COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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To: Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure

From: David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure

Date: May 14, 2001

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met on March 12, 2001, and April 23 and 24, 2001, at the Administrative Office of the United States Courts in Washington, D.C. It voted to recommend adoption of a new rule and rules amendments that were published for comment in August 2000 and January 2001, with modifications in response to the public comments. Part I of this report details these recommendations in four parts. The first relates to new Civil Rule 7.1, governing corporate disclosure; this proposal parallels published proposals to amend Appellate Rule 26.1 and to adopt a new Criminal Rule 12.4, and may be affected by the proposal to publish a Bankruptcy Rule that would depart from these other proposals in significant ways. The second relates to amendments of Civil Rule 58 aimed at the "separate document" requirement, including a conforming amendment of Civil Rule 54; these proposals are integrated with proposals to amend Appellate Rule 4(a)(7), and indeed began with the Appellate Rules Committee. The third relates to Civil Rule 81, which would be amended to integrate better with the separate rules governing § 2254 and § 2255 proceedings; it began in conjunction with review of those rules, but can be separated from them as the Criminal Rules Committee continues its work on them. The fourth and final part is a set of technical amendments to conform forfeiture provisions of the Supplemental Admiralty Rules to legislative changes that occurred too late to be recognized in the Admiralty Rules amendments that took effect on December 1, 2000.

Part II describes Advisory Committee recommendations to publish for comment three sets of rules amendments. Each involves a project that has been long on the Advisory Committee

agenda. The first set, which would amend Civil Rule 23, grows out of ten years of Advisory Committee work, important empirical studies, and the Report of the Ad Hoc Mass Torts Working Group. The central focus is on improving review of class-action settlements, addressing some of the most pressing problems that arise from competing and overlapping class actions, and providing for the first time in Rule 23 for appointment of class counsel and approval of fee awards. Additional changes address notice and also the times for acting to determine whether to certify a class and to consider revision of a certification decision.

The second proposed amendment would rewrite Civil Rule 51 to express clearly the many jury-instruction rules that have grown out of its moderately opaque text. New provisions are added to address such matters as the time for requesting instructions and the court's obligation to inform the parties of all proposed instructions.

The third proposed amendment would rewrite Civil Rule 53 to reflect the vast changes that have overtaken the use of special masters. This work was assisted by a study undertaken by the Federal Judicial Center. The amendment is not intended either to encourage or to discourage the pretrial and post-judgment uses of special masters that have grown up since Rule 53 was framed to address the use of trial masters. It is intended to give guidelines for these new practices. Special attention is devoted to the relationship between the appointment of special masters and a judicial institution — magistrate judges — that did not exist when Rule 53 was written. In addition, the draft reduces the many cumbersome details that have been written into present Rule 53.

Finally, Part III provides a brief summary of ongoing Advisory Committee work.

Attachments: Enabling Act Memorandum
Notes on § 2283

I Action Items: Rules Published For Comment

A. RULES PUBLISHED FOR COMMENT IN AUGUST 2000

Three sets of rules proposals were published for comment in August 2000. The hearing scheduled for January 29, 2001 was cancelled because no one wished to testify. Summaries of the written comments are provided with the discussion of each proposal. Almost all of the comments were devoted to issues that were discussed thoroughly before the proposals were published. Although the debates are familiar, the views of experienced practitioners and widely representative bar groups lend added support to some of the competing positions.

Discussion of each of these proposals is complicated by the fact that none of them is the sole responsibility of the Civil Rules Advisory Committee among the advisory committees. Indeed, it is fair to say that none of them originated with the Civil Rules Committee. It was possible to coordinate discussion in the Civil Rules Committee with actions taken at the earlier meetings of the Appellate Rules and Bankruptcy Rules Advisory Committees. As to the Criminal Rules Committee, consultation between the reporters was all that was possible.

Each proposal is presented in the form recommended for adoption. Changes from the published versions are described after the summary of comments for each rule.

New Rule 7.1

Rule 7.1. Disclosure Statement

(a) Who Must File: Nongovernmental Corporate Party. A nongovernmental corporate party to an action or proceeding in a district court must file two copies of a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

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

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

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

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

Committee Note

Rule 7.1 is drawn from Rule 26.1 of the Federal Rules of Appellate Procedure, with changes to adapt to the circumstances of district courts that dictate different provisions for the time of filing, number of copies, and the like. The information required by Rule 7.1(a) reflects the "financial interest" standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges. This information will support properly informed disqualification decisions in situations that call for automatic disqualification under Canon 3C(1)(c). It does not cover all of the circumstances that may call for disqualification under the financial interest standard, and does not deal at all with other circumstances that may call for disqualification.

Although the disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts.

Rule 7.1 does not prohibit local rules that require disclosures in addition to those required by Rule 7.1. Developing experience with local disclosure practices and advances in electronic technology may provide a foundation for adopting more detailed disclosure requirements by future amendments of Rule 7.1.

Recommendation

The comments summarized below raise two fundamental questions, each of which was discussed extensively by several committees before Rule 7.1, Appellate Rule 26.1, and Criminal Rule 12.4 were published for comment. As extensive as it was, the prior discussion achieved compromise positions rather than clearly dispositive conclusions. As published for comment, Rule 7.1(a)(1)(B) required nongovernmental corporate parties to "disclose any additional information that may be required by the Judicial Conference of the United States." Rule 7.1(a)(2) imposed the same requirement on any other party. This provision was challenged as a delegation of rulemaking authority to the Judicial Conference, in defiance of full Enabling Act procedures. And there is a difficult question whether and when Rule 7.1 might preempt local district rules that impose additional disclosure requirements. The Committee Note stated that Rule 7.1 does not prohibit local disclosure rules "unless the Judicial Conference adopts a form that preempts additional disclosures." This observation prompted additional challenges asserting that the Judicial Conference lacks authority to preempt local rules. Discussion of these issues persuaded the Advisory Committee that it is better to retract the Judicial Conference provisions. These provisions were designed to serve an important purpose, and to achieve a wise integration of the Enabling Act with the special competence of the Judicial Conference and its Committee on Codes of Conduct. But the prospect that the Judicial Conference will act in the mid-term future to adopt new disclosure requirements is too slender to justify further testing of the Enabling Act questions.

The recommendation, then, is to delete the provisions for requirements to be adopted by the Judicial Conference and to recommend that the Judicial Conference adopt the remainder of Rule 7.1 as published.

Delegation to Judicial Conference

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

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

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

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

Deference to the Codes of Conduct Committee did not account for the full sweep of Rule 7.1 and the parallel proposals. The Codes of Conduct Committee urged adoption of Appellate Rule 26.1 in all the sets of rules with only minor changes. The history of Appellate Rule 26.1, however, led to consideration of the need for additional disclosure requirements. Before Rule 26.1 was adopted, a draft that required extensive disclosures was circulated among circuit judges for comment. The reactions were so diverse and hostile that the advisory committee withdrew to a much narrower version. Recognizing the limited nature of the disclosures required, the advisory committee observed that the circuits might wish to adopt circuit rules calling for additional disclosures. Rule 26.1 has been further narrowed since its adoption by deleting the former requirement for disclosures relating to corporate subsidiaries. Most of the circuits have adopted local rules; some of the local rules call for far more information than Rule 26.1 requires. Predictably, wide variations have emerged among the local circuit rules.

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

Against this background, the "local rule problem" provoked the usual reactions. Proliferation of local rules is not favored by many of those engaged in the national rules process. At the same time, it was recognized that proposed Rule 7.1, modeled on current Appellate Rule 26.1, requires less disclosures than many local variations. The outcome of the debates was captured in the final sentence of the Committee Note: "Rule 7.1 does not prohibit local rules that require disclosures in addition to those required by Rule 7.1 unless the Judicial Conference adopts requirements that preempt additional disclosures." This sentence reflects an understanding that real benefits may

emerge from experience with local rules that supplement Rule 7.1, not only in directly avoiding tardy discovery of disqualification problems but also in paving the way for more detailed national disclosure requirements that really work. At the same time it reflects the hope that one day it may be possible to adopt uniform national requirements. Uniform requirements not only make life easier for the lawyers who practice in multiple districts, but also make life much easier for institutional litigants who engage in litigation in many different districts.

This history provides, paradoxically, the strongest argument for putting aside the concern that the proposed rules effect an improper delegation of Enabling Act authority. The argument is that disclosure requirements could be adopted by the Judicial Conference, on advice of the Committee on Codes of Conduct, without any exercise of Enabling Act authority. The question is not one of the procedural rules that govern litigation but one of court administration. There is a sufficient touch of "practice and procedure" to support formal rules, and some advantage in providing notice to the bar through the formal rules. But reliance on the Judicial Conference does not reflect any "delegation" of Enabling Act authority. The proposed rules serve only to reflect — and provide notice to the bar of — the independent Judicial Conference authority to regulate these matters.

The argument for independent Judicial Conference authority is subject to its own constraints. The fourth paragraph of 28 U.S.C. § 331 authorizes the Judicial Conference to "submit suggestions and recommendations to the various courts to promote uniformity of management procedures and expeditious conduct of court business." The authority to submit suggestions and recommendations may impliedly defeat authority to impose requirements. The third-from-last paragraph of § 331 directs the Judicial Conference to review rules prescribed under § 2071 by federal courts "other than the Supreme Court and the district courts." Coupled with provisions directing the judicial councils of the circuits to review local district rules, § 332(d)(4) and § 2071(c), these provisions create obstacles to achieving national uniformity by combining Rule 7.1, which could directly supersede local rules, with reliance on the Judicial Conference.

Deferring to doubts about "delegation" to the Judicial Conference does not defeat the original purpose of adopting Rule 7.1. The Committee on Codes of Conduct originally recommended adoption of Appellate Rule 26.1 in all the separate sets of rules. Paring Rule 7.1 back to this core, for these reasons, likely does not require a second publication for comment.

Other Rule 7.1 Revisions

The Bankruptcy Rules Committee has proposed publication of disclosure requirements that would depart significantly from Rule 7.1 as published. The disclosure must identify "any nongovernmental corporation that directly or indirectly owns 10% or more of any class of the corporation's equity interests or states that there are not such entities to report * * *." The Civil Rules Committee has not independently considered the terms of present Appellate Rule 26.1; they were adopted for Rule 7.1 for the reasons described above. It has not independently considered the reasons for the changes proposed by the Bankruptcy Rules Committee. It defers consideration of these matters to the Standing Committee.

Summary of Comments on Rule 7.1

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

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

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

00-CV-005, Federal Civil Procedure Committee, American College of Trial Lawyers, Gregory P. Joseph: Supports two aspects of the proposal: (1) it is desirable to address disclosure in the Civil Rules "so that there is a uniform national standard." (2) "[T]hese disclosure statements ought not be limited to corporations, but extended to nongovernmental parties generally." But disagrees with delegation of further work to the Judicial Conference. There is a trap for the unwary in "referencing a set of requirements that are not included in the Rules, may not exist and are not readily available." The Judicial Conference is part of the process of making Civil Rules; it "is in a position to ensure that all disclosure requirements it deems important become a part of the Rules." But if the Judicial Conference becomes responsible, a useful way to make litigants aware of Judicial Conference disclosure requirements would be to place them in the Civil Cover Sheet. (This will not help with Appellate Rule 26.1, however.)

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

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

Comments on Appellate Rule 26(a)(1)

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

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

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

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

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

Changes Made After Publication and Comment

The provisions that would require disclosure of additional information that may be required by the Judicial Conference have been deleted.

Amended Rules 54(d)(2), 58

Rule 54. Judgments; Costs

* * *

(d) Costs; Attorneys' Fees.

* * *

(2) *Attorneys' Fees.*

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

(B) Unless otherwise provided by statute or order of the court, the motion must be filed ~~and served~~ no later than 14 days after entry of judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion in accordance with Rule 43(e) or Rule 78. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. The court shall find the facts and state its conclusions of law as provided in Rule 52(a)~~, and a judgment shall be set forth in a separate document as provided in Rule 58~~.

* * *

Committee Note

Subdivision (d)(2)(C) is amended to delete the requirement that judgment on a motion for attorney fees be set forth in a separate document. This change complements the amendment of Rule 58(a)(1), which deletes the separate document requirement for an order disposing of a motion for attorney fees under Rule 54. These changes are made to support amendment of Rule 4 of the Federal Rules of Appellate Procedure. It continues to be important that a district court make clear its meaning when it intends an order to be the final disposition of a motion for attorney fees.

The requirement in subdivision (d)(2)(B) that a motion for attorney fees be not only filed but also served no later than 14 days after entry of judgment is changed to require filing only, to establish a parallel with Rules 50, 52, and 59. Service continues to be required under Rule 5(a).

Rule 58. Entry of Judgment

~~Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except that, when a timely motion for attorneys' fees is made under Rule 54(d)(2), the court, before a notice of appeal has been filed and has become effective, may order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.~~

(a) Separate Document.

(1) Every judgment and amended judgment must be set forth on a separate document, but a separate document is not required for an order disposing of a motion:

(A) for judgment under Rule 50(b);

(B) to amend or make additional findings of fact under Rule 52(b);

(C) for attorney fees under Rule 54;

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

(E) for relief under Rule 60.

(2) Subject to Rule 54(b):

(A) the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment when:

(i) the jury returns a general verdict,

(ii) the court awards only costs or a sum certain, or

(iii) the court denies all relief;

(B) the court must promptly approve the form of the judgment, which the clerk must promptly enter, when:

(i) the jury returns a special verdict or a general verdict accompanied by interrogatories, or

(ii) the court grants other relief not described in Rule 58(a)(2).

(b) Time of Entry. Judgment is entered for purposes of 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), and

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

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

(c) Cost or Fee Awards.

(1) Entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees, except as provided in Rule 58(c)(2).

(2) When a timely motion for attorney fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and has become effective to order that the motion have the same effect under Rule 4(a)(4) of the Federal Rules of Appellate Procedure as a timely motion under Rule 59.

(d) Request for Entry. A party may request that judgment be set forth on a separate document as required by Rule 58(a)(1).

Committee Note

Rule 58 has provided that a judgment is effective only when set forth on a separate document and entered as provided in Rule 79(a). This simple separate document requirement has been ignored in many cases. The result of failure to enter judgment on a separate document is that the time for making motions under Rules 50, 52, 54(d)(2)(B), 59, and some motions under Rule 60, never begins

to run. The time to appeal under Appellate Rule 4(a) also does not begin to run. There have been few visible problems with respect to Rule 50, 52, 54(d)(2)(B), 59, or 60 motions, but there have been many and confused problems under Appellate Rule 4(a). These amendments are designed to work in conjunction with Appellate Rule 4(a) to ensure that appeal time does not linger on indefinitely, and to maintain the integration of the time periods set for Rules 50, 52, 54(d)(2)(B), 59, and 60 with Appellate Rule 4(a).

Rule 58(a) preserves the core of the present separate document requirement, both for the initial judgment and for any amended judgment. No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate document that recites the terms of the judgment without offering additional explanation or citation of authority. Forms 31 and 32 provide examples.

Rule 58 is amended, however, to address a problem that arises under Appellate Rule 4(a). Some courts treat such orders as those that deny a motion for new trial as a "judgment," so that appeal time does not start to run until the order is entered on a separate document. Without attempting to address the question whether such orders are appealable, and thus judgments as defined by Rule 54(a), the amendment provides that entry on a separate document is not required for an order disposing of the motions listed in Appellate Rule 4(a). The enumeration of motions drawn from the Appellate Rule 4(a) list is generalized by omitting details that are important for appeal time purposes but that would unnecessarily complicate the separate document requirement. As one example, it is not required that any of the enumerated motions be timely. Many of the enumerated motions are frequently made before judgment is entered. The exemption of the order disposing of the motion does not excuse the obligation to set forth the judgment itself on a separate document. And if disposition of the motion results in an amended judgment, the amended judgment must be set forth on a separate document.

Rule 58(b) discards the attempt to define the time when a judgment becomes "effective." Taken in conjunction with the Rule 54(a) definition of a judgment to include "any order from which an appeal lies," the former Rule 58 definition of effectiveness could cause strange difficulties in implementing pretrial orders that are appealable under interlocutory appeal provisions or under expansive theories of finality. Rule 58(b) replaces the definition of effectiveness with a new provision that defines the time when judgment is entered. If judgment is promptly set forth on a separate document, as should be done when required by Rule 58(a)(1), the new provision will not change the effect of Rule 58. But in the cases in which court and clerk fail to comply with this simple requirement, the motion time periods set by Rules 50, 52, 54, 59, and 60 begin to run after expiration of 150 days from entry of the judgment in the civil docket as required by Rule 79(a).

A companion amendment of Appellate Rule 4(a)(7) integrates these changes with the time to appeal.

The new all-purpose definition of the entry of judgment must be applied with common sense to other questions that may turn on the time when judgment is entered. If the 150-day provision in Rule 58(b)(2)(B) — designed to integrate the time for post-judgment motions with appeal time — serves no purpose, or would defeat the purpose of another rule, it should be disregarded. with Rule 58. In theory, for example, the separate document requirement continues to apply to an interlocutory

order that is appealable as a final decision under collateral-order doctrine. Appealability under collateral-order doctrine should not be complicated by failure to enter the order as a judgment on a separate document — there is little reason to force trial judges to speculate about the potential appealability of every order, and there is no means to ensure that the trial judge will always reach the same conclusion as the court of appeals. Appeal time should start to run when the collateral order is entered without regard to creation of a separate document and without awaiting expiration of the 150 days provided by Rule 58(b)(2). Drastic surgery on Rules 54(a) and 58 would be required to address this and related issues, however, and it is better to leave this conundrum to the pragmatic disregard that seems its present fate. The present amendments do not seem to make matters worse, apart from one false appearance. If a pretrial order is set forth on a separate document that meets the requirements of Rule 58(b), the time to move for reconsideration seems to begin to run, perhaps years before final judgment. And even if there is no separate document, the time to move for reconsideration seems to begin 150 days after entry in the civil docket. This apparent problem is resolved by Rule 54(b), which expressly permits revision of all orders not made final under Rule 54(b) "at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

New Rule 58(d) replaces the provision that attorneys shall not submit forms of judgment except on direction of the court. This provision was added to Rule 58 to avoid the delays that were frequently encountered by the former practice of directing the attorneys for the prevailing party to prepare a form of judgment, and also to avoid the occasionally inept drafting that resulted from attorney-prepared judgments. See *11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 2786.* The express direction in Rule 58(a)(2) for prompt action by the clerk, and by the court if court action is required, addresses this concern. The new provision allowing any party to move for entry of judgment on a separate document will protect all needs for prompt commencement of the periods for motions, appeals, and execution or other enforcement.

Recommendation

The Advisory Committee recommends that Rules 54(a) and 58 be adopted as published, subject to minor style changes and two significant changes in Rule 58(b). The first change in Rule 58(b) opens up the definition of the time when judgment is entered. As published, Rule 58(b) defined the time of entry solely for purposes of the Civil Rules governing the post-judgment motions that suspend appeal time under Appellate Rule 4(a)(4), adding Civil Rule 62 (execution) as well. At the behest of the Appellate Rules Committee, the definition is changed to cover entry of judgment "for purposes of these rules." The second change expands from 60 days to 150 days the period that defines entry of judgment when a required separate document is not provided.

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

New Rule 58(a)(1) carries forward the requirement that every judgment be entered on a separate document, and adds an explicit requirement that every amended judgment be entered on a

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

Rule 58(a)(1) drew little comment. Public Citizen Litigation Group finds it a "close question," but believes that the separate document requirement should be retained for these orders. Compliance with the separate document requirement does not impose a great burden. And in complex cases the separate document will alert the parties that appeal time is running.

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

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

The public comments include many comments hostile to the "60-day" provision in Rule 58(b)(2). The comments come from many organizations that have great collective experience with federal appeals, and that have provided thoughtful and helpful comments on many rules proposals

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

These are powerful arguments that commanded serious attention. The responses made by the Appellate Rules Committee, however, were convincing. As "easy" as it may seem to comply with the separate document requirement, repeated efforts to achieve uniform compliance have been made without success. Extending the time of entry to 150 days after entry in the civil docket without a required separate document provides ample protection. A lawyer who hears nothing further about an action for 150 days after entry and notice of an order should inquire whether the order was meant to be the final act in the action. The 150-day period is nearly as long as the 180 day period set by Appellate Rule 4(a)(6)(B) that cuts off any opportunity to appeal when there is no notice at all that judgment has been entered; if we are prepared to cut off any appeal opportunity without any notice, it is generous to set 150 days as the time that starts the appeal period after notice of entry on the docket of an order that ought to have been set forth on a separate document but was not. Expiration of the 150-day period only starts appeal time — there will be at least another 30 days to file the notice of appeal. And in fact many of the untold numbers of "time bombs" do explode into long-delayed appeals. Adherence to the published proposal is recommended, with the change that the period after entry in the civil docket without a required separate document be extended from 60 days to 150 days.

A closer question is presented by the change that extends Rule 58(b) to define entry of judgment for all Civil Rules purposes. The published proposal was designed solely to effect a workable integration of Rule 58 with the Appellate Rules. The need for integration relates directly to Civil Rules 50, 52, 54(d)(2)(b), 59, and 60. Coordination of the execution provisions of Rule 62 with these post-judgment motion rules seemed wise. No thought was given to the ways in which other rules might be affected if included in the definition. But there was much concern that the literal meaning of present Rule 58 could create serious mischief when applied to the Rule 54(a) definition of a judgment as "a decree and any order from which an appeal lies." The Committee Note speaks to this concern and urges a common-sense approach that in effect invites occasional disregard of the literal meaning of proposed Rule 58(b). One of the reasons for adopting this approach was the concern of the Appellate Rules Committee that Rule 58(b) should be simplified to reduce the burden faced by a lawyer directed by Appellate Rule 4(a)(7) to the definition in Rule 58(b). The Appellate Rules Committee has now suggested that it may prove better to adopt the Rule 58(b) language directly into Appellate Rule 4(a)(7). If that happens, Rule 58(b) is left as an all-purpose definition that is qualified in the Committee Note. Nonetheless, the Advisory Committee

determination at the April meeting is presented as a recommendation to approve the revised form of Rule 58(b) that defines entry of judgment for the purpose of all Civil Rules.

Summary of Comments: Rules 54, 58

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

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

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

00-CV-003, Bradley Scott Shannon: Professor Shannon's comment is difficult to summarize because it is rich in detail. The conclusion picks up on the observation in the draft Committee Note that

drastic surgery would be required to fully address the problems that arise from present Rules 54(a) and 58. He agrees, but urges that the time has come for drastic surgery, including revision of Rule 54(a).

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

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

00-CV-004, Ninth Circuit Conference of Chief Bankruptcy Judges, Hon. Louise De Carl Adler: "[W]holeheartedly supports the solution proposed. Failure to timely submit a final judgment is frequently a problem faced by litigants in bankruptcy court and the proposed rules changes will solve it."

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

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

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

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

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

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

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

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

00-CV-013, District of Columbia Bar, Litigation Section and Courts, Lawyers and the Administration of Justice Section: Accepts the restructuring of Rule 58, and the Rule 58(a)(1) list of orders that do not require a separate document. But urges that when a separate document is required by Rule 58(a)(1), only entry of a separate document should establish entry of judgment. Rule language is proposed for this purpose. The published proposal "will create more problems than

it will cure." The proposal would impose on attorneys an obligation to inspect the docket at regular intervals, in part because "courts normally do not give attorneys notice of docket entries." The amendment could mean that an appeal is lost after 90 days even though there is no separate document. "The remedy is to clarify the requirement for entry of a separate document so that failures to follow the rule are less common." In addition, proposed Rule 58(d) should be revised to state that the court must comply with any legitimate request to enter a separate document.

Comments on Appellate Rule 4(a)(7)

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

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

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

The Appellate Practice Committee of the Commercial and Federal Litigation Section of the New York State Bar Association (00-AP-017) objects only to the 60-day provision. It has no objection to the remainder of the Rule 4(a)(7)/FRCP 58 proposal, including the provisions that would make clear that the appellant alone can waive the separate document requirement and that orders disposing of certain post-judgment motions need not be entered on separate documents. The Committee does note, though, that it would prefer that FRCP 58 instead provide that *all* orders disposing of post-judgment motions be entered on separate documents.

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

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

proposal would be clearer if it said that when a separate document is required, judgment is entered when it is set forth on a separate document and entered on the docket under Rule 79(a).

Changes Made After Publication and Comment

Minor style changes were made. The definition of the time of entering judgment in Rule 58(b) was extended to reach all Civil Rules, not only the Rules described in the published version — Rules 50, 52, 54(d)(2)(B), 59, 60, and 62. And the time of entry was extended from 60 days to 150 days after entry in the civil docket without a required separate document.

Rule 81(a): Rules Governing Habeas Corpus

Rule 81. Applicability in General

(a) To What Proceedings Applicable.

* * *

(2) These rules are applicable to proceedings for admission to citizenship, habeas corpus, and quo warranto, to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255 Proceedings, and has heretofore conformed to the practice in civil actions. ~~The writ of habeas corpus, or order to show cause, shall be directed to the person having custody of the person detained. It shall be returned within 3 days unless for good cause shown additional time is allowed which in cases brought under 28 U.S.C. § 2254 shall not exceed 40 days, and in all other cases shall not exceed 20 days.~~

Committee Note

This amendment brings Rule 81(a)(2) into accord with the Rules governing § 2254 and § 2255 proceedings. In its present form, Rule 81(a)(2) includes return-time provisions that are inconsistent with the provisions in the Rules Governing §§ 2254 and 2255. The inconsistency should be eliminated, and it is better that the time provisions continue to be set out in the other rules without duplication in Rule 81. Rule 81 also directs that the writ be directed to the person having custody of the person detained. Similar directions exist in the § 2254 and § 2255 rules, providing additional detail for applicants subject to future custody. There is no need for partial duplication in Rule 81.

The provision that the Civil Rules apply to the extent that practice is not set forth in the § 2254 and § 2255 rules dovetails with the provisions in Rule 11 of the § 2254 Rules and Rule 12 of the § 2255 Rules.

Recommendation

The Advisory committee recommends that the Rule 81(a)(2) amendment be submitted to the Judicial Conference for adoption as published. The Committee Note has been changed by deleting a reference to § 2241 proceedings that was marked for deletion before publication but slipped through.

The comment of the National Association of Criminal Defense Lawyers summarized below points out that the Criminal Rules Committee plans further work on the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings. This work does not seem a reason

to defer adoption of the Rule 81 amendments. The amendments eliminate inconsistencies between Rule 81 and some of the § 2254 and § 2255 rules. The second paragraph of § 2243 includes the provisions for addressing the writ and for return time that are deleted from Rule 81 — the amendments will not leave a gap that will be filled only later.

Summary of Comments: Rule 81

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

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

Changes Made After Publication and Comment

The only change since publication is deletion of an inadvertent reference to § 2241 proceedings.

Rule C. In Rem Actions: Special Provisions

* * *

(3) Judicial Authorization and Process.

(a) Arrest Warrant.

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

* * *

(6) Responsive Pleading; Interrogatories.

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

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

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

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

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

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

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

Committee Note

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

Rule C(6)(a)(i)(A) is amended to adopt the provision enacted by 18 U.S.C. § 983(a)(4)(A), shortly before Rule C(6)(a)(i)(A) took effect, that sets the time for filing a verified statement as 30 days rather than 20 days, and that sets the first alternative event for measuring the 30 days as the date of service of the Government's complaint.

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

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

Recommendation

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

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

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

Changes Made After Publication and Comment

No changes have been made since publication.

II Action Items: Rules Recommended For Publication

Introduction

The class action rule has been the subject of close study by the Civil Rules Advisory Committee over the past ten years. Rule 23(b)(3), providing for damage class actions, is of comparatively recent vintage. It is safe to say that the eminent authors of that provision had little conception in 1966 that a mere rule of joinder, designed to "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated,"[1] would become such a prominent feature in the landscape of modern litigation, dramatically altering the stakes, scale, and outcomes in certain kinds of class action lawsuits. However, while the drafters of 23(b)(3) may not have anticipated its extraordinary impact, they certainly did understand that the Rule would require re-evaluation after a period of experience. We have undertaken that evaluation, in the light of experience, empirical study, and academic and professional commentary.

The present set of rules attempt to address the problems in class action litigation that are redressable by rule. These proposals focus on the persistent problem areas in the conduct of class suits, including oversight, the appointment and compensation of class counsel, and the disruptions caused by duplicative and competing class litigation. The overall goal of the Committee has been to develop rule amendments that, on the one hand, protect against improvident certifications and that, on the other, protect the interests of class members once a class action is filed. The rule amendments seek to provide the court with the tools, authority, and discretion to closely supervise class action litigation.

1. Background and Synopsis

In 1991, the Civil Rules Committee began a study of class action litigation that culminated in a variety of proposed rule amendments published in 1996. Those proposals focused on the substantive standards for certification of class actions. Advocates for reform advised the Committee that in many cases the certification decision was dispositive of the litigation; once a class is certified and the stakes of the litigation are magnified, whatever the merits of the claim, the defendant has little choice but to bow to the overwhelming pressure to settle. To address this problem and foster the growth of appellate law, the Committee proposed 23(f), the interlocutory appeal provision that went into effect in 1998. The Committee also devoted attention to: (1) whether the rule should permit or require a court to make some preliminary assessment of the merits and public value of a proposed class litigation as part of the certification decision and (2) whether the rule should permit certification of settlement classes on a less exacting standard than litigation classes. The public comment on these proposals was extensive, forceful, and enlightening. The comments are collected in the four volume set of working papers of the Committee that were published in May 1997. Ultimately, the Committee reached the view that the questions surrounding certification standards were not ripe for rule making. The Committee reasoned that the interlocutory appeal provision and the recent decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), would lead to the development of a body of case law that

[1] Notes of the Advisory Committee on 1966 Amendments.

would guide district judges and the Committee and that it would be premature to curtail this natural development. Instead, the Committee turned its attention away from the substantive standards for certification to matters of process and procedure, in particular to the adequacy of the rule in assuring appropriate judicial oversight of class action litigation from stem to stern, from certification, to class counsel appointment, to settlement approval, and finally to attorney fee awards.

To advance this study, a class action subcommittee, chaired by Judge Lee H. Rosenthal, was appointed. Professor Edward Cooper, Reporter to the Committee, supported the work of the subcommittee as did Professor Richard L. Marcus, who was retained as Special Reporter to assist the subcommittee in drafting attorney appointment and compensation rules. The subcommittee had before it an unusually rich record concerning the operation of Rule 23(b)(3), including the voluminous record generated in the public comment on the 1996 proposed revisions to Rule 23; the Federal Judicial Center's 1996 empirical study of federal class action suits; the RAND Institute for Civil Justice's publication in 2000 of *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, analyzing the results of detailed case studies and surveys of lawyers engaged in class action litigation in state and federal courts; and the extensive materials assembled by the Working Group on Mass Torts. In addition to these sources, the subcommittee obtained practical insight by consulting with a number of experienced class action practitioners who represent all points of view. While the proposals offered for publication undoubtedly will be controversial, all of them have at least some support from leading members of the class action bar. Taken as a whole, the package is a balanced and neutral attempt to protect individual class members and further the overall goals of the class action device -- efficiency, uniform treatment of like cases, and access to court for claims that cannot be litigated individually, "without sacrificing procedural fairness or bringing about other undesirable results."[2]

The proposals focus on five areas: the timing of the certification decision and notice; judicial oversight of settlements; control of duplicative and inconsistent class litigation; attorney appointment; and attorney compensation. Two aspects of the proposals deserve highlighting. First, new Rule 23(e)(3) generally affords to class members the opportunity to opt out of a (b)(3) class upon learning the terms of a proposed settlement of the class action. This proposal attempts to put members of (b)(3) classes that are certified for litigation, and then settle at a later date, in as informed a position as members of classes certified for settlement whose opportunity to opt out arises when the terms of the settlement are known. The permission to opt out after a tentative settlement is reached generally has not been fatal to class action settlements; many class actions are presented for certification with a proposed settlement so that the certification decision, evaluation of the settlement, and right to opt out merge in time. Settlement class actions are viewed with particular caution by the courts because of the lack of adversariness and because plaintiffs' counsel lack the leverage of a possible trial. See e.g. *Hanlon v. Chrysler*, 150 F.3d 1011, 1026 (9th Cir. 1998) (joining with other circuits in holding that "settlement approval that takes place prior to formal class certification requires a higher standard of fairness" because of the dangers of collusion). However, pre-certification settlements do have one feature that is worthy of extension to all (b)(3) class actions: the right to opt out of a settlement when the terms of that settlement are known. This

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[2] Id.

proposal introduces a measure of class member self-determination and control that best harmonizes the class action with traditional litigation. It also provides the assurance to the supervising court that if the settlement is unfair in any significant way class members can be expected to protect themselves by opting out. Many – and often most – members of Rule 23(b)(3) opt-out classes "consent" to join the class by inattention and inertia[3]; such inadvertent litigants should not be locked into a settlement that they consider to be unfair.[4] In short, the provision of an opt out opportunity, once the terms of the settlement are known, is just the sort of "structural assurance of fairness," see *Amchem*, that permits class actions in the first place.

Second, the proposed rule amendments attempt to address what has become among the most pressing of current problems: duplicative class litigation in state court. Duplicative litigation within the federal courts can be coordinated and consolidated through the panel on mult-district litigation. All federal courts are subject to the same standards concerning certification, approval of settlements, and appointment and compensation of counsel; all federal judges have the protection of Article III. The incentives for evading judicial supervision in one federal court by filing in another are thereby greatly diminished. The same is not true in diversity class actions that can be filed in federal and state court. Parallel litigation filed in multiple fora in order to avoid strict judicial oversight furthers no legitimate interest, and certainly no interest protected by the class action device. The purpose of the class action is to eliminate repetitive litigation, promote judicial efficiency, permit small claims to find a forum, and achieve uniform results in similar cases. Duplicative class litigation is destructive of just these goals: "Repeated relitigation of the common issues in a complex case unduly expends the resources of attorney and client, burdens already overcrowded dockets, delays recompense for those in need, results in disparate treatment for persons harmed by essentially identical or similar conduct, and contributes to the negative image many people have of the legal system." American Law Institute, *Complex Litigation Project*, 9.

The proliferation of competing and overlapping class suits, pending simultaneously in federal and state courts, raises a number of issues. One concern is the potential of such filings to frustrate judicial scrutiny of certification motions, settlements, and fee requests as the means of regulating class action practices. In the current system, class counsel and defendants who wish to evade exacting scrutiny in one court have the ability to take their proposed class or proposed settlement to

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[3] Benjamin Kaplan, The Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 397 (1967) (noting that the opt out default includes persons in the class who whether from ignorance, timidity, or unfamiliarity with business or legal matters "will simply not take the affirmative step" of joining a litigation).

[4] Professor John C. Coffee, Jr. of the Columbia University Law School suggests that a "bill of rights" for class members should include the right to opt out from any settlement; "the basic principle should be that each member of the class is entitled to reject the settlement and bring his or her own individual action. This right should not expire until the terms of the settlement are known." Testimony of Professor John C. Coffee, Jr., Adolf A. Berle Professor of Law before the Subcommittee on Administrative Oversight and the Courts of the Committee on the Judiciary, United States Senate, October 30, 1997, at 9.

another court, where the standards may be less rigorous or the court may be more accommodating. Another concern is that competing -- or even cooperating -- groups of attorneys may file overlapping class actions to seek advantages through earlier class counsel appointments, different rulings on threshold motions, different discovery timetables and requirements, and the opportunity to seek compensation as the price of ending competing suits. Multiple filings offer the opportunity for the "reverse auction," in which competing sets of putative class attorneys attempt to seize control of the class for personal gain. The process and the outcome can be unfair not only to class members but also to conscientious class counsel. Present procedural mechanisms appear inadequate to provide effective relief or coordination.

The proposed amendments include provisions attempting to facilitate effective coordination, while recognizing the respect due to other federal and state courts in which parallel litigation may be filed. Proposed 23(c) (1)(D) provides that a court that refuses to certify a class "may direct that no other court may certify a substantially similar class" unless there is a "difference of law or change of fact that creates a new certification issue." This proposal defers to state certification rules that may be more generous than Rule 23 while otherwise recognizing that a fully litigated decision on certification should not be repeated in other courts. Proposed Rule 23(e) on settlements would provide that a refusal to approve a settlement should bar any other court from approving the same settlement. The proposal keeps parties from "shopping" a settlement that a court has rejected as inadequate or unfair, to the detriment of class members. Finally, proposed Rule 23(g) authorizes the court to enter an order prohibiting class members from "filing or pursuing a class action in any other court that involves the class claims" with a possible exception, indicated by brackets, where the further action is purely an in-state class action "on behalf of persons who reside or were injured in the forum state and who assert claims that arise under the law of the forum state." The Committee invites comment on the bracketed language which attempts to acknowledge the important interest of the states in controlling truly in-state litigation while recognizing that the federal interest in managing the class action before the federal court may take precedence over a competing multi-state class action brought in state court. The issuance of an order under Rule 23(g) can only be made upon findings that other litigation will interfere with the court's management of the class action before it. The rule also provides that the federal court may coordinate with the state court or stay the federal action to avoid inefficiency and conflict.[5]

It is well established that "a district court has both the duty and the broad authority to exercise control over a class action and to enter appropriate orders governing the conduct of counsel and parties." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981). Nonetheless, the Committee recognizes that some will question whether the preclusion aspects of the proposed amendments are within the rulemaking authority conferred by the Enabling Act. Professor Cooper has prepared two memoranda addressed to issues raised by both the Enabling Act and the Anti-Injunction Act. Professor Cooper concludes that the proposals are consistent with these statutes. Some members of the Committee

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[5] While the Rule is drafted with diversity class actions in mind, Rule 23(g) could be employed to halt a state court class action that might resolve federal law claims, even where the state court would not have jurisdiction to entertain the federal claims. See *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996).

remain unconvinced but believe that the proposals deserve publication and that the issues raised will benefit from public comment.

2. Rule 23 Proposals

a. Proposed Rule 23(c)

(i). Rule 23(c)(1)(A): The Timing of Certification

The 1996 proposals included one to amend Rule 23(c)(1) by changing the requirement that a certification decision be made "as soon as practicable" into a "when practicable" requirement. Although public comment was largely favorable, the Standing Committee declined to approve the amendment on two grounds. One was that it would be better to consider all Rule 23 changes in a single package, leaving apart as clearly separate the Rule 23(f) appeal provision that was adopted. The other was doubt as to the wisdom of the change. It was feared that the change in wording would encourage courts to delay deciding certification motions and would lead to an increase in precertification discovery into the merits of a class suit. Amended Rule 23(c)(1)(A) recommends the "when practicable" language, but with Notes to address the concerns previously identified. The proposal is presented as part of a package of amendments, not as a "piecemeal" item. The proposed "when practicable" language is consistent with the reality of when courts generally make certification decisions, as shown by Federal Judicial Center figures on the time from filing to decision of certification motions. The proposed language is also consistent with best practice; a court should decide a certification motion promptly, but only after obtaining the information necessary to make that decision on an informed basis. The proposed Committee Note clearly states that the amended language is not intended to permit undue delay or permit extensive discovery unrelated to certification.

The proposed amendment at first reading may seem overly fastidious, a matter of semantics. In fact, it authorizes and legitimates a different approach to class action litigation that recognizes the important consequences to the parties of the court's decision on certification. The current rule's emphasis on dispatch in making the certification decision has, in some circumstances, led courts to believe that they are overly constrained in the period before certification. A certain amount of discovery may be appropriate during this period to illuminate issues bearing on certification, including the nature of the issues; whether the evidence on the merits is common to the members of the proposed class; whether the issues are susceptible to class-wide proof; whether there are conflicts problems within classes; and what trial management problems the case will present. As the Note discusses, this discovery does not concern the weight of the merits or the strength of the evidence. Furthermore, if the defendant makes a motion to dismiss or for summary judgment as to the named plaintiffs, the court may chose to deal with these motions in advance of deciding the certification issue. The proposed Note sets out factors that a court should consider in deciding whether the certification decision is ready for resolution, or is appropriately deferred for specific reasons. By making it clear that the timing of a certification decision, and related discovery, is limited to that necessary to determine certification issues, the amended Rule and Note give to courts and lawyers guidance lacking in the present rule.

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

Proposed Rule 23(c)(1)(B) is new. It specifies the contents of an order certifying a class action. Such a requirement facilitates the application of Rule 23(f), by requiring that a court must define the class it is certifying and identify the class claims, issues, and defenses. The proposed amendment also requires that the order certifying a (b)(3) class, not the notice alone, state when and how class members can elect exclusion.

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

The proposed amended language in Rule 23(c)(1)(C) allows amendment of an order granting or denying class certification at any time up to "final judgment;" the current rule terminates the power at "the decision on the merits," an event that may happen before final judgment. This change avoids possible ambiguity in the reference to "the decision on the merits." Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class.

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

Proposed new Rule 23(c)(1)(D) is the first of three proposals designed to address, and ameliorate, some of the problems raised by competing, overlapping, and duplicative class litigation proceeding in different courts. The frequency of competing and overlapping parallel suits is high and appears to be rising. The trend is demonstrated in the RAND Institute for Civil Justice's study of ten class actions.. In four of the ten cases, class counsel filed parallel cases in other courts. In five of the ten class actions, other groups of plaintiff attorneys filed competing actions in other jurisdictions. There were only two of the ten cases where neither type of additional filings occurred. These multiple filings can threaten appropriate judicial supervision, damage the interests of class members, hurt conscientious class counsel, impose undue burdens of multiple litigation on defendants, and needlessly increase judicial workloads. While competing federal class actions can be consolidated for pretrial purposes by the Judicial Panel on Multi-District Litigation (MDL), neither MDL consolidation nor similar intrastate consolidation provisions can address the problem of competing class actions in different states, or in both federal and state courts.

New Rule 23(c)(1)(D) provides that a court refusing to certify, or decertifying, a class "may direct that no other court may certify a substantially similar class to pursue substantially similar claims, issues, or defenses unless a difference of law or change of fact creates a new certification issue." The proposed rule is limited to a refusal to certify a class on grounds other than those based on the failings of the would-be class representative. If a court refuses to certify a class because the proposed class does not satisfy Rule 23(a)(1) or (2), or 23(b), the proposed rule permits the court to direct that its order be binding on subsequent courts faced with a substantially similar class pursuing substantially similar claims, issues, or defenses. An exception is created if the later court determines that a difference of law or change of fact creates a new certification issue.

The provision that preclusion only attaches if the court denying certification so directs recognizes that the court may believe that the reasons for denying certification are not likely to apply in another action. The argument for certification may have been poorly presented, for

example, or the action may turn on the law of another forum that is in a better position to decide on certification and to administer a class once certified. Preclusion is limited by expressly recognizing that a difference of law or change of fact may create a new certification issue. A state court considering a later application for class certification is free to conclude that its own class action rule means something different from Federal Rule 23. A federal or state court considering a later application for class certification is free to conclude that the facts have changed so as to create a new certification issue.

The characteristics and effect of orders denying class certification support treating such orders as sufficiently final for preclusion to result. The potential for abuse presented by unfettered opportunities to present the same class action to a different court and the opportunity for interlocutory appeal support a procedural mechanism permitting a court denying certification to make that denial binding on a subsequent, sufficiently similar, proposed class. There are other places in the Federal Rules that address the effect of a federal ruling in another forum. See e.g., Rule 36(b) (effect of admission). The proposed amendment seeks to balance the interests of the finality of an order refusing to certify a class with the interest of comity with other courts.

(v). Rule 23(c)(2): Notice

Proposed new Rule 23(c) requires what the cases now treat as aspirational: class action notices are to be in "plain, easily understood language." This requirement is supported by the model forms of class action notice that will be available to judges and lawyers as a result of an ongoing Federal Judicial Center project to develop such notices. Rule 23(c) for the first time expressly requires notice in (b)(1) and (b)(2) class actions. Notice in these mandatory classes is not made the same as the (b)(3) requirement of individual notice, because there is no right to request exclusion from (b)(1) and (b)(2) classes. Notice in such classes is intended to serve more limited, but important, interests, such as the interest in monitoring the conduct of the action.

b. Rule 23(e): Settlement Review

(i). Rule 23(e)(1)-(4)

The need for improved judicial review of proposed class settlements, and the abuses that can result without effective judicial review, was a recurring theme in the testimony and written statements submitted to the Committee during the public comment on the 1996 rule proposals. The 1996 proposals included a "settlement class" provision that the Committee deferred pending lower court development of the *Amchem* and *Ortiz v. Fibreboard Corporation* rulings. The proposed amendment instead focuses on strengthening the rule provisions governing the process of reviewing and approving proposed class settlements.

New Rule 23(e)(1)(A) makes clear what many courts have required, but what lawyers and other courts often fail to appreciate: a court must approve the pre-certification settlement, voluntary dismissal, or withdrawal of class claims. Although the amendment requires court approval of a settlement, voluntary dismissal, or withdrawal of class claims, even before certification is sought or achieved, the detailed notice, hearing, and review provisions of Rule 23(e) apply only if a class has been certified.

New Rule 23(e)(1)(B) requires notice of a proposed settlement, but only when a class has been certified. The notice is to issue in a "reasonable" manner; individual notice is not required in all classes or all settlements. New Rule 23(e)(1)(C) adopts an explicit standard for approving a settlement for a class: the proposed settlement must be "fair, reasonable, and adequate," and the district court must make detailed findings to support the conclusion that the settlement meets this standard. The Note sets out factors that experience and case law have identified as the most reliable indicators of whether a settlement meets the required criteria.

New Rule 23(e)(2) supports a court's examination of the terms of the proposed settlement by making explicit that a court may direct the parties to file a copy or summary of any "agreement or understanding" made in connection with the proposed settlement. Such "side agreements" are often important to understanding the terms the parties have agreed to, but which are often not disclosed to the court.

New Rule 23(e)(3) permits a court, in a case involving a class previously certified under Rule 23(b)(3), to allow a class member to request exclusion from the class after notice of the terms of a proposed settlement. In many cases, settlement and class certification occur simultaneously, and one notice, with one opportunity to request exclusion, issues. The proposed amendment will not affect the (b)(3) opt-out in such cases. The proposal will only make a difference in cases in which the class is certified and the initial opt-out period expires before a settlement agreement is reached. In such a case, the proposal would allow members of a (b)(3) class, who did not request exclusion when the certification notice first issued, to have a second opportunity to opt-out, once the settlement terms are known. A court may decide that the circumstances make providing a second opportunity to request exclusion inadvisable. The case may have been litigated to a stage that makes it similar to a fully tried suit and that reduces the need for a second opportunity to opt-out. There may be other circumstances that make the additional opt-out opportunity inadvisable. The amendment recognizes that the opt-out mechanism often captures class members as a result of inertia rather than informed decision, especially when the notice of the right to opt-out does not identify the results of the litigation. When a class is simultaneously certified and settled, the notice tells the class members what they can expect from remaining in the class. When a class is certified for trial, the notice cannot tell a class member what he or she will receive by not opting out. That information, which provides a much more meaningful basis for deciding whether to remain in the class, is only available in such a case when it reaches the settlement stage. The proposed amendment would provide a mechanism to the class members to act on the basis of this information.

The Committee asks for comment on two alternative versions of the settlement opt out opportunity. The first opportunity requires the opportunity to request exclusion from the class unless the court finds otherwise (when there has been a previous opportunity to opt out upon class certification). The second alternative is more neutral, neither presuming that there will or will not be a settlement opt out opportunity: the notice of settlement "may state terms that afford class members a second opportunity to elect exclusion from the class."

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

New Rule 23(e)(5) seeks to reduce "settlement shopping." This provision is the second proposal to address the problems that arise from overlapping and competing class actions. It establishes the preclusive effect of an order that refuses to approve a settlement, voluntary dismissal, or compromise on behalf of a certified class. Another court may not approve substantially the same settlement "unless changed circumstances present new issues as to the fairness, reasonableness, and adequacy of the settlement." A refusal to approve a settlement is given binding effect only if a class has been certified. The preclusion reflects the careful consideration that class action settlements must receive as well as the court's continuing supervision of the class action after a settlement is disapproved. It would be inconsistent with that supervision to permit a competing action to compromise the class claims on the basis of the rejected settlement. The preclusion is not absolute, however. Another court can approve a settlement that is not "substantially the same," or can approve the same settlement if changed circumstances significantly alter the calculus of fairness. The proposal balances the deference that should be due a court's rejection of a class settlement with the respect due to the ability of other courts to reach a different result when changed circumstances warrant. The proposal plugs a procedural hole that, if left open, may continue to frustrate the effectiveness of judicial scrutiny over class action settlements.

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

This third portion of amended Rule 23 is the most general approach to the problem of multiple simultaneous class litigation. It reflects the "urgent need of procedural reform to meet the exigencies of the complex litigation problem," in particular the problems generated by uncoordinated, overlapping, duplicative class action lawsuits. American Law Institute, Complex Litigation Project at 9. New Rule 23(g) gives limited preemptive control to a federal court that is asked to certify a class or that has certified a class, through orders addressed to members of the proposed or certified class, to protect the purposes of class litigation. The need for protection is most apparent with a mandatory (b)(1) class, established for the very purpose of protecting against the effects of competing litigation that may impose inconsistent liability or prevent effective protection of all class members' rights. Similarly, in (b)(2) classes the need to protect against inconsistent injunctive or declaratory relief is evident, particularly when reform of important social institutions is involved. Even with opt-out (b)(3) classes, the pressure of competing actions may prevent fulfillment of the purposes served by class certification, whether because of the reverse auction effect or simply because of the costs and inefficiencies of multiplied litigation.

The proposal reconciles the competing interests of the parties and other courts that are involved in parallel litigation. The rule leaves undisturbed individual, non-class action litigation in other courts; it is only addressed to other class litigation concerning the same class claims that are pending before the federal court, and even then only on a finding that the need to protect against interference with the court's ability to achieve the purposes of the class litigation is greater than the class member's need to pursue other litigation. Further, in recognition of the central role of the state courts in a federal system, the proposal limits a court from issuing orders regulating a "state-wide" class action on behalf of persons who reside or were injured in the forum state and who assert claims that arise under the law of the forum state.

Rule 23(g) explicitly recognizes that the federal court may choose to stay its own proceedings to coordinate with proceedings in another court, and may defer the class certification decision as part of this coordination effort. The third paragraph expressly authorizes and thereby supports consultation with other courts as part of the process of determining what course to pursue.

d. Rule 23(h): Class Counsel Appointment

All recent examinations of class action practice recognize the crucial significance of class counsel. But Rule 23 nowhere addresses the selection or responsibilities of class counsel.

Paragraph (1)(A) recognizes the requirement that class counsel be appointed for each class that the court certifies. As the Note points out, the court may appoint lead or liaison counsel during the precertification period as a case management measure.

Paragraph (1)(B) states that class counsel "must fairly and adequately represent the interests of the class." The Note discusses the distinctive role of class counsel, making it clear that the relationship between class counsel and the individual members of the class is not the same as the one between a lawyer and an individual client. Appointment as class counsel entails special, paramount responsibilities to the class as a whole.

Paragraph (2) sets out the appointment procedure for class counsel. The rule recognizes that competition for appointment as class counsel may be beneficial in some cases. Paragraph 2(A) states that the court may allow a "reasonable period" after a class action is filed for attorneys seeking appointment as class counsel to apply. In addition, paragraph 2(C) specifically authorizes the court to direct counsel to propose terms for awarding fees and costs in the order appointing class counsel. The provision encourages counsel and the court to reach early shared understandings about the basis on which fees will be sought. Such a provision has been encouraged by judges emphasizing the importance of judicial control over attorney fee awards. This feature might foster competitive applications; permit innovative approaches such as bidding, where appropriate; obviate later objections to the fee request; and serve as a more productive way for the court to deal in advance with fee award matters that seem to defy regulation after the fact. The court's authority to include provisions regarding fees in its order appointing class counsel provides a bridge to the proposed attorney fees rule.

e. Rule 23(i): Attorney Fees

Attorney fees play a prominent role in class action practice and are the focus of much of the concern about class actions. The disparity between the large size of the attorney fee award and the small or meretricious "coupon" recoveries by class members in some consumer class actions brings the civil justice system into disrepute. The RAND Report's most specific recommendations are that judges must assume much greater responsibility for determining attorney fees, rather than simply accepting previously negotiated arrangements, and must determine fees in relation to the actual benefits that class members collect as a result of the lawsuit. The only provisions on fee awards in the Civil Rules appear in Rule 54(d)(2), but that rule is not tailored to the special features of class actions. The amendment addresses notification of the class of a motion for award of fees, the rights of objectors, and the criteria to be considered in determining the amount of the fee award.

The proposed rule applies when an award of attorney fees is authorized by law or the parties' agreement in a class action. The award must be "reasonable," and it is the court's job to determine the reasonable amount. The rule does not attempt to influence the ongoing case law development regarding a choice between (or combination of) the percentage and lodestar amounts. As emphasized in the Note, because the class action is a creation of the court, the court has a special responsibility to superintend the attorney fee award, as it also does with regard to proposed settlements. The Note further recognizes the critical role of the court in assuring that the class action achieved actual results for class members that warrant a substantial fee award.

Paragraph (1) characterizes the attorney fee motion as one "under Rule 54(d)(2), subject to the provisions of this subdivision." The entry-of-judgment and appeal-time features covered by Rule 58 (which refers explicitly to Rule 54(d)(2)) would apply to class action fee motions as well. However, the distinctive features of class actions call for application of the provisions of subdivision (i) rather than the different provisions of Rule 54(d)(2). Subdivision (i) therefore provides that a motion for fees must be made "at a time directed by the court."

The rule also requires notice to class members in a reasonable manner (similar to Rule 23(e) notice to the class of a proposed settlement) regarding attorney fee motions by class counsel. In settled cases, sufficient notice should ordinarily be included in the notice sent out under Rule 23(e), on which the notice requirement is modeled.

Paragraph (2) allows any class member or party from whom payment is sought to object to the motion. The Note points out that the court may direct discovery and links the decision whether to allow it to the completeness of the fee motion, pointing out that broad discovery is not normal in regard to fee motions.

Paragraph (3) calls for a hearing and findings. In settled class actions, the hearing might well be held in conjunction with proceedings under Rule 23(e), and in other situations there should be considerable flexibility in determining what suffices as a hearing. The findings requirement appears in Rule 54(d)(2) and provides important support for meaningful appellate review, as the Note points out. As under Rule 54(d)(2), the court can refer the motion to a special master or magistrate judge.

The Note sets out the factors that courts have recently, and consistently, found important to consider in determining whether the fee sought is "reasonable." The Note attempts to identify the analytic framework for such determinations, recognizing that the case law will continue to develop and will have subtle variations from circuit to circuit. The factors discussed in the Note cut across different methods of determining the size of fee awards, such as percentage of fund or lodestar.

3. Conclusion

The proposed amendments, and Note language, are attached. In addition, Professor Cooper has provided memoranda that analyze the issues the proposals raise under the Anti-Injunction Act and the Rules Enabling Act. Finally, the minutes of the meetings of the Civil Rules Committee on March 12, 2001, and April 23, 2001, at which these proposals were discussed and approved for transmission to the Standing Committee, are also attached.

Nothing has become simpler or less controversial since the Standing Committee last approved the publication of proposed amendments to Rule 23. The Advisory Committee requests publication of these proposals and looks forward to what will surely be a lively and informative period of public comment.

(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.~~

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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.

(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.

Committee Note

Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. It applies to all classes, whether certified only for settlement; certified as an adjudicative class and then settled; or presented to the court as a settlement class but found to meet the requirements for certification for trial as well.

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses. The reference to settlement is added as a term more congenial to the modern eye than "compromise." The requirement of court approval is made explicit for pre-certification dispositions. The new language introduces a distinction between voluntary dismissal and a court-ordered dismissal that has been recognized in the cases. Court approval is an intrinsic element of an involuntary dismissal. Involuntary dismissal often results from summary judgment or a motion to dismiss for failure to state a claim upon which relief can be granted. It may result from other circumstances, such as discovery sanctions. The distinction is useful as well in determining the need for notice as addressed by paragraph 1(B).

The court-approval requirement is made explicit for voluntary pre-certification dismissals to protect members of the described class and also to protect the integrity of class-action procedure. Because class members may rely on the class action to protect their interests, the court may direct notice of the dismissal to alert class members that they can no longer rely on the class action to toll statutes of limitations or otherwise protect their interests. As an alternative, the court may provide an opportunity for other class representatives to appear similar to the opportunity that often is provided when the claims of individual class representatives become moot. Special difficulties may arise if a settlement appears to include a premium paid not only as compensation for settling individual representatives' claims but also to avoid the threat of class litigation. A pre-certification settlement does not bind class members, and the court cannot effectively require an unwilling representative to carry on with class representation. Nor is it fair to stiffen the defendant's resolve by forbidding payment of a premium to avoid further subjection to the burdens of class litigation.

One effective remedy again may be to seek out other class representatives, leaving it to the parties to determine whether to complete a settlement that does not conclude the class proceedings.

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e), but makes it mandatory only for settlement, voluntary dismissal, or compromise of the class claims, issues, or defenses. Notice is required both when the class was certified before the proposed settlement and when the decisions on certification and settlement proceed simultaneously — the test is whether the settlement is to bind the class, not only the individual class representatives, 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.

Overlapping Classes: Revised Rule 23(g)

(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).

Committee Note

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. (*Cf. 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.

Appointing Counsel: Revised Rule 23(h)

(h) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, when a member of a class sues or is sued as a representative party on behalf of all, the court must appoint class counsel in any order granting class action certification.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(2) Appointment Procedure.

(A) The court may allow a reasonable period after the commencement of the action for attorneys seeking appointment as class counsel to apply.

(B) In appointing an attorney class counsel, the court must consider counsel's experience in handling class actions and other complex litigation, the work counsel has done in identifying or investigating potential claims in this case, and the resources counsel will commit to representing the class, and may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class. The court may direct potential class counsel to provide information on any such subject and to propose terms for attorney fees and nontaxable costs. The court may also make further orders in connection with selection of class counsel.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(i).

Committee Note

Subdivision (h). Subdivision (h) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Yet until now the rule has said nothing about either the selection or responsibilities of class counsel. This subdivision recognizes the importance of class counsel, states their obligation to represent the interests of the class, and provides a framework for selection of class counsel. It also provides a

method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class at the time it certifies a class. Class counsel must be appointed for all classes, including each subclass if the court certifies subclasses.

Ordinarily, the court would appoint class counsel at the same time that it certifies the class. As a matter of effective management of the action, however, it may be important for the court to designate attorneys to undertake some responsibilities during the period before class certification. This need may be particularly apparent in cases in which there is parallel individual litigation, or those in which there is more than one class action on file. In these circumstances, it may be desirable for the court to designate lead or liaison counsel during the pre-certification period.

Paragraph (1)(A) does not apply if "a statute provides otherwise." This recognizes that pertinent provisions of the Private Securities Litigation Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in various sections of 15 U.S.C.), contain specific directives about selection of a lead plaintiff and the retention of counsel. This subdivision does not purport to supersede those provisions, or any similar provisions of other legislation.

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The class comes into being due to the action of the court in granting class certification, and class counsel are appointed by the court to represent the class. The rule thus defines the scope and nature of the obligation of class counsel, an obligation resulting from the court's appointment and one that may be different from the customary obligations of counsel to individual clients. See American Law Institute, Restatement (Third) of the Law Governing Lawyers, § 128 comment d(iii) (2000); Bash v. Firstmark Standard Life Ins. Co., 861 F.2d 159, 161 (7th Cir. 1988) ("conflicts of interest are built into the device of the class action, where a single lawyer may be representing a class consisting of thousands of persons not all of whom will have identical interests or views").

For these reasons, the customary rules that govern conflicts of interest for attorneys must sometimes operate in a modified manner in class actions; individual class members cannot insist on the complete 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.

Attorney Fees: Revised 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 (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.

RULE 51

The Rule 51 project began with a request from the Ninth circuit Judicial Council. Reviewing local district rules, the Ninth Circuit found that many districts had rules that require submission of proposed jury instructions before trial begins. The Council was concerned that these rules may be invalid in light of Rule 51's provision for filing requests "[a]t the close of the evidence or at such earlier time *during trial* as the court reasonably directs." The Advisory Committee easily concluded that there is no apparent reason to leave this practice dependent on local rules. The conclusion to recommend authority to direct submission before trial flowed almost as easily. Once consideration of Rule 51 was launched, and spurred by parallel consideration of Criminal Rule 30, the Advisory Committee undertook a more thorough review. In the end, it concluded that Rule 51 should be revised to state more clearly what it means now, and also to include a few new provisions.

Rule 51 can be read easily only by those who already know what it means. A party who wants an issue covered by instructions must do both of two things: make a timely request, and then separately object to failure to give the request as made. The cases that explain the need to renew the request by way of objection suggest that repetition is needed in part to ensure that the court has not simply forgotten the request or its intention to give the instruction, and in part to show the court that it has failed in its attempt to give the substance of a requested instruction in better form. An attempt to address an omitted issue by submissions to the court after the request deadline fails because it is not an "objection" but an untimely request.

Reading the text of Rule 51 is difficult with respect to the request and objection requirements. It is not possible as to the "plain error" doctrine. Many circuits recognize a "plain," "clear," or "fundamental" error doctrine that allows reversal despite failure to comply with Rule 51. This doctrine is not reflected at all in the text of Rule 51, but is explicit in the general "plain errors" provision of Criminal Rule 52. The contrast between Criminal Rule 52 and Rule 51 has led some circuits to reject the plain error doctrine for civil jury instructions.

Although unlikely, it also is possible that the formal requirements of Rule 51 may discourage the timid from making untimely requests that would be granted if made. Requests framed as objections may well be given, despite the risk that tardy requests will lead the court into error, confuse the jury, or at least unduly emphasize one issue.

Proposed Rule 51 goes beyond clarification of the relationship between requests and objections and express adoption of the "plain error" standard. Subdivision (b)(1) requires the court to inform the parties of all instructions, not only action on requests, before instructing the jury and before jury arguments. Subdivision (b)(2) recognizes the practice of instructing the jury "at any time after trial begins." Subdivision (c)(2) elaborates on the time for objections. Subdivision (d)(2) seeks to articulate the principle that an objection is not required if "the court made a definitive ruling on the record rejecting the request."

~~**Rule 51. Instructions to Jury; Objection**~~

~~At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.~~

Rule 51. Instructions to Jury; Objection; Plain Error

(a) Requests.

(1) A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests.

(2) After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and

(B) with the court's permission file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's presence to the proposed instructions and actions on requests before the instructions and arguments are delivered; and

(3) may instruct the jury at any time after trial begins and before the jury is discharged.

(c) Objections.

(1) A party may object on the record to an instruction or the failure to give an instruction, stating distinctly the matter objected to and the grounds of the objection.

(2) An objection is timely if:

(A) a party that has been informed of an instruction or action on a request under Rule 51(b)(1) objects under Rule 51(b)(2); or

(B) a party that has not been informed of an instruction or action on a request under Rule 51(b)(1) objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Forfeiture; Plain Error. A party may assign as error:

(1) an error in an instruction actually given if that party made a proper objection under Rule 51(c);

(2) a failure to give an instruction if that party made a proper request under Rule 51(a), and — unless the court made a definitive ruling on the record rejecting the request — also made a proper objection under Rule 51(c); or

(3) a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1) or (2).

Committee Note

Rule 51 is revised to capture many of the interpretations that have emerged in practice. The revisions in text will make uniform the conclusions reached by a majority of decisions on each point. Additions also are made to cover some practices that cannot now be anchored in the text of Rule 51.

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(3), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial. Particularly in complex cases, pretrial requests can help the parties prepare for trial. Trial also may be shaped by severing some matters for separate trial, or by directing that trial begin with issues that may warrant disposition by judgment as a matter of law; see Rules 16(c)(14) and 50(a). It seems likely that the deadline for pretrial requests will often be connected to a final pretrial conference.

The close-of-the-evidence deadline may come before trial is completed on all potential issues. Trial may be formally bifurcated or may be sequenced in some less formal manner. The close of the evidence is measured by the occurrence of two events: completion of all intended evidence on an identified phase of the trial and impending submission to the jury with instructions.

The risk in directing a pretrial request deadline is that unanticipated trial evidence may raise new issues or reshape issues the parties thought they had understood. Even if there is no unanticipated evidence, a party may seek to raise or respond to an unanticipated issue that is suggested by court, adversary, or jury. The need for a pretrial request deadline may not be great in an action that involves well-settled law that is familiar to the court and not disputed by the parties. Courts need not insist on pretrial requests in all cases. Even if the request time is set before trial or early in the trial, subdivision (a)(2)(A) permits requests after the close of the evidence to address issues that could not reasonably have been anticipated at the earlier time for requests set by the court.

Subdivision (a)(2)(B) expressly recognizes the court's discretion to act on an untimely request. Untimely requests are often accepted, at times by acting on an objection to the failure to give an instruction on an issue that was not framed by a timely request. This indulgence must be set against the proposition that an objection alone is sufficient only as to matters actually stated in the instructions. This proposition is stated in present Rule 51, but in a fashion that has misled even the most astute attorneys. Rule 51 now says that no party may assign as error the failure to give an instruction unless that party objects thereto. It is easy to read into this provision an implication that it is sufficient to "object" to the failure to give an instruction. But even if framed as an objection, a request to include matter omitted from the instructions is just that, a request, and is untimely after the close of the evidence or the earlier time directed by the court. The most important consideration in exercising the discretion confirmed by subdivision (a)(2)(B) is the importance of the issue to the case — the closer the issue lies to the "plain error" that would be recognized under subdivision (d)(3), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered — the earlier the request deadline, the more likely it is that good reason will appear for failing to recognize an important issue. Courts also must remain wary, however, of the risks posed by tardy requests. Hurried action in the closing minutes of trial may invite error. A jury may be confused by a tardy instruction made after the main body of instructions, and in any event may be misled to focus undue attention on the issues isolated and emphasized by a tardy instruction. And if the instructions are given after arguments, the parties may have framed the arguments in terms that did not anticipate the instructions that came to be given. To be considered under subdivision (a)(2)(B) a request should be made before final instructions and before final jury arguments. What is a "final" instruction and argument depends on the sequence of submitting the case to the jury. If separate portions of the case are submitted to the jury in sequence, the final arguments and final instructions are those made on submitting to the jury the portion of the case addressed by the arguments and instructions.

Instructions. Subdivision (b)(1) requires the court to inform the parties, before instructing the jury and before final jury arguments related to the instruction, of the proposed instructions as well as the proposed action on instruction requests. The time limit is addressed to final jury arguments to reflect the practice that allows interim arguments during trial in complex cases; it may not be feasible to develop final instructions before such interim arguments. It is enough that counsel know

of the intended instructions before making final arguments addressed to the issue. If the trial is sequenced or bifurcated, the final arguments addressed to an issue may occur before the close of the entire trial.

Subdivision (b)(2) complements subdivision (b)(1) by carrying forward the opportunity to object established by present Rule 51. It makes explicit the opportunity to object on the record, ensuring a clear memorial of the objection.

Subdivision (b)(3) reflects common practice by authorizing instructions at any time after trial begins and before the jury is discharged. Preliminary instructions may be given at the beginning of the trial, a device that may be a helpful aid to the jury. In cases of unusual length or complexity, interim instructions also may be made during the course of trial. Supplemental instructions may be given during jury deliberations, and even after initial deliberations if it is appropriate to resubmit the case for further deliberations. The present provision that recognizes the authority to deliver "final" jury instructions before or after argument, or at both times, is included within this broader provision.

Objections. Subdivision (c) states the right to object to an instruction or the failure to give an instruction, carrying forward the requirement that the objection state distinctly the matter objected to and the grounds of the objection. The provisions on the time to object make it clear that it is timely to object promptly after learning of an instruction or action on a request when the court has not provided advance information as required by subdivisions (b)(1). The need to repeat a request by way of objection is mollified, but not discarded, by new subdivision (d)(2).

Forfeiture and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. But this doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. Subdivision (d)(2) establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made a definitive ruling on the record rejecting the request.

Many circuits have recognized that an error not preserved under Rule 51 may be reviewed in exceptional circumstances. The foundation of these decisions is that a district court owes a duty to the parties, to the law, and to the jury to give correct instructions on the fundamental elements of an action. The language adopted to capture these decisions in subdivision (d)(3) is borrowed from Criminal Rule 52. The advantages of using familiar language should not disguise the phenomenon that plain error is more likely to be found in a criminal prosecution than in a civil action. The government may share a greater responsibility for correct jury instructions in a criminal prosecution than is fairly attributed to the winning party in a civil action.

The court's duty to give correct jury instructions in a civil action is shaped by at least four factors.

The factor most directly implied by a "plain" error rule is the obviousness of the mistake. Obviousness reduces the need to rely on the parties to help the court with the law, and also bears on society's obligation to provide a reasonably learned judge. Obviousness turns not only on how well

the law is settled, but also on how familiar the particular area of law should be to most judges. Clearly settled but exotic law often does not generate obvious error. Obviousness also depends on the way the case was presented at trial and argued.

The importance of the error is a second major factor. Importance must be measured by the role the issue plays in the specific case; what is fundamental to one case may be peripheral in another. Importance is independent of obviousness. A sufficiently important error may justify reversal even though it was not obvious. The most likely example involves an instruction that was correct under law that was clearly settled at the time of the instructions, so that request and objection would make sense only in hope of arguing for a change in the law. If the law is then changed in another case or by legislation that has retroactive effect, reversal may be warranted.

The costs of correcting an error reflect a third factor that is affected by a variety of circumstances. If a complete new trial must be had for other reasons, ordinarily an instruction error at the first trial can be corrected for the second trial without significant cost. A Rule 49 verdict may enable correction without further proceedings.

In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties. Common examples are provided by actions that attack government actions or private discrimination.

RULE 53

The Rule 53 project began several years ago, prompted by observations addressed to the committee by two of the local committees formed to develop Civil Justice Reform Act plans. In working through the Civil Rules, these committees observed that Rule 53 does not describe the uses of special masters that have grown up over the years. Rule 53 was developed to govern the use of trial masters who hear trial testimony and report recommended findings. The Supreme Court has severely limited resort to trial masters. But masters have come to be used increasingly for pretrial and post-judgment purposes. A detailed draft revising Rule 53 was prepared and reviewed by many people with extensive experience in the use of special masters. The Federal Judicial Center did a study that was shaped by the premises adopted in the draft rule, and confirmed that special masters often are used for purposes not clearly contemplated by Rule 53. See Willging, Hooper, Leary, Miletich, Reagan, & Shapard, *Special Masters' Incidence and Activity, Report to the Judicial Conference's Committee on Civil Rules and Its Subcommittee on Special Masters* (Federal Judicial Center 2000). Against this background, a Rule 53 Subcommittee went to work on the initial draft. Under the leadership first of Judge Roger Vinson and then Judge Shira Scheindlin, the Rule 53 draft has been pared down, omitting many details and focusing on standards for appointment and review. The intervening provisions describing the powers that can be assigned to a special master reflect the provisions of present Rule 53, but are recast in shorter and more open terms. The provisions relating appointment of special masters to the responsibilities borne by magistrate judges elaborate extensively on the brief provision in present Rule 53(f).

One part of the proposal that deserves special mention appears in draft Rule 53(a)(1)(B). This provision limits the use of trial masters to actions to be tried to the court. The present provision for appointment of a trial master in a jury trial is deleted; if this recommendation is adopted, a trial master could be appointed in a jury-tried case only with the consent of the parties. The reasons for this change are expressed in the draft Committee Note. The recommendation to delete the present Rule 53 provisions for trial masters in jury cases is not intended to close off further exploration of more creative models. The role of the jury in complex litigation may be enhanced by providing neutral advice under the court's auspices. The most interesting proposals combine the roles of master and court-appointed expert witness. In rough outline, the person appointed by the court would have authority to investigate as an expert might do, and to compel discovery and testimony as a master might do. The recommendations to the jury would be presented as testimony, subject to cross-examination. The underlying information gathered by the witness would be presented to the jury to the extent designated by the witness, any party, or the court. Such proposals as this will be difficult to develop, and will require collaboration among at least the Evidence and Civil Rules Committees. Any attempt to pursue them must lie in the future.

This proposal is not designed to encourage — nor, for that matter, to discourage — use of special masters. It is designed to reflect contemporary practice, and to establish a framework to regularize the practice.

Proposed Rule 53(g)(5) is recommended for publication for comment, but set in brackets to solicit comment on the need for any provision defining the standard to review procedural rulings by a master.

Amendment of Rule 53 will require technical conforming changes in two rules that cross-refer to specific subdivisions of present Rule 53. These amendments are set out at the end of the Rule 53 materials.

RULE 53. MASTERS

(a) APPOINTMENT.

(1) A court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and recommend findings of fact in an action to be tried by the court if appointment is warranted by

(i) some exceptional condition, or

(ii) the need to perform an accounting or resolve a difficult computation of damages; or

(C) perform duties that cannot be performed by an available district judge or magistrate judge of the district.

(2) A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge under 28 U.S.C. § 455 unless the parties consent to appointment of a particular person after disclosure of a potential ground for disqualification.

(3) A master must not, during the period of the appointment, appear as an attorney before the judge who made the appointment.

(4) In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

(b) ORDER APPOINTING MASTER.

(1) Hearing. The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment.

(2) Contents. The order appointing a master must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties and any limits on the master's authority under Rule 53(c);

(B) the circumstances in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved as the record of the master's activities;

(D) the time limits, procedures, and standards for reviewing the master's orders and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).

(3) **Amendment.** The order appointing a master may be amended at any time after notice to the parties.

(4) **Effective Date.** A master's appointment takes effect:

(A) after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification, and

(B) on the date set by the order.

(c) **MASTER'S AUTHORITY.** Unless expressly limited by the appointing order, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties.

(d) **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. The master may enforce against a party any noncontempt sanction provided by Rule 37 or Rule 45, and may recommend to the court a contempt sanction against a party and sanctions against a nonparty.

(e) **MASTER'S ORDERS.** A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

(f) **MASTER'S REPORTS.** A master must report to the court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.

(g) **ACTION ON MASTER'S ORDER, REPORT, OR RECOMMENDATIONS.**

(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: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.

(2) **Time.** A party may file objections to — or a motion to adopt or modify — the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.

(3) **Fact Findings or Recommendations.** Unless the order of appointment provides for de novo decision by the court, the court receives evidence, or the parties stipulate with the court's consent that the master's findings will be final, the court may set aside a master's fact findings or recommendations for fact findings only if clearly erroneous.

(4) **Legal questions.** In acting under Rule 53(g)(1), the court must decide questions of law de novo , unless the parties stipulate with the court's consent that the master's disposition will be final.

[(5) **Discretion.** Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.]

(h) COMPENSATION.

(1) **Fixing Compensation.** The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and opportunity to be heard.

(2) **Payment.** The compensation fixed under Rule 53(h)(1) must be paid either:

(A) by a party or parties; or

(B) from a fund or subject matter of the action within the court's control.

(3) **Allocation.** The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

(i) APPOINTMENT OF MAGISTRATE JUDGE. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule. A court may appoint a magistrate judge as master only for duties that cannot be performed in the capacity of magistrate judge and only in exceptional circumstances. A magistrate judge is not eligible for compensation ordered under Rule 53(h).

Committee Note

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform pretrial and post-trial functions. A study by the Federal Judicial Center documents the variety of responsibilities that have come to be assigned to masters. See Willging, Hooper, Leary, Miletich, Reagan, & Shapard, *Special Masters' Incidence and Activity* (FJC 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if the parties consent. The new rule ~~and~~ clarifies the provisions that govern the appointment and function of masters for all purposes. The core of the original Rule 53 remains. Rule 53 was adapted from equity practice, and reflected

a long history of discontent with the expense and delay frequently encountered in references to masters. Public judicial officers, moreover, enjoy presumptions of ability, experience, and neutrality that cannot attach to masters. These concerns remain important today.

The new provisions reflect the need for care in defining a master's role. It may prove wise to appoint a single person to perform multiple master roles. Yet separate thought should be given to each role. Pretrial and post-trial masters are likely to be appointed more often than trial masters. The question whether to appoint a trial master is not likely to be ripe when a pretrial master is appointed. If appointment of a trial master seems appropriate after completion of pretrial proceedings, however, the pretrial master's experience with the case may be strong reason to appoint the pretrial master as trial master. Nonetheless, the advantages of experience may be more than offset by the nature of the pretrial master's role. A settlement master is particularly likely to have played roles that are incompatible with the neutral role of trial master, and indeed may be effective as settlement master only with clear assurance that the appointment will not be expanded to trial master duties. For similar reasons, it may be wise to appoint separate pretrial masters in cases that warrant reliance on a master both for facilitating settlement and for supervising pretrial proceedings. There may be fewer difficulties in appointing a pretrial master or trial master as post-trial master, particularly for tasks that involve facilitating party cooperation.

SUBDIVISION (a)(1)

District judges bear initial and primary responsibility for the work of their courts. A master should be appointed only in restricted circumstances. Subdivision (a)(1) describes three different standards, relating to appointments by consent of the parties, appointments for trial duties, and appointments for pretrial or post-trial duties.

CONSENT MASTERS. Subparagraph (a)(1)(A) authorizes appointment of a master with the parties' consent. Courts should be careful to avoid any appearance of influence that may lead a party to consent to an appointment that otherwise would be resisted. Freely given consent, however, establishes a strong foundation for appointing a master. But party consent does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment. The court may well prefer to discharge all judicial duties through official judicial officers.

TRIAL MASTERS. Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions. The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement in Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference "shall be the exception and not the rule" is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

Subparagraph (a)(1)(B)(ii) carries forward the approach of present Rule 53(b), which exempts from the "exceptional circumstance" requirement "matters of account and of difficult computation of damages." This approach is justified only as to essentially ministerial determinations

that require mastery of much detailed information but that do not require extensive determinations of credibility. Evaluations of witness credibility should only be assigned to a trial master when justified by an exceptional condition.

The use of a trial master in a jury case without party consent is abolished. Former Rule 53(b) authorized appointment of a master in a jury case. Rule 53(e)(3) directed that the master could not report the evidence, and that "the master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury." This practice intrudes on the jury's province with too little offsetting benefit. If the master's findings are to be of any use, the master must conduct a preliminary trial that reflects as nearly as possible the trial that will be conducted before the jury. This procedure imposes a severe dilemma on parties who believe that the truth-seeking advantages of the first full trial cannot be duplicated at a second trial. It also imposes the burden of two trials to reach even the first verdict. The usefulness of the master's findings as evidence is also open to doubt. It would be folly to ask the jury to consider both the evidence heard before the master and the evidence presented at trial, as reflected in the longstanding rule that the master "shall not be directed to report the evidence." If the jury does not know what evidence the master heard, however, nor the ways in which the master evaluated that evidence, it is impossible to appraise the master's findings in relation to the evidence heard by the jury.

Abolition of the direct power to appoint a trial master in a jury case leaves the way free to appoint a trial master with the consent of all parties. As in other settings, party consent does not require the court to appoint a master. A trial master should be appointed in a jury case, with consent of the parties and concurrence of the court, only if the parties waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence in the matter provided by former Rule 53(e)(3). In no circumstance may a master be appointed to preside at a jury trial.

The central function of a trial master is to preside over an evidentiary hearing. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master may often need to conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials. This authority is omitted from Rule 53(a)(1)(B). The person who takes the evidence should work through the determinations of credibility, regardless of the standard of review set by the court. In special circumstances a master may be appointed under Rule 53(a)(1)(C) to take evidence and report without recommendations. Such circumstances might involve, for example, a need to take evidence at a location outside the district — a circumstance that might justify appointment of the trial judge as a master — or a need to take evidence at a time or place that the trial judge cannot attend. Improving communications technology may reduce the need for such appointments and facilitate a "report" by combined visual and audio means.

For nonjury cases, a master also may be appointed to assist the court in discharging trial duties other than conducting an evidentiary hearing. Courts occasionally have appointed judicial

adjuncts to perform a variety of tasks that do not fall neatly into any traditional category. A court-appointed expert witness, for example, may be asked to give advice to the court in addition to testifying at a hearing. Or an appointment may direct that the adjunct compile information solely for the purpose of giving advice to the court. If such assignments are given to a person designated as master, the order of appointment should be framed with particular care to define the powers and authority that shape these relatively unfamiliar trial tasks. Even greater care should be observed in making an appointment outside Rule 53.

PRETRIAL AND POST-TRIAL MASTERS. Subparagraph (a)(1)(C) authorizes appointment of a master to perform pretrial or post-trial duties. Appointment is limited to duties that cannot be performed by an available district judge or magistrate judge of the district.

Magistrate Judges. Particular attention should be paid to the prospect that a magistrate judge may be available to respond to high-need cases. United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(b)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge. A magistrate judge is an experienced judicial officer who has no need to set aside nonjudicial responsibilities for master duties; the fear of delay that often deters appointment of a master is much reduced. There is no need to impose on the parties the burden of paying master fees when a magistrate judge is available. A magistrate judge, moreover, is less likely to be involved in matters that raise disqualification issues.

The statute specifically authorizes appointment of a magistrate judge as special master. 28 U.S.C. § 636(b)(2). In special circumstances, it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). These advantages are most likely to be realized with trial or post-trial functions. The advantages of relying on a magistrate judge are diminished, however, by the risk of confusion between the ordinary magistrate judge role and master duties, particularly with respect to pretrial functions commonly performed by magistrate judges as magistrate judges. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53. Subdivision (i) requires that appointment of a magistrate judge as master be justified by exceptional circumstances.

A court confronted with an action that calls for judicial attention beyond the court's own resources may request assignment of a district judge or magistrate judge from another district. This opportunity, however, does not limit the authority to appoint a special master; the search for a judge need not be pursued by seeking an assignment from outside the district.

Despite the advantages of relying on district judges and magistrate judges to discharge judicial duties, the occasion may arise for appointment of a nonjudicial officer as pretrial master. Absent party consent, the most common justifications will be the need for time or expert skills that cannot be supplied by an available magistrate judge. An illustration of the need for time is provided by discovery tasks that require review of numerous documents, or perhaps supervision of depositions at distant places. Post-trial accounting chores are another familiar example of time-consuming work that requires little judicial experience. Expert experience with the subject-matter of specialized litigation may be important in cases in which a district judge or magistrate judge could devote the required time. At times the need for special knowledge or experience may be best served by

appointment of an expert who is not a lawyer. In large-scale cases, it may be appropriate to appoint a team of masters who possess both legal and other skills.

Pretrial Masters. The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. Reflections of the practice are found in such cases as *Burlington No. R.R. v. Dept. of Revenue*, 934 F.2d 1064 (9th Cir. 1991), and *In re Armco*, 770 F.2d 103 (8th Cir. 1985). This practice is not well regulated by present Rule 53, which focuses on masters as trial participants. A careful study has made a convincing case that the use of masters to supervise discovery was considered and explicitly rejected in framing Rule 53. See *Brazil, Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?*, 1983 ABF Research Journal 143. Rule 53 is amended to confirm the authority to appoint — and to regulate the use of — pretrial masters.

Pretrial masters should be appointed only when needed. The parties should not be lightly subjected to the potential delay and expense of delegating pretrial functions to a pretrial master. Ordinarily public judicial officers should discharge public judicial functions. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. Appointment of a master risks dilution of judicial control, loss of familiarity with important developments in a case, and duplication of effort. At the extreme, a broad delegation of pretrial responsibility can run afoul of Article III. See *Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir. 1992); *In re Bituminous Coal Operators' Assn.*, 949 F.2d 1165 (D.C.Cir. 1991); *Burlington No. R.R. v. Dept. of Revenue*, 934 F.2d 1064 (9th Cir. 1991). The risk of increased delay and expense is offset, however, by the possibility that a master can bring to pretrial tasks time, talent, and flexible procedures that cannot be provided by judicial officers. Appointment of a master is justified when a master is likely to substantially advance the Rule 1 goals of achieving the just, speedy, and economical determination of litigation.

A wide variety of responsibilities have been assigned to pretrial masters. Settlement masters are used to mediate or otherwise facilitate settlement. Masters are used to supervise discovery, particularly when the parties have been unable to manage discovery as they should or when it is necessary to deal with claims that thousands of documents are protected by privilege, work-product, or protective order. In special circumstances, a master may be asked to conduct preliminary pretrial conferences; a pretrial conference directed to shaping the trial should be conducted by the officer who will preside at the trial. Masters may be used to hear and either decide or make recommendations on pretrial motions. More general pretrial management duties may be assigned as well. With the cooperation of the courts involved, a special master even may prove useful in coordinating the progress of parallel litigation.

Post-Trial Masters. Courts have come to rely extensively on masters to assist in framing and enforcing complex decrees, particularly in institutional reform litigation. Current Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes. The constraint of subdivision (a)(1)(C) limits this practice to cases in which the master's duties cannot be performed by an available district judge or magistrate judge of the district.

It is difficult to translate developing post-trial master practice into terms that resemble the "exceptional condition" requirement of original Rule 53(b) for trial masters in nonjury cases. The tasks of framing and enforcing an injunction may be less important than the liability decision as a matter of abstract principle, but may be even more important in practical terms. The detailed decree and its operation, indeed, often provide the most meaningful definition of the rights recognized and enforced. Great reliance, moreover, is often placed on the discretion of the trial judge in these matters, underscoring the importance of direct judicial involvement. Experience with mid- and late twentieth century institutional reform litigation, however, has convinced many trial judges and appellate courts that masters often are indispensable. The rule does not attempt to capture these competing considerations in a formula. Reliance on a master is inappropriate when responding to such routine matters as contempt of a simple decree; see *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1096-1097 (3d Cir. 1987). Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC*, 478 U.S. 421, 481-482 (1986). Among the many appellate decisions are *In re Pearson*, 990 F.2d 653 (1st Cir. 1993); *Williams v. Lane*, 851 F.2d 867 (7th Cir. 1988); *NORML v. Mulle*, 828 F.2d 536 (9th Cir. 1987); *In re Armco, Inc.*, 770 F.2d 103 (8th Cir. 1985); *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 111-112 (3d Cir. 1979); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737 (6th Cir. 1979); *Gary W. v. Louisiana*, 601 F.2d 240, 244-245 (5th Cir. 1979). The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system. The master in the *Pearson* case, for example, was appointed by the court on its own motion to gather information about the operation and efficacy of a consent decree that had been in effect for nearly twenty years. A classic example of the need for — and limits on — sweeping investigative powers is provided in *Ruiz v. Estelle*, 679 F.2d 1115, 1159-1163, 1170-1171 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983).

Other duties that may be assigned to a post-trial master may include such tasks as a ministerial accounting or administration of an award to multiple claimants. Still other duties will be identified as well, and the range of appropriate duties may be extended with the parties' consent.

It may prove desirable to appoint as post-trial master a person who has served in the same case as a pretrial or trial master. Intimate familiarity with the case may enable the master to act much more quickly and more surely. The skills required by post-trial tasks, however, may be significantly different from the skills required for earlier tasks. This difference may outweigh the advantages of familiarity. In particularly complex litigation, the range of required skills may be so great that it is better to appoint two or even more persons. The sheer volume of work also may favor the appointment of more than one person. The additional persons may be appointed as co-equal masters, as associate masters, or in some lesser role — one common label is "monitor."

EXPERT WITNESS OVERLAP. This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. To be effective, a court-appointed expert witness may need court-enforced powers of inquiry that resemble the powers of a pretrial or post-trial master. Beyond some uncertain level of power, there must be a separate appointment as a master. Even with a separate appointment, the combination of roles can easily confuse and vitiate both functions. An expert

witness must testify and be cross-examined in court. A master, functioning as master, is not subject to examination and cross-examination. Undue weight may be given the advice of a master who provides the equivalent of testimony outside the open judicial testing of examination and cross-examination. A master who testifies and is cross-examined as witness moves far outside the role of ordinary judicial officer. Present experience is insufficient to justify more than cautious experimentation with combined functions.

SUBDIVISION (a)(2), (3), AND (4).

Masters are subject to the Code of Conduct for United States Judges, with exceptions spelled out in the Code. Special care must be taken to ensure that there is no actual or apparent conflict of interest involving a master. The standard of disqualification is established by 28 U.S.C. § 455. The affidavit required by Rule 53(b)(4)(A) provides an important source of information about possible grounds for disqualification, but careful inquiry should be made at the time of making the initial appointment. The disqualification standards established by § 455 are strict. Because a master is not a public judicial officer, it may be appropriate to permit the parties to consent to appointment of a particular person as master in circumstances that would require disqualification of a judge. The judge must be careful to ensure that no party feels any pressure to consent, but with such assurances — and with the judge's own determination that there is no troubling conflict of interests or disquieting appearance of impropriety — consent may justify an otherwise barred appointment.

The rule prohibits a lawyer-master from appearing before the appointing judge as a lawyer during the period of the appointment. The rule does not address the question whether other members of the same firm are barred from appearing before the appointing judge. Other conflicts are not enumerated, but also must be avoided. For example, a lawyer may be involved in other litigation that involves parties, interests, or lawyers or firms engaged in the present action. A lawyer or nonlawyer may be committed to intellectual, social, or political positions that are affected by the case.

SUBDIVISION (b)

The order appointing a pretrial master is vitally important in informing the master and the parties about the nature and extent of the master's duties and authority. Care must be taken to make the order as precise as possible. The parties must be given notice and opportunity to be heard on the question whether a master should be appointed and on the terms of the appointment. To the extent possible, the notice should describe the master's proposed duties, time to complete the duties, standards of review, and compensation. Often it will be useful to engage the parties in the process of identifying the master, inviting nominations, and reviewing potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement.

Present Rule 53 reflects historic concerns that appointment of a master may lengthen, not reduce, the time required to reach judgment. Rule 53(d)(1) directs the master to proceed with all reasonable diligence, and recognizes the right of a party to move for an order directing the master to speed the proceedings and make the report. Today, a master should be appointed only when the appointment is calculated to speed ultimate disposition of the action. New Rule 53(b)(2) reminds

court and parties of the historic concerns by requiring that the appointing order direct the master to proceed with all reasonable diligence.

Rule 53(b)(2) also requires precise designation of the master's duties and authority. There should be no doubt among the master and parties as to the tasks to be performed and the allocation of powers between master and court to ensure performance. Clear delineation of topics for any reports or recommendations is an important part of this process. It also is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties. And experience may show the value of describing specific ancillary powers that have proved useful in carrying out more generally described duties.

Ex parte communications between a master and the court present troubling questions. Often the order should prohibit such communications, assuring that the parties know where authority is lodged at each step of the proceedings. Prohibiting ex parte communications between master and court also can enhance the role of a settlement master by assuring the parties that settlement can be fostered by confidential revelations that will not be shared with the court. Yet there may be circumstances in which the master's role is enhanced by the opportunity for ex parte communications. A master assigned to help coordinate multiple proceedings, for example, may benefit from off-the-record exchanges with the court about logistical matters. The rule does not directly regulate these matters. It requires only that the court address the topic in the order of appointment.

Similarly difficult questions surround ex parte communications between a master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited. The rule does not provide direct guidance, but does require that the court address the topic in the order of appointment.

Subdivision (b)(2)(C) provides that the appointment order must state the nature of the materials to be preserved as the record of the master's activities. It is not feasible to prescribe the nature of the record without regard to the nature of the master's duties. The records appropriate to discovery duties may be different from those appropriate to encouraging settlement, investigating possible violations of a complex decree, or making recommendations for trial findings. [In some circumstances it may be appropriate for a party to file materials directly with the court as provided by Rule 5(e), but in many circumstances filing with the court may be inappropriate. Confidentiality is vitally important with respect to many materials that may properly be considered by a master.] Materials in the record can be transmitted to the court, and filed, in connection with review of a master's order, report, or recommendations under subdivision (f) and (g). Independently of review proceedings, the court may direct filing of any materials that it wishes to make part of the public record.

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guidelines to control total expense. The order of appointment should state the basis, terms, and procedures for fixing compensation. When there is an apparent danger that the

expense may prove unjustifiably burdensome to a party or disproportionate to the needs of the case, it also may help to provide for an expected total budget and for regular reports on cumulative expenses. The court has power under subdivision (h) to change the basis and terms for determining compensation, but should recognize the risk of unfair surprise to the parties.

The provision in Rule 53(b)(3) for amending the order of appointment is as important as the provisions for the initial order. New opportunities for useful assignments may emerge as the pretrial process unfolds, or even in later stages of the litigation. Conversely, experience may show that an initial assignment was too broad or ambitious, and should be limited or revoked. It even may happen that the first master is ill-suited to the case and should be replaced. Anything that could be done in the initial order can be done by amendment.

Subdivision (b)(4) describes the effective date of a master's appointment. The appointment cannot take effect until the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455. If the affidavit discloses a ground for disqualification, the appointment can take effect only if the parties, knowing of the ground for disqualification, consent with the court's approval to waive the disqualification. The appointment order must also provide an effective date, which should be set to follow the filing of the (b)(4)(A) affidavit.

SUBDIVISION (c)

Subdivision (c) is a simplification of the provisions scattered throughout present Rule 53. It is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities. The most important delineation of a master's authority and duties is provided by the Rule 53(b) appointing order.

SUBDIVISION (d)

The subdivision (d) provisions for evidentiary hearings are reduced from the extensive provisions in current Rule 53. This simplification of the rule is not intended to diminish the authority that may be delegated to a master. Reliance is placed on the broad and general terms of subdivision (c).

It is made clear that the contempt power referred to in present Rule 53(d)(2) is reserved to the judge, not the master.

SUBDIVISION (e)

Subdivision (e) provides that a master's order must be filed and entered on the docket. It must be promptly served on the parties, a task ordinarily accomplished by mailing or other means as permitted by Rule 5(b). In some circumstances it may be appropriate to have the clerk's office assist the master in mailing the order to the parties.

SUBDIVISION (f)

Subdivision (f) restates some of the provisions of present Rule 53(e)(1). The report is the master's primary means of communication with the court. The materials to be provided to support review of the report will depend on the nature of the report. The master should provide all portions of the record preserved under Rule 53(b)(2)(C) that the master deems relevant to the report. The

parties may designate additional materials from the record, and may seek permission to supplement the record with evidence. The court may direct that additional materials from the record be provided and filed. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report or review record against public access — a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Such circumstances may even justify denying access to the report or review materials by the parties, although this step should be taken only for the most compelling reasons. Sealing is much less likely to be appropriate with respect to a trial master's report.

Before formally making an order, report, or recommendations, a master may find it helpful to circulate a draft to the parties for review and comment. The usefulness of this practice depends on the nature of the master's proposed action.

A master may learn of matters outside the scope of the reference. Rule 53 does not address the question whether — or how — such matters may properly be brought to the court's attention. Matters dealing with settlement efforts, for example, often should not be reported to the court. Other matters may deserve different treatment. If a master concludes that something should be brought to the court's attention, ordinarily the parties should be informed of the master's communication.

SUBDIVISION (g)

The provisions of subdivision (g)(1), describing the court's powers to afford a hearing, take evidence, and act on a master's order, report, or recommendations are drawn from present Rule 53(e)(2), but are not limited to the report of a trial master in a nonjury action.

The subdivision (g)(2) time limits for objecting to — or seeking adoption or modification of — a master's order, report, or recommendations, are important. They are not jurisdictional. The subordinate role of a master means that although a court may properly refuse to entertain untimely review proceedings, there must be power to excuse the failure to seek timely review. The basic time period is lengthened to 20 days because the present 10-day period may be too short to permit thorough study and response to a complex report dealing with complex litigation. No time limit is set for action by the court when no party undertakes to file objections or move for adoption or modification of a master's order, report, or recommendations. The court remains free to adopt the master's action or to disregard it at any relevant point in the proceedings. If the court takes no action, the master's action has no effect outside the terms of the court's own orders and judgment.

Subdivision (g)(3) provides several alternative standards for review of a master's fact findings or recommendations for fact findings, but the clear error test, carried forward from present Rule 53(e)(2), provides the presumptive standard of review for findings of fact. The "clearly erroneous" phrase is as malleable in this context as it is in Rule 52, and in applying this test account may be taken of the fact that the relationship between a court and master is not the same as the relationship between an appellate court and a trial court. A court may provide a more demanding standard of review in the original order of appointment; if it does not, the Rule 53(b)(3) power to amend the order should be exercised to provide more searching review only for compelling reasons. Special characteristics of the case that suggest more searching review ordinarily should be apparent

at the time of appointment, and action at that time avoids any concern that the standard may have been changed because of dissatisfaction with the master's result. In addition, the parties may rely on the standard of review in proceedings before the master. A court may not accord the master's findings or recommendations greater weight than clear-error review permits without the consent of the parties; clear-error review marks the outer limit of appropriate deference to a master. Parties who wish to expedite proceedings, however, may — with the court's consent — stipulate that the master's findings will be final.

Absent consent of the parties, questions of law cannot be delegated for final resolution by a master. As with matters of fact, a party stipulation can make the master's disposition final only if the court consents to the stipulation.

Apart from factual and legal questions, masters often make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The court may set a standard for review of such matters in the order or appointment, and may amend the order to establish the standard. If no standard is set by the original or amended order appointing the master, review of procedural matters is for an abuse of discretion. The abuse-of-discretion standard is as dependent on the specific type of procedural issue involved in this setting as in any other. In addition, the subordinate role of the master means that the trial court's review for abuse of discretion is much more searching than the review that an appellate court makes of a trial court. A trial judge who believes that a master has erred has ample authority to correct the error.

As an alternative to including subdivision (g)(5) in Rule 53, the Rule could remain silent. The Committee Note would say: No standard of review is set for rulings on procedural matters. The court may set standards of review in the order appointing the master, see Rule 53(b)(2)(D), or may face the issue only when it arises. If a standard is not set in the order appointing the master, a party seeking review may ask the court to state the standard of review before framing the arguments on review.

SUBDIVISION (h)

The need to pay compensation is a substantial reason for care in appointing private persons as masters. The burden on the parties can be reduced to some extent by recognizing the public service element of the master's office. One court has endorsed the suggestion that an attorney-master should be compensated at a rate of about half that earned by private attorneys in commercial matters. See *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737, 746 (6th Cir. 1979). But even a discounted public-service rate can impose substantial burdens.

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. Many factors, too numerous to enumerate, may affect the allocation. The amount in controversy may provide some guidance in making the allocation, although it is likely to be more important in the initial decision whether to appoint a master and whether to set an expense limit at the outset. The means of the parties also may be considered, and may be particularly important if there is a marked imbalance of resources. Although there is a risk that a master may feel somehow beholden to a well-endowed party who pays a major portion of the fees, there are even greater risks of unfairness and strategic manipulation if costs can be run up

against a party who can ill afford to pay. The nature of the dispute also may be important — parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case.

The basis and terms for fixing compensation should be stated in the order of appointment. The court retains power to alter the initial basis and terms, after notice and an opportunity to be heard, but should protect the parties against unfair surprise.

SUBDIVISION (i)

This subdivision carries forward present Rule 53(f). It is changed, however, to emphasize that a magistrate judge should be appointed as a master only when justified by exceptional circumstances. See the discussion in subdivision (a). Because the magistrate judge remains a judicial officer, the parties cannot consent to waive disqualification under 28 U.S.C. § 455 in the way that Rule 53(a)(2) permits with respect to a master who is not a judicial officer.

Rule 54 and Rule 71A Amendments To Conform to Rule 53

Rule 54. Judgments; Costs * * *

(d) Costs; Attorneys' Fees. * * *

(2) *Attorneys' Fees.* * * *

(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the provisions of subdivision ~~(b)~~ (a)(1) thereof and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

Committee Note

Rule 54(d)(2)(D) is revised to reflect amendments to Rule 53.

Rule 71A. Condemnation of Property * * *

(h) Trial. * * *

In the event that a commission is appointed the court may direct that not more than two additional persons serve as alternate commissioners to hear the case and replace commissioners who, prior to the time when a decision is filed, are found by the court to be unable or disqualified to perform their duties. An alternate who does not replace a regular commissioner shall be discharged after the commission renders its final decision. Before appointing the members of the commission and alternates the court shall advise the parties of the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each such designee. The parties shall not be permitted or required by the court to suggest nominees. Each party shall have the right to object for valid cause to the appointment of any person as a commissioner or alternate. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect,

and be dealt with by the court in accordance with the practice, prescribed subdivisions in (e), (f), and (g) of Rule 53. Trial of all issues shall otherwise be by the court.

Committee Note

The references to specific subdivisions of Rule 53 are deleted to reflect amendments of Rule 53.

III Ongoing Work

The Advisory Committee and its Discovery Subcommittee continue to study the questions that arise from discovery of computer-based information. It is clear that many difficult issues remain to be resolved. Conferences and less formal exchanges with lawyers, judges, and forensic experts continue to provide an even division of opinion — there are as many who advise against rules changes as there who advise that rules changes should be made. It is not clear whether these issues should be addressed by amending the discovery rules, nor whether the time has come to initiate such amendments as may prove desirable.

Another long-range project, focusing on the possibility of developing simplified rules for some unspecified range of cases, is being held in abeyance. Many judges have expressed enthusiasm for the abstract idea of simplified rules, but translating the enthusiasm into concrete rules is difficult. Special difficulty is encountered in attempting to define the cases that would be governed by simplified rules, whether the approach is to identify categories of cases or to rely on some more flexible combination of party consent and judicial direction.

A number of topics have come to the agenda in recent years in response to concerns expressed in Congress. Among the topics that appear perennially are the sanction provisions of Civil Rule 11 and the offer-of-judgment provisions of Rule 68. Recent consideration of both topics has failed to point the way to useful changes. These and other topics, however, will remain open for regular evaluation.

The proposals recommended for publication this summer have resulted from much hard work. Not much time has been left for smaller-scale proposals, nor will much time be available for other projects if the recommended proposals proceed to publication this summer. As time does become available, a number of more easily managed issues will return to the agenda.

MEMORANDUM

ENABLING ACT AUTHORITY FOR ADDRESSING OVERLAPPING CLASS ACTIONS

Introduction

Draft Civil Rules 23(c)(1)(D), 23(e)(5), and 23(g) address the problems that arise when management of a federal class action is affected by parallel class actions growing out of the same basic dispute. The parallel actions may lie in state courts or other federal courts. Coordination of actions pending in federal courts has been substantially facilitated by pretrial consolidation under 28 U.S.C. § 1407. Coordination is more difficult when some of the related actions are pending in state courts.

The Ad Hoc Working Group on Mass Torts undertook a study of the problems that arise from overlapping actions concerning "mass torts." The Report provides an impressive picture of the situation in one area of practice, but recognized that practices may be different in litigation that grows out of different subject matters. Perhaps more importantly, it recognized that practice is continually evolving at a rapid pace. The exact state of present practice cannot be defined with precision. The lack of fully detailed information, however, does not defeat useful general description.

The simplest statement is that in some areas the effective management of federal class actions is seriously affected by overlapping, duplicating, and at times competing, class litigation. If the underlying dispute generates claims that support meaningful individual litigation, individual actions can present a problem. Individual claims may be pursued individually or in aggregations based on basic party joinder rules. The form of individual litigation may mask the underlying reality that in some settings a single law firm may represent hundreds or even thousands of clients and pursue their claims in ways that amount to large-scale aggregation. A time may come when a means is found to address these problems. The current proposals, however, aim only at parallel class actions. Whether or not individual actions are feasible, competing class actions also are brought. Competing class actions may generate incredible inefficiencies in discovery, although the potential problems often are reduced by the informal cooperation of pragmatic judges who understand the need to ameliorate the formal rules of jurisdiction and procedure. A greater concern is that competing class actions may devolve into competitions for judgment, whether or not abetted by one or more courts. The most particular concern is that this competition will lead to settlement on terms that do not effectively protect class interests.

One response to these concerns is reflected in various bills framing federal legislation to deal with class actions in state courts. Legislative approaches to these problems are welcome. Great care will be required, however, to avoid the temptation to legislate in terms that sweep too much into federal courts without adequate opportunity for case-specific adjustment of the relationships between federal and state courts. Some problems will be better addressed by state courts than by federal courts.

Rule 23 Drafts

The Rule 23 drafts embody approaches that focus on the particular problems that parallel class-action litigation poses for effective management of federal class actions. Rule 23(c)(1)(D) authorizes a judge to direct that a denial of class certification precludes another court from certifying a substantially similar class to pursue substantially similar claims, subject to several limits. This rule reduces the dilution of control that results when another court is asked to certify the same class. Rule 23(e)(5) addresses the problem that arises when rejection of an inadequate settlement is "shopped" by asking another court to approve substantially the same settlement for substantially the same class. Rule 23(g) seeks to preserve the ability to proceed in an orderly way to determine whether to certify a class and, if a class is certified, the ability to manage the class to achieve the goals of uniformity, fairness, and efficiency that underlie class-action procedure. The method adopted by Rule 23(g) is to recognize the power of the federal class-action court to control class actions brought on behalf of members of a potential or certified federal class in other tribunals. There is no automatic rule, nothing as severe as the "automatic bar" raised by initiation of bankruptcy proceedings. Instead, the court is to make case-specific determinations based on the actual needs and opportunities of its "own" class action in relation to other class proceedings. The outcome may be a stay of the federal action. And cooperation with the judges of other courts is directly encouraged.

The advantages of these draft rules are described in somewhat greater detail in the draft Committee Notes. This memorandum addresses the question whether the Rules Enabling Act, 28 U.S.C. § 2072, confers authority to adopt such rules. The question of authority reflects relationships between federal courts and state courts that must be considered with the utmost sensitivity even apart from issues of authority.

Enabling Act — General Supreme Court Interpretation

Section 2072(a) grants authority "to prescribe general rules of practice and procedure." Section 2072(b) limits this authority, requiring that "[s]uch rules shall not abridge, enlarge or modify any substantive right." There are additional limits. The power to make rules of practice and procedure is the power to make rules for the exercise of subject-matter jurisdiction established by statute, and "is not an authority to enlarge that jurisdiction * * *." *U.S. v. Sherwood*, 312 U.S. 584, 589-590 (1941). The statute, moreover, cannot delegate authority beyond the limits on Congress's authority to regulate federal procedure. Congressional regulation of federal judicial procedure originates in the Article III definition of judicial power and the Article I authority to establish federal courts, supplemented by the "necessary and proper" clause. See *Hanna v. Plumer*, 380 U.S. 460, 469-474 (1965). The implication of the *Hanna* opinion is that Congress meant to delegate all of its own power to the Supreme Court through the Enabling Act. This implication is confirmed in *Burlington No. R.R. v. Woods*, 480 U.S. 1, 5 (1987): A Federal Rule [Appellate Rule 38] that speaks to a question "must * * * be applied if it represents a valid exercise of Congress' rulemaking authority, which originates in the Constitution and has been bestowed on this Court by the Rules Enabling Act."

The Rule 23 drafts present several issues along these dimensions. The most pressing issues arise from the Rule 23(g) authority to control the litigating behavior of class members outside the federal class-action court. One simple illustration can be used to frame the questions. Rule 23(g)

would authorize a federal court to restrain members of a proposed or certified class from pursuing class litigation in another court on a claim involved in the class proceeding. It must be asked whether this authority is a rule of procedure; whether, although a rule of procedure, it abridges or modifies a "substantive right"; and whether it effects an impermissible expansion of federal subject-matter jurisdiction.

The questions whether a rule is indeed a rule of procedure and whether it impermissibly affects a substantive right may well collapse into a single question. The leading case is *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13-14 (1941). It is not possible to provide a definitive restatement of an opinion so prominent and so evocative. The setting is remembered by all lawyers. Sibbach, injured in an accident in Indiana, brought suit in a federal court in Illinois. The court ordered a physical examination under Civil Rule 35, and [mistakenly] imposed a contempt sanction under Civil Rule 37 for refusing to comply with the order. It was assumed that if the judicial act of ordering physical examination of a party is a matter of substantive law, the order would be authorized by the law of Indiana where the accident occurred. Sibbach thus conceded that Rule 35 is a rule of procedure, and argued only that Rule 35 nonetheless abridged or modified the right not to be subjected to a court-ordered examination. The Court — noting that Sibbach "admits, and, we think, correctly that Rules 35 and 37 are rules of procedure" — rhetorically translated this argument into an argument that the claimed right, although not "substantive," must be protected because "important" or "substantial." The Court rejected this test as one that would "invite endless litigation and confusion worse confounded. The test must be whether the rule really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them. That the rules in question are such is admitted." The Court went on to reject the argument that Rule 35 effected "a major change of policy." The Enabling Act itself established a "new policy" — "that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth."

Academics are given to making light of the seemingly tautological statement that "the test must be whether the rule really regulates procedure." The Court indeed barely purported to apply that test, pointing out only that Sibbach had conceded, "we think[] correctly," that Rule 35 is procedural. But the full context of the opinion does more. It seems to say that § 2072 authorizes rules that affect substantial and important "rights" so long as the purpose is to serve the "speedy, fair and exact determination of the truth." This purpose may also be expressed in the terms of the Court's own Civil Rule 1, looking for "the just, speedy, and inexpensive determination of every action."

The most important elaboration of the *Sibbach* test was provided in *Hanna v. Plumer*, 380 U.S. at 472-474. The Court there stated:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carried with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

The Court concluded in terms that seem to say that Congress used § 2072 to delegate all of its power to the Court:

> To hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.

(Recall the more explicit statement quoted above from the *Burlington Northern* opinion: "Congress' rulemaking authority * * * has been bestowed on this Court by the Rules Enabling Act.")

Three more recent Supreme Court opinions address the reach of the Enabling Act in the context of Civil Rule 11 disputes. In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990), the Court referred to "the Rules Enabling Act's grant of authority [to] streamline the administration and procedure of the federal courts." In *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 551-554 (1991), the Court rejected dissenting arguments that a Rule 11 attorney-fee sanction violated the Enabling Act as a new rule on liability for attorney fees and as a federal law of malicious prosecution. Rule 11 is designed to deter baseless filings and curb abuses. The Enabling Act is not violated by the incidental effect on substantive rights. *Willy v. Coastal Corp.*, 503 U.S. 131, 136-139 (1992), upheld imposition of Rule 11 sanctions for filings made in a case that eventually was held to fall outside federal subject-matter jurisdiction. The Constitution authorizes Congress to enact laws regulating the conduct of federal courts. The concern to maintain orderly procedure justifies the requirement that those who practice in federal court "conduct themselves in compliance with the applicable procedural rules" until there is a final determination whether there is subject-matter jurisdiction.

Semtak Internat. Inc. v. Lockheed Martin Corp., 2001 WL 182650 (Feb. 27), the Supreme Court's most recent opinion, provides little additional guidance, either in what it says or in the nature of the Enabling Act question it avoids. A federal diversity court in California invoked the California statute of limitations to dismiss an action "on the merits and with prejudice." The plaintiff then brought an action on the same claim in a Maryland state court, seeking the shelter of the longer Maryland limitations period. The state court concluded that the federal judgment precluded the action, applying federal law. The Supreme Court held that California claim-preclusion rules govern the effect of the federal judgment. In reaching that conclusion, it interpreted the Civil Rule 41(b) provision that a dismissal "operates as an adjudication upon the merits." Rule 41(b) is "ensconced in rules governing the internal procedures of the rendering court itself." "[I]t would be peculiar to find" that it governs the preclusion effect that other courts must give a federal judgment. At this point, the Court added the observation that Enabling Act questions would arise from an interpretation of Rule 41(b) that establishes an independent rule of claim preclusion. If a California court would allow an action in another state following dismissal under the California statute of limitations, reading Rule 41(b) to preclude an action in a different state "would seem to violate" the direction that a Civil Rule may not abridge, enlarge, or modify a substantive right. This observation addresses a distinctive question. Federal diversity courts are bound to apply state limitations law to state-created claims, and to choose the law of the state that would be chosen by the forum state. If California courts would apply California limitations law only for the purpose of barring a remedy

in a California state court, a federal court applies it only for the same purpose. An attempt to magnify the effect of the California statute through Rule 41(b), to serve no apparent federal procedural purpose or need, would indeed seem to violate § 2072(b). There is no useful analogy to proposed Rule 23(g). [The Court addressed a second Enabling Act question in a footnote. As interpreted, a Rule 41(b) dismissal with prejudice bars filing the same action in the same federal court. But an Enabling question would arise even then if a state court would dismiss only without prejudice to refiling the same action. The Court chose not to address this question either. The question is not likely to arise with a limitations dismissal. It could easily arise in other circumstances — one obvious illustration would be failure to satisfy a precondition to suit. In that setting dismissal should bar relitigation of the question whether the precondition must be satisfied, but should not bar relitigation after the precondition is satisfied. Again, the possible questions are far removed from proposed Rule 23(g).]

Enabling Act — Rule 23

There is little specific guidance to help interpret the scope of the Enabling Act in relation to Rule 23. It seems to be accepted that Rule 23 itself is generally within Enabling Act authority. Accepting that assumption carries a long way in examining provisions that help to make class actions more effective, fair, and efficient. A few scattered reflections are noted here, leaving the more detailed questions for the final section.

The Enabling Act was noted in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613, 629 (1997), to support the proposition that Rule 23 must be construed to honor the Enabling Act limit that a Civil Rule must not abridge substantive rights. It also was noted that since 1966, "class-action practice has become ever more 'adventuresome' as a means of coping with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one. * * * The development reflects concerns about the efficient use of court resources and the conservation of funds to compensate claimants who do not line up early in a litigation queue." 521 U.S. at 617-618. This recognition of the purposes of class actions may provide some support for amendments designed to support better fulfillment of those purposes.

Ortiz v. Fibreboard Corp., 119 S.Ct. 2295 (1999), provides similar references to the Enabling Act. The limit that bars abridgment of substantive rights by Rule was said to "underscore[] the need for caution" in interpreting Rule 23. The Court noted the argument that the settlement, by compromising full individual recoveries, abrogated state law rights. The argument was seen to present "difficult choice-of-law and substantive state-law questions" that need not be resolved, apart from noting the tension between the settlement "and the rights of individual tort victims at law." This observation was followed immediately by suggesting that it is best to keep "limited fund practice under Rule 23(b)(1)(B) close to the practice preceding its adoption, "[e]ven if we assume that some such tension is acceptable under the Rules Enabling Act." 119 S.Ct. at 2314. The Court went on to notice further implications for the Seventh Amendment right to jury trial and the due process right of each individual to have his own day in court. 119 S.Ct. 2314-2315. The jury trial concern focused on the nature of a mandatory settlement class, which by avoiding any trial necessarily avoids jury trial. The day-in-court concern, if pushed very far, would undermine any mandatory class, a result the Court clearly did not intend. These concerns nonetheless stand as a

warning that enthusiasm for the advantages of class litigation must be tempered by recognition of the sacrifices it may entail. Finally, toward the close of the opinion the Court relied on the Enabling Act in a manner similar to the Amchem opinion — courts are bound to honor Rule 23 as adopted, and should seek to change it through the orderly processes of the Enabling Act rather than through de facto amendment by interpretation. 119 S.Ct. at 2322.

Two other Supreme Court cases may provide some tangential perspective. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 116-125 (1968), rejected the view that decisions before adoption of amended Civil Rule 19 in 1966 had established a federal "substantive law" of party joinder that could not be affected by Rule. Rule 19 takes account of substantive rights in the process of determining mandatory party joinder questions. So it may be understood that Rule 23 takes account of substantive rights — as indeed it must — in determining whether to certify a class. So too, the effects on substantive rights must be calculated in determining how to respond to the threats that other class litigation may pose to realization of the purposes of federal class-action litigation. The 1966 Rule 19 amendments, indeed, were deliberately coordinated with the 1966 Rule 23 amendments — Rule 23(b)(1) in many ways reflects the same concerns as Rule 19(a), written for situations better approached wholesale than retail.

The decision in *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) dealt with the effects of a state class-action judgment, and had no occasion to deal with the Enabling Act. But the effect recognized for class-action procedure is so momentous as to deserve comment. The class representatives settled not only state-law claims but also federal securities law claims that fell into exclusive federal subject-matter jurisdiction. The Court ruled that the full faith and credit statute, 28 U.S.C. § 1738, compels a federal court to honor the preclusion effects of the settlement judgment as measured by state law. The class representatives had no real-world relationship whatever with most class members, and without certification of a class action could not have done anything to affect class members' rights. Recognition of their status as class representatives by a court that lacked any authority to adjudicate the federal claims, however, conferred on them authority to dispose of class members' rights by a private agreement later confirmed by the state court. This conclusion at least allows state courts to place a very — on some views an astonishingly — high value on the efficiencies of class-based adjudication.

Finally, an Enabling Act challenge to the very institution of class-action settlement has been summarily rejected in recent federal litigation. *In re: The Prudential Ins. Co. of America Sales Practices Litigation*, 962 F.Supp. 450, 561-562 (D.N.J.1997), affirmed 148 F.3d 283, 324 (3d Cir.1998). The argument that the settlement necessarily abridged or modified state-law rights was transformed by the district court into the response that Rule 23(e) approval of a settlement "merely recognizes the parties' voluntary compromise of their rights." The court of appeals affirmed "for the reasons outlined by the district court."

Application to Draft Rules

The proposition that these authorities support Enabling Act authority to adopt the proposed Rule 23 amendments is easily stated, but difficult to evaluate with assurance. The testing example put at the outset remains sufficient: Can Rule 23 be framed, as proposed subdivision (g) would do,

to authorize a federal court to support a proposed or certified class by directing class members to stay a competing class action?

The starting point is simple. Rule 23 is a rule of procedure, validly adopted under § 2072. The purpose of draft Rule 23(g) is to support the procedural goals of Rule 23. A federal court, if it certifies a class, is acting within the framework of a general procedural rule to create a legal construct — the class — that can fulfill the reasons for its creation only if protected against the intrusion of other class litigation. The reason for creating the class is to achieve, with as much efficiency as possible, a fair and uniform disposition with respect to all class members. Competing class litigation may make this task more difficult, and in some circumstances may thwart it completely. Fulfillment of the procedure, and effective implementation of the jurisdictional authority that supports resort to federal procedure, require that the class be protected in much the same way that a court is authorized to protect the res that supports in rem jurisdiction. (The analogy to in rem litigation is particularly persuasive with respect to a (b)(1)(B) class created to ensure equitable division of a limited fund.) When the effect of an order directed to a class member is to enjoin state-court class-action proceedings, the order is necessary in aid of the federal court's jurisdiction within the meaning of the anti-injunction act, 28 U.S.C. § 2283.

The procedural character and purpose of the draft rule bring it within the *Sibbach v. Wilson* test. The rule "really regulates procedure," and such effect as it has on substantive rights is legitimated by that character. It readily meets the elaboration of this test provided in the *Burlington Northern* opinion, where the Court repeated the *Hanna v. Plumer* understanding that a rule that falls in the uncertain area between substance and procedure is valid if it is arguably capable of classification as procedural. The Court went on to recognize that the purpose of developing "a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision [barring abridgement of a substantive right] if reasonably necessary to maintain the integrity of that system of rules." 480 U.S. at 5-6. Proposed Rule 23(g) is necessary to maintain the integrity of federal class-action procedure.

Similar considerations support the other Rule 23 proposals. If another court can certify a class that has been denied certification by a federal court, the authority to make a wise certification decision is undermined. The prospect that another court may certify the class may impel a federal court to grant a certification that otherwise would be withheld, believing that it is better to maintain control of a dubious class than to stand by helpless while another court pursues the same class to judgment. Even more obviously, the federal court's effective power to reject a proposed class-action settlement as inadequate or unfair is held hostage to the prospect that the parties can simply shop the country for a court willing to bless the same settlement.

These arguments seem compelling so far as they address relationships among different federal courts. They have great force even as to relationships between federal courts and state courts. But the wisdom of adopting a rule that touches highly sensitive relationships between federal and state courts is not resolved by the conclusion — if it is accepted — that the rule is authorized by the Enabling Act. Decision must depend on the severity and persistence of the threats competing litigation poses to fulfillment of Rule 23's purposes. In judging these threats, it also is appropriate

to take account of the proposed remedy. None of the draft rules would impose a rigid limit on state-court action, nor even a detailed and nuanced but prescribed regulation. Instead, federal-court discretion is recognized. A federal court acting under draft Rule 23(g) can allow state court class-action proceedings to continue, can stay its own proceedings, and may confer with state judges to achieve the best practicable accommodation. Draft Rule 23(c)(1)(D) establishes preclusion only on express direction of the court that denies certification, and even then is subject to stringent limits. Even the refusal to approve a proposed class settlement can be followed under draft Rule 23(e)(5) by another court's approval if warranted by changed circumstances.

PRELIMINARY NOTES: § 2283 - RULE 23

Effective pursuit of a class action may require that the class-action court be able to stay proceedings in competing class actions. As among federal courts, this need can be served by adding provisions to Civil Rule 23. As between a federal court and state courts, on the other hand, restrictions arise both from general concepts of comity and from the specific strictures of 28 U.S.C. § 2283. These Notes seek to frame the question, not to provide an exhaustively researched answer.

I. The Statutes

The general authority to issue an injunction is confirmed by 28 U.S.C. § 1651(a), the All Writs Act: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This general authority is limited by § 2283 with respect to injunctions directed at proceedings in a state court: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

It is common to say that the exceptions in § 2283 are read narrowly. That statement should not be taken at full face value. The possible bearing of the exceptions for injunctions authorized by Act of Congress or necessary in aid of a federal court's jurisdiction — and a more general limit on § 2283 — are explored below after a brief look at the general view of Rule 23 injunctions. There is no apparent reason to consider further the exception that allows an injunction to protect or effectuate a judgment. Res judicata injunctions are authorized after final judgment without any need to rely on special characteristics of class actions. The special needs of a class judgment may affect the exercise of injunction discretion, but do not seem necessary to support injunction authority.

II. Rule 23 Injunctions in General

The works that review use of injunctions to protect orderly disposition of a federal class action against encroachment by state litigation generally take a restrictive view of the effects of § 2283. A detailed statement of the proposition that an injunction is most likely to be available to protect an imminent opportunity to achieve settlement of the class action is provided in Marcus & Sherman, Complex Litigation 368-372 (3d ed. 1998). A markedly pessimistic view is taken in Wright, Miller & Kane, Federal Practice & Procedure: Civil 2d, § 1798.1, p. 435: "[T]o date all the courts of appeals that have ruled on the applicability of the statute in the class action context have refused to authorize injunctions of coordinate state actions in order to protect the federal class action before them." A more optimistic view is taken, more as a matter of principle than as a matter of authority, in 17 Wright, Miller & Cooper, Federal Practice & Procedure: Jurisdiction 2d, § 4425, pp. 531-533 & n. 11: "A good argument can be made that * * * it should be permissible for a federal court to enjoin state proceedings that would interfere with efficient disposition of a federal class action." And a decidedly encouraging view is urged in Weinstein, Note, Avoiding the Race to Res Judicata: Federal Antisuit Injunctions of Competing State Class Actions, 2000, 75 N.Y.U.L.Rev. 1085.

These views rest on the present form of Rule 23. They do not address the question whether Rule 23 can be cast in a form that provides greater support for invoking both the general § 1651 authority to issue injunctions necessary or appropriate in aid of the jurisdiction that supports a class action and also the specific § 2283 exception that permits an injunction necessary in aid of the federal court's jurisdiction.

III. In Aid of a Revised Rule 23 Jurisdiction

Civil Rule 23 can be framed to authorize injunctions that support orderly, efficient, and fair development of a class action. Draft Rule 23(g) does that. The question is whether express authority provided by a court rule can affect application of § 2283.

The § 2283 question is interdependent with the question of Enabling Act authority. If there is Enabling Act authority to add an antisuit injunction provision to Rule 23, it is because the provision is part of the very construct of a class action. The new rule provision helps to define what it is that a federal court is doing when it contemplates certification of a class and then when it certifies a class. If it is decided that the Enabling Act authorizes the provision, the first step has been taken toward integrating the provision with § 2283.

One of the next steps is easy. Section 2283 does not apply to an injunction against proceedings that have not yet been filed. E.g., *Dombrowski v. Pfister*, 380 U.S. 479, 484 n. 2 (1965). A Rule 23 antisuit injunction provision can authorize restraints that bar filing future actions, even if it can do nothing more. That authority may be useful in itself.

The remaining steps explore two exceptions: whether clarification of the class-action concept can support an antisuit injunction as necessary in aid of the underlying jurisdiction, and whether a Civil Rule 23 injunction counts as one expressly authorized by Act of Congress.

The in-aid-of-jurisdiction argument is straight-forward. In rather open-ended dictum, the Supreme Court has stated that this exception — along with the exception for protecting a federal judgment — allows federal relief where "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atlantic Coast Line R.Co. v. Brotherhood of Locomotive Engineers*, 298 U.S. 281, 295 (1970). Those words do not mean all that they might; in the ordinary setting of two parallel in personam actions, a federal court cannot simply say that a state proceeding is impairing its flexibility to decide the case and enjoin the state proceeding. Not even the prospect that victory by the state court in the race to judgment will preclude further federal proceedings will support an injunction. But these words suggest that there is room to build on the equally well-settled rule that a federal court that has in rem jurisdiction of property can enjoin a state proceeding that threatens to interfere with control of the property.

The in-rem analogy is most persuasive if a federal class is viewed as something akin to a thing in the jurisdiction of the federal court. This "entity" view of a federal class is developed in the memorandum on Enabling Act authority. To the extent that Rule 23 revisions clarify the practical concept of a class that has evolved with the startling transformation of class-action practice since 1966, the very act of making rules amendments provides added support for the in-rem analogy.

Very slight added support may be found in *Battle v. Liberty National Life Ins. Co.*, 11th Cir.1989, 877 F.2d 877, 882. The circumstances do not permit much reliance on the court's use of in-rem concepts. The district court entered a class-action judgment in 1978, involving a class of about 1,000,000 burial insurance policyholders, and retained jurisdiction to implement the decree. In 1985 it enjoined state-court class actions that sought to win added relief on the theory that the federal judgment was not valid to bind class members. Affirming the injunction, the court of appeals relied in part on the rule that state proceedings may be enjoined to protect or effectuate a federal judgment. But it also relied on the rule that an injunction may be issued when necessary in aid of federal jurisdiction. Distinguishing the rule that parallel in personam proceedings are not to be enjoined, it said that "it makes sense to consider this case, involving years of litigation and mountains of paperwork, as similar to a res to be administered." This statement was immediately followed by quoting the district court's observations about the need to protect the federal settlement and judgment, but it does offer a sound description of the in-rem analogy. (In *Wesch v. Folsom*, 6 F.3d 1465, 1470 (11th Cir.1993) the Eleventh Circuit repeated the Battle opinion's view "that a lengthy and complicated class action suit is the virtual equivalent of a res to be administered." The court affirmed an injunction that barred a state-court class action seeking to adopt a congressional redistricting plan different from the plan enforced by the final judgment and injunction earlier entered by the federal court. The in rem analogy is interesting, but does not play any significant role in the court's decision.)

Similar use of the in rem analogy can be found in other cases. *In re Baldwin-United Corp.*, 2d Cir.1985, 770 F.2d 328, 337, upheld an injunction against state proceedings. The injunction issued after the court had tentatively approved settlements in 18 of 26 class actions pending before it, and while settlement negotiations were continuing in the other 8. "The existence of multiple and harassing actions by the states could only serve to frustrate the district court's efforts to craft a settlement in the multidistrict litigation before it." "[T]he need to enjoin conflicting state proceedings arises because the jurisdiction of a multidistrict court is 'analogous to that of a court in an in rem action or in a school desegregation case, where it is intolerable to have conflicting orders from different courts.'" The class action proceeding was "so far advanced that it was the virtual equivalent of a res over which the district court required full control."

Rather greater support can be found in a case that moves beyond the in rem analogy to announce a general principle that a federal court can enjoin state proceedings that threaten the federal court's control of its own orderly procedure. Many of the things said in *Winkler v. Eli Lilly & Co.*, 7th Cir.1996, 101 F.3d 1196, 1201-1203, are clear and helpful. The district court had managed consolidated pretrial proceedings involving claims arising from the use of Prozac. The lead counsel appointed in the consolidated proceedings settled a Kentucky state-court action where he also was lead counsel. The settlement was reached shortly before submission to the jury, and the parties initially denied having reached any settlement. The state judge became suspicious and launched an inquiry that was barred by prohibition from the intermediate court of appeals. Meanwhile lead counsel withdrew from the federal proceedings. After most of the consolidated actions were remanded, plaintiffs who had been involved in the federal consolidation sought discovery in various state courts of the settlement arrangements in the Kentucky action. The federal court enjoined the discovery. In the end the injunction was reversed because the federal court had not inquired into the

nature of the settlement agreement — without learning at least in camera about the nature of the settlement, there was no basis for the injunction. But the court said in clear terms — characterized as a holding — that § 2283 did not prohibit the injunction. "[T]he question is whether a federal court has the authority to issue an injunction to protect the integrity of a discovery order." In rem jurisdiction is not necessary to support an injunction as one necessary in aid of federal jurisdiction. The in-aid-of-jurisdiction principle has been "extended * * * to consolidated multidistrict litigation, where a parallel state court action threatens to frustrate proceedings and disrupt the orderly resolution of the federal litigation." More generally, the court approved a suggestion by Professor Redish that a federal court should have power to enjoin a concurrent state proceeding that might render nugatory the exercise of federal jurisdiction. Indeed, the policies of federalism and comity embodied in § 2283 "include a strong and long-established policy against forum-shopping." Section 1407, by authorizing pretrial consolidation, creates a policy of control that is intended to prevent predatory discovery and "to conserve judicial resources by avoiding duplicative rulings." There is more in this vein; the summary statement is this:

> [W]e hold that the Anti-Injunction Act does not bar courts with jurisdiction over complex multidistrict litigation from issuing injunctions to protect the integrity of their rulings, including pre-trial rulings like discovery orders, as long as the injunctions are narrowly crafted to prevent specific abuses which threaten the court's ability to manage the litigation effectively and responsibly.

This principle can be transferred readily to the class-action setting. If anything, the purpose of class-action procedure provides greater support because it is broader than the limited purposes of a § 1407 consolidation, which gathers in only cases from federal courts.

One potential limit of the in-aid-of-jurisdiction theory deserves note. *Amalgamated Clothing Workers v. Richman Brothers*, 1955, 348 U.S. 511, ruled that this exception does not authorize a federal court to enjoin state-court proceedings that arguably are preempted by exclusive NLRB authority. Even if the state-court injunction against labor activities was preempted by federal protection of those activities, a federal court does not have "jurisdiction to enforce rights and duties which call for recognition by the Board. Such non-existent jurisdiction therefore cannot be aided." 348 U.S. at 519. This ruling has been extended by most lower federal courts to mean that a federal court cannot enjoin a state-court proceeding simply because the dispute lies in exclusive federal judicial jurisdiction. 17 Federal Practice & Procedure, Jurisdiction 2d § 4425, pp. 538-539. It might be urged that denial of authority to protect exclusive federal subject-matter jurisdiction entails denial of the less necessary authority to protect effective federal procedure in cases of concurrent jurisdiction. Protection of effective federal procedure, however, is not a matter of less necessity. To the contrary, protection of exclusive jurisdiction is little different from protection of concurrent jurisdiction. Parallel in personam actions among private parties can proceed; if necessary, exclusive federal authority might be protected by denying preclusive effect to a state judgment, although that conclusion may well be denied. State proceedings that interfere with the federal court's ability to manage its own proceedings, on the other hand, can be enjoined. The cases described above — and here, most particularly, the several cases recognizing antisuit injunction authority to protect imminent settlement of a concurrent-jurisdiction federal class action — show as much.

In combination, then, the in-aid-of-jurisdiction injunction power recognized by § 1651 and the parallel exception in § 2283 provide some support for the Rule 23(g) proposal that would expressly authorize litigation-controlling orders directed at members of a prospective or certified federal class.

IV. Expressly Authorized by Act of Congress

The § 2283 exception that permits an injunction "expressly authorized by Act of Congress" is not quite as precise as it may seem. The leading illustration may be *Mitchum v. Foster*, 1972, 407 U.S. 225, 237-238. The Court ruled that 42 U.S.C. § 1983 is an Act of Congress that expressly authorizes injunctions against state proceedings. Section 1983 does this by providing "an action at law, suit in equity, or other proper proceeding for redress." That language does not match any obvious standard of express authorization. But the Court announced that "[t]he test * * * is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." Section 1983 embodies the policy that federal courts should protect federal rights against intrusion by any branch of state government, including state courts.

Proposed Rule 23(g) surely meets the "expressly authorized" part of the § 2283 exception. The question remains whether it qualifies as authorized by an "Act of Congress."

Some slight guidance might be found in the opinion in *Piambino v. Bailey*, 5th Cir.1980, 610 F.2d 1306, 1331. Reversing an injunction against distributing funds from an escrow fund established by a California judgment, the court said that the general provisions of Rule 23(d) do not establish the exception. The test of the Mitchum decision is not met: "Rule 23(d) is a rule of procedure and it creates neither a right nor a remedy enforceable in a federal court of equity." It would indeed be surprising to find express authorization in the general terms of Rule 23(d).

The more difficult question addressed by this brief statement is whether a Civil Rule can ever qualify as expressly authorized by Act of Congress. This is the point at which the question of Enabling Act authority returns. In some ways the question may seem almost circular. The Enabling Act is an Act of Congress. It provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." A Civil Rule provision that legitimately implements Enabling Act authority may seem to fit. It is the Enabling Act that expressly authorizes the rule that expressly authorizes stays and like orders addressed to members of a federal class. The supersession provision simply underscores the status of Enabling Act rules as the equivalent of Acts of Congress. In some sense, a rule becomes as if part of the Enabling Act itself.

Of course the reliance on the Enabling Act simply returns the question to Enabling Act authority. There is no logical way out of the circle. If the Enabling Act authorizes Civil Rule provisions that authorize antisuit "injunctions," then the § 2283 exception should be read to apply. But the broader anti-injunction policy of § 2283, drawn from deeply rooted concepts of comity and federalism, must be considered in determining whether proposed Rule 23(g) really is a rule of practice and procedure, and really does not impermissibly abridge, enlarge or modify any substantive right.

V. Supersession

Rather than the terms of § 2283, reliance may be placed on the Enabling Act's supersession provision: "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." This approach again depends on the initial conclusion that proposed Rule 23(g) regulates procedure and does not abridge, enlarge, or modify any substantive right. It also depends on the conclusion that the rule does not impermissibly enlarge federal-court jurisdiction.

The tie between Enabling Act validity and supersession is apparent. An invalid rule does not supersede a valid statute. Little elaboration is required. Some help may be found, however, in *Henderson v. U.S.*, 1996, 517 U.S. 654. The Suits in Admiralty Act, enacted in 1920, waives sovereign immunity and requires that the plaintiff "forthwith" serve process on the United States Attorney. At the time of the Henderson litigation, Civil Rule 4(j), enacted by Congress in terms different from those recommended by the Supreme Court, allowed 120 days for service and further provided for additional time by court order. With authority from a court order, Henderson made service 148 days after filing. The Court concluded readily that "forthwith" embraces a period "far shorter than 120 days," much less 148 days. Rule 4(j), however, was held to supersede the statute. Initially, the Court ruled that the time for service was not so much a condition of the immunity waiver as to limit subject-matter jurisdiction, or as to be "substantive." Then it asked whether the "forthwith" requirement "is * * * a rule of procedure superseded by Rule 4." The Court observed that it was among other provisions that "have a distinctly facilitative, 'procedural' cast. They deal with case processing, not substantive rights or consent to suit." Rule 4 likewise is "a nonjurisdictional rule governing 'practice and procedure' in federal cases * * *." The conflict between a statutory rule of procedure and a Civil Rule was then readily resolved — Rule 4 supersedes the earlier and inconsistent statute. (There is a modest ambiguity in the opinion. The Court addressed as a "preliminary issue" the question whether supersession is affected by the fact that Rule 4(j) "was enacted into law by Congress as part of the Federal Rules of Civil Procedure Amendments Act of 1982." This issue was resolved by accepting the acknowledgment of the United States that "a Rule made law by Congress supersedes conflicting laws no less than a Rule this Court prescribes." The Court then quoted the United States brief statement that § 2072 provides the best evidence of congressional intent regarding the interaction of Rule 4(j) with other laws. 517 U.S. at 668-669. Later, however, the Court referred to § 2072(b) as the source of supersession. 517 U.S. at 670. It is proper to read the opinion to invoke § 2072(b), not the more general rule that a later statute supersedes an earlier statute.)

The "jurisdiction" question in some ways seems easy. There is substantial authority that § 2283 does not limit subject-matter jurisdiction, but operates only to limit the injunction remedy. See 17 Federal Practice & Procedure 2d, § 4422, p. 514. To that extent, a rule that qualifies a remedial limit does not expand jurisdiction. And there is little force to the possible argument that federal jurisdiction is enlarged by an injunction that, by ousting state-court jurisdiction, effectively transforms a statutory grant of concurrent federal jurisdiction into an unauthorized assertion of exclusive federal jurisdiction. The injunction is simply an exercise of established jurisdiction, such as occurs in any other situation where an antisuit injunction is proper because a § 2283 exception applies or because § 2283 itself does not apply.

The supersession approach may not be as simple as these arguments make it seem. The federalism policies that have become embodied in the lore and practice of § 2283 are important, whether or not they are in some meaningful sense "jurisdictional." Even accepting the important procedural goals that are advanced by authorizing a federal court to establish control of a class action by controlling state-court class-action litigation by class members, a clash of values remains. The anti-injunction policies must be weighed in measuring the validity of proposed Rule 23(g) as a rule of practice and procedure, in the same way that jurisdictional concerns are weighed despite the failure of § 2072(b) to say anything about abridging, enlarging, or modifying federal jurisdiction. The arguments that Rule 23(g) is valid are powerful and should prevail. But use of the Enabling Act to supersede § 2283 may seem over-reaching to some. For that reason, it is wise to rely as well on the exceptions stated in § 2283. The in-aid-of-jurisdiction exception is clearly independent of supersession concerns. Reliance on the "Act-of-Congress" exception, on the other hand, is interdependent with the supersession approach. If a valid injunction rule is expressly authorized by Act of Congress, it prevails both because of the § 2283 exception and because of supersession.