for a national class: the defendant in such a case does not want to remove. Would it be desirable to adopt minimum-diversity removal, including removal by any class member? The response was "I am not in favor of bringing more state-law cases into federal court by minimum diversity."

A different panel member observed that the decision of the judgment court to describe its dismissal as "with" or "without" prejudice has an enormous impact on preclusion. The response was that a second court may well say that the representative plaintiff before it seeking class certification was not a plaintiff in the first court, so there is nothing to support preclusion.

The final panel member addressed the legislative proposals advanced as alternatives to the "adventuresome" proposals for rule amendments. The alternatives include amendment of the Enabling Act, of the Anti-Injunction Act, and of the full faith and credit act. Of the three, the Enabling Act approach should be preferred. "It is hard to be confident of the quality of Congress's work." Nor can drafting a statute anticipate all problems; it will be easier to change a rule of procedure to accommodate unanticipated problems than to change a statute. Should Congress amend the Enabling Act to authorize rulemaking in this area, moreover, political concerns would be reduced. Congress can take an open-ended approach in the Enabling Act. The Enabling Act proposal sketched here would be improved, however, if it incorporated the language set out in the alternative Anti-Injunction Act proposal: it should refer not simply to the ability of a federal court to proceed with a class action, but instead to the ability of a federal court to proceed effectively with a class action. Another possibility would be to combine the two approaches, amending the Anti-Injunction Act to authorize injunctions subject to refinements to be provided by the rules of procedure. Apart from these possibilities, "minimal diversity removal may not happen." If such a removal statute were adopted, it would concentrate suits in federal court and reduce the problems of different state class-action standards. But this approach still does not address collusive settlements, since neither plaintiff nor defendant will remove when they like the deal; only the broad proposal to permit removal by any member of a plaintiff class, or by any defendant, would address that weakness. Even then, removal by individual class members faces limits of knowledge and incentive. "Exclusive federal jurisdiction is a bit much." So if a federal court denies certification, there still could be a second action; as an earlier panel member observed, it may be that due process requires a second chance.

Panel 8: Reflections on the Conference

The moderator for Panel 8 was Professor Arthur R. Miller. The panel members included Professor Paul D. Carrington; Chief Judge Edward R. Becker; Judge Paul V. Niemeyer; Judge Sam C. Pointer, Jr.; and Judge Wiliam W Schwarzer.

The panel was introduced as the "greybeards" of federal civil procedure. "Our job is to help the Committee." Discussion should begin with the proposals actually published for comment; the nonpublished proposals should be deferred for later.

The first panel member thought "there is a lot of sensible stuff here." But caution is indicated for a variety of reasons. Rule 23 should be amended only if there is a real need. There are many cross-fires, and there can be important effects on substantive interests. The rulemaking process is too fragile to bring to bear. The package does not have any "hot button" issues, but caution is indicated. In 1941, Harry Kalven wrote an article about small claims that do not get litigated. That

article was the inspiration for the eventual adoption of Rule 23(b)(3), and "that's why we're here." Perhaps the time has come to delete Rule 23(b)(3). (Another panel member interjected: "I can't believe you said that.")

The next panel member recommended that the Committee go forward, "with a couple of exceptions." The proposals have been attacked in ways that "I would not have been anticipated." But they are good. Codifying present good practice is a good thing; not all judges are as adept in managing class actions as the best. But the settlement opt-out may create more problems than it is worth. And the Notes are too long. The Rule 23(h) Note includes material that should be in the Manual. A Note should explain the reason for the rule. The Note can be shortened by cross-referring to the Manual. Lists of "factors" should not be put into the rules; they should be set out in the Note, or not at all. In response to a question about the "destabilizing effects" of rules amendments, this panel member responded: "I don't see them." Evidence Rule 702 was amended to codify the Daubert approach to expert-witness testimony, and it has worked.

The third panel member began by observing that "it is deja vu all over again." The history of the Advisory Committee's efforts deserves review. "History is history. Rule 23 is here." There is little reason to believe that the group that created Rule 23(b)(3) nearly forty years ago understood the power they were unleashing. "It has become a de facto political institution." Attorneys appoint themselves heads of their own little principalities. Some are good, and some bring abuses. How can we control or manage this? The proposals are not remarkable. But to get through the full rulemaking process, "you cannot be remarkable." There are many interests; that makes it difficult to change rules, and even makes it difficult to get disinterested advice. An approach that codifies existing practice leads to a choice for the Advisory Committee: is it to be a leader or a follower? As with the Daubert approach to expert testimony, it is wise to be cautious about engraving current practices in a Rule. Rule 23 has a very sophisticated set of followers. That should be taken into account. As to more specific proposals, the Rule 23(c) proposal leaves some confusion about pre-certification discovery; that should be clarified. The attorney appointment and fee proposals should be collapsed into Rule 23(c). And there should be something that speaks to pre-certification appointment of counsel. The settlement-review proposal seems about right, apart from the settlement opt-out. The settlement opt-out might be reduced to one of the factors considered in reviewing fairness, or perhaps a compromise version could be retained in the rule. Finally, the Notes are "intelligent, complete, but longer than you need after the present process is worked through." There is some substance in them. The list of factors seems to work pretty well. But there are some inconsistencies. The Notes probably "are a little fulsome."

It was observed that "there has been an organic shift in Notes. The Rules also have grown longer." The earlier attitude was to be sparse, to give direction and describe intent. A panel member suggested that it is important to describe the Committee's purpose. Probably it is better to leave out advice on how to exercise the power. It was suggested that the Notes are now attempting to fill a new legislative history role. Another suggestion was that the proposed attorney-fee rule "has a quasi-

public aspect." There is good reason to have something in the Rule; the question is how far to get involved in it.

Another panel member thought that the biggest problem is what will happen to the proposals on competing and overlapping classes. If they are going forward to publication, there will be trouble with the already published proposals if kept on a parallel track. The published proposals would not change much. The settlement opt-out would be a change; under present practice, settlement opt-outs are negotiated when appropriate. This proposal fails to distinguish between different forms of class actions. It will "generate a lot of heat. It is a problem." The other proposals are "largely instructive" to lawyers, trial judges, and appellate judges. If the nonpublished proposals are not going forward, it makes sense to go forward with the published proposals apart from the settlement opt-out. And the three criteria for selecting class counsel should not be in the text of the rule. Focusing on the amount of work an attorney has done will become a reward for racing to do a lot of up-front activity to win the appointment. The Notes are too long, and at times are self-contradictory or contradict something in the Rule That needs attention. Finally, the biggest problem arises from settlement classes. It is "amazing" that the overlapping class materials should have been disseminated, even for discussion in this conference, without also including a settlement-class proposal.

Another panel member agreed that there should be a settlement-class proposal.

One of the earlier panel members observed that some in Congress view Rule 23 as "an end-run around Congress." The settlement class "is an entire agency. Amchem was dead on." This observation met the response that Amchem is consistent with smaller, cohesive settlement classes. "They're here, they exist. They're tough to draft." It remains difficult to figure out what the Amchem opinion means by saying that settlement can be taken into account. The rejoinder to this observation was that the problem with a settlement class is that it cannot be tried, so there is no constraint arising from the alternative prospect of litigation.

An academic panel member suggested that the problem with the current discussion is that it involves too many federal judges. The problems cannot all be solved by judges. Settlement classes "overstrain" the Enabling Act. We used to take seriously the ideas of self-government and jury trial in civil cases. Settlement classes disregard these ideas.

The next panel member expressed general agreement that the proposals make sense. But the Rule 23(e) notes imply that there is such a thing as a settlement class; "not everyone agrees." There is no need to cover everything in Rule 23. There is plenty of law on attorney fees; you do not need a rule. The rest of it is useful in guiding the district judge. The factors in the Notes will help judges. Case management will be improved. The Notes to the 1993 amendments of Rule 26 are a good model; they are not short, but are a good source of guidance. These Notes are too much text, and resource about the law. The law may change. And the Notes also focus on the need for findings; that should be in the Rule, not the Notes. The mandatory settlement opt-out is a bad idea; it almost gets into the substance of the settlement.

An earlier panel member responded that the settlement opt-out is a good idea. Its virtues have been fully stated. It legitimates the decision. Rule 23(b)(3) was written for small-stakes cases. If it is used for cases that involve significant individual claims, class members should know what is at stake before being asked to decide whether to opt out. There should not be an absolute right to opt out. "But a willing seller is needed."

The panel then was asked to address the overlapping class proposals.

The first response was that "This is not doable." It sparks too much reaction, and divides so deeply, that it is "dead from the beginning." The problem, to be sure, is serious: "universal venue" means unlimited repeats, and eventually the plaintiffs will win. One fair day in court should be enough. A rough and quick response may be appropriate; that is what Congress can do. The question of Enabling Act authority is academic; the lawyers who are interested in class actions will fight and defeat the proposals no matter whether they are within Enabling Act authority.

The next response was that these proposals "have put the cooper over the barrel." The statutory approach is proper. But the statutes will not be enacted. But different statutory approaches may be feasible. A choice-of-law statute, federalizing choice of law, is doable. In terms of overlapping classes, we are now down to the "outlier judge, not outlier jurisdictions." A choice-of-law statute would enable more federal classes, reducing these problems.

Professor Miller observed that he had devoted five years to developing the proposals in The American Law Institute Complex Litigation project. It deals with all of these questions, including choice of law.

A panel member noted that the various overlapping class proposals had been created as illustrations to provoke exactly the conversations that have been occurring. They have served the purpose of uncovering the arguments of authority and usefulness that have been made at this conference.

A different panel member noted that a multiparty-multiforum bill has languished in Congress for ten years because agreement on precise terms has proved impossible.

Still another panel member suggested that it might be desirable to have more class actions in state courts if they could be limited to state-wide classes. The nasty problems emerge from nationwide classes in state courts; the Kamilowicz action is a particularly noisome example. A member of the audience was asked to respond to this suggestion. She thought it would interfere with a "universal choice-of-law system." Chapter 6 of the ALI study is good. If we had a uniform choice of law we would be much better off. Often it would limit state courts to state-wide classes. But the state that is the heart of where a product is made should be able to entertain a nationwide class. The difficulty that stands in the way is that "academics defeat reform."

It was observed that we are in a situation in which many people distrust state courts, but will not say it. The Shutts litigation in effect involved a national class action. Part of the opinion

addresses choice of law. It was sent back to Kansas courts for guidance, and the state courts decided that all states have the same law as Kansas. Such results inspire cynicism.

A member of the audience responded that a federal court is obliged to look to state law. How can you not let a state court decide what state law is? You have to. And you may be able to extrapolate that to other jurisdictions. Why assume the federal court has the ultimate wisdom to decide the state law that should control? It is overreaching for an MDL judge to assume control over state cases for the purpose of implementing an eventual class settlement. So a state judge acting in a case involving in-state defendants and in-state activities should not be preempted by federal courts for the purpose of implementing a national solution.

A panel member agreed that a state court should be able to apply state law to "state situations," but should not be able to apply its own state law to the entire country. The audience member responded that a state court is better able than a federal court to determine whether its own state law is the same as the state law of twenty other states.

The moderator concluded that the panel had offered no support for the nonpublished rules on overlapping classes. He went on to note that the 1963-1966 period of the Advisory Committee was also the period when state long-arm statutes were emerging. The Committee debated at length the possible adoption of long-arm provisions in Rule 4, focusing on the Enabling Act. One Committee member had direct back-channel advice from at least two Justices that a rule-based long-arm provision might exceed Enabling Act limits, and that it would be ill-advised overreaching to attempt the task. Later, the Committee again backed off a long-arm provision, adopting only a "100-mile bulge" that was "put in as a sort of test." "The debate today is fascinating."

The Conference concluded with one final expression of thanks to all the panelists and all others who attended.

Respectfully submitted,

Edward H. Cooper, Reporter

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First Rule 23(c), (e) Suggestions

Introductory Note

The versions of Rule 23(c) and (e) that follow show some of the changes that might be made to react to early comments on the published drafts. To reduce the risk of confusion arising from the underlining and striking over in the published drafts, several typographic conventions are employed.

Suggested new matter is inserted in bold type.

For the text of the Rules, deletions are indicated in "shadow" form -- hollow double-line letters. In the Notes, however, deletions are indicated by the traditional overstriking.

Redlining is used to indicate Note material that is most easily deleted if sheer length seems a problem. Some of the material within the redlined portions is set in bold or overstrike form, indicating changes that might be made if that portion is generally retained.

Footnotes are used to indicate the purpose of proposed changes or to identify suggestions that do not yet seem worthy of advancing into revised Rule or Note text.

There has been support for integrating the attorney-appointment draft with Rule 23(c). Attorney appointment is intended to be part of the initial certification process and fits comfortably at this point. The most likely method would be to incorporate the provisions published as Rule 23(g) as a new subdivision (c)(5).

The attorney-fee provisions could easily remain at the end of Rule 23, as Rule 23(g).

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CIVIL PROCEDURE*

Rule 23. Class Actions

* * * * *

(c) Determiningation by Order Whether to Certify a Class Action ~~to Be Maintained~~; 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

*New material is underlined; matter to be omitted is linedthrough.

of a class, the court must — at an early practicable time — 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.[1] [redacted]

[redacted]

[redacted]

[redacted]

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1 Michael J. Stortz, in his written statement for the San Francisco hearing, suggested that the same words should be used here and in the notice provisions of (c)(2)(A)(i), which directs the court to describe in the notice "the claims, issues, or defense with respect to which the class has been certified." This more formal phrase seems to fit the notice provision; the less formal phrase does the job in (c)(1)(B), but if there is any risk that the difference will cause confusion we should use the same language in both places.

2 Barry Himmelstein made a cogent argument in his written statement for the San Francisco hearing that it is difficult to state the time for opting out at the time of the initial (b)(3) certification order if certification is contested. The parties do not begin to plan the notice campaign until certification has been ordered, and in many cases a substantial period is required to develop both the notice and the plan for reaching class members. It might be added that in some cases it will make sense to defer notification until it is determined whether post-certification settlement can be reached; a single notice of certification, opportunity to elect exclusion, and settlement saves much. One solution would be to delete this sentence entirely, adding its substance to the bullets in (2)(A)(i) as shown below.

(C) An order under Rule 23(c)(1) ~~may be~~ [redacted] [redacted][3] may be altered or amended before ~~the decision on the merits~~ final judgment.

(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 definition of the class certified,**[4]
- 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,

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3 There is something to be said for the suggestion that we should strike "is conditional and." The working words say that the order may be altered or amended before final judgment. To state that the order is conditional may encourage certification in the spirit of waiting to see what happens next.

4 This seems an essential part of the notice, not adequately expressed in the description of the class claims, issues, or defenses.

• the right to elect to be excluded from a class certified under Rule 23 (b)(3), **stating when and how members may elect to be excluded,**[5] and

• the binding effect of a class judgment on class members under Rule 23(c)(3).

(ii) For any class certified under Rule 23 (b)(1) or (2), the court must direct notice by means calculated to reach a reasonable number of class members.[6]

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5 This addition would correspond to deleting the second sentence in (c)(1)(B); see note 2.

6 The concerns that have surrounded the drafting process continue in the comments. Most of the attention focuses on "reform" litigation brought under Rule 23(b)(2), promising little in the way of eventual money recoveries to defray the costs of notice. This concern is expressed in part by suggestions that it is obscure to require notice to "a reasonable number of class members." It is not clear what alternative is proposed, other than to delete any Rule provision for notice in (b)(1) and (b)(2) classes and to carry on as before, relying on discretionary exercise of the general notice power established by Rule 23(d)(2) and latent concepts of due process. The current response has been to express sympathy for these concerns in the Note. Alternative rule language has proved elusive in earlier discussions. It would be possible to explore some variation of this: "For any class certified under Rule 23(b)(1) or (2), the court must direct notice by reasonable means at a cost that does not defeat the practical ability to maintain the action." (Another suggestion has been that the court should have authority to direct that the defendant pay notice costs, even with a presumption that the defendant should pay.)

(iii) ~~In~~ For 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

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 determination "at an early practicable time." The notice provisions are substantially revised. Notice now is explicitly required in (b)(1) and (b)(2) classes.

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made "at an early practicable time." **The "as soon as practicable" exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision.** 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. ~~These seemingly tardy certification decisions often are in fact made as soon as practicable, for practicability itself is a pragmatic concept, permitting consideration of all the factors that may support deferral of the certification decision. If the "as soon as practicable" phrase is applied to require determination at an early practicable time, 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, although settlement discussions should not become the occasion for deferring the activities needed to prepare for the certification determination. 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(g).~~

Time ~~also~~ may be needed for discovery to support **to gather and present information necessary to** 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.[7] In this sense it is appropriate to conduct controlled discovery into the "merits"**, limited to those aspects relevant to making the certification decision on an informed basis.** ~~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; to assess potential conflicts of interest within a proposed class; and particularly to determine for purposes of a

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The early comments suggest continuing concern by some plaintiffs that defendants may attempt an artificial separation of discovery into two phases — a first phase aimed at the certification decision, then a second phase aimed at the merits — for the purpose of increased delay and expense. The delay and expense arise because certification discovery inevitably overlaps merits discovery. Others believe that certification discovery can be controlled effectively, and that it can be managed to reduce any duplication.

(b)(3) class whether common questions predominate and whether a class action is superior to other methods of adjudication. ~~The most~~ A critical need is to determine how the case will be tried. Some courts now require a party requesting class certification to present a "trial plan" that describes the issues ~~that~~ likely ~~will~~ **to** be presented at trial **and tests whether they are susceptible of class-wide proof.** ~~, a desirable — and at times indispensable — practice~~ **Such trial plans** ~~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~~ **for** 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 bearing 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. **If related litigation remains in a relatively early stage, on the other hand, the prospect that duplicating, overlapping, or competing classes may result in conflicting or disruptive developments may be a reason to expedite the determination whether to certify a class.**[8]

Other reasons may affect the timing of the certification decision. 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(g or (c)(5)), recognizing that in many cases the need to progress toward the certification determination may require interim designation of counsel for the putative class during the period before official designation.[9]

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8 These words respond to a suggestion at the Chicago Conference.

9 These words are added as a reminder of a theme often sounded with respect to appointment of class counsel. The alternative reference to (c)(5) indicates the prospect that the appointment provisions may be integrated into subdivision (c).

The period immediately following filing may support free exploration of settlement opportunities, although settlement discussions should not become the occasion for deferring the activities needed to prepare for the certification determination.

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not **unjustifiably** delayed ~~beyond the needs that justify delay~~. ~~These amendments are~~ **The rule is** not intended to encourage or excuse a dilatory approach to the certification determination. 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. T~~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 sufficient information 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.~~[10]

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

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10 This paragraph should be deleted if the notice sentence is moved from (c)(1)(B) to (c)(2)(A)(i). See note 2.

institutional reform litigation. **For example,** proceedings to enforce a complex decree **in protracted institutional reform litigation may require several adjustments in the class definition after liability is determined.** ~~may generate several occasions for final judgment appeals, and likewise may demonstrate the need to adjust the class definition.~~

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of "one-way intervention" that was rejected by the 1966 revision of Rule 23. A court may not decide the merits first and then certify a class.[11] It is no more appropriate to certify a class after a determination that seems favorable to the class than it would be to certify a class for the purpose of binding class members by an adverse judgment previously rendered without the protections that flow from class certification. A determination of liability after certification, however, may show the need to amend the class definition. In extreme circumstances, decertification may be warranted after further proceedings show that the class is not adequately represented or that it is not proper to maintain a class definition that substantially resembles the definition maintained up to the time of ruling on the merits.

The former statement that an order under Rule 23(c)(1) is conditional is deleted. It suffices to state that the order may be altered or amended before final judgment.[12]

Paragraph (2). The first change made in Rule 23(c)(2) is to require notice in Rule 23(b)(1) and (b)(2) class actions. The present rule expressly

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11 A comment at the Chicago Conference suggested that this sentence is at war with the earlier statements that a court may rule on a motion to dismiss or for summary judgment before deciding whether to certify a class. It would be possible to add a few words: "A court may not decide the merits first and then certify a class that will benefit or be bound by the merits determination." Or the statement could be made longer, expressly disclaiming any intent to weaken the earlier statement that it is proper to dismiss before ruling on certification so long as only the class representatives are bound.

12 This paragraph would correspond to the suggestion that "is conditional" be deleted from the text of the rule.

requires 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 difficult task of communicating with class members. It is ~~virtually impossible~~ **difficult** 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. **Courts may need to consider whether the case involves class members who are more likely to understand notice in a language other than English, or who are more likely to receive notice delivered through a means other than — or in addition to — the mail.** In ~~some~~ **many** cases, **it has proved useful to provide** ~~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 illustrative clear-notice forms that provide a helpful starting point. ~~Even with these illustrative guides, the responsibility to "fill in the blanks" with clear language for any particular case 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.~~[13]

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 electing exclusion.

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13 It has been suggested that notice written by collaboration of class lawyers with opposing lawyers will inevitably be made incomprehensible by the need to protect themselves. On this view, notice should be written by the court or by someone appointed by the court; the most daring suggestion is that the court should appoint a person who is not a lawyer. That suggestion seems to go beyond the sphere of the Note.

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 designed to reach a reasonable number of class members; should be 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.[14] 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 **or intrusive**,[15] the reasons for giving notice often can be satisfied without

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It has been forcefully urged by one regular participant in the drafting deliberations that this sentence should be stricken. We should not invite repetition of the careful process that led to the initial certification order.

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As noted with the text of the rule, public-interest groups continue to urge that this Note language does not allay the risk that notice costs will defeat the ability to maintain worthy (b)(1) and (2) classes. One specific suggestion is that defendants should be made to share or pay notice costs. A similar suggestion has been put aside as to small-stakes (b)(3) actions. The present Note language was intended to urge courts to carefully consider these concerns. Perhaps something more could be said about the costs of published notice and the suitability of such alternatives as posting in a place of employment. It also would be possible to suggest that the court should avoid pressures to narrow the class definition in order to reduce notice costs.

There is a separate question about notice to identified class

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.

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members in civil rights and discrimination cases. Jocelyn D. Larkin testified at the San Francisco hearing that Rule 23 is important in part "because of the anonymity it provides." That concern might extend to efforts to identify class members for notice purposes.

RULE 23(e): REVIEW OF SETTLEMENT

Rule 23. Class Actions

* * * * *

(e) Settlement, Voluntary Dismissal, ~~or~~ Compromise, and Withdrawal. ~~A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.~~

(1) (A) A person who sues or is sued as a representative of a class may settle, voluntarily dismiss, compromise, or withdraw all or part of the class claims, issues, or defenses, but only with the court's approval.[16]

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on **making** findings **of fact and**

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16 Comment 01-CV-05 urges that the Rule should incorporate "some adverse consequences" to deter plaintiffs from filing class actions designed to coerce settlement, and to deter defendants from buying off plaintiffs who have filed plausible demands for class certification. It remains difficult to draft a rule that would do more good than harm.

conclusions of law under Rule 52(a)[17] 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, compromise, or withdrawal 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) *[Alternative 1]* In an action previously certified as a class action under Rule 23(b)(3), the Rule 23(e)(1)(B) notice must state terms on which individual class members may elect exclusion from the class, but the court may for good cause refuse to allow an opportunity to elect exclusion if class members had an earlier opportunity to elect exclusion.

[Alternative 1.5] In an action previously certified as a class action under Rule 23(b)(3), the Rule 23(e)(1)(B) notice must state terms that afford individual class members a second opportunity to elect exclusion from the class unless the court finds that the circumstances of the action and

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17 This formulation is taken from published Rule 23(h)(3). It seems reasonable to request parallel expressions in amendments proposed for adoption at the same time.

settlement sufficiently protect class members without a second opportunity to elect exclusion.

(3) *[Alternative 2]* In an action previously certified as a class action under Rule 23(b)(3), the Rule 23(e)(1)(B) notice may state terms that afford individual class members a second opportunity to elect exclusion from the class.

(4) (A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(C).

(B) An objector may withdraw objections made under Rule 23(e)(4)(A) only with the court's approval.

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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. **Settlement is an important and desirable means of resolving class actions. But court review and approval is essential to assure adequate representation of class members who have not participated in shaping the settlement.**[18]

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18 This sentence is a possible response to the occasional protests that the tone of the Note is unnecessarily negative. More pervasive reminders of the value of settlement could be added, but the whole purpose of subdivision (e) is to ensure that the attractions of settlement do not overwhelm the imperative of fair, reasonable, and adequate disposition.

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~~ **dismissals, to assure judicial supervision over class-action practice and to protect the integrity of class-action procedure**. ~~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.~~ **If a pre-certification settlement or withdrawal of class allegations appears to include a premium paid not only as compensation for settling individual representatives' claims, but also to avoid the threat of class litigation, the court may seek assurances that the class-action allegations were not asserted, or withdrawn, solely for strategic purposes, and that the rights of absent class members are not unfairly prejudiced.** ~~Because~~ **When special circumstances suggest that** class members may **have** rely**ied**[19] on the class action to protect their interests, the court may ~~direct~~ **consider whether some reasonable form of** notice of the dismissal **is warranted** 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~~

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19 This change would respond to the suggestion that most class actions are not publicized at the time of filing; absent general notice, it is unlikely that any potential class member has relied on the action. It would be possible to say more along that line in the Note. It also would be possible to be even more restrained in describing the possibility of notice, to say nothing about notice, or to refer to Rule 23(d)(2) as a source of authority to give notice of a pre-certification dismissal "in an unusual case in which putative class members may have relied on continuing progress of the action as a class action."

~~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.~~[20]

Administration of subdivision (e)(1)(A) should not interfere with exercise of the right to amend once as a matter of course provided by Rule 15(a). During the period before a responsive pleading is filed, class counsel may discover reasons to reformulate the claims in ways that omit some theories included in the original complaint. ~~There is a risk that inquiry into the reasons for such changes might interfere with the adversary balance of the litigation.~~ In most circumstances the court should not inquire into the reasons for changes made by an amended complained filed as a matter of course unless the changes appear to surrender central parts of the original class claims.[21]

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20 It was urged at the Chicago Conference that the court should not take on the role of seeking out class representatives to replace those who, for reasons good or not so good, seek to surrender before a certification determination. One easy response would be to delete this sentence. A different response would be to make this sentence parallel to the third sentence in the paragraph: "One remedy again may be to delay dismissal for a suitable period to allow other class representatives to appear." The difficulty with this response is that absent notice of some sort, appearance by other would-be representatives seems unlikely.

21 This new paragraph is an attempt to respond to a suggestion in Barry Himmelstein's written statement for the San Francisco hearing. Mr. Himmelstein urges that the Note should say that court approval is not required for an amendment made as a matter of right "unless the amendment would delete the class allegations in their entirety." Saying that in the Note would create an apparent

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 **when the settlement binds the class through claim and issue preclusion; notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.** ~~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, by the claim- and issue-preclusion effects of res judicata. The court may order notice to **members of** the **proposed** class of a disposition made before a certification decision, and may wish to do so if **special circumstances show** there is reason to suppose that other class members may have relied on the pending action to defer their own litigation.~~ **The court may also require** ~~N~~notice ~~also may be ordered~~ if there is an involuntary dismissal after certification**, although such orders are unusual.**~~;~~ ~~o~~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 that would bind members of a class. 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~~ **those seeking approval** 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 that would bind class members. The settlement must be fair, reasonable, and adequate. The court~~, further,~~ must make findings **under Rule 52(a)** 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

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disagreement between Rule and Note. Saying it in the text of the Rule would provide a clear direction, but might go too far: the amendment might leave no more than an insignificant class claim, or a claim that manifestly could not be certified.

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. **In other cases, however,**

~~R~~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. **Recent decisions should always be consulted, and guidance can be found in the Manual for Complex Litigation.** The examples provided here are only **illustrative; some** ~~examples of factors that~~ may be important in some cases but irrelevant in others. Matters ~~excluded~~ omitted from the examples may, in a particular case, be more important than any matter offered as an example.

A number of variables influence settlement evaluation. ~~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~~ **A** class involving only small claims may be the ~~only~~ **sole** opportunity for relief, and also pose ~~less~~ **little** 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.

Among the factors that may 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[22] 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,[23] and other facts that bear on the ability to assess the probable outcome of a trial 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);

() the effect of the settlement on other pending actions;[24]

(H) the existence and probable outcome of **similar** 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 **pressing similar claims**;

(J) whether class or subclass members~~, or the class adversary,~~ are accorded the right to ~~opt out of~~ **request exclusion from** the settlement**, and if so, the number exercising the right to do so**;

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22 Judge Schwarzer suggests substituting "resolved" for "maintained."

23 Judge Schwarzer suggests adding "the discovery in the litigation."

24 This suggestion was made at the Chicago Conference.

(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[25]

(N) the apparent intrinsic fairness of the settlement terms.[26]

~~Apart from these factors, s~~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).[27]

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25 Judge Schwarzer suggests adding two additional factors:

(N) Whether the settlement will have significant effects on claimants in actions in other courts; and

(O) Whether the settlement will have significant effects on potential claims of class or subclass members arising out of the same or related transactions or occurrence but excluded from the settlement.

26 Judge Rosenthal has suggested that if we retain this list of settlement review factors in the Note, it should be rearranged in this order: A, B, C, I, F, J, E, G, (), H, D, K, L, M, N.

27 Judge Schwarzer suggests revising this paragraph to read as follows: Settlement review may also lead to problems concerning the cogency of the initial class definition and the adequacy of

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.[28] 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 **that are not reflected in the formal settlement documents** ~~outside the settlement negotiations~~. **There may be accepted implicit conventions or unspoken understandings that accompany settlement.**[29] Particularly in substantive areas that have generated frequent

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representation. The terms of the settlement or objections may reveal the existence of conflicting interests among class members. Rule 23(c)(1) recognizes that an order certifying a class "may be altered or amended before the decision on the merits." However, a redefinition of the class or the creation of subclasses may affect substantial rights and raise the potential of prejudice, in particular should it result in the exclusion of claimants heretofore considered members of the class. Problems may be resolved by identifying needs for adequate representation of conflicting interests. See Ortiz v. Fibreboard, [etc.]

28

It would be possible to add another set of examples offered at the Chicago Conference: agreements by class attorneys to indemnify lead plaintiffs against liability for costs, and "simple money buy-outs of objectors."

29

Judge Rosenthal suggests that if the following sentence is retained, it could be written: Such conventions or understandings are likely to arise in substantive areas that have generated frequent class actions, or in litigation involving counsel that have tried other class actions.

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~~ **agreements for** the court **to review as part of the settlement process.** ~~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 settlement 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~~ **may require accommodation with a need for** confidentiality. Some agreements may involve work-product or related interests that ~~may deserve~~ **merit** protection against general disclosure.[30] One example frequently urged relates to some forms of 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~~ **specific** terms may encourage third parties to solicit class members to opt out.

Paragraph (3). Subdivision (e)(3) creates an opportunity to elect exclusion from a class certified under Rule 23(b)(3) after settlement terms are announced. 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

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Judge Schwarzer would revise these two sentences: "The direction to file copies or summaries of agreements or understandings made in connection with a proposed settlement may give rise to a need for protection of confidential materials or information. The court should provide an opportunity to make appropriate claims to work product or other relevant protection.

these cases, the basic Rule 23(b)(3) opportunity to elect exclusion applies without further complication. **In some cases, particularly if settlement appears imminent at the time of certification, it may be possible to achieve equivalent protection by deferring notice and the opportunity to elect exclusion until actual settlement terms are known. This approach avoids the cost and potential confusion of providing two notices and makes the single notice more meaningful. But notice should not be delayed unduly after certification in the hope of settlement.** ~~Paragraph (3) creates a second opportunity to elect exclusion for cases in which there has been an earlier opportunity to elect exclusion that has expired by the time of the settlement notice.~~

Paragraph (3) creates a ~~This~~ second opportunity to elect exclusion for cases that settle after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. **This second opportunity to elect exclusion** reduces the **influence** ~~forces~~ of inertia and ignorance that may undermine the value of a pre-settlement opportunity to elect exclusion. A decision to remain in the class is ~~apt to~~ **likely** be more carefully considered and is better informed when settlement terms are known.

The second opportunity to elect 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 carefully **a court inquires** ~~the inquiry~~ into the **terms of a proposed** settlement, ~~terms,~~ a class-action settlement **often** does not **provide the court with the same type or quality of information as to the fairness, reasonableness, and adequacy of the outcome for class members that the court obtains in an adjudicated resolution. A settlement can lack the assurance of justice that an adjudicated resolution provides.** ~~carry the same reassurance of justice as an adjudicated resolution.~~ **A settlement, moreover, may seek the greatest benefit for the greatest number of class members by homogenizing individual claims that have distinctively different values, harming some members who would fare better in individual litigation. The fact that a settlement includes an opportunity to request exclusion after the terms are known may be one factor supporting approval of the settlement.**

Objectors may provide important support for the court's ~~inquiry~~ **review of a proposed settlement**, but attempts to encourage and support objectors may prove difficult. An opportunity to elect exclusion after the terms of a proposed settlement are known ~~provides~~ **is** a valuable protection against improvident settlement that is not provided by an earlier

opportunity to elect 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. In some settings, however, a sufficient number of class members may opt out to support a successor class action. The protection is quite meaningful as to~~ **The decision of most class members to remain in the class after they know the terms of the settlement may provide a court added assurance that the settlement is reasonable. This assurance may be particularly valuable if** class members ~~whose~~ **have** individual claims **that** 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 **protect against the risk that a party will become bound by an agreement that does not afford an effective resolution of class claims by** allow**ing** any party to withdraw from the agreement if a specified number of class members request exclusion.[31] 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.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action. 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.

[Alternative 1: Although the opportunity to elect 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 elect 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

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31 The bold words are added to dispel the possible confusion of this reference to negotiated back-out provisions with the settlement opt-out provided to class members by proposed 23(e)(3).

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 elect exclusion. Denial of this opportunity may increase the prospect that the settlement will become effective, establishing final disposition of the class claims.*]*

[Alternative 1.5: Although the opportunity to elect exclusion from the class after settlement terms are announced should apply to most settlements, paragraph (3) allows the court to deny this opportunity if the circumstances of the action and settlement sufficiently protect class members without a second opportunity to request exclusion. The original opportunity to elect exclusion may have come at a time when class members were aware of the possibility of settling on terms closely similar to the terms of the actual proposed settlement. Other circumstances may provide equally strong assurances as to the quality of the settlement. 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. Most or all class members may hold potential claims too small or too risky to support individual litigation. The size of individual claims and the subject of the action may suggest strongly that too few members will opt out to support a successor class action.]

[Alternative 2: The decision whether to allow a second opportunity to elect 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.*]*

An opportunity to elect exclusion after settlement terms are known, either as the initial opportunity or a second opportunity, may reduce the need to ~~provide procedural support to~~ **rely upon** objectors **to reveal deficiencies in a proposed settlement**. 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~~ **and lack meaningful alternatives to pursue them**, the decision to elect 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, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C). If the disposition would not bind the class, requiring approval only under the general provisions of subdivision (e)(1)(A), the court retains the authority[32] to hear from members of a class that might benefit from continued proceedings and to allow a new class representative to pursue class certification. 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~~ **Unless a number of class members raise objections, they** are not likely to provide much information about the overall reasonableness of the settlement unless there are many individual objectors.[33] 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. ~~.~~ **Such** class-based objections may ~~be the only means available to provide strong~~ **present the most effective** adversary challenges to the reasonableness of the settlement. ~~the parties who have presented~~

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32 Judge Schwarzer suggests substituting "discretion" for "the authority."

33 Judge Schwarzer suggests deleting this sentence.

~~the agreement for approval may be hard put to understand the possible failings of their own good-faith efforts. It seems likely that in practice m~~ **M**any objectors will argue in terms that ~~seem to involve~~ **invoke** both individual and class interests.[34]

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.[35]

The important role **objectors** play~~ed 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.[36] If settlement is reached early in the progress of the class action,~~

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The shaded material clearly is not essential to explain the purpose of adding paragraph (4). It may, however, stimulate some courts to consider matters that otherwise would go unconsidered.

35

It was urged again at the Chicago Conference that the Committee should restore the short-lived proposal to add an express provision permitting appeal by an objector who did not intervene. Class members, it is urged, often act pro se without any awareness of such procedural refinements.

36

Barry Himmelstein's written statement for the San Francisco hearing thinks this Note paragraph is "overly solicitous of objectors." The sentence observing that parties to a settlement may make the results of discovery available to objectors is met by the observation that almost invariably, an objector who is interested enough to review hundreds of thousands or millions of pages of document is "of the 'professional' variety." The objector may "seek[] to park time in a case," investing many hours in reviewing the discovery materials, demanding some adjustment of the settlement, and then seeking compensation. This comment echoes the familiar theme sounded by both plaintiff and defense

~~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 elect 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 **play in some cases** 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[37] 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.[38] 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, or 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

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representatives. No change in the Note is presently proposed.

37 Judge Schwarzer suggests substituting "impact" for "influence."

38 Judge Schwarzer suggests adding "and may indeed place the entire settlement in jeopardy."

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 **should not be rewarded** ~~merely because it succeeds in winning some change in the settlement; cosmetic changes should not become the occasion for~~ **on the basis of insignificant or cosmetic changes in the settlement. fFee** awards ~~that~~ **made on such grounds** 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.~~[39]

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. A difficult uncertainty is created if the objector, having objected, simply refrains from pursuing the objections further.[40] An objector should not be required to pursue objections after concluding that the potential advantage does not justify the effort. Review and approval should be required if the objector surrendered the objections in return for benefits that would not be available to the objector under the settlement terms available to other class members. The court may inquire whether such benefits have been accorded an objector who seems to have abandoned the objections. An objector who receives a benefit should be treated as withdrawing the objection and may retain the benefit only if the court approves.[41]

39

It was urged at the Chicago Conference that this sentence "comes across as a threat." Early drafts included a cross-reference to Rule 11 in Rule 23 text; perhaps the demotion should become deletion. Deleting all of the shadow material would abandon the small bits that remain from continuing expressions of concern about misuse of the objection process.

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Judge Schwarzer would delete this sentence and add: "If the objector simply abandons pursuit of the objection, the court in its discretion may need to inquire into the circumstances leading to the abandonment."

41

The shaded words may count as a "nice try." Court approval is required for withdrawal of the objection. If the court does not

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. ~~Greater difficulties arise~~[42] **Different considerations may apply** if the objector has protested that the proposed settlement is not fair, reasonable, or adequate **on grounds that apply generally to a class or subclass.**~~as to the class.~~ Such objections, **which purport to represent class-wide interests, may** augment the strategic opportunity for obstruction **or delay.**~~, and purport to represent class interests. The objections may be~~ **If such objections are** surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, **the court can approve withdrawal of the objections without elaborate inquiry.** In ~~some situations~~ **unusual circumstances,** the court may fear that other potential objectors have relied on the objections already made and ~~seek some means~~ **provide an opportunity for others to appear** to replace the defaulting objector. In most circumstances, however, **the court should allow an objector to abandon the objections.** ~~an objector should be free to abandon the objections, and the court can approve 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

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approve withdrawal, the court will rule on the objection. That does not of itself affect the objector's right to retain anything received for desisting from supporting the objection.

42 Judge Schwarzer suggests replacing "Greater difficulties may arise" with "Closer scrutiny may be required."

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.[43]

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.

43

This paragraph addresses a real problem. The amendment that brings objectors into Rule 23(e) for the first time may justify this amount of "tough problem — good practice" advice.

CONSOLIDATED TEXT AND NOTE

OF PROPOSED AMENDMENTS TO RULE 23

AS PUBLISHED FOR COMMENT AUGUST 2001

RULE 23

* * * * *

(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.

(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.~~

* * * * *

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

~~A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.~~

(1) (A) A person who sues or is sued as a representative of a class may settle, voluntarily dismiss, compromise, or withdraw all or part of the class claims, issues, or defenses,

but only with the court's approval.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(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) ***[Alternative 1]*** In an action previously certified as a class action under Rule 23(b)(3), the Rule 23(e)(1)(A) notice must state terms on which class members may elect exclusion from the class, but the court may for good cause refuse to allow an opportunity to elect exclusion if class members had an earlier opportunity to elect exclusion.

(3) ***[Alternative 2]*** In an action previously certified as a class

action under Rule 23(b)(3), the Rule 23(e)(1)(B) notice may state terms that afford class members a second opportunity to elect exclusion from the class.

(4) (A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that the court must approve under Rule 23(e)(1)(C).

(B) An objector may withdraw objections made under Rule 23(e)(4)(A) 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.

* * * * *

(g) Related class actions.(1) When a person 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 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]. In entering an order under this Rule 23(g)(1) the court must make findings 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).

(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).

(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 class members 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 (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.

Paragraph (1). 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. These seemingly tardy certification decisions often are in fact made as soon as practicable, for practicability itself is a pragmatic concept, permitting consideration of all the factors that may support deferral of the certification decision. If the "as soon as practicable" phrase 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; to assess potential conflicts of interest within a proposed 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.

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of "one-way intervention" that was rejected by the 1966 revision of Rule 23. A court may not decide the merits first and then certify a class. It is no more appropriate to certify a class after a determination that seems favorable to the class than it would be to certify a class for the purpose of binding class members by an adverse judgment previously rendered without the protections that flow from class certification. A determination of liability after certification, however, may show the need to amend the class definition. In extreme circumstances, decertification may be warranted after proceedings showing that the class is not adequately represented or that it is not proper to maintain a class definition that substantially resembles the definition maintained up to the time of ruling on the merits.

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 exposures 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. These obstacles, grounded in traditional individual litigation, may forestall judicial development of "common-law" certification preclusion. Contemporary class-action litigation presents new challenges. Responding to these challenges requires elaboration of res judicata theory to incorporate the conceptual needs and opportunities of class actions.

A difficulty with preclusion 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)(D) establishes a limited opportunity for preclusion that balances these competing concerns. 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 adequately litigated. 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 preclusion effects of a Rule 23(c)(1)(D) direction against class certification will be enforced under the usual rules that apply to res judicata. Ordinarily the court asked to certify a class will determine whether the direction precludes certification.

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. 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.

Paragraph (2). 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 difficult task of communicating with class members. 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 electing 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.

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, by the claim- and issue-preclusion effects of res judicata. 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 that would bind members of a class. 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 that would bind class members. The 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.

Among the factors that may 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 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 some forms of 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 elect exclusion from a class certified under Rule 23(b)(3) after settlement terms are announced. 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 elect exclusion applies without further complication. Paragraph (3) creates a second opportunity for cases in which there has been an earlier opportunity to elect exclusion that has expired by the time of the settlement notice.

This second opportunity to elect exclusion reduces the forces of inertia and ignorance that may undermine the value of a pre-settlement opportunity to elect 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 elect 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 class-action 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 elect 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 elect 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.

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.

[Alternative 1: Although the opportunity to elect 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 elect 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 elect 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.*]*

[Alternative 2: The decision whether to allow a second opportunity to elect 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 elect 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 opt-outs, and even by campaigns designed to encourage class members to elect 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.*]*

An opportunity to elect 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 elect 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, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C). If the disposition would not bind the class, requiring approval only under the general provisions of subdivision (e)(1)(A), the court retains the authority to hear from members of a class that might benefit from continued proceedings and to allow a

new class representative to pursue class certification. 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. It seems likely that in practice many objectors will argue in terms that seem to involve both individual and class interests.

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 elect 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 withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. A difficult uncertainty is created if the objector, having objected, simply refrains from pursuing the objections further. An objector should not be required to pursue objections after concluding that the potential advantage does not justify the effort. Review and approval should be required if the objector surrendered the objections in return for benefits that would not be available to the objector under the settlement terms available to other class members. The court may inquire whether such benefits have been accorded an objector who seems to have abandoned the objections. An objector who receives a benefit should be treated as withdrawing the objection and may retain the benefit only if the court approves.

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 under the proposed settlement 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. The objections 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 approve 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. The common practice of ordering "provisional" class certification for purposes of settlement review does not count as class certification for purposes of Rule 23(e)(5) if the settlement is not approved. 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.

The preclusion effect of a refusal to approve a settlement will be enforced under the usual rules that apply to res judicata. Ordinarily the court asked to approve a class-action settlement will determine whether the prior refusal to approve a settlement precludes later approval.

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.

Subdivision (g). 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.

Effective regulation of a class action may be impeded by litigation in other courts that is not framed as a class action. The interference may approach the level that flows from a competing class action when large numbers of actions framed as individual actions are informally coordinated in ways that amount to effective aggregation.

But there may be compelling reasons to persist with an individual action while a class action is pending, and it has not yet seemed wise to authorize a class-action court to enjoin individual actions in other courts. If the litigation in another court is framed as a representative action in which a party sues on behalf of others who have not individually authorized the representation, however, the litigation counts as a "class action" for purposes of Rule 23(g) no matter what label is attached by forum procedure.

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 and counsel 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.

The need to rationalize the relations between parallel class actions does not of itself dictate which court should become the leader. Any decision must take account not only of priority in filing and certification, but also of 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 other class 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. This need is emphasized by subdivision (g)(1)(B) and (C): the need to protect against interference by another class action must be greater than the interest in pursuing the other class action. There are many reasons, including many that are common rather than special, that may weigh in favor of permitting another class action 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 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 class 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. (C*f. Matsushita Electric Indus. Co. v. Epstein, 516 U.S. 367 (1996).)* 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 power recognized by subdivision (g)(1) may be limited by constraints of international 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.

[The only situation that supports a definite rule regulating 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 class litigation. There is no room for any simplistic

assumptions that the federal class action must always come first.

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 when practicable. 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 (1976). 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.

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 fealty 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 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 concerning 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 often be a productive technique for 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 should be alert to whether it is 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 all potential class counsel, the court concludes that none 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.

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.

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.

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, and is used in many fee-shifting statutes. 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, 243 F.3d 722 (3d Cir. 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.), cert. denied, 516 U.S. 824 (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, 243 F.3d 722 (3d Cir. 2001) (including chart of attorney fee awards in cases in which the 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.

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, 243 F.3d 722 (3d Cir. 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.

Summary of Comments & Testimony: 2001 Rule 23(c)(1)

At an Early Practicable Time

Conference: In 1997 the Standing Committee rejected the "when practicable" proposal. It was concerned that this would lead to delay, and reinstate "one-way intervention." It also was concerned that the parties need to know the stakes of the litigation. But to apply the certification criteria, the judge "needs to know what the substance" of the dispute is. The pleadings alone do not reveal enough in many cases. The premise of the proposal is that it is proper to take the time needed to uncover the substance of the dispute, "but not to indulge discovery on the merits or decision on the merits." The proposal simply confirms practices that have emerged over many years. If this were the only change to be made in Rule 23, probably it would not be worth it. But if Rule 23 is to be changed in other ways, "this change is probably a good one."

Conference: From a plaintiff's perspective, the proposal makes no difference. "As soon as practicable" gives all needed flexibility, and courts understand that. The Note says the purpose is to preserve current practice. But there is a risk of unintended consequences. More precertification activity will be encouraged. It is a mistake to fine-tune the rules, to make them into a "Code." Rule 23(c)(1) works now.

Conference: The "at an early practicable time" proposal is a close call, but "I favor it." There has been a substantial change in practice in the last few years, in response to appellate demands that a record be made to support the certification determination. The FJC study documents the change. One reason to revise the rule is to support publication of the Committee Note. In most cases, at least some discovery is needed to support the certification determination. "The question is now much discovery — there should be an adequate record, but no more discovery than needed for that." The Note properly encourages trial courts to play an active role in determining how much discovery is needed. The change also may drive out lingering vestiges of practice that allow certification on the pleadings with minimal or no discovery. It will discourage local rules that require a determination within a stated period; often the stated period expires before disclosure or discovery can even begin. It also will encourage courts to understand that they can rule on 12(b)(6) and summary-judgment motions before the certification determination.

Conference: The proposal reflects present practice. In 1976 there was de minimis discovery to support a certification determination, or none at all. There has been progressive movement; in some cases, it may carry too far into discovery on the merits. The Committee Note helps. The proposed language is indeed "fastidious." And it is a good thing that the Note refers to trial plans; if they are kept brief, they are a good thing.

Conference: The underlying principle is salutary. The Note deals adequately with the risk of unintended consequences. The trial plan should look carefully at what issues are assertedly common, and how they will be proved. More importantly, it should look at what individual issues will be left at the end of the class trial, and at how they will be proved; if there is a lot of proof to be taken individually after the class trial, we need to ask whether a class trial is worthwhile. It is a good idea to submit a draft class notice with the trial plan because the notice often shows issues not reflected in the plan, including problems with choice of law and jury trial. Even the identification of the persons to whom notice is directed is important.

Conference: A plaintiffs' lawyer thought there is no need to change. "As soon as practicable" provides ample flexibility, and courts use it wisely. In parallel litigation, it may be advisable to defer certification until merits discovery has been completed in a nonclass action; that has worked well. It might be helpful simply to publish the Note without changing the Rule. (And class counsel must be appointed before the certification determination, in part to manage discovery that bears on the determination.)

Conference: (The "as soon as practicable" proposal was the focus of much of the discussion on the proper role of a Committee Note. One view was that a Note is useful because it gives detailed guidance, making it possible to frame the Rule itself in general and flexible terms. A different view was that all this material should be put into the Manual for Complex Litigation. One judge suggested that judges generally do not seem much persuaded by Committee Notes. A lawyer responded that more judges seem familiar with Committee Notes than seem familiar with the Manual. "Without the Notes, it will be hard for judges to follow the change from 'as soon as practicable' to 'at an early practicable time.'" Another judge thought the Committee Notes should make more frequent references to the Manual, and say less directly.

Conference: The Second Circuit has not followed the lead of the Seventh Circuit's Szabo opinion. The rule change and Note will allow more leeway to the trial judge. "The Note, however, is somewhat Janus-faced."

Conference: There was general discussion of the question whether it is possible to permit enough discovery to inform the certification decision without launching full discovery on the merits. One defense lawyer recognized that this feat may not be universally possible, but that it has been done successfully. A plaintiff's lawyer agreed that it is possible, although difficult — if an antitrust conspiracy is claimed, for example, it is important to know whether the claim will be proved by documents or by offering evidence — and urging inferences from the pattern — of each class member's transactions. If the parties inform the judge the feasibility of certification discovery can be worked out at an early Rule 16 conference. A judge observed that when certification discovery is possible (and it is not always possible), it is not fruitful to engage in fights over the purpose of specific discovery requests: much discovery will be useful both on the merits and for certification. A defense lawyer observed that common issues always can be found; "the real question is what are the individual issues, how will they be proved, and how important are they. Discovery can focus on that, and can be a lot simpler than mammoth document discovery on the merits." A plaintiffs' lawyer disagreed — the defense is too much prone to conjuring up hosts of individual issues. But another plaintiffs' lawyer thought that it is proper to separate discovery to support an early certification decision; "generally you can tell the difference."

Conference: The FJC study found a full spectrum of practice on the question whether "as soon as practicable" defeats pre-certification 12(b)(6) and summary-judgment rulings. The "early time" change may not address that issue. The Note says the court may not decide the merits first and then certify; there is an ambivalence here.

Conference: It was asked whether the change will support defense delay by "going after the representatives."

Conference: It was suggested that today the certification issue is considered several times as

discovery unfolds. A judge responded that that is not common practice. A lawyer observed that in federal courts there tends to be one consideration of certification; multiple consideration may become a problem when there are parallel federal and state filings. Another lawyer observed that in federal courts, MDL practice waits for federal filings to accumulate and then provides one certification decision for all. "But there has been an uptick in trying to get certification by filing another case after certification is denied in the first case."

Conference: The proposed rule on attorney appointment underscores the need for an early certification decision so class counsel can be appointed.

Conference: Early appointment of class counsel is needed so the class adversary knows who can discuss discovery.

Conference: Some state courts proceed with alacrity into full merits discovery while federal courts languish over the certification decision. That makes coordination more difficult.

Michael J. Stortz, Esq., S.F. testimony 14-15: There is a risk that deferring a certification decision will cede the lead to state courts. The Note should say that pending litigation may be a ground not to defer but instead to move more quickly to resolve the issues that arise from overlapping litigation.

Barry R. Himmelstein, Esq., S.F. testimony 16: The Note seems to express a preference for bifurcated discovery, first on certification then on the merits. This should be left to the judge's discretionary case management. Plaintiffs and defendants typically disagree about bifurcation. The line between certification and merits discovery is very fuzzy; bifurcation leads to discovery battles about what is appropriate to certification discovery. If plaintiff is left free, discovery will be sought "as to what we really need now to move the case forward." Given a deadline to move for certification, plaintiff will focus on the information needed to prevail on certification. Defendants typically object to discovery as not relevant before certification, and draw from their own information to show the reasons why certification should be denied. The plaintiff must be able to discover the defendant's information to be able to show why certification should be granted.

Mary Alexander, Esq., S-F Testimony pp 58 ff: For ATLA. The change to at an early practical time "will provide an opportunity for extensive precertification discovery and litigation that could be used to delay crucial certification." Although the change seems modest, we are concerned that it will make the situation "even worse," that defendants will use the new language to convince courts to do further discovery and make plaintiffs more desperate to settle. Discovery, even if it is said to be on class certification only, "is much more open for abuse on the part of the litigants." Keep the present language. The danger is that discovery will be so extensive "that you are really litigating the case prior to certification," and that this will be done to delay the case. (In response to a question: ATLA does not have a position on dismissing causes of action before certification.) (In response to another question: we have often seen defendants resisting discovery, but this too is done to delay things. What we need is judicial oversight of discovery; it has to be taken on a case-by-case basis. (In response to yet another question: there is a need to develop sufficient information so the court is able to determine whether a proposed class is unfair to individual class members because it homogenizes claims that should not be homogenized. Individual rights and also defendant rights need to be protected, but that should not mean undue delay just for discovery on the certification question.) ATLA would be happy to look into the question whether it would be desirable to provide for

bifurcated discovery, with a first wave limited to certification issues, in return for a prompt certification determination. We will examine the proposed Note language again to see how well it expresses the need for balance, but we are concerned that the change of Rule language will be used inappropriately to persuade the court that this discovery has to be done.

Other (c)(1)

Conference: (c)(1)(C) carries forward the present statement that a certification determination is conditional. "The word should be deleted. Certification is supposed to be 'for keeps.'" (This view was repeated later.)

Conference: Appointment of class counsel is tied to certification; the class-counsel rule should be added to subdivision (c).

Michael J. Stortz, Statement for S-F Hearing: Proposed Rule 23(c)(1)(B) requires the order certifying a class to "define the class and the class claims, issues, or defenses." Proposed Rule 23(c)(1)(A)(i) requires the notice to the class to describe "the claims, issues, or defenses with respect to which the class has been certified." The language should be made parallel. The order should describe the claims, issues, or defenses; the notice should set forth the class definition.

Barry R. Himmelstein, Esq., S.F. Testimony 19: It is not practicable to require that the certification order set an opt-out deadline. The court should be free to enter this order later.

Mary Alexander, Esq., S-F Testimony 64: For ATLA. Supports requiring certification orders to define the class and identify class claims, issues, and defenses. Takes no position on (c)(1)(C) provisions for amending the certification order.

Summary of Comments: Rule 23(c)(2) 2001

(b)(1), (2) Notice

Conference: Notice can be given now. The proposal for notice to a "reasonable number" of class members "is odd."

Conference: Notice in (b)(1) and (2) classes is to be applauded. But it is troubling to suggest that individual notice is not required; we should demand that. Still, notice need not be "as extensive" as in (b)(3) classes. It should be made clear that the defendant can be made to pay for the notice, or to include it in regular mailings to class members.

Conference: Notice to (b)(1) and (2) classes "should be meaningful."

Conference: The Committee Note, p. 49, says that notice supports an opportunity for (b)(1) and (2) class members to challenge the certification decision. "This should not be what you have in mind. Change it."

Mary Alexander, Esq., S-F Testimony 64: Notice is expensive, time-consuming, but necessary to protect the rights of individual litigants. Some notice processes are shaped so that class members do not even realize the notice describes a civil action in which their rights may be taken away. ATLA supports the plain language provision. It takes no position on (C)(2)(A)(ii) or (iii).

James M. Finberg, Esq., S-F Testimony 97 ff: Actions for declaratory and injunctive relief are often — perhaps almost always — brought by public-interest groups that have limited economic resources. Notice can be very expensive; the cost will deter many meritorious cases. As an example, consider the class action in California to challenge Proposition 187 that would limit health, education, and welfare benefits to immigrants. It is a very large class; it would be difficult to notify that class at the certification stage. The Notes recognize the burdens and suggest that courts look at the issue, but the language of the Rule is mandatory. There is no option to refuse to order any notice. It also says that notice must be calculated to reach a reasonable number of class members. But that could be so costly as to defeat the action. Perhaps the rule should say "shall consider directing," and also should allow the court to decide who must pay for the cost of notice as an initial matter. (His written statement says the presumption should be that the defendant pay the notice costs.) Remember that Rule 23(e) requires notice of settlement. The settlement notice will give an opportunity to members of a (b)(1) or (b)(2) class to appear and challenge the settlement; at that stage, the burden of payment will be on the defendant, and will not deter filing. (In response to a question: There were several Proposition 187 cases. The one that went to judgment did not settle; so deferring notice to settlement would not work. The class won that one. Notice before settlement or judgment would support monitoring by class members, but is it worth the cost of deterring meritorious actions? (In response to another question: some notice, such as posting on the internet, is relatively inexpensive, but the rule seems to demand more by requiring notice to a reasonable number of class members. Many members of the Proposition 187 class do not have access to computers; many do not speak English. Reaching even a high percentage of the class, though less than a majority, would be extraordinarily expensive.) The rule should be modified to give the court discretion to have minimal notice, or even no notice, in some cases.

James C. Sturdevant, Esq., S-F Testimony 117 ff: For Consumer Attorneys of California (p. 127).

Began practice in public interest cases on behalf of people with entitlements under federal and state programs; they were mostly (b)(1) or (b)(2) classes. Since then, has tried consumer protection and employment class actions as (b)(3) actions. Mandatory notice in (b)(1) and (b)(2) classes will eliminate a number of cases, including "cases that are brought on a daily basis by public interest organizations challenging policies and practices of governmental agencies, both state and federal, which violated federal law or a mixture of state and federal law." One recent case against AT&T challenged an arbitration provision in a new agreement required by the detariffing of the telecommunications industry. The class included AT&T's California long-distance customers, some 7,000,000 to 9,000,000 persons. The case was filed on July 30; trial began November 13; evidence has been completed. Adding any form of notice cost to this action seeking predominantly injunctive or declaratory relief would have added tens or hundreds of thousands of dollars, perhaps even millions, to the cost, depending on the form of notice selected. Individualized notice would have cost at least $5,000,000. Publication might have been $30,000 to $60,000. Internet notice might be of some assistance, but only 40% to 45% of American households have internet connections, and of them notice would go only to those who were plugged into the particular website. There is no opt-out opportunity to protect. The determinations required to be made under Rule 23(a) to certify the class are protection enough for class members. Most of these true public interest cases "do not settle * * * until there is some certainty as to how the liability hammer is going to fall."

Other Notice

Conference: There should be automatic review of the notice plan in a nonadversarial setting as part of the case-management plan.

Conference: To be effective, notice should be directed individually to class members as a letter from the court.

Conference: No one will argue with a "plain language" requirement. "Almost every notice is unintelligible to the ordinary person." Lawyers, anxious to protect themselves, draft impenetrable language. Plain language is achieved only when the judge writes the notice. The Rule might focus on encouraging the judge to write the notice, or else to appoint someone — preferably not a lawyer — to write it.

Conference: We should consider imposing notice costs on defendants in (b)(3) class actions. And we should consider softening the requirement of notice to every individual (b)(3) class member; in some small-claims classes, representative notice is enough. (A panel member noted that the Advisory Committee had abandoned this idea in face of the difficulty of deciding which class members would get notice.)

Barry R. Himmelstein, Esq., S.F. Testimony 15, 19-: It is not practical to require that the order granting certification also direct appropriate notice to the class, (c)(2)(A)(i). That is practical when the parties have worked out a settlement and agreed on notice before certification. But if there is a contested certification the defendants are not willing to work with the plaintiffs on notice until certification is granted. Publication often is important. The AARP publication is very effective, but it has a two-month advance booking requirement. It is proper to require that notice be covered by a court order, but not practical to require that the order issue at the time certification is granted.

Jocelyn D. Larkin, Esq., S-F Testimony 139 ff: For The Impact Fund, which maintains its own class-action practice, and provides both grants and training to lawyers to bring other class actions. The focus is on civil-rights actions, particularly employment discrimination actions. The number of civil-rights class actions declined greatly between 1979 and 1989, and has essentially held steady since then despite significant enhancements of the civil rights statutes. (Her written statement observes that one reason that class actions are less effective is that some courts have come to analyze civil rights class actions as if they were personal injury mass-tort classes; one court even drew an analogy to a tobacco class action.) In employment discrimination litigation against mid-sized companies, with classes of 100 to 800 members, class actions are important. One reason for this importance is that individual class members are reluctant to invite retaliation by filing suit; the anonymity of the class is important. The mandatory notice provision for (b)(2) actions "will deter the filing of many worthy civil rights class actions." The number one problem faced by civil-rights practitioners is resources. The clients cannot afford to advance the costs of notice. Our grants average $10,000; typically there is no other resource to pay for litigation costs. These may be small cases involving public benefits, environmental justice, criminal justice, voting rights, as well as the smaller employers. $10,000 is not adequate for deposition costs and experts. "Adding a big ticket cost like notices is simply going to mean they don't bring those cases." (In response to a question whether low-cost notice would satisfy the rule as proposed — whether, for example, notice to employees posted at the job site, or notice to a class of homeless persons posted at various places, would do: Where people are centralized, as in

employment, perhaps that will do. But the more worrisome cases are those that involve people who have applied for a job and are turned away; only fairly expensive notice can find them. Or a case in which a local public agency stopped taking applications from disabled people for public housing: notice to reach them would have to be fairly broad. Or, in response to a question, a class involving all blacks and hispanics in the City of New York who were allegedly stopped on the basis of racial profiling.) The Carlisle case also is troubling — it says that nothing in Rule 23 suggests that notice requirements may be tailored to fit the pocketbooks of particular plaintiffs.

In addition to cost, we must consider the practical reality: what is the benefit of notice? There is no right to opt out. The Committee envisions class members being able to monitor class representatives and class counsel, but "I must respectfully suggest that that's just not a reality. Class members in civil rights cases don't have the interest, the time, the resources or the capacity to monitor the progress of a class action or hire their own attorneys to do it. And that's not to suggest for a moment that class counsel should not be closely monitored in these cases. Judicial scrutiny of adequate representation is absolutely critical. And the representatives often do have an interest in monitoring their class counsel. In one recent example, the representatives in a gender discrimination case came to the Impact Fund because their lawyers had negotiated a settlement that they thought was wrong. We agreed, and were able to substitute in as class counsel. (Her written statement adds the observation that in civil rights litigation notice may be both expensive and ineffective: "the typical civil rights class member does not read the Wall Street Journal." Non-English speaking class members also pose a problem.)

So: "Don't change the rule because changing the rule will effectively close the door or may effectively close the courthouse doors to the least powerful members of our society."

James M. Finberg, Written Statement for S-F Hearing: The FJC notices appear to attach opt-out forms, objection forms, and claim forms to the notice. Only claim forms should be attached. My practice is to contact people who have opted out; in the overwhelming majority of instances, they did not understand what they were doing; they did not understand that by opting out they lost the right to participate in the settlement. They are misled to believe that they must complete the opt-out form to be able to participate in the settlement. The same is true for the objection form. The sample notice forms also are too long. Class members will feel overwhelmed and will not try to read the notice. In addition, it costs more to print and mail a long form. The maximum length should be four printed pages.

Plain Language

Conference: This adds nothing. Plain language is sought now.

Jocelyn D. Larkin, Esq., S-F Testimony 146: For The Impact Fund. The notice language change is welcome.

Summary of Comments: Rule 23(e) 2001 General

Conference: The proposal largely codifies existing practice. Let it be assumed that a settlement satisfies the requirements of Amchem and Ortiz; that it is not possible to adopt rules that make more drastic changes; that the Notes are fine; and that the settlement opt-out is a distinct problem. On those assumptions,it must be decided whether proposed (e)(1), (2), and (4) are an improvement. The first statement was that there are no major problems; the notice provision in (1)(B) is an improvement; it is proper to spell out the standard for approval; it is good to require findings. But there are some problems with the Note.

Conference: What is attempted is sensible. But the proposal does not address the "current crisis." It addresses past wars. Clever attorneys in the hip-implant litigation are attempting to create a non-opt-out class. And a settlement rule must address the need to achieve fairness and avoid discrimination. A matrix settlement will create disadvantages for some, who should be free to opt out. "The fact that a majority of class members want a settlement does not justify giving the class an impregnable first lien, but only for those who remain class members by refusing to opt out."

Conference: The proposal generally is a nice job in doing what the Committee is allowed to do — codify best practices. "It would be desirable to be more daring." Reform efforts have been killed by the excessive demands of defense counsel, seeking such things as opt-in classes. The hip-implant ploy is new; we should not fight a war before it starts.

Conference: The rule is "a step forward, as a codification of practice with some additions." It will help courts that do not often encounter class actions, and that tend to view settlement from the bi-polar view taken in simple litigation. It is difficult to believe that the lien ploy adopted in the hip-implant litigation will be approved; there is no need yet to think about shaping the rule to reject it.

Conference: If the proposal largely tracks and formalizes existing practice, it would be better to leave it alone. Changes lead lawyers and judges to look for reasons beyond confirming existing practice. Judges will think they are being asked to "put the brakes on." But if substantive change is intended, it should be considered on the merits.

Conference: Why require approval of dismissal or withdrawal before certification? And why require notice if a class is not certified: who gets the notice? And an attempt to list factors is a problem; the list tends to be treated as describing the only factors to be considered, but is not likely to be complete.

Conference: It is good to express present good practice in an expanded rule. This is a useful guide to judges and lawyers.

Conference: Notice of pre-certification dismissal, if any, should be simple.

Conference: The Note should refer to the need to consider subclasses at the time of settlement review.

Conference: Notice and opt-out exist because unscrupulous class and defense counsel sell valid claims down the river. Small claimants do not need individual notice.

Conference: Settlement is an area where both plaintiffs and defendants have agreed for years that Rule 23 could be amended. We need assurances of fairness in the nonadversary setting of settlement

review. One possibility is to appoint an objector, but consideration of that approach caused real consternation. Trial and summary judgment are different from settlement; they were presented by adversaries and decided by the court.

Conference: Settlement classes are always adversarial: someone always appears from the class as an objector, or a member of the plaintiffs' bar appears, or a co-defendant objects. "The day-to-day problem is the sweetheart settlement that no one objects to."

Conference: That observation applies only in mass torts. The FJC study showed that 90% of the settlements reviewed were approved without objections and without change. "Class settlements are fundamentally different from individual actions, where settlement is favored."

Conference: Why give notice of a pre-certification dismissal that does not bind the class? A defendant who wants such notice should pay for it.

Conference: There is no authority to do anything before certification; a defendant should not be forced to pay for notice of a pre-certification dismissal because the plaintiff brought a bad case.

Conference: There is confusion about dismissal of individual claims without notice. Why mention notice in connection with voluntary settlement? The Note can be greatly condensed; but the list of factors "are a good start," and it is better to have them in the Note than in the Rule.

Conference: We do not want the judge to be a fiduciary for the class, "part of the strategy that causes the defendant to pay money." Page 54 of the Note refers to seeking out other class representatives when the original representative seeks to settle before certification; the present lawyers, or other lawyers, may seek another representative, but the judge should not be involved. Page 68 is similar in suggesting that the court might seek some means to replace a defaulting objector; at most, the court should set a defined period for other objectors to appear. Generally, the Notes should be shorter. But the factors for reviewing and approving a settlement are good and well stated. Citing cases helps.

Conference: Proposed 23(e)(1)(C) speaks only of "finding" the settlement is fair, reasonable, and adequate; the Note, p. 55, requires detailed findings. The detailed findings requirement should be stated in the Rule. The settlement-review factors properly belong in the Note, but factor (I) needs "some tweaking": it should say explicitly that it looks to results for other claimants who press similar claims. The Note observes, p. 65, that an objector should seek intervention in order to support the opportunity to appeal. It would be better to adopt an explicit rule provision — similar to a draft considered by the Advisory Committee — that would support class-member appeal without intervention. Class members often act pro se; such refinements on objection procedure as the need to seek intervention in order to protect appeal rights are inappropriate. And the p. 67 reference to Rule 11 sanctions against objectors "comes across as a threat"; we should be hospitable to objectors.

Conference: The "fairness" of a settlement is not defined. Should it be the greatest good for the greatest number of class members, even though the settlement may be ruinous for some? The Note, and perhaps the Rule text, should incorporate a test of nondiscrimination. The "trick" of imposing a lien on the defendant's assets only for the benefit of those who remain in the class is subordination of one group to another, and unfair.

Conference: The Note list of settlement-review factors should expand to include the effect of the settlement on pending litigation.

Conference: The first sentence on Note p. 55 says that notice may be given to the class of a disposition made before certification; it is not possible to give notice to a class that does not exist.

Conference: The settlement-review proposal seems about right.

Conference: The Note focuses on the need for findings; this should be in the Rule.

Michael J. Stortz, Written Statement for S.F. Hearing: It is proper to confirm the rule that a putative class representative does not have a right to dismiss prior to certification; requiring approval may deter forum shopping through filing multiple actions and dismissal of those that develop unfavorably. But the Note overstates the prospect that class members may rely on the filing. Reliance is plausible only with the actions that warrant news coverage and class members sophisticated enough to understand the significance of certification. It would be improper to establish a presumption that notice of pre-certification dismissal be provided class members. As to tolling the statute of limitations, a denial of certification also terminates the tolling, but there is no requirement that notice be provided when certification is denied. The Note sentence stating that the court may direct notice of dismissal to alert class members should be deleted.

Barry R. Himmelstein, Esq., S.F. Testimony 19- The requirement that the court approve pre-certification "withdrawal" of part of a class claim may interfere with the right to amend the complaint as a matter of course under Civil Rule 15(a). Class actions often are complicated actions, made more complicated by interlocking state and federal cases, choice-of-law rules, MDLs, fast-developing fact situations, and even continuing legal research. After filing it may prove wise to eliminate a particular theory. A RICO theory, for example, may seem to jeopardize certification if a court applies an individual reliance requirement; rather than run this risk, it may be wise to withdraw that theory by amending the complaint. It may advance the class position, not harm it, to withdraw a theory that may prevent certification. "It is best to bypass marginal theories if their presence would spoil the use of an aggregation device that on the whole is favorable to the holders of small claims. So a class action complaint is very much a work in progress." Generally there is a motion to dismiss; that does not cut off the right to amend. An answer will come months later, after a ruling on the motion. "A lot happens before then. And plaintiffs' lawyers of various jurisdictions who have been pursuing various theories come together and, hopefully, try and put together the best combined work product for their clients." We should not have to explain the reasons for changing theories "and have to explain our strategy and legal theories to the defendants." Clarification of the Rule and Note would help. Court approval should be required if class action allegations are amended out entirely, but not for one amendment as a matter of right. We need a bright-line rule. That means that the rule should not distinguish between a minor amendment and a major amendments such as one that drastically narrows the class definition. If there are side-deals going on, the defendant will want total withdrawal of class allegations because settlement with any class claims remaining will require judicial scrutiny. Proposed Rule 23(e)(2) requires that information about side deals be available to the judge. "The judge will find out about it sooner or later and if you try to pull something, * * * you will be held accountable."

John P. Frank, Esq., 01-CV-03; again in S-F Testimony 92 ff: (The specific focus is on settlement review, but the underlying theme is broader:) Administrative Office Reports show 2,393 class actions in federal courts for the year 2000. The proposed Rule 23 revisions add many "decision points" that will each demand more time and attention from the judge: withdrawal of a claim demands approval; notices of settlement must be evaluated; there must be a determination whether a settlement is reasonable and adequate; proposals for exclusions from the class must be reviewed; if an objection is withdrawn, the court must determine whether the objector has been undesirably bought off; and so on. It is often suggested that Congress should have a serious judicial impact statement before acting on legislation that adds significant burdens to the federal courts. The Committee should have before it some substantial basis for evaluating the impact of these proposals. "Such an analysis may suggest to you that the time has come to consider that class actions ought to be moved out of the court system entirely, put either into existing administrative agencies or creating new ones."

Lawrence M. Berkowitz, Esq., 01-CV-05: The problem with requiring court approval of every precertification settlement or dismissal of class claims "would be that plaintiffs would file class actions in order to gain settlement leverage for their individual claims. On the other hand, defendants are encouraged to simply 'buy off' a class representative and/or his or her attorney in order to avoid a class action. There ought to be some adverse consequences in the Rule to prevent these actions by plaintiffs or defendants or their counsel."

Mary Alexander, Esq., S-F Testimony 65: ATLA generally supports the concept of judicial involvement and scrutiny. Although often exaggerated in debate, there are some problems and abuses in class actions, "and many of these involve settlements and the settlement process." ATLA also support (e)(1)(B) requiring notice of a settlement that would bind class members.

Jocelyn D. Larkin, Esq., S-F Testimony 146: For The Impact Fund. The settlement review and other proposals are welcome.

Side Agreements

Conference: It is a mistake to require disclosure of side agreements. Side agreements "often fuel settlement." They will not remain secret. Judges will look into the deals. "But you need empirical evidence that these deals are promoting unjust settlements."

Conference: Side agreements should be disclosed, and should be disclosed early. This is particularly important when the agreements deal with fees, or effect settlements outside the class settlement.

Conference: Individual premiums incidental to settlement "are a real problem."

Conference: Some lead plaintiffs now ask attorneys to indemnify them against liability for costs. There may be a simple money buy-out of an objectors. The Note should make clear that these are examples of side agreements.

Mary Alexander, Esq., S-F Testimony 65: ATLA is less concerned that some about so-called side agreements. "We wonder just how practical or appropriate it is for federal judges to try to police such agreements unless there really are serious allegations of wrongdoing and meritorious dissatisfaction by class members."

Objections

Conference: The requirement of approval to withdraw objections is new, and is good; some objections are made "for not meritorious reasons."

Michael J. Stortz, Esq., Written Statement for S-F Hearing: The Note observes that discovery in parallel litigation may provide information to support objections. But the objector may take advantage of discovery in the settlement class proceeding to further objectives in an overlapping state-court class action. It should be confirmed that a federal court that provides discovery to an objector has authority to limit the objector's pursuit of similar discovery in parallel state-court proceedings.

Mary Alexander, Esq., S-F Testimony 66: For ATLA. Supports the objection provisions. (e)(4)(B) "judicial scrutiny of withdrawn objections would provide some protection against the possibility of collusion."

Settlement Classes

Conference: The proposals fail to address settlement classes

Conference: Express provision should be made for settlement classes. "They are useful for the end game." Asbestos litigation will go on for another 20 years because the settlement-class effort was scuttled by the courts.

Conference: The Committee Note to draft 23(e) assumes the certification of settlement classes. "They cannot be done any longer."

Conference: It is amazing that overlapping class proposals have been considered, even in a tentative way, without also including a settlement-class proposal.

Conference: There should be a settlement-class proposal.

Conference: Some members of Congress view Rule 23 as an end-run around Congress. The settlement class "is an entire agency. Amchem was dead on."

Conference: Amchem is consistent with smaller, cohesive settlement class. "They're here, they exist. They're tough to draft." It remains difficult to understand what Amchem meant in saying that settlement can be taken into account.

Conference: The problem with the settlement class is that it cannot be tried, so there is no constraint arising from the alternative prospect of litigation.

Conference: Judges cannot solve all problems. Settlement classes "overstrain" the Enabling Act. "We used to take seriously the ideas of self-government and jury trial in civil cases. Settlement classes disregard these ideas."

Conference: The Rule 23(e) Committee Notes imply that there is such a thing as a settlement class; "not everyone agrees."

Mary E. Alexander, Esq., Statement for S-F: ATLA policy expresses deep concern over adjudication of the rights of future claimants through settlement-only classes.

James M. Finberg, S-F Testimony 103-104, 106-107: Ortiz is based on due process; it applies to state courts equally with federal courts. There should not be any difference in the ability to settle whether the action is in state court or federal. Probably there are more objections to settlements now than formerly. It is clear that a class can settle claims that are in the exclusive jurisdiction of another court, so global settlements can still be reached in state or federal courts. There is more attention paid to sub-classing and making sure there is a representative who would have standing to allege the claim of each category of persons involved. But I do not work with cases that involve future damages; they may present greater difficulties.

Anna Richo, Esq., S-F Testimony 138-139: Rule 23 should be amended to require opt-in for trial of individual cases, or better to eliminate class certification for trial purposes for any personal injury claim, with the exception of claims arising out of mass disasters. Certification of a dispersed mass

tort class for settlement, on the other hand, would be desirable. There should be a separate mass-tort settlement class rule.

Summary of Comments & Testimony: Rule 23(e)(3) 2001

Conference: The stronger alternative is better.

Conference: It would be better to provide that a (b)(3) class member always can opt out of a settlement.

Conference: Knowledge of a settlement provides a better basis for deciding whether to opt out. But we should not allow opt-out from every (b)(3) settlement. The first alternative, which presumes there should be an opt-out, will come to require opt-out. The second alternative, cast in neutral terms, is better. It would be still better to address the issue only in the Note. Notice is expensive; if it is delivered by TV and national print media, it can cost ten million dollars or more. "The class action is an attorney vehicle; the idea that people worry about it is a dream." What is important is notice to lawyers, not class members. Opt-out campaigns "are political wars." Propaganda is unfurled on all sides. The fen-phen settlement has opt-out opportunities "every time you turned around," but few defendants can afford to settle on terms that offer so low a level of peace.

Conference: Before settlement, it's "a pig in a poke." The ordinary class member does not have enough information to determine whether to request exclusion. A reasonable opt-out decision can be made only when the terms of settlement are known. It would be better to allow the opportunity in all cases.

Conference: The first alternative is better. It does have an escape clause. The class may have had notice of proposed settlement terms during the original opt-out period, even though there was not yet a formal submission for approval. But this first alternative "maximizes consumer choice" in more general cases. Notice could be more modest. It is better to have this in the text of the rule, for the benefit of judges who are "new to class actions."

Conference: The first alternative is dangerously close to one-way intervention. The "good cause" test for denying opt-out is very vague; to the extent that it turns on the fairness of the settlement, the court should approve only a fair settlement in any event. If settlement terms afford an opportunity to opt out, that is one factor to consider in favor of approval; that is as far as this should go. And the Note should say clearly that informative notice is far more important at the time of settlement than at the beginning of the action.

Conference: The diet drugs litigation allowed four opt-out events for each class member. "At least one informed opt-out should be allowed; usually it is sufficient to provide this at the time of settlement."

Conference: The time of the opt-out is important. In a mass tort, probably it is sufficient to provide an opt out when the aggregate settlement terms are known. That is not likely to be a problem that seriously impedes settlement. It would be possible to defer the opt-out until the individual class member knows what he is going to get under the settlement, but that is probably wrong. It would destroy most mass-tort settlements if latent-injury class members were allowed to decide to opt out "23 years later" when injury becomes manifest.

Conference: The back-end opt-out may be important in mass torts; indeed it may be that a class is certifiable only if a back-end opt-out is provided. The diet drug settlement was done under pressure

that improved the settlement because of the higher legal standards that flowed from the Amchem decision. But that is not what 23(e)(3) proposes. (It was rejoined that it is dangerous to think of opt-out only in mass-tort terms.)

Conference: The settlement opt-out would apply to antitrust and securities classes. There is a history of successful settlements in these areas without opt-outs. It is a mistake to write a general rule that applies to all types of class actions. Indeed it might make sense to deny any opt-out opportunity at any time from a class that deals with small claims that would not support individual litigation.

Conference: These considerations support the second alternative as the better option. Settlement opt-out makes sense only in some cases. One problem is that the money spent on notice comes out of actual class relief. The Committee Note should describe "levels of notice." In some cases, it should suffice to publish notice in the manner generally used for legal notices. Often the "mass buy" on television and in newspapers of general circulation is not warranted. Notice to attorneys should be provided.

Conference: What needs to be fixed? Mass-tort classes negotiate opt-outs; it is proper for the Note to treat this as a factor bearing on fairness. There may be an issue in a small fraction of cases where the notice is published early and the opt-out period expires.

Conference: The problem of early notice and expiration of the opt-out period could be solved by deferring the first notice and opt-out period until there is a settlement agreement.

Conference: The need for fairness to class members is adequately protected by judicial review.

Conference: When the class is heterogeneous, it is not possible to shape a settlement that is fair to all class members. Notice at the time of class certification will be used to lock class members in. There is no problem in securities litigation because for years the practice has been to seek certification at the same time as a settlement is presented. If certification and settlement are separated, the expensive notice should be deferred to the time of settlement.

Conference: People should not be asked to decide whether to request exclusion until they know what they are going to get, at least in personal-injury cases. Notice at the time of the "aggregate agreement" is not enough. The total available in the Agent Orange settlement sounded like a lot at the time, but an intelligent opt-out choice could not be made on the basis of knowing that alone.

Conference: Multiple opt-outs often are negotiated in mass tort settlements, and such terms may indeed be required. But there is no need for a rule to accomplish this. But for securities and antitrust cases, a settlement opt out turns the rule on its head. Class members are told at the time of certification that they will be bound unless they opt out. If you allow an opt-out on settlement, why not also after granting a motion to dismiss for failure to state a claim, or after granting summary judgment? Indeed, why not after trial? The settlement opt-out interferes with negotiation settlements. Adequate protection can be found in the negotiation process.

Conference: The settlement opt-out became increasingly attractive to the Advisory Committee as it struggled with proposals to enhance support for objectors. The settlement opt-out is a lot better than fueling objections to every settlement. But the Note should be revised to make it clear that settlements are favored; as presently drafted, it seems to have a hostile tone.

Conference: From the defendant's perspective, there is a tension between the ability to settle and a class member's ability to base an opt-out decision on meaningful information. A defendant can negotiate a "walk-away," but knows that if the settlement sticks there will be some opt-outs who must be compensated and who will treat the settlement terms as the floor for bargaining. The second alternative is more flexible and thus more sensible, but it too will make settlement more difficult.

Conference: Concern about notice costs is a red herring. Notice of settlement is required today. The settlement opt-out simply requires that one more item be included in the notice. The first alternative is better; indeed, it might be better to adopt an even stronger presumption in favor of opt-out. The defendant's path to global peace is made more difficult, but informed choice by class members is more important.

Conference: But the notice will be more complex and thus more expensive if it includes a settlement opt-out.

Conference: If we are precluding substantial damage claims we should have good notice.

Conference: The "pig-in-a-poke" problem is most significant with small-claims classes. Class members have no stake at the beginning. The opt-out could lead to better recovery in another class; even apart from that, a 20% or 40% opt-out rate would tell the court something. The opt-out is useful.

Conference: Why do we need the first opt-out, if the limitations period is extended to the second opt-out?

Conference: The second notice may be more effective. The IOLTA cases say that clients have a property interest in pennies; so class members have a property interest in small claims. Those who want global peace have an interest in effective notice. This helps ensure that settlement is adequate for the absentees. The first alternative, favoring the opt-out, "is a big improvement."

Conference: The idea of a court-appointed objector "is horrible. Any alternative is better." The best approach is to list an opt-out alternative provided by the settlement itself as a factor favoring fairness. The next-best approach is the second settlement opt-out alternative.

Conference: The only real choice is between the two settlement opt-out alternatives. The court-appointed objector system would degenerate into a "judge's buddy" system or a civil-service bureaucracy. "Market forces are better." Perhaps the first alternative should be softened: a settlement opt-out is required "unless the court finds that a second opportunity is not required on the facts of the case." This would be stronger, and better, than the second alternative.

Conference: The parties should be fully informed in connection with settlement, but opt-out does not follow. Defendants should be able to achieve global peace. Is unfairness to class members so great an evil as to require the opt-out? "I do not know the answer."

Conference: (Several views in a single dialogue:) A back-end opt-out is not likely to be provided in securities or antitrust cases, but can a mass-tort settlement be approved without one? The risk of latent injury is a real problem. But if injury is apparent at the time of settlement, an informed initial opportunity to opt out after settlement terms are known suffices. Asbestos should not be used as an

example for all cases. In many cases "the biological clock ticks faster" — it will be two years, or four, to identify all "downstream claims. Defendants can deal with this kind of "extended global peace." The back-end opt-out can be worked out. In a large heterogeneous mass tort, the back-end opt out "can address the constitutional needs." But if the class is more cohesive, settlement without a back-end opt-out may be appropriate. It would be a mistake to require a back-end opt-out in all mass torts; if the disease affects a finite population and its progression is known, back-end opt-out may not be needed.

Conference: Settlement opt-out may cause more problems than it is worth.

Conference: The settlement opt-out might be reduced to a factor considered in evaluating fairness, but perhaps a compromise version could be retained in the Rule.

Conference: It does not make sense to go forward with the settlement opt-out.

Conference: Settlement opt-out is a bad idea; "it almost gets into the substance of the settlement."

Conference: The settlement opt-out is a good idea. It legitimates the decision. Rule 23(b)(3) was written for small-stakes cases. If it is used for cases that involve significant individual claims, class members should know what is at stake before being asked to decide whether to opt out. There should not be an absolute right to opt out. "But a willing seller is needed."

Michael J. Stortz, Esq., Statement for S.F Hearing: The second alternative "properly takes a neutral position, leaving the issue of a second opt-out to the trial court's discretion." The first alternative "does not take into account the myriad circumstances in which a settlement on behalf of the class may be reached. Practice under the new Rule 23(e) should be permitted to develop * * *."

Barry R. Himmelstein, Esq., S.F. Testimony 24-: Either alternative is suitable. "I prefer to leave things to judicial discretion when there is a choice." Settlements can be done with a settlement opt-out, but the more usual occurrence is that settlement and certification occur at the same time so the first opt-out opportunity remains available. The second opt-out opportunity is "just fine. I like to give people the option to stay in or get out. I'm not trying to hold them in against their will. Relatively few people generally do opt-out unless they have serious personal injuries and I have questions about whether class certification is appropriate for those kinds of claims anyway."

Mary E. Alexander, Esq., S-F Testimony 65-: ATLA supports Alternative 2 settlement opt-outs. The opt-out can be difficult for practitioners on both sides, but "litigants' choice is most more to [her written statement says "paramount to"] administrative convenience and the management of the litigation." (Her written statement notes concern that class-action settlements do not afford class members "real choice as to whether to accept a settlement.")

Gerson Smoger, Esq., S-F Testimony 91: For ATLA. It is terribly unfair to have the only opportunity occur before settlement of a (b)(3) class. "Nobody attends to it. Nobody looks at it." Most people do not understand what the notice means, and there is no reward even in seeking out your local lawyer for an explanation. Often I have people come to me after the class is closed and a settlement is effectuated, "and now they have no choice and they disagree with the settlement. They want to have their day in court. They want to be able to choose their own lawyer, but they are foreclosed." We support Alternative 2. And we must be careful to protect the small-claim class "because those

are the essence of the purpose of this system."

Anna Richo, Esq., S-F Testimony 138: The opt-out option on settlement is appropriate.

Jocelyn D. Larkin, Esq., S-F Testimony 146: The Impact Fund welcomes a number of the proposals, including "the option for second notices and opt-out. These are already part of our practice for the post part. We understand them."

Alfred W. Cortese, Jr., Esq., S-F Testimony 163 ff: It would be better to have opt-in for trial, the way it was before we had opt-out settlements. We should be weaned from settling these cases because they just get worse and worse. Amchem and Ortiz have not made a difference: "If you put enough money on the table, somebody is going to find a way" to settle. The second opt-out, however, is the more benign of these proposals.

Hon. William Alsup, 01-CV-04: "I wholeheartedly support the proposed Rule 23 revisions. I vote for the 'good cause' version of the settlement opt-out provision."

Rule 23 2001 Proposals: General Comments

Conference: There is a lot of sensible stuff here. But Rule 23 should be amended only if there is a real need. Caution is indicated even though there are no "hot-button" issues. Rule 23(b)(3) is the source of the difficulties. Perhaps the time has come to abandon it.

Conference: With a couple of exceptions, the Committee should go forward. The proposals are good. It is useful to codify good practice; not all judges are as adept as the best in managing class actions. The Notes are too long; the attorney-fee Note includes material that should be in the Manual. "A Note should explain the reason for the Rule." Lists of factors should not be included in the Rules; they should be set out in Notes, or not at all. Amendments of themselves will not have destabilizing effects; the Evidence Rules have codified Daubert, and it has worked.

Conference: The group that recreated Rule 23 in 1966 did not know what powers they were unleashing. "It has become a de facto political institution." The proposals are not remarkable, but remarkable proposals cannot be put through the rulemaking process. Rule 23 affects many interests, so much so that it is difficult to get disinterested advice from the people with the greatest experience. It is wise to be cautious about engraving current practices in Rule 23. "Rule 23 has a very sophisticated set of followers. That should be taken into account. The Notes are intelligent, complete, but longer than needed after the present process is worked through." The lists of factors seem to work pretty well. But there are some inconsistencies.

Conference: Both Notes and Rules have grown longer over the years. The earlier attitude was to be sparse, to give direction and describe intent. It is useful to describe the purpose of a Rule, but to leave out advice on how to exercise the power conferred. Notes now are attempting to become legislative history.

Conference: The proposals would not change much. They are largely "instructive" to lawyers, trial judges, and appellate judges. The Notes are too long and sometimes contradict themselves or something in the accompanying Rule.

Conference: There is no need to cover everything in Rule 23. Most of this is useful in guiding the district judge. The factors in the Notes will help judges. Case management will be improved. The Notes to the 1993 Rule 26 amendments are a good model; they are not short, but they are a good source of guidance. The draft Rule 23 Notes are too much text, and too much resource about the law. The law may change.

Conference: Rule 23 should be amended to address the problem of discovery from "absent" class members.

Conference: Consideration should be directed to the Department of Justice proposal prepared more than 20 years ago with Dan Meador that would establish authority for the Department to pursue important "consumer" actions.

Michael J. Stortz, Esq., Written Statement for S-F Hearing: The Note on Rule 23(e) suggests that the development of scientific knowledge bears on the maturity of the substantive issues and the review of a settlement. It should be noted that the development of scientific knowledge also is relevant to certification of a class.

Mary Alexander, Esq., S-F Testimony pp 55 ff: For ATLA. Class actions can be an important means of deterring wrong conduct and providing compensation for small-scale damages claims. But it is important to protect also the right to dedicated legal counsel, trial by jury, and the right of an individual plaintiff to control litigation of an individual claim. There should be meaningful opt-out rights. We must be vigilant to prevent erosion of individual class members' rights.

John Frank, Esq., S-F Testimony pp. 92 ff: I dissented from the adoption of Rule 23(b)(3) in 1966. It should be repealed and replaced by administrative agencies appropriate to the subject matter. It simply produces a commercial transaction, blessed by the courts, in which defendants buy res judicata from the plaintiff for a considerable sum of money. The published proposals produce a number of decision points. Each will require time. Anything that adds time to the judicial process must be evaluated to ensure that the gain is worth the cost.

Anna Richo, Esq., S-F Testimony 139: As Chief Judge Posner has quoted Judge Friendly, "settlements induced by a small probability of an immense judgment in a class action" are "blackmail settlements."

Alfred W. Cortese, Jr., Esq., S-F Testimony 156 ff: "What has happened in the class action area is that we have a burdensome, expensive, ineffective method of transferring wealth from one segment of the economy, the wealth creators, the target defendants that I generally represent, to another segment of the economy and very little of that wealth ends up with the alleged victims. That's a very serious problem and it's a much deeper and much more serious problem than is even addressed, as many of the Committee members know, in the proposed amendments." John Frank's recommended surgery may, at this late date, be too bold, but it reflects a feeling at both ends of the political and philosophical spectrum that we need to do something about class actions one way or another. The pending amendments are a start. "I would urge you not to stop there."

It is unfair to have a class that includes a wide range of injury or damages among individual class members. Fundamental fairness, due process, and the right to jury trial are involved. The opt-out (b)(3) class shifts the burden of inertia to class members and weighs in favor of inclusion in the class. Opt-in classes would be better.

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Summary of Comments & Testimony: Overlapping Classes

Michael J. Stortz, Esq., S.F. 5- Represents a drug company that has been the target of dozens of class actions upon withdrawal of a drug from the market. Many seek medical monitoring — some for statewide classes, some for national classes. They are pending in half a dozen state courts. The federal MDL judge has about 30 class actions. Plaintiff counsel have been racing to see who can go first in getting a favorable class decision. Many of the state actions cannot be removed. One drug store in Mississippi has been made defendant in many class actions to prevent removal. "You can't do two medical monitoring programs," but that is the risk of multiple actions. And the litigation risks are that "the state courts proceed on their own schedule without regard to anything that is happening in the federal MDL." Federal courts are attempting to corral these problems. It would help to provide some guidelines through articulated rules. Minimal diversity jurisdiction also would help. If there is doubt about the ability to act by rule, legislative proposals would be welcome. "There is a real problem out there. It's not scattered. It's not rare. It's very common." As defendant, we argue that an MDL court has in rem jurisdiction to prevent some of these abuses by injunction. Despite the anti-injunction at, "judges have created and crafted solutions, given the pragmatic crisis they face."

There is a further problem with duplicative, overlapping discovery. The same company officials are being noticed for depositions in different jurisdictions — there may be demands to produce the same person for depositions in different places at the same time. Judges attempt to coordinate, but "it's very much a liquid promise that, unfortunately," dissolves. Plaintiff counsel get what they can in the MDL proceeding, and then try state proceedings to get what was not available in the MDL proceeding. MDL judges are anxious to accomplish coordination.

(His written statement observes that at times overlapping classes are filed by the same group of counsel in an effort to obtain the most favorable forum. More common are filings by different groups of plaintiffs' attorneys.)

(His written statement also suggests that the proposals to strengthen review of settlement will be frustrated unless federal courts are given authority to limit and control parallel state-court proceedings.)

Jacqueline M. Jauregui, Esq., S-F Testimony p 45 ff: Her firm has been defending a medical device litigation. In the first six months of 2001 53 class actions were filed involving the same product; 35 of them alleged nationwide classes, while 18 alleged a single-state or Canadian class. 36 were initially filed in federal court or were removed; they are now in MDL proceedings. There were 17 cases that could not be removed — or, if removed, were dismissed and then refiled in state court with an additional and local defendant to defeat removal. These events involve a prodigious waste of judicial and public resources, and of the defendant's resources as well. Other people in the product-liability arena tell me that this is a not uncommon series of events. For just this one device, the cases in federal court involve 1.5% of a year's class-action filings. Half a dozen similar events a year would mount up to 10% of the class-action filings. Minimal diversity legislation would go a long way toward supporting MDL processes for these cases. There may be a reluctance to support

expanded diversity jurisdiction, but that is the only way to unravel this knot. Outside the mass torts context, another client provided another example. Oklahoma state courts, through the state supreme court, denied certification of a class. Two weeks later the same law firm challenged the same practice on behalf of a different named plaintiff in a federal court class action. A different client in the insurance field says that the average cost of discovery and briefing before decision of a certification motion is one million dollars. The client in the Oklahoma litigation reflected and agreed that her costs in this stage run from $750,000 to one million dollars. Going through that process twice or more often is wasteful. The not-published certification-preclusion draft Rule 23(c)(1)(D) would be a superb tool to diminish the waste.

When we have been confronted with competing class actions in different courts, it has tended to be a competition among lawyers each of whom wishes to represent a nationwide class. Coordination, when it has occurred, has been the result of informal efforts of defense counsel. In financial services and insurance litigation, there has not been any sign of informal efforts of the judges to cooperate among themselves. Coordination among judges might be a good thing, "but I don't know whether in a state court setting judges would be willing to do that."

Gerson Smoger, Esq., S-F Testimony 73 ff: For ATLA. ATLA is "rather strongly opposed to the preclusion proposals." There has been limited study and limited ability to get empirical evidence on the problem of dual classes, apart from "the high profile examples that we all hear about." The proposals are designed to affect only a minority of filings, but if adopted in general terms will affect all state-court class actions. The proposals seem to be simply a matter of telling judges to do their jobs. "This is legislation over * * * the state judicial systems." This is a matter for state legislatures, and perhaps for Congress; it is not a matter for the rulemaking process. Class actions commonly are justified for reasons that bear either on efficiency or on providing a forum for small claims.

As to forum-shopping on certification, once one court has denied certification the defendant will describe that decision to any other judge asked to certify the same class. Then it is a question for the second judge. If the job is not being done right, the answer lies in judicial education and in cooperation among the judges.

Settlement shopping is done by the defendant, by the person who is being asked to pay money. If the defendant does not want to settle, there is no settlement to shop. Again, it is a question for the judiciary. (In response to a question whether a court should be able to enjoin a defendant from settling in another court while a class claim remains pending in the first court: The settlement might change, the procedures might change. It may not be the same cause of action. And the parties may dismiss the federal action after the court refuses to approve a settlement. Once an action is dismissed, how does the court exercise continuing control? Who enforces the injunction — the judge who issued it? But if the action remains pending in the first court after the settlement is rejected and another court is preparing to approve the same settlement, "that's very problematic." Overall, these problems — the 37 class actions — seem to arise "where there are high stakes and very bad acts." When there are 37 classes, "a lot of it gets sorted out realistically fairly shortly on." The sorting process occurs in the plaintiffs' bar; there is a self-policing. The problem of overlapping classes is for the most part being resolved within the system. "You couldn't say that in certain situations it's not a problem," but the tools exist to resolve it. Resolution of the actions depends on the defendant. There is some attempt to try to have resolution even if there are multiple state and

federal actions. It is not always settlement: very few go to trial. Once the first trial or second trial is lost on a classwide basis, plaintiffs become unwilling to put more resources into a classwide trial. A second trial will happen only if it appears that the earlier trial or trials were not well managed; the risk, cost, and time required deter multiple attempts.

(In response to a question whether it is fair to allow multiple opportunities for certification? How many times do we have to win before we lose on certification? Is it fair that when certification is finally ordered, it's the whole ball game? There are many types of class actions. In a mass-tort class action, certification is not the ball game. "The ball game is the reality of the existence of the large torts." In a small-claim consumer class action, certification is necessary for effectuation of the action. The discovery has been done for the first certification attempt, the issues have been explored, so the duplication in successive certification attempts is reduced. So in the example earlier this morning: after Oklahoma courts have denied certification, a federal judge certainly has power to certify a class, but certainly will be influenced by what the state courts did. And there may be a new federal element added when the new action is filed in federal court; if the law changes, there is a new certification issue. The reality is that the multiple filings are there, but most of the federal filings will get consolidated in MDL proceedings. A lot of the state filings will sit back "and not have activity." A few state filings will have activity, but you will never have more than five full "trials" on certification, and usually it is fewer than two. It is not a matter for judicial power to decide whether to enjoin state-court cases once the federal cases are consolidated for MDL proceedings; that is a legislative judgment. But the system is working itself out well without legislation. Informal conversations are taking place among judges. If there is a federal MDL proceeding, the federal judge will be talking to the state judges. Informal mechanisms also exist within the plaintiffs' bar, because there is a coalescence of the plaintiffs' bar. There is some agreement as to who takes what roles. When there are multiple defendants, the same thing happens on the defense side. These things "have to happen because * * * everyone needs the efficiency. The plaintiffs don't need thousands of hearings to attend."

(His written statement adds several points. It is not surprising that these proposals have the enthusiastic support of multinational corporations. But there is not sufficient problem that there is a problem that needs to be addressed. The federal courts do not need more cases — and defendants, if given the opportunity, will remove virtually every class action. Class actions that involve state law belong in state courts. The draft proposals depart so drastically from basic federalism as to be unconstitutional. None of the alternative proposals can disguise the impact. The idea of revising the statutes to authorize rules that the statutes not forbid is surprising, absent any "paramount, urgent basis for doing so.")

Jack B. McGowan, Jr., Esq., S-F Testimony 107 ff: Has defended pharmaceutical, medical-device, and product-liability cases. The breast implant litigation provides an example of overlapping classes. One client had 34 federal class actions around the country, three Canadian class actions, and at last one state-court class action that was limited to a statewide class. There were also 17,000 individual actions around the country. It cannot be said that these numbers reflect the merits of the claims: it has been fairly well established that there is no causal link between the implants and autoimmune disease. In another case involving phenylpropanolamine, there were two virtually identical class actions filed in California courts, alleging violation of state unfair competition statutes and seeking

statewide class certification. "One obviously copied the other." The class actions and individual actions are being coordinated before a single state judge. (California has a consolidation procedure similar to federal MDL proceedings; there has been active coordination. In the breast implant litigation, California Judge O'Neill was very active in coordinating with the federal MDL court.) There are, however, likely to be federal actions as well. The state judge is likely to seek active coordination with the federal judge. In California latex glove litigation, the state judge is having conversations with the federal judge in Philadelphia who has the MDL proceeding. But for all the efforts at coordination, state judges oftentimes try to push the litigation faster than the pace of the MDL proceedings. That happened with the California breast implant cases; we tried cases; "they were never tried in the MDL." The cost of parallel proceedings "is phenomenal." There have been numerous class actions around the country in the diet drug litigation. Some seek statewide classes, while others seek national classes. Some have been dismissed because the state involved does not recognize medical monitoring relief. In other states medical monitoring classes were certified. (In response to a question based on the earlier testimony that multiple filings get sorted out: "Maybe they are sorted out at great expense." So it was in the diet drug litigation. It does not make sense to have more than one nationwide class. "We only have one group of all the people. And it just makes no sense.") It may be that the rulemaking process lacks power to address these problems. But then legislation should be considered. Congress should address a problem that "is costing hundreds and hundreds and hundreds of millions of dollars. I'm just talking about three or four clients." The class actions often come first "because there is a major interest on the part of class action lawyers, personal injury lawyers around the country to be there first, to get on the committee, to be a player in the decisions around the country — not only in state courts, but in federal courts — to participate in that activity."

The written statement submitted for the San Francisco hearing added two points. First was an account of a state-court class action involving laser eye surgery: when the defendant filed a motion to compel arbitration, a second class action was filed that named an additional defendant who could not invoke an arbitration agreement. The sole purpose seemed to be to defeat the arbitration demand. Second was the observation that mass-tort litigation often is launched by the filing of multiple class actions in different jurisdictions. Commonly there is no coordination or control of discovery, leading to inconsistent rulings that escalate the cost of litigating. And there may be inconsistent rulings on class certification.

Anna Richo, Esq., S-F Testimony 129 ff.: Vice-President for Law, Biosciences Division, Baxter Healthcare. Baxter never made breast implants, but inherited litigation based on the activities of a division of an acquired company. It was named in class actions filed in ten state courts — mostly a nationwide classes, four federal courts, and four courts in Canada. Some sought worldwide classes. None of the state actions was certified, but Baxter had to contest certification in each one. The federal actions were consolidated. Baxter had to settle some 6,500 suits for people who opted out. The litigation was bet-the-company for Baxter and several other defendants. The science that exonerated the defendants came too late for some companies. Baxter did defend individual actions on the merits; it won consecutively over 20 cases, but the cost was $1,000,000 to $2,000,000 a case. Publicly-traded companies cannot afford to defend themselves one-by-one. And the class action is a lever for settlement.

In the HIV Factor Concentrate litigation, Baxter was sued in class actions in three state courts and five federal courts. The federal actions were consolidated, but no class was certified for trial in any court. These experiences with multiple class actions brought simultaneously in state and federal courts has shown that the MDL procedure is an effective mechanism for federal courts. But competing multistate, multiparty actions in state courts should be removed to federal court whenever possible. Baxter strongly supports the proposed Class Action Fairness Act.

The Reporter's Call for Comment is a thoughtful attempt to address the problems. Multiple overlapping class actions have overreached the original goal of providing access to courts for similarly situated claimants. The abused have ignored the clients and enriched the attorneys. They ignore due process and single recovery. "They have presented inconsistent and uncertain results and have contributed to the financial crisis in which corporate America, the insurance industry, and the American consuming public find themselves."

Another illustration is provided by five separate class actions in four different state courts seeking damages for children inoculated with childhood DPT vaccine containing Thiomerosol. The National Childhood Vaccine Injury Compensation Act of 1986 provides an administrative remedy and precludes injury claims for more than $1,000 outside the statutory claims process. In an effort to circumvent this limit, some of the plaintiffs' attorneys are seeking to represent national classes of persons with claimed damages of less than $1,000 each. These de minimis claims, when aggregated, could once again threaten to cripple the industry. The certification preclusion proposal, draft Rule 23(c)(1)(D), and the settlement preclusion proposal, draft Rule 23(e)(5), are clearly wise. "Each side will have one opportunity to make its best case on the issuing of class certification or class settlement. The informed well-reasoned decision of the court * * * will have the final word on the subject." Forum shopping will be ended. Judicial resources will be preserved. The Enabling Act gives authority to adopt these rules; in any event, the Advisory Committee should recommend them to Congress.

Alfred W. Cortese, Jr., Esq., S-F Testimony 156 ff: The problem of overlapping duplicative class actions has become worse. The preclusion rules in the call for comment are within the power of the Committee to adopt to "protect Federal judges' Article III powers and jurisdiction. I think that is the essence of federalism. * * * The federal courts were created to provide protection to out-of-state residents and to provide protection against the extension of state law to other states to the detriment of other state residents." But these are very controversial issues. They involve exceedingly important policy choices. They have a substantial impact on substantive rights. Perhaps these changes ought to be left to Congress. If the Committee decides it is better for Congress, the Committee has the responsibility to participate in the process in whatever way it can "to ensure, frankly, that Congress gets it rights." The letter transmitting the Mass Torts Working Group Report to the Chief Justice observed that the best chance of success lies in the lead of the Third Branch "with a sensitive interaction with Congress." If not rulemaking, then the Committee should develop a package of legislative recommendations.

Minimal diversity legislation "should rightly be a very high priority for this Committee." The Judicial is presently on record opposing such legislation. That should be worked out, "so that nationwide class actions are tried or handled in nationwide courts, federal courts." Dealing with overlapping classes will (1) avoid the waste of duplicative litigation; (2) prevent use of overlapping

actions for interim strategic effects, the need to win 50 separate certification hearings until there is res judicata; and (3) to minimize forum shopping. Sequential forum shopping is much more invidious in class actions than in individual actions.

Even with minimum diversity legislation, the preclusion rules would serve a purpose because there will be a certain number of competing state class actions that are limited by a state's boundaries.

Summary of Comments & Testimony: 2001 Rule 23 "Other"

Mass Torts

Conference: The proposals fail to address mass torts.

Conference: There is a real problem with fitting mass torts into Rule 23. Perhaps they deserve a separate rule.

Conference: Discussion of mass-tort classes has included consideration of opt-in classes. What might such a rule be? Another participant suggested that a mass-torts rule that "does not involve a class" might be useful. Perhaps it would be useful to revive consideration of the first Advisory Committee drafts that collapsed the (b) categories, permitted opt-in classes, allowed denial of opt-out from any type of class, would permit a judge to condition the right to opt-out on specified preclusion consequences, and so on.

Conference: Mass torts are different from securities, antitrust, or consumer class actions. Different rules are needed. We are trying too hard to fit disparate forms of litigation into a single procedural bottle. "There are sufficient needs of judicial economy to justify work on a mass-torts rule."

Conference: One approach might be to establish a procedure that facilitates "judicial management of individual settlements." This would not be a class action, but a process to establish a method for settlement or resolution that does not depend on counsel alone in the way that class settlements do.

General Practice

Conference: Rule 23 should be amended to address the problem of discovery from "absent" class members.

Conference: Consideration should be directed to the Department of Justice proposal prepared more than 20 years ago with Dan Meador that would establish authority for the Department to pursue important "consumer" actions.

June 20, 2001

U.S. Judicial Conference

Committee on the Administration of the Bankruptcy System

REPORT OF THE SUBCOMMITTEE ON MASS TORTS

Future claims -- that is, claims that have not yet ripened but may well do so in the future -- present the greatest challenge to the adequate legal treatment of mass torts, whether in or out of the bankruptcy system. In 1997, the National Bankruptcy Review Commission (the "Commission"), partly in elaboration of § 524(g) of the Code, made five recommendations for revision of the Code to standardize the treatment of mass future claims in bankruptcy. See National Bankruptcy Review Commission, Bankruptcy: The Next Twenty Years 316-18 (1997). The recommendations are set forth in full in the Appendix to this report. Briefly stated, the recommendations are to amend the Bankruptcy Code to expressly cover "mass future claims" and "holders of mass future claims" (defined in terms of a modified "conduct" test, discussed infra); to provide for appointment of future claims representatives; to expressly permit estimation of future claims; to limit (as through "channeling injunctions") the assets against which such claims could be satisfied; and to permit discharge of such claims. Id. In February, 2000, the Committee On Federal-State Jurisdiction of the U.S. Judicial Conference asked its sister Committee On The Administration Of The Bankruptcy System to review the recommendations, and a Subcommittee on Mass Torts (the "Subcommittee") was created for this purpose. In August, 2000, following a preliminary review, the Subcommittee reported that the Commission's recommendations had merit but that significant problems remained to be explored, which the Subcommittee identified and grouped under the headings: (1) due process; (2) future claims representatives; (3)

estimation; (4) statutes of limitations and repose; and (5) conflicts of interest and inappropriate incentives. Following further study, the Subcommittee herewith presents its views as to each of the problem areas.

1. Due Process

A. Some Concerns*

The primary due process problem presented by any attempt to deal with future claims is the problem of lack of notice. As the Supreme Court noted in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950):

> "The fundamental requisite of due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 394. . ." This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

The Commission's recommendations pose due process problems in that some persons whose rights are to be affected may not receive notice and an opportunity to be heard before their rights are substantially limited. Moreover, certain potential claimants, at the time that their claims are discharged, may not yet have experienced any injury or have any way of knowing that they will one day have a claim.[1]

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Marjorie O. Rendell, U.S. Circuit Judge, Third Circuit.

[1] In his article, Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability, 148 U. Pa. L. Rev. 2045 (2000), Professor Alan N. Resnick refers to these claims, as a group, as "unmanifested." Id. at 2067. However, it should be noted that the harm may not even have occurred, based on the definitions proposed, so that the holders may well have claims that are unknowable, not merely unknown or "unmanifested."

Under the Commission's proposals, debtors would be able to affect and discharge "mass future claims." A "mass future claim" would be defined as a "claim arising out of a right to payment, or equitable relief that gives rise to a right to payment, that has or has not accrued under non-bankruptcy law that is created by one or more acts or omissions of the debtor," if certain things have occurred. See Commission Recommendation 2.1.1. By adopting this "conduct" test, the Commission essentially gives a claim to all those who could be harmed by a debtor's act or omission, whether or not the claim has yet accrued or is even known.

It is true that the proposed definition of "mass future claim," found at section 2.1.1 of the Commission's Recommendations, does contain further limitations, including:

> . . . .
> (3) at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds;
> (4) the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and
> (5) the amount of such liability is reasonably capable of estimation.

But even with these limitations, the holders of future claims need not be able to be "identified" but, instead, can be merely "described" with reasonable certainty.[2] It is thus apparent

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[2] Professor Resnick argues that even the concept of claimholder identification or description can be eliminated because there is a provision for a future claims representative (discussed infra). Interestingly, nowhere in the Commission's comments is there any reference to the "description" requirement, while the other "gatekeeping" provisions are discussed to some extent. While the concept of claims identification or description may be somewhat hollow assurance, if it were eliminated would a claims representative know whom he or she is representing?

that holders of these claims are not intended to necessarily receive prior personal notice of the proceedings, let alone of the determination of their claims.

This is made even more apparent by the express provision for a "mass future claims representative," and a recommendation that the Bankruptcy Code should authorize the bankruptcy court to order the appointment of a mass future claims representative. The recommendation thus embraces the concept of some kind of constructive notice, or substitute for notice altogether, noting that in Mullane the Supreme Court discussed the impracticalities of personal notice in every case. See 339 U.S. at 313. While the Commission does recognize the potential for due process concerns in such an approach, see Bankruptcy: The Next Twenty Years, supra, at 331 n. 818, it nevertheless concludes that such constructive notice is sufficient.

Admittedly, some courts have already been willing to deal with future claims in bankruptcy proceedings, and discharge them, where the "conduct" test was employed and there was no actual notice;[3] but query whether approval of such across-the-board constructive notice should be legislated in this manner? And even if it should as a matter of policy, query whether the Due Process Clause permits such substitute notice in the bankruptcy arena, let alone in such wholesale fashion. Just because a claimholder cannot be notified and there is a need to discharge his claim so that bankruptcy policies can be advanced, does that make an alternative -- such as a

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[3] See, e.g., Grady v. A.H. Robins Co., 839 F.2d 198, 201 (4th Cir. 1988) (holding that "claim" existed prior to filing of bankruptcy petition where shield was inserted before bankruptcy); In re Texaco Inc., 182 B.R. 937, 955 (S.D.N.Y. 1995) (stating that publication was sufficient to discharge potential environmental claims of landowners); In re Waterman S.S. Corp., 141 B.R. 552, 556 (S.D.N.Y. 1992) (finding that claims of future asbestos claimants were not discharged where attempt to notify them was unreasonable and Court did not appoint a representative), vacated on other grounds, 157 B.R. 220 (S.D.N.Y. 1993).

future claims representative -- a permissible and satisfactory guarantee of due process?

Perhaps the key to this issue lies in assessing, and predicting, the scope of the Supreme Court's disapproval of the class action treatment of future claimants in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), and of its disposition in Flannigan v. Ahearn, 521 U.S. 1114 (1997), which vacated the Court of Appeals' judgment and remanded the case in light of Amchem. Can a Bankruptcy Code that embodies the same objectionable traits pass constitutional muster?

It should be noted that in Amchem, the public notice was designed to reach out to anyone and everyone who might possibly be exposed. The Court was concerned, however, with the "sufficiency" of the notice. 521 U.S. at 628.[4] Here, the situation is slightly different in that, while actual notice might be attempted to the maximum extent possible, it is still contemplated that there would be instances where a complete substitute for notice by way of a class

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[4] The Supreme Court made the following observation in Amchem:

> Impediments to the provision of adequate notice, the Third Circuit emphasized, rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement. Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciated the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.
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> . . . In accord with the Third Circuit . . . we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.

521 U.S. at 628 (emphasis added).

representative would be relied upon as sufficient. How the Supreme Court would view that, in the context of the Bankruptcy Code, is difficult to say. Does the presence of a class representative reduce due process concerns? Does constructive notice add to the attempts at actual notice in a way that improves the "sufficiency" of notice?

As Professor Gibson notes in her article on this topic, the Supreme Court has not granted certiorari in a mass torts bankruptcy case. S. Elizabeth Gibson, A Response to Professor Resnick: Will this Vehicle Pass Inspection, 148 U. Pa. L. Rev. 2095, 2098 n.18 (2000). While one could argue that there are considerations in bankruptcy that could weigh differently on the Supreme Court's view of the requisite notice, nonetheless, Professor Gibson notes that class actions actually are an exception to the general due process requirement "that everyone be afforded her own day in court." Id. at 2107. The rationale for such an exception in the class action context is based on the legal principle that "the certification of classes . . . is confined to the situations in which there is a sufficient identity of interest between the class members and their representatives that the members' rights may be fairly adjudicated in their absence." Id. Therefore, while it could be said that bankruptcy policy considerations might support a relaxed notice requirement as part of a bankruptcy solution, nonetheless, it should be noted that policy considerations did not in the end prove sufficient to avoid due process impediments in the class action setting in Amchem. See Samuel Issacharoff, Class Action Conflicts, 30 U.C. Davis L. Rev. 805, 805 (1997).

Some further due process problems should also be noted. One is conflicts of interest among future claimants. As Professor Gibson notes, based upon the Supreme Court's statements in Amchem,

> [O]ne might question whether the Supreme Court will view constructive notice as providing much protection for future claimants in bankruptcy. If not, the Court may be unwilling to allow future claimants to be bound by a reorganization plan confirmed in a bankruptcy case in which their interests were litigated by an appointed representative unless great care was given to insuring the absence of conflicting interests within the group represented by each future claims representative.

Gibson, supra at 2115. Another problem is the difficulty of putting effective advance limits on future claims. As Professor Gibson notes further, in her penultimate footnote:

> Even if the "practicalities and peculiarities" of a mass tort bankruptcy case, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), justify the provision of constructive notice to such future claimants, I fear that it pushes the limits of due process too far to include within the group of future claimants persons who, at the time of bankruptcy, have not been exposed to the offending product. It cannot even be pretended that someone who has not yet purchased, used, or come in contact with a product that precipitates a mass tort bankruptcy will have any reason to understand that the bankruptcy might affect her rights.

Id. at 2115 n. 97.

Finally, due process also implicates issues of fairness as between future claimants and as between the class of future claimants compared with the classes of known claimants. Some of these problems are discussed, infra, in the section on Future Claims Representatives.

B. Some Countervailing Considerations and Suggestions*

Notwithstanding the potential due process problems described above, it is worth remembering that the Due Process Clause is designed to make the legal process work fairly, not

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to prevent it from working at all. As a practical matter, if procedures cannot be devised consistent with due process to provide for present protection of future claims and future claimants, in many cases there will be nothing left to satisfy future claims and compensate future claimants when their injuries become manifest and they most deserve help. Accordingly, notwithstanding cases like Amchem, it may be that the Supreme Court will not interpret due process so as to entirely eliminate any solution to the future claims problem in mass tort bankruptcies, especially since the bankruptcy process -- with its automatic stays, nationwide jurisdiction, and in rem approach -- seems otherwise so well suited to addressing the mammoth problems presented by mass torts.

The key to the Commission's response to the due process concerns discussed above is the appointment of a future claims representative who, as mandated by the Commission's recommendations and further discussed in section 2 of this report, infra, has a fiduciary responsibility to future claimants. Both state and federal law recognize that a fiduciary can sometimes act on behalf of a person who lacks notice without thereby offending due process, not just because of the legal fiction of "constructive notice" but because of the very strict standards to which the fiduciary will be held and the ultimate accounting she will have to render. Thus, for example, courts, consistent with due process, regularly appoint guardians to represent both infants, who will not have any meaningful notice of the guardian's actions until the infant reaches an age of understanding, and incompetents, who will never have any meaningful notice of the guardian's actions. The analogy to a future claims representative is not perfect for the guardian at least knows exactly who he is representing, whereas a future claims representative may not know her actual "clients" until sometime in the future, but the point is that due process is not so

MEMORANDUM

6/20/01

To: Judge Krieger
Judge McKinney
Judge Montali
Judge Rendell
Judge Rosenthal
Judge Schmetterer

cc: Judge Melloy
Francis Szczebak
Ralph Avery
Kevin K. Gallagher
Beth Wiggins

Re: Mass Torts Subcommittee Report -- "Final" Version

I have made the edits agreed to in our conference call earlier today, and am herewith attaching our final report, which Frank can now send to all members of the Committee on Bankruptcy Administration and Jack can submit to the Committee on Federal-State Jurisdiction. Thanks again for all your help.

JSR

June 20, 2001

U.S. Judicial Conference

Committee on the Administration of the Bankruptcy System

REPORT OF THE SUBCOMMITTEE ON MASS TORTS

Future claims -- that is, claims that have not yet ripened but may well do so in the future -- present the greatest challenge to the adequate legal treatment of mass torts, whether in or out of the bankruptcy system. In 1997, the National Bankruptcy Review Commission (the "Commission"), partly in elaboration of § 524(g) of the Code, made five recommendations for revision of the Code to standardize the treatment of mass future claims in bankruptcy. See National Bankruptcy Review Commission, Bankruptcy: The Next Twenty Years 316-18 (1997). The recommendations are set forth in full in the Appendix to this report. Briefly stated, the recommendations are to amend the Bankruptcy Code to expressly cover "mass future claims" and "holders of mass future claims" (defined in terms of a modified "conduct" test, discussed infra); to provide for appointment of future claims representatives; to expressly permit estimation of future claims; to limit (as through "channeling injunctions") the assets against which such claims could be satisfied; and to permit discharge of such claims. Id. In February, 2000, the Committee On Federal-State Jurisdiction of the U.S. Judicial Conference asked its sister Committee On The Administration Of The Bankruptcy System to review the recommendations, and a Subcommittee on Mass Torts (the "Subcommittee") was created for this purpose. In August, 2000, following a preliminary review, the Subcommittee reported that the Commission's recommendations had merit but that significant problems remained to be explored, which the Subcommittee identified and grouped under the headings: (1) due process; (2) future claims representatives; (3)

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Admittedly, some courts have already been willing to deal with future claims in bankruptcy proceedings, and discharge them, where the "conduct" test was employed and there was no actual notice;[3] but query whether approval of such across-the-board constructive notice should be legislated in this manner? And even if it should as a matter of policy, query whether the Due Process Clause permits such substitute notice in the bankruptcy arena, let alone in such wholesale fashion. Just because a claimholder cannot be notified and there is a need to discharge his claim so that bankruptcy policies can be advanced, does that make an alternative -- such as a

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Gibson, supra at 2115. Another problem is the difficulty of putting effective advance limits on future claims. As Professor Gibson notes further, in her penultimate footnote:

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The key to the Commission's response to the due process concerns discussed above is the appointment of a future claims representative who, as mandated by the Commission's recommendations and further discussed in section 2 of this report, infra, has a fiduciary responsibility to future claimants. Both state and federal law recognize that a fiduciary can sometimes act on behalf of a person who lacks notice without thereby offending due process, not just because of the legal fiction of "constructive notice" but because of the very strict standards to which the fiduciary will be held and the ultimate accounting she will have to render. Thus, for example, courts, consistent with due process, regularly appoint guardians to represent both infants, who will not have any meaningful notice of the guardian's actions until the infant reaches an age of understanding, and incompetents, who will never have any meaningful notice of the guardian's actions. The analogy to a future claims representative is not perfect for the guardian at least knows exactly who he is representing, whereas a future claims representative may not know her actual "clients" until sometime in the future, but the point is that due process is not so

rigid a concept as to preclude practical accommodations to situations where notice is inherently impossible at the very time when action is required.

If the future claims representative is to serve as a genuine fiduciary, however, she must have a reasonably tight idea of the characteristics of the persons she serves, even if she doesn't yet know their identity. A somewhat narrower definition of "future claimant" than the one suggested by the Commission may therefore be in order. At a minimum, this Subcommittee would recommend that subparagraph "4" of the Commission's definition of a mass future claim be amended so that it is limited, inter alia, to situations where "the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty and the nature and extent of their rights to payment can be described with specificity" (new language underscored). Likewise, as suggested by the Commission itself and discussed further in section 2, infra, there may be a need for separate future claims representatives to represent definably separate groups of future claimants.

The fiduciary responsibilities of the future claims representative are not the only due process protection that future claimants will receive in the bankruptcy context. As the Commission notes, bankruptcy "rules requiring collective action, extraordinary disclosure requirements, and regular and extensive court supervision from the inception of the case, make bankruptcy more protective of future claimants [than are class actions] . . . The fundamental structure of the bankruptcy system, with restrictions such as the 'absolute priority rule,' provides safeguards for the interests of mass future claimants that are unmatched in the class action system." Bankruptcy: The Next Twenty Years, supra, at 340-41. Similarly, Prof. Gibson, after carefully comparing mass tort limited fund settlements under Rule 23 with mass tort bankruptcy

reorganizations, concludes that "bankruptcy comes out ahead of limited fund class action settlements with respect to the fairness of the resolution process and the effectiveness of judicial review." Gibson, Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations at 5 (2000).

In practice, to be sure, some of these protections operate better in some contexts than in others. In a Chapter 7 liquidation, a failure to deal with future claims, however difficult, means, in effect, that future claimants will be deprived of any recovery whatever. If ever some substitute for personal notice would seem direly required, it would be in such a case. By contrast, in the case of a Chapter 11 reorganization there is at least the possibility of meaningful assets being available for future claimants even if no future claims representative is appointed, and, conversely, there is more of a danger of future claimants' rights being unfairly compromised if negotiated by a future claims representative who does not yet know exactly who the future claimants will be. In the case of a Chapter 11 reorganization, therefore, the Subcommittee is of the view that it might better comport with due process for the amount of any fund set aside to pay future claims not to be forever fixed at the time of discharge but rather to be subject to possible future expansion in situations where the estimates on which the fund was based prove later to have been materially mistaken.

Will any or all of this be enough to satisfy the Supreme Court? Prof. Gibson, in the article cited in the preceding subsection, is uncertain, noting that "the Court has not shown itself to be pragmatic in its approach to the judicial resolution of mass torts." Gibson, supra, at 2116. Moreover, there are a wide variety of situations in which mass tort bankruptcies may arise, and it may be that a solution that satisfies due process in some such situations may not satisfy it in

others. But it is respectfully submitted that, short of far more radical legislation than anything suggested by the Commission, no better solution has been proposed to the problem of future mass tort claims than the bankruptcy approach utilizing future claims representatives.

2. Future Claims Representatives*

The issues raised by the selection and responsibilities of a future mass tort claims representative in bankruptcy proceedings, especially as contemplated by the proposals of the Commission, are usefully considered against the backdrop of similar issues presented by Rule 23 class representatives in dispersed mass tort class actions involving future claimants. In dispersed mass tort cases involving exposure to toxic substances that may produce injury or death after a long latency period, there are at least two different categories of future claimants. First, there is the category of those who know that they have been exposed but do not yet show signs of illness. Those in this category know, or can be provided with notice, that there is some risk of future illness, but they do not presently know that they will develop symptoms, when such symptoms will occur, or to what degree of severity. Second, there is the category of those who have been exposed, but do not know of the exposure. They are an "amorphous and unself-conscious" group, Amchem, 521 U.S. at 628; they do not know of the risk of future illness and cannot even be given notice of such a risk. In the context of the class action, the courts have made it clear that special obligations and limitations accompany a judge's ability to appoint an

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Larry J. McKinney, U.S. District Judge, S.D. Ind., and the Hon. Lee H. Rosenthal, U.S. District Judge, S.D. Tex.

adequate representative for such claimants. These obligations and limits inform the need for specific standards governing the appointment and duties of the future claims representative and the threshold decision whether the future claims representative is merely a professional or more closely akin to a fiduciary.

In Amchem, supra, the Supreme Court addressed the problem of future claimants in the context of settlement class actions. The Court held that a settlement class of asbestos claimants must meet all the requirements for certification under Rule 23(a) and (b), with the sole exception of trial manageability. In so holding, the Court emphasized that the presence of different categories of future claimants raised a large obstacle to finding adequacy of representation, a necessary finding for class certification. The Court's discussion made it clear that the problem was not limited to Rule 23, but included constitutional dimensions.

In Amchem, the Court rejected a proposed nationwide settlement of thousands of asbestos claimants. The Court held that the class representatives and their attorneys did not meet the Rule 23(a)(4) adequacy of representation requirement because of conflicts of interest. Those who were presently ill wanted a large present recovery. Those who were exposed but had no manifest symptoms, one category of future claimants, had a conflicting interest in preserving assets for future claims. The Court raised doubts that those who did not even know that they had been exposed to asbestos could ever be given constitutionally sufficient notice. However, such claimants have an identifiable interest in preserving sufficient assets far into the future to respond to the most delayed manifestations of illness.

After Amchem, courts and parties have addressed the problem of cohesiveness in determining whether adequacy of representation can be assured for the purpose of Rule 23.

Courts have relied upon subclasses, with separate representation for each discrete group, to avoid problems of conflicting settlement goals and disparate interests that would otherwise defeat Rule 23 certification. For example, courts have attempted to create subclasses, and appoint separate representatives for each subclass, of presently injured and exposed but not yet injured groups, who require measures to assure that assets are available in the future to respond to later manifestations of symptoms; of groups for whom medical monitoring is the only present relief; and of groups that have similar types of present symptoms, who require the availability of an appropriate amount of assets in the present to respond to present symptoms. The success of these efforts has varied. In some cases, the courts have found that proposed classes present such diversity of interests that adequacy of representation cannot be achieved even with subclasses and separate representatives. See, e.g., Walker v. Liggett Group, Inc., 175 F.R.D. 226 (S.D. W. Va. 1997) (refusing to certify for settlement a proposed class of past and present cigarette smokers, their families and estates, those exposed to secondhand smoke, and those who paid medical claims). Other courts have relied upon subclasses for different types of claims, particularly to separate out future claims, with separate representatives, to achieve cohesiveness and adequacy of representation. See, e.g., O'Connor v. Boeing N. Am., Inc., 185 F.R.D. 272, 275-76 (C.D. Cal. 1999); Cook v. Rockwell Int'l Corp., 181 F.R.D. 473 (D. Colo. 1998). However, since Amchem, courts appear to recognize that those who do not even know that they have been exposed and could be class members in the future cannot be provided notice or adequate representation under Rule 23, even in a separate subclass certified as part of a settlement class.

Can this problem be solved in the context of bankruptcy? As already suggested in the

preceding sections of this report, the solution, if there is one, must rest with the creation of a future claims representative who has a reasonably specific idea of whom she represents and has the power to do so adequately. So armed, the future claims representative for the class of exposed but not yet ill claimants should attempt to create as large a fund as possible to protect those who move from a quiescent to an active condition. Such a future claims representative must also administer that fund so as to assure that the fund is protected into the future and will grow to meet increasing demands. Also, the future claims representative must pay out funds only under specifically enumerated circumstances, to be agreed upon at the creation of the fund.

While that pay-out itself might be considered an administrative task, depending upon the nature of the qualifications imposed upon the claimants, the duties imposed on the future claims representative are, under the Commission's proposals, fiduciary in nature. The fiduciary relationship is much like that between the administrator of an ERISA plan and beneficiaries under that plan. Many of the already established principles of insurance law and ERISA law could be applied to the future claims representative as criteria governing the responsibility for amassing and preserving the fund, administering the fund, and paying claimants from the fund. In order to insure the integrity of the fund in the most efficient manner, the future claims representative should be regarded from the outset as a fiduciary.

As the Commission also recognizes, it is necessary for a separate future claims representative to be appointed for each separate class if a separate fund is required. The same reasons that require the creation of subclasses under Rule 23 require the creation of separate funds for groups with disparate interests with respect to those funds, with different representatives that have undivided loyalties -- the hallmark of the fiduciary.

It is also vital that each future claims representative be empowered to vote on a plan of reorganization on behalf of his class of future claimants, with the number of votes determined by the reasonably estimated amount of the future claims. The difficulties inherent in giving a group of existing creditors more power than future creditors can be avoided if they are treated in the same fashion.

A future claims representative possessing these powers and particulars may possibly avoid the due process objections earlier described. To draw again on the analogous principles from insurance and ERISA law, the presence of presently unknown claimants does not necessarily defeat or alter the ability to represent such interests, consistent with fiduciary obligations. The fiduciary nature of the responsibility the future claims representative owes the class of claimants represented is analogous to the responsibility of the insurance adjustor to the policy holder or the ERISA administrator to beneficiaries. The point here is not to specifically list all the powers and responsibilities of the future claims representative but to suggest that there are sources of familiar and developed principles from which the duties and responsibilities could be derived and applied.

3. Estimation*

It has been suggested that the bankruptcy process is appropriate for disposition of mass tort claims, in part, because Section 502(c) of the Bankruptcy Code allows for estimation of

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Marcia S. Krieger, U.S. Bankruptcy Judge, D. Colo., and the Hon. Jed S. Rakoff, U.S. District Judge, S.D.N.Y.

present and future tort claims. However, as presently written, the function of Section 502(c) is so limited that, without modification, it would offer little benefit in a mass tort context. This is one of the reasons why, if bankruptcy is to play a successful role in resolving mass tort litigations, the Commission's proposal for estimation, or something akin to that proposal, should be enacted.

Section 502(c) of the Bankruptcy Code provides:

> (c) There shall be estimated for purpose of allowance under this section----
>
> (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or
>
> (2) any right to payment arising from a right to an equitable remedy for breach of performance.

Section 502(c) is intended to facilitate allowance of claims against a bankruptcy estate. It permits the court to estimate the amount of a contingent or unliquidated claim for purposes of distribution of estate assets to the claimholder. Once the claim has been estimated, the estimated amount can be used to determine the holder's vote for or against a proposed Chapter 11 plan. (Acceptance by a class of creditors requires that a majority in number and at least 2/3 in the amount of claims actually voting vote to accept.) Because claims are payable in accordance with the statutory hierarchy, senior claims must be satisfied (by payment in full or acceptance by class) before payment of junior claims. Estimation of contingent or unliquidated claims thus fixes the amount necessary to satisfy such claims (or classes of claims), and therefore when junior claims can be paid. Ordinarily, a contingent or unliquidated debt is scheduled by the debtor, but for such a claim to be allowed, the claimholder must timely file a proof of claim. Once the proof of claim is filed, the claim can be estimated upon notice to the claimholder.

Future claims are, by nature, unliquidated and in some instances may be contingent. The

debtor may schedule such claims by group designation, but it is unlikely that they will be scheduled individually. Without identification of the claimholder(s), the claimholder(s) will receive no individual notice of the bankruptcy case, likely will not file a proof of claim, and will not receive notice of and therefore will not participate in the estimation process.

The recommendations of the Commission do not solve all these problems, but they do mitigate many of them. Recommendation 2.1.3 proposes amending § 502 to expressly empower the bankruptcy court to estimate mass future claims and determine the amount of mass future claims prior to confirmation of a reorganization plan for purposes of distribution as well as allowance and voting. Recommendation 2.1.4 proposes expanding § 524 to authorize courts to issue in all cases involving future claims so-called "channeling injunctions," which would prohibit future claimants from pursuing any of the debtor's present or future assets other than those specifically designated assets that, as part of the plan of confirmation, had been placed into a trust to be administered by the future claims representative for the payment of future claims.

Although these two recommendations would resolve or reduce many of the legal problems described above, they are not without difficulties of their own. The multiple contingencies inherent in the Commission's definition of future claims make it very difficult to estimate the dollar amount of future claims with a high degree of confidence; and, indeed, the limited experience with such estimation thus far (chiefly in the context of asbestos bankruptcies) has been that the actual amount of future claims has sometimes materially exceeded both the estimated amounts and the value of the assets put aside for their satisfaction. But the Commission's recommendations expressly provide that future claims will only apply to liabilities that are "reasonably capable of estimation," see 2.1.1(5), and the Subcommittee would expect

that this would be applied much as in the insurance industry to estimate insurable risks but exclude as uncovered those risks too diffuse or speculative to be reasonably estimated.

Channeling injunctions, by effectively placing a "cap" on the amount of money available to future assets, are also vital if meaningful reorganization is to occur to a company confronting a mass torts problem. But at the same time placing such a cap on recovery may mean that difficult questions will arise as to whether preference should be given to certain kinds of future claimants over others; and it may also mean that some distant future claimants may not realize any recovery at all (although, because of statutes of limitations, see infra, this may be a small group). As previously noted, the Subcommittee believes these problems (as well as due process problems) can be reduced if the "cap" thus created is subject to periodic reconsideration in light of new information and experience. It should also be noted that channeling injunctions can also be used for other positive purposes, such as mandating arbitration of future claims.

With experience, moreover, the extent of the problems sketched above should be reduced. As the Commission points out, while the future claims estimates made in the Johns-Manville case proved woefully inadequate, the trust established in the subsequent A.H. Robins case turned out to be, if anything, over-funded. Inherent in the bankruptcy approach to mass torts is the recognition that all kinds of creditors, including future tort claimants, will recover less than they would be entitled to in the absence of all other creditors, and the problem of estimation, while difficult, is essentially just a variation on that theme.

4. Statutes of Limitations and Repose*

The Commission's recommendations do not address the issue of whether future claimants should be entitled to seek payment from the estate (or trust created by the plan) when their claims would have been denied under state law because of the expiration of the state's statute of limitations. This Subcommittee, however, is of the view that state statutes of limitation should determine the enforceability and therefore the allowability of claims in bankruptcy.[5] Stated otherwise, if the victim had a cause of action that could have been pursued under state (or if applicable, other federal law), and that cause of action expired before bankruptcy, that victim should be precluded from asserting a claim against a bankruptcy estate. The approach is consistent with the interaction between bankruptcy and non-bankruptcy law in general,[6] and there is no sound reason to alter this principle as it applies to claimants in a mass tort bankruptcy case.

Integrated into the concerns about affording future claimants due process is the issue of whether state statutes of limitations should apply. The main objective of these recommendations is to balance the concerns of procedural due process with finality and with the predictability of estimating the number of claimants and extent of claims.

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Dennis Montali, U.S. Bankruptcy Judge, N.D. Cal.

[5] 11 U.S.C. § 502(b)(1) provides in pertinent part: "[T]he court . . shall determine the amount of such claim. . . as of the date of filing of the petition, and shall allow such claim in such amount, except to the extent that . . .such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law."

[6] In most circumstances, a "claim" arises for bankruptcy purposes when the event or conduct giving rise to liability occurs, though injury is manifested post-petition. In re Jensen, 995 F.2d 925, 928-30 (9th Cir. 1993); Grady v. A.H. Robins, 839 F.2d 198, 201 (4th Cir. 1988), cert. dismissed, 487 U.S. 1260 (1988).

It should be acknowledged that, depending on the type of the cause of action, the state statute of limitations may be difficult to apply. For catastrophic events, the victims will likely be readily aware they have a claim, although the exact extent may be unknown. For personal injuries caused by mass torts, the discovery rule generally applies: the claimant's rights are triggered when he or she knows or should have known that his/her rights existed. The clearest situation involves a present tort claimant with manifested personal injuries that directly relate to the tortious conduct or product. For other types of claims, such as claims based on breach of contract, state law statutes of limitation seem relatively easy to apply. For example, the date payment on a note is due readily triggers the running of time in which the holder may sue.

A more difficult situation is presented when the prospective plaintiff (much like the victim of a classic mass tort who experiences no symptoms) has no way of knowing a claim exists as of the date the prospective defendant files bankruptcy. Take the situation of a developer of real property, or a contractor or architect who works on the project, who negligently performs services that result in latent defects. The California statute of limitations for suits against such a party runs ten years after the conduct took place, regardless of discovery of the injury.[7] Is it a denial of due process for state law to bar a claim before the claimant knows of the claim? Apparently the California legislature favors finality.

On the assumption that such a statute of limitations could survive a constitutional challenge, there does not appear to be a reason to make a different rule in bankruptcy. If the

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[7] California Code of Civil Procedure § 337.15 bars actions based upon a "latent deficiency" after ten years from substantial completion, except in cases of fraudulent concealment or wilful misconduct. "Latent deficiency" is defined in the statute to mean "not apparent by reasonable inspection."

developer files for relief nine years after completing the project, the homeowner who is yet to discover the defect should be allowed to file a claim, assuming that homeowner can discover it in time. The real problem comes along when the homeowner (with or without knowledge of the developer's bankruptcy) has no reason even to suspect that something was done negligently nine years earlier. If the court confirms a plan that says nothing about the class of homeowners who bought latently defective homes but do not know it, it seems as though post-confirmation it would be best to let state statutes of limitations control. If the developer files eleven years after completion, then state law would bar the claim regardless of when it is discovered.

If, instead of a single home, the developer builds 10,000 homes, all with lead-based paint as a primer, -- now the developer faces mass tort litigation and files for bankruptcy under the provisions contemplated by the National Bankruptcy Review Commission. But we see no reason why the same principles regarding choice and application of statutes of limitations should not apply.

Possibly the most difficult application of the state statute of limitations in the mass tort context arises in a case of an insidious tort, such as toxic torts, where injuries may be latent for a period of years. See The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits, 96 Harv. L. Rev. 1684 (May 1983). Where appropriate, notice procedures should be applied so as to reach those claimants to which the "should have known" branch of the discovery rule applies, and to give them an opportunity to participate. While it may still be impossible to achieve total fairness, this would minimize unfairness and accord with minimal due process (see section on due process, supra).

Although applying state law statutes of limitations to claimants against bankruptcy

estates in a mass tort case may be complex and may lead to different results in different states, it is consistent with interpretation of the bankruptcy code generally, and promotes the goal of finality in bankruptcy litigation. By inherently limiting the pool of claimants, it minimizes the "floodgate" problem, and properly discriminates in favor of legitimate claimants.

5. Conflicts of Interest and Inappropriate Incentives*

A forceful and independent future claims representative is critical to the Commission's approach. The question therefore arises as to what safeguards can be created to prevent a mass tort future claims representative from colluding with, or simply being overswayed by, counsel for present claimants and debtors.

It should first be noted that the classic kind of collusion said to arise in certain "prepackaged" bankruptcies is very unlikely to arise in mass tort bankruptcies involving future claim representatives. The term prepackaged bankruptcy applies to plans where the negotiations and solicitation of acceptance occurred before commencement of a chapter 11 case. Sandra E. Mayerson, Current Developments in Prepackaged Bankruptcy Plans, 804 PLI/Comm 979, 981 (2000). Although the term has also been used sometimes to apply to "hybrids where all or part of the plan has been negotiated prepetition and/or certain but not all creditors have been solicited prepetition," id., the essence of a "prepack" is that most or all of the negotiation and solicitation occurs prebankruptcy and therefore is presented to the Court as a fait accompli. A future claims representative, however, would always be appointed after the bankruptcy petition has been filed.

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Jack B. Schmetterer, U.S. Bankruptcy Judge, N.D. Ill.

Because that additional party would be interjected, any prebankruptcy agreements among other parties could be challenged, and the future claim representative would often have a fiduciary duty to do so. By contrast, without that new party the "prepack" collusion would not likely be challenged. Therefore, appointment of a future claims representative would likely reduce rather than enhance collusive or otherwise unfair arrangements in "prepack" cases.

This is not the end of the issue, however. Some articles have expressed concerns regarding possible conflicts of interest or other inappropriate incentives to which a future claims representative might be subject, see, e.g., Frederick Tung, The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry, 3 Chap. L. Rev. 43 (2000); Hon. Edith Jones, Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform, 76 Tex. L. Rev. 1695 (1998). For example, Judge Jones writes in pertinent part:

> In bankruptcy, as in future claims class actions, the claimants are absent, invisible, and passive, creating room for exploitation in several ways. The class representative, delegated extraordinary exclusive power under the proposal to file and compromise class claims, operates without the supervision or control of real clients. Because the claims themselves are not concrete, but rather amorphous and conjectural, the representative's bargaining position is weak. The representation of future claims thus carries with it a tendency toward conflicts of interest. There is no vigorous check on a class representative's accepting a settlement that provides generous fees for the representative but modest relief for the class. A conflict may arise if the representative undertakes to settle claims of both present and future "future" claimants. In short the Commission proposal offers no protection analogous to "[t]he adequacy inquiry under Rule 23 [which] serves to uncover conflicts of interest between named parties and the class they seek to represent."

Jones, 76 Tex. L. Rev. at 1713.

The concerns raised by Prof. Tung and Judge Jones stem from their asserted apprehension that the future claims representative would be an agent without a principal. They contend that

conflicts of interest are inherent in representation of this type. Both authors are skeptical as to whether the future claims representative mechanism would truly provide zealous representation for future claimants when those persons would have no role in choosing or monitoring their agent. Tung, at 67. In addition, the debtor and creditors might initiate the process of whom to appoint, as well as terms of the appointment, of the future claims representative, Tung, at 61 and 67, even though debtors and creditors as moving parties would have interests in likely conflict with those of future claimants. (See Amchem, supra).

But the actual Commission recommendation 2.1.2. urges that any "party in interest" have standing to petition for appointment of the future claims representative. While the U.S. Trustee is not defined by statute or rule as a "party in interest," that officer is allowed under the Code to "raise . . . appear and be heard on any issue . . ." (except filing of a plan). 11 U.S.C. § 307. Therefore, the U.S. Trustee could initiate a motion to appoint the future claims representative and nominate the person to be appointed, and this Subcommittee recommends this approach since the U.S. Trustee has no financial interest at stake and would likely be viewed as a source of objective recommendations. Furthermore, this Subcommittee would favor a further modification of the Commission's recommendations to make explicit that the Bankruptcy Court itself is expected to play an active role in both the selection and the supervision of the future claims representative. Finally, of course, the future claims representative should be required to make the same kind of disclosures regarding possible conflicts of interest as is required for any professional to be employed by a trustee or debtor-in-possession under Rule 2014(a) Fed. R. Bankr. P. See Resnick, supra, 148 U. Pa. L. Rev. at 2078-79.

The other point of concern expressed is that the bargaining power of the future claims representative would be weak because future claimants and their losses are abstract and prospective, while competing present claimants and their losses are concrete and present. Tung, at 75; Jones, at 1713. Moreover, within bankruptcy cases involving mass torts, there is a culture that values consensual reorganization. Lawyers for different interests in large cases may have to "forego strict enforcement of their clients' legal entitlements in order to achieve consensus." Tung, at 73. The future claims representative must operate in this culture, and because future clients are abstract and conceptual, she may be vulnerable to group pressure to compromise interests because the other players have clients to answer to.

On the other hand, as Prof. Tung recognizes, under the Commission's proposals the future claims representative would have an extraordinary amount of independence to resist such pressure. Tung, at 75. Moreover, as described above, the Subcommittee would favor increasing the powers of the future claims representatives even beyond the Commission's recommendations.

As mentioned in section 1.B, supra, the future claims representative is in some respects called upon to play a role akin to the classic role of a guardian appointed to protect minors or future interests. While the use of such a representative is not without possible problems, see Hon. Sheila Murphy, Guardian Ad Litem: The Guardian Angels of our Children in Domestic Violence Court, 30 Loy. U. Ch. L.J. 281 (1999); David M. Johnson, The Role of the Guardian Ad Litem; Changes in the Wind, 27 Colo. Law 73 (1998), state courts using such appointments have recognized that the alternative of leaving the future interests and minors unprotected by a representative could result in little or no protection of their interests, see id. Critics of the

Commission's future claims representative proposal have not shown why difficulties in use of such representatives in bankruptcy would justify doing nothing to appoint a champion for future claims merely because that champion might not be perfect.

Giving the future claims representative economic motivation has also been suggested as one way to create a further safeguard of independence. Giving that party a financial stake in recovery by future claimants might provide the greatest incentive to maximize recovery, as by compensation giving a percentage of the amount held back for future claimants. Tung, at 78. One concern expressed in creating a compensation arrangement of this sort, however, is that the future claims representative might "unreasonably" scuttle a deal in hopes of obtaining more for the future claimants and thereby increasing the representative's personal compensation. On balance, the Subcommittee is unpersuaded that the economic incentive approach is either necessary or helpful.

In sum, while appointment of a future claims representative is not a perfect solution, in the absence of such a representative the other parties are free to collude with each other without adequately considering future claims of unrepresented parties, leaving only the judge and U.S. Trustee to question projection of future needs, without benefit of an adversarial presentation by someone charged with concern for the future. The recommendation to add a future claims representative provides a check on collusive or self-interested behavior by others, an imperfect check, but a check nonetheless.

Conclusion

This report is not intended to be a comprehensive discussion of every issue raised by the

Commission's proposals but rather a selective discussion of some of the more prominent issues. Overall, however, the Subcommittee believes that, while the Recommendations of the National Bankruptcy Review Commission do not solve all the problems inherent in dealing with the thorny thicket of future claims, they are an important step in the right direction.

Respectfully submitted,

Subcommittee on Mass Torts

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Hon. Marcia S. Krieger
Hon. Larry J. McKinney
Hon. Dennis Montali
Hon. Marjorie O. Rendell
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Appendix

1997 Recommendations of the National Bankruptcy Review Commission for Amendments to the Bankruptcy Code Regarding Mass Torts

2.1.1 Definition of Mass Future Claim

A definition of "mass future claim" should be added as a subset of the definition of "claim" in 11 U.S.C. § 101(5). "Mass future claim" should be defined as a claim arising out of a right to payment, or equitable relief that gives rise to a right to payment that has or has not accrued under nonbankruptcy law that is created by one more acts or omissions of the debtor if:

1) the act(s) or omission(s) occurred before or at the time of the order for relief;
2) the act(s) or omission(s) may be sufficient to establish liability when injuries ultimately are manifested;
3) at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds;
4) the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and
5) the amount of such liability is reasonably capable of estimation.

The definition of "claim" in section 101(5) should be amended to add a definition of "holder of a mass future claim;" which would be an entity that holds a mass future claim.

2.1.2 Protecting the Interests of Holders of Mass Future Claims

The Bankruptcy Code should provide that a party in interest may petition the court for the appointment of a mass future claims representative. When a plan includes a class or classes of mass future claims, the Bankruptcy Code should authorize a court to order the appointment of a representative for each class of holders of mass future claims. A mass future claims representative shall serve until further order of the bankruptcy court.

The Bankruptcy Code should provide that a mass future claims representative shall have the exclusive power to file a claim or claims on behalf of the class of mass future claims (and to determine whether or not to file a claim), to cast votes on behalf of the holders of mass future claims and to exercise all of the powers of a committee appointed pursuant to section 1102. However, a holder of a mass future claim may elect to represent his, her, or its own interests and may opt out of being represented by the mass future claims representative.

The Bankruptcy Code should provide that prior to confirmation of a plan of reorganization, the fees and expenses of a mass future claims representative and his or her agents shall be administrative expenses under section 503. Following the confirmation of a plan of reorganization, and for so long as holders of mass future claims may exist, any continuing fees and expenses of a mass future claims representative and his or her agents shall be an expense of the fund established for the compensation of mass future claims.

The Bankruptcy Code should provide that a mass future claims representative shall serve until further orders of the bankruptcy court declare otherwise, shall serve as a fiduciary for the holders of future claims in such representative's class, and shall be subject to suit only in the district where the representative was appointed.

2.1.3 Determination of Mass Future Claims

Section 502 should provide that the court may estimate mass future claims and also may determine the amount of mass future claims prior to confirmation of a plan for purposes of distribution as well as allowance and voting. In addition, 28 U.S.C. § 157(b)(2)(B) should specify that core proceedings include the estimation or determination of the amount of mass future claims.

2.1.4 Channeling Injunctions

Section 524 should authorize courts to issue channeling injunctions.

2.1.5 Plan Confirmation and Discharge; Successor Liability

Sections 363 and 1123 should provide that the trustee may dispose of property free and clear of mass future claims when the, trustee or plan proponent has satisfied the requirements for treating mass future claims. Upon approving the sale, the court could issue, and later enforce, an injunction to preclude holders from suing a successor/good faith purchaser.

Civil Rules Advisory Committee

Agenda Report: January 22-23 2002

The January meeting is to be held in conjunction with the January 22 hearings on the proposals to amend Civil Rules 23, 51, and 53 that were published in August 2001.

A major purpose of the January Committee meeting will be to reflect on early comments on the August proposals. The proposals were explored at the October meeting, which focused entirely on a two-day conference discussing the Rule 23 proposals at the University of Chicago Law School. Some written comments have been received, thirteen witnesses testified at the November 30 hearing in San Francisco, and further testimony is expected at the January hearing. The Chicago conference and parts of the testimony have focused on draft Rule 23 proposals to address the problems that arise when overlapping and competing class actions are filed in both state and federal courts. Those proposals were circulated for informal comment, and are not part of the published proposals. A second purpose of the January Committee meeting will be to consider what — if anything — the Committee might do to pursue the problems of overlapping class actions either by proposing rules amendments or by supporting legislative initiatives.

The draft Minutes for the April and October 2001 Committee meetings are attached.

If time allows, the January meeting also may address some of the matters that have accumulated on the agenda. The months since April have been quiet. Only a few new suggestions have been added to the agenda. The pages that follow offer descriptions of these suggestions, and add also a long-postponed summary-judgment topic.

Notice of Constitutional Challenge to Statute

Appellate Rule 44, including a new subdivision (b) transmitted to the Supreme Court by the Judicial Conference in September 2001, provides:

> **(a) Constitutional Challenge to Federal Statute.** If a party questions the constitutionality of an Act of Congress in a proceeding to which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.
>
> **(b) Constitutional Challenge to State Statute.** If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

This rule reflects requirements established by 28 U.S.C. § 2403, albeit in somewhat different terms. The point of notifying the United States or the State is that the statute establishes a right to intervene.

Judge Barbara B. Crabb, commenting on the amendment, added the suggestion that a similar rule should be added to the Civil Rules "to assist district courts in remembering to make the requir[ed] notification." The comment apparently reflects the view that present Rule 24(c) does not provide an appropriate reminder, perhaps because of its relatively obscure location in the rule on intervention.

Civil Rule 24(c), describing the procedure for intervention, includes these three sentences, the final two of which were added in 1991:

> **(c) Procedure.** * * * When the constitutionality of an Act of Congress affecting the public interest is drawn in question in any action in which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C., § 2403. When the constitutionality of any statute of a State affecting the public interest is drawn in question in any action in which that State or any agency, office, or employee thereof is not a party, the court shall notify the attorney general of the State as provided in Title 28, U.S.C. § 2403. A party challenging the constitutionality of legislation should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted.

It seems likely that these provisions were attached to Rule 24 because the purpose of notice is to support the right to intervene. This location, however, is not calculated to catch the attention of any but the most devoted students of procedure. There is a plausible argument that these provisions should be relocated. They might be added to Civil Rule 5, which includes service requirements, or they might be established as a new Rule 5.1.

The differences between Appellate Rule 44 and Civil Rule 24(c) highlight the issues that might be addressed if revision is undertaken. Rule 44 imposes a more explicit duty on the party who raises the constitutional question. It transfers the notice requirement from "court" to "clerk." It adds an element found neither in § 2403 nor in Rule 24(c) — the duty of notice is not excused if the parties include an officer or employee who is not sued in an official capacity. It refers broadly to a "proceeding" rather than the "action" referred to in statute and Rule 24(c). It does not reflect the words that limit the statute to a challenge to an Act of Congress or state statute "affecting the public interest."

The departures of Appellate Rule 44 from § 2403 raise the interesting question whether Rule 44 is intended to supersede the statute to the extent of the departures. Does it require the clerk to give notice without inquiring whether the challenged statute affects the public interest? Does it — as seems apparent — supersede the seeming statutory rule that notice is not required when an officer or employee is sued in an individual capacity? Would a Civil Rule modeled on Appellate Rule 44 have the same effects?

Because Rule 24(c) does most of the work, there is no urgent need to add this project to the agenda. It may be time enough to face the question as part of the Style project, although the Style project may be far off and some of the issues go beyond style.

If an attempt is to be made now, account should be taken of the differences between district-court and appellate-court proceedings. The most specific difference is that Civil Rule 4(i)(2)(B) requires service on the United States when an officer or employee is sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States. The United States will have notice of the action, although it may not have notice of the constitutional challenge if it does not assume the burden of defense. Remember that the statute requires notice only if "the United States or any agency, officer or employee thereof is not a party." A rule goes beyond the statute if it requires notice to the court — and notice by the court to the Attorney General — when an officer of the United States is sued in an individual capacity, whether or not the claim is related to official duties. There is room to dispense with the notice requirement if we wish.

One version might look like this, rearranging the provisions of Appellate Rule 44 to bring the party's notice obligation closer to the beginning of the first sentence in each subdivision:

Rule 5.1 Notice of Constitutional Question

(a) Constitutional Challenge to Federal Statute. A party who questions the constitutionality of an Act of Congress must give written notice to the clerk when the question is first raised if

no party is the United States, an agency of the United States, an officer or employee of the United States suing or being sued in an official capacity, or an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States. The clerk must then certify that fact to the Attorney General.

(b) Constitutional Challenge to State Statute. A party who questions the constitutionality of a statute of a State must give written notice to the clerk when the question is first raised if no party is that State, an agency of that State, or an officer or employee of that State suing or being sued in an official capacity. The clerk must then certify that fact to the attorney general of that State.

(c) No forfeiture. Failure of a party or the clerk to give the notice or certification required by Rule 5.1(a) or (b) does not forfeit any constitutional right otherwise timely asserted.

Committee Note

Rule 5.1 replaces the final three sentences of Rule 24(c). Although the purpose of notice is to support the statutory right of intervention established by 28 U.S.C. § 2403, location of this requirement in the vicinity of the rules that require notice by service and pleading seems more likely to attract the attention of the party charged with giving notice.

The provisions that formerly were placed in Rule 24(c) are amended to establish a close parallel with the provisions of Appellate Rule 44. The party who raises a constitutional challenge to a state or federal statute is directed to give written notice to the clerk when the question is first raised. Prompt notice is important to provide an opportunity for timely intervention and participation. The former requirement that limited the duty to give notice to cases involving statutes "affecting the public interest" reflected the terms of § 2403. Rule 5.1 goes beyond that limit because it is better to allow the Attorney General to determine whether the statute affects a public interest. The notice obligation also is expanded to include cases in which the only "official" party is a state officer or employee suing or being sued in an individual capacity, or a federal officer or employee suing in an individual capacity or being sued in an individual capacity for acts or omissions that did not occur in connection with the performance of duties on behalf of the United States. Such cases are not literally covered by § 2403, but there is a risk that an individual-capacity party will not think to give notice to the Attorney General or to appropriate state officials.

The no-forfeiture provision of subdivision (c) is carried forward from former Rule 24(c).

Page Limits — Briefs

Jacques Pierre Ward submitted 01-CV-A, a proposal that the Civil Rules adopt explicit provisions governing the length of briefs. His problems apparently do not arise from district court practice, but instead are caused by the refusal of prison officials to copy his 30-page briefs. The officials limit copies to ten or eleven pages. Adding insult to injury, they refuse to recognize his arguments by analogy to Appellate Rule 32(a)(7).

The difficulties that would be encountered in adopting length limits in the Civil Rules seem nearly insurmountable. The range of circumstances that call for written argument in a district court is far more variable than the circumstances likely to attend an appellate brief. A single page limit for briefs supporting or opposing "a motion," for example, would be difficult to adjust for the wide variety of motions that occur in trial courts. For that matter, it would be necessary to distinguish between a motion and a brief, a task that might lead to uncertainties of the sort that surround the "separate document" requirement of Rule 58.

There has not been any demand for page-limit rules from district judges, magistrate judges, or lawyers who regularly practice before them. Mr. Ward's difficulties are caused by prison officials, not courts. It is recommended that no rule be adopted.

"Indicative Rulings"

On March 14, 2000, Solicitor General Seth P. Waxman proposed to Judge Garwood, as chair of the Appellate Rules Advisory Committee, an amendment to the Appellate Rules. The amendment would address a common procedure that at times is characterized as an "indicative ruling." The problem arises when a notice of appeal has transferred jurisdiction of a case to the court of appeals. A party may seek to raise a question that is properly addressed to the district court — a common example is a motion to vacate the judgment under Civil Rule 60(b). As a rough statement, the most workable present approach is that the district court has jurisdiction to deny the motion but lacks jurisdiction to grant the motion. If persuaded that relief is appropriate, the district court can indicate that it is inclined to grant relief if the court of appeals should remand the action for that purpose. The court of appeals can then decide whether to return the case to the district court. This procedure, however, is not securely entrenched; different approaches are taken. See 11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2873. Additional detail is provided in Solicitor General Waxman's letter.

The proposal to adopt a court rule was made for several reasons. First, differences remain among the circuits. A uniform national procedure seems desirable. Second, experience shows "that the existence of the indicative ruling procedure is generally known only by court personnel and attorneys with special expertise in the courts of appeals." Third, the Supreme Court's ruling that a court of appeals need not vacate a district court judgment when an appeal is mooted by settlement creates a new need for advice from the district court. The parties to an appeal may be able to settle only if they can persuade the district court to vacate the judgment; providing a procedure for an indication by the district court will lead to settlement of more "cases on the docket of the appellate courts."

The proposal was limited to civil actions because "post-judgment motion practice in criminal cases does not pose a problem and is not used nearly as often as in civil matters."

The Appellate Rules Committee considered this proposal in April 2000 and April 2001. Judge Garwood reported that although committee members "seemed to have a variety of views on the merits of the proposal and on the drafting of the proposed rule," "the committee concluded unanimously" that any rule should be included in the Civil Rules, not the Appellate Rules. Reliance on the Civil Rules makes sense because the court of appeals plays only a minor role in the process. The first line of action is in the district court. The court of appeals becomes involved only if the district court indicates a desire to grant relief, and then "a routine motion to remand is made in the appellate court."

If a civil rule is to be adopted, it should be tailored to the transfer of jurisdiction effected by an appeal. There is no apparent reason to limit existing district-court freedoms to act pending appeal. An interlocutory injunction appeal, for example, does not oust district-court jurisdiction to carry on many proceedings, including entry of judgment on the merits. Section 1292(b) and Civil Rule 23(f) expressly address stays of district-court proceedings. Collateral-order appeals present special questions: immunity appeals, for example, are designed to protect against the burdens of trial

and even pretrial proceedings, while a security appeal may have quite different consequences. It does not seem desirable, however, to limit any new rule to appeals from "final" judgments.

The following draft is simply a sketch to illustrate the form a rule might take. It is described as Rule 62.1, bringing it within Civil Rules Part VII (Judgments). An alternative might be to resurrect the appeals numbers beginning with Rule 74.

RULE 62.1 INDICATIVE RULINGS

(a) A district court may entertain an otherwise timely motion to alter, amend, or vacate a judgment that is pending on appeal [and that cannot be altered, amended, or vacated without permission of the appellate court] and

(1) deny the motion, or

(2) indicate that it would grant the motion if the appellate court should remand for that purpose.

(b) A party who makes a motion under Rule 62.1(a) must notify the clerk of the appellate court when the motion is filed and when the district court rules on the motion.

(c) If the district court indicates that it would grant a motion under Rule 62.1(a)(2), a party may move the appellate court to remand the action to the district court. The appellate court has discretion whether to remand.

(d) This Rule 62.1 does not apply to relief sought under Federal Rule of Appellate Procedure 8, nor to proceedings under Title 28, U.S.C., §§ 2241, 2254, and 2255.

Committee Note

[The Committee Note should make clear that subdivision (a) does not address a judgment that the district court can change or supersede without appellate permission.

[Subdivision (c) calls for remand of the action. It might be better to retain jurisdiction of the appeal, with a limited remand for the purpose of ruling on the motion in the district court. Much would depend on the nature of the relief indicated by the district court. If there is to be a new trial, outright remand makes sense. If the judgment is to be amended and re-entered, retained jurisdiction may make better sense.]

Rule 15(c)(3)(B)

The agenda carries forward a "mailbox" suggestion that Rule 15(c)(3)(B) be amended to overrule several appellate decisions. This proposal has been urged again by the Third Circuit opinion in Singletary v. Pennsylvania Department of Corrections, C.A.3d, 2001, 266 F.3d 186, 200-203 & n. 5.

The nature of the problem is illustrated by the Singletary case. The plaintiff's decedent committed suicide in prison. On the last day of the applicable 2-year limitations period, the plaintiff sued named defendants and "unknown corrections officers." The claim was deliberate indifference to the prisoner's medical needs. Eventually the plaintiff sought to amend to name a prison staff psychologist as a defendant. The court concluded that relation back was not permitted because it was clear that the new defendant had not had notice of the action within the period prescribed by Rule 15(c)(3)(A). It took the occasion, however, to address the question whether there is a "mistake" concerning the proper party when the plaintiff knows that the identity of a proper party is unknown. The court counts seven other courts of appeals as ruling that there is no mistake, and relation back is not permitted even though all other requirements of Rule 15(c)(3) are met, when the plaintiff knows that she cannot name a person she wishes to sue. For this case, the psychologist could not be named as an added defendant. The court also concludes that its own earlier decision had taken a contrary view; if the other requirements of Rule 15(c)(3) are satisfied, the psychologist could be named.

The Third Circuit concludes its opinion by recommending that the Advisory Committee modify Rule 15(c)(3) to permit relation back in these circumstances. The specific recommendation, taken directly from the Advisory Committee agenda materials, would allow relation back when the new defendant "knew or should have known that, but for a mistake or lack of information concerning the identity of the proper party, the action would have been brought against" the new defendant.

The 1999 memorandum invoked by the Third Circuit is rather lengthy. The present question is only whether this agenda item should be restored to the discussion calendar. The memorandum can be added if further discussion is requested.

Admiralty Rules

A number of Admiralty Rules projects are under way. The most substantial project stems from the belief of the Department of Justice that the forfeiture provisions should be separated from the provisions that apply to traditional admiralty and maritime proceedings. The present forfeiture provisions would become a separate Rule G within the Supplemental Rules. A draft Rule G was discussed by Mark Kasanin and the Reporter with representatives of the Department of Justice and the Maritime Law Association after the November 30 hearing. A revised draft will be discussed after the January hearing by the same group, aided by a newly reinvigorated Admiralty Rules Subcommittee. There appear to be good reasons to pursue this project. The time for consideration by the Advisory Committee may be affected by the weight of other topics that must be considered at the May meeting.

Rule 45(c)(2)(B)

This item is not yet on the agenda; the question is whether it should be.

Linder v. Calero-Portocarrero, D.C.Cir.2001, 251 F.3d 178, affirmed an order enforcing a third-party subpoena for records of the Department of Defense and the CIA, approving a condition that the plaintiff pay half the $200,000 labor and copying costs of complying with the subpoena.

The cost-sharing provision was imposed under Rule 45(c)(2)(B). The rule provides that a person commanded by a subpoena to produce and permit inspection and copying of documents may serve a written objection. The party serving the subpoena may then move for an order to compel production. "Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded."

The court raised the question whether the government is a "person" within the meaning of this rule, but did not answer it because the question was not raised in the district court. The problem is that under the "dictionary act," 1 U.S.C. § 1, the government is not a "person."

This is a fine illustration of a number of problems. There is no reason to suppose that the dictionary act should apply to the rules of procedure, but the temptation is there. It has seemed dangerous to adopt a Rule that defines the words used in the rules, even as part of a general style revision. And of course there is the specific question, whether the government should have the protection of this provision.

It is tempting to respond when a court identifies a perceived ambiguity in a rule. But there are many ambiguities and disagreements among courts in applying the Civil Rules. It may be better to allow this question, as so many others, to mature in the process of ongoing construction and application.

Rule 56(c)

More than ten years ago, the Judicial Conference rejected a proposal that would have redrafted Rule 56 in conjunction with parallel amendments to Rule 50. The purpose of the proposal was in part to emphasize the integration of summary judgment procedure with the standards for judgment as a matter of law, and in part to capture in the text of the rule the tests announced in three 1986 Supreme Court decisions. Other changes significantly clarified the procedural incidents of summary judgment, often reflecting practices adopted by local district rules.

In 1995, a narrow question of summary-judgment procedure prompted further consideration of subdivision (c) of the rejected draft. The question has languished on the agenda ever since. The notes set out below are taken from the 1995 agenda version without change. The question for the moment is not whether to approve the revised Rule 56(c) draft but whether the topic should be restored to the agenda for active discussion at the spring or autumn meeting.

Rule 56(c)

The first two sentences of Rule 56(c) establish the following procedure for summary judgment motions: "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits." Rule 5(b) provides that service by mail is complete upon mailing. Read together, the two rules seem to permit a party opposing a motion for summary judgment to wait until the day before the hearing to mail affidavits to the moving party, confidently expecting that the moving party will not receive the affidavits before the hearing.

One response to this bizarre possibility has been local rules governing the time for making summary judgment motions and responding to them. Local rules in the Central District of California, for example, have required that the motion be filed 21 days before the hearing, or 24 days if service is by mail. The opposition must be filed 14 days before the hearing, and a reply must be filed 7 days before the hearing. This schedule makes it possible for the court and all counsel to be prepared for the hearing, and also may make it possible to determine that a hearing is not required. But the schedule seems inconsistent with the Rule 56(c) provisions that the motion be served at least 10 days before the hearing, and that opposing affidavits may be served up to the day before the hearing. In Marshall v. Gates, C.D.Cal.1993, 812 F.Supp. 1050, reversed 9th Cir.1995, 44 F.3d 722, the district court refused to consider opposing papers filed after the local deadline, noting that service had been by mail and that moving counsel had not seen the opposing papers at the time of the hearing. The papers included both affidavits and many other forms of submission. In its first opinion, the Ninth Circuit reversed on the ground that as applied to affidavits the local rule was invalid because of conflict with Rules 5(b) and 56(c). After another Ninth Circuit judge pointed out that every district in the Circuit has rules similar to the Central District Rules, the court withdrew its opinion. The new opinion finds the local rule valid on the ground that Rule 56(c)

> does not unconditionally require a district court to accept affidavits up to the date set for hearing on the motion * * *. Rather, the rule allows district courts to adopt

procedures pursuant to which the nonmoving party may oppose a motion prior to a hearing date. Local Rule 7.6 in no way eliminates this opportunity; instead it places a condition on that right.

The initial Ninth Circuit opinion was called to the attention of the Advisory Committee by several judges. Among others, Judges Keep, Levi, Schwarzer, and Stotler have suggested that the Committee should consider correcting amendments to Rule 56. Even after the Ninth Circuit managed to uphold the local rule, the problem remains. Clarification of Rule 56(c) may be in order.

One model falls ready to hand. The package that amended Rule 50 originally included a complete revision of Rule 56 that integrated it with Rule 50. Although the Judicial Conference rejected the Rule 56 revision, attention apparently focused on the perception that the revision simply restated present practice — depending on the eyes of the beholders, this character made it either unnecessary or an unnecessary confirmation of undesirable practice. There is no reason to suppose that anything particular was found amiss in the provisions of proposed Rule 56(c), which would not only create a realistic set of time limits but also impose other requirements of specificity that should help ensure good practice.

The Rule 56(c) proposal, as drafted, looked like this:

(c) Motion and Proceedings Thereon. A party may move for summary adjudication at any time after the other parties to be affected thereby have made an appearance in the case and have been afforded a reasonable opportunity to discover relevant evidence pertinent thereto that is not in their possession or under their control. Within 30 days after the motion is served, any other party may serve and file a response thereto.

(1) Without argument, the motion shall (A) describe the claims, defenses, or issues as to which summary adjudication is warranted, specifying the judgment or determination sought; and (B) recite in separately numbered paragraphs the specific facts asserted to be not genuinely in dispute and on the basis of which the judgment or determination should be granted, citing the particular pages or paragraphs of stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting those assertions.

(2) Without argument, a response shall (A) state the extent, if any, to which the party agrees that summary adjudication is warranted, specifying with respect thereto the judgment or determination that should be entered; (B) indicate the extent to which the asserted facts recited in the motion are claimed to be false or in genuine dispute, citing the particular pages or paragraphs of any stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other materials supporting that contention; and (C) recite in separately numbered paragraphs any additional facts that preclude summary adjudication, citing the materials evidencing such facts. To the extent a party does not timely comply with clause (B) in challenging an asserted fact, it may be deemed to have admitted such fact.

(3) If a motion for summary adjudication or response thereto is based to any extent on depositions, interrogatory answers, documents, affidavits, or other materials that have not been previously filed, the party shall append to its motion or response the pertinent portions of such materials. Only with leave of court may a party moving for summary adjudication supplement its supporting materials.

(4) Arguments supporting a party's contentions as to the controlling law or the evidence respecting asserted facts shall be submitted by a separate memorandum at the time the party files its motion for summary adjudication or response thereto or at such other times as the court may permit or direct.

Apart from the reference to "summary adjudication," taken from the other portions of the rule, these provisions could be cast in current style conventions and provide a strong framework for regulating summary judgment practice. Some questions, however, may deserve further consideration. This proposal does not include any explicit relation between the time for response and hearing; perhaps it can be assumed that the moving party will set a hearing date beyond the 30-day period permitted for responding. The initial timing provision, allowing a motion to be made only after a reasonable opportunity for discovery, may invite unnecessary squabbling; Rule 56(f) may be sufficient protection. A simplified version of Rule 56(c) might look something like this:

(c) **Motion and Proceedings.** A party may move at any time for summary adjudication against a party that has appeared. A party opposing the motion may serve and file a response within 30 days after the motion is served.

(1) Without argument, the motion must:

(A) describe the claims, defenses, or issues as to which summary adjudication is warranted;

(B) specify the adjudication sought;

(C) recite in separately numbered paragraphs the specific facts asserted to be not genuinely in dispute, citing the particular pages or paragraphs of [stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other] materials supporting the assertions.

(2) Without argument, a response must:

(A) specify any summary adjudication that the party agrees is warranted;

(B) (i) respond to the facts asserted under paragraph (1)(C), and (ii) recite in separately numbered paragraphs any additional facts precluding summary adjudication, citing the particular pages or paragraphs of [stipulations, admissions, interrogatory answers, depositions, documents, affidavits, or other] materials supporting the response;

(3) The court may accept the truth of a fact asserted as required by paragraph (1)(C) if a response is not made as required by paragraph (2)(B).

(4) A party must append to a motion or response [the pertinent parts of] any materials cited that have not been filed.

(5) The court may permit a party to supplement the materials supporting a motion or response.

(6) A party must submit its contentions as to the controlling law or the evidence respecting asserted facts in a separate memorandum filed with the motion or response or at the time the court directs.

This form does not set a time for hearing, nor a time that relates the time of the response to the time for hearing. Since 30 days are allowed for response, there is an indirect constraint — the moving party must allow at least 30 days for the hearing, and should allow more if it wishes an opportunity to consider the response before the hearing. It is possible that so many lawyers will find ways to behave foolishly that additional constraints should be provided. A local rule requiring that the motion be made at least x days before the hearing date would not be inconsistent with this rule. Local rules may make more sense than an attempt at greater detail in the national rule.

This draft substantially eliminates the function served by present subdivisions (a) and (b), which provide separately for motions by a party seeking to recover upon a claim and a party against whom a claim is asserted. Rule 56(a) also sets a time limit — a party seeking to recover may move "at any time after the expiration of 20 days from the commencement of the action, or after service of a motion for summary judgment by the adverse party." Compared to the time-for-service provisions in Rule 4(m), this provision seems odd. It might make sense to adopt a demand-for-judgment procedure that allows what is in effect an invitation to submit to summary judgment, and to permit the demand to be served with the complaint. That, however, is a separate question.
April, 1995 Minutes, Rule 56(c). Rule 56(c), on its face, establishes implausible time periods for notice of a summary judgment and response to the motion. Many courts have adopted local rules establishing more sensible periods, and also providing procedures that require specification of the facts claimed to be established beyond genuine issue and identification of supporting materials. It may be time to adopt uniform national standards. The Committee concluded that this topic should be set for further discussion on the agenda for the fall meeting.