MINUTES

CIVIL RULES ADVISORY COMMITTEE

March 12, 2001

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

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

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

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

The original impulse to study Rule 23 arose from fear that classes were being improvidently certified. There were protests that the risks and burdens of class litigation forced "extortionate" settlements, enriching class lawyers but often yielding little or no real benefit to class members. And there were counter-concerns that other class actions were selling off valuable claims of class members for very little, again for the

benefit of the class lawyers, this time for the benefit of defendants, but still without benefit for class members. Rules addressed to the certification process were proposed. Only Rule 23(f) survived. Rule 23(f) has been a success. One result of Rule 23(f) appeals may be a reduction in the number of improvident class certifications. But Rule 23(f) of itself will do little for the problem of "reverse-auction" settlements that sell off class claims for too little.

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

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

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

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

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

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

Among the goals pursued by the proposals are these: To provide

in Rule 23 improved structural assurances of fair settlement; to improve relations of class attorneys to the class and court, and to regulate attorney fees; and to address, within the rules, the problem of overlapping, duplicating, competing class actions.

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

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

Rule 23(c) would be amended in several ways. The first would revive a proposal that was published in 1996, changing the requirement that the court decide the certification question "as soon as practicable" to a requirement that it decide "when practicable." The change in part reflects the reality that most courts take several months to determine whether to certify a class. This reality in turn reflects the need to become informed about the case. Many courts recognize that resolution of the (b)(3) tests asking whether a class action is superior to other modes of adjudication, and requiring that common questions predominate, can be applied only after determining what issues are likely to be presented at trial. That determination in turn requires some measure of discovery to show what the dispute on the merits will be; and it is desirable to manage the discovery so that it does not entail all of the merits discovery that must be had if a class is certified, but so that there will be no need to repeat the same discovery after certification. Some courts require presentation of a "trial plan" that predicts what issues will actually be disputed at trial as part of this process. On the other hand, there is a risk that relaxation of the requirement may encourage unnecessary delay; it is desirable to ensure reasonable dispatch in gathering the information needed to support the certification determination, and to ensure prompt determination once the information is available.

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

Draft (c)(1)(B) would amend the present provision that the power to alter or amend a certification decision extends up to "decision on the merits." The new event that cuts off alteration

or amendment would be "final judgment." This change reflects the concern that events that seem to be a decision on the merits — such as a ruling on liability — may be followed by other events, such as formulation of a decree, that show the need to revise the class definition.

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

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

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

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

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

implications of the Amchem decision, and it seems premature to attempt either to restate the Amchem opinion in Rule 23 or to attempt to revise any of its implications.

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

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

The second paragraph of draft (e) recognizes the court's authority to direct that the parties supporting a settlement file "a copy or a summary of any agreement or understanding made in connection with the proposed settlement." This term is necessarily vague. The underlying concern is that there may be "side agreements" reached in the settlement environment that are not expressed as part of the settlement agreement, but that capture for other interests benefits that might instead have gone to class members. Earlier drafts required either disclosure or filing; the present version has avoided any general requirement, leaving this question to the discretion of the court.

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

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

A provision that has long been set out in revised versions of subdivision (e) would have allowed the court to appoint a magistrate judge or other person to investigate and report on the terms of a proposed settlement. This provision was in effect designed to assure that there would be an objector acting in good

faith and adequately supported to conduct an effective inquiry into the settlement. It has been dropped for several reasons. One concern goes to the opportunity of the parties to respond to the report. The analogy to an objector suggests that the report should be made in the same way as objections by any other objector, and subject to response in the same way. That may prove to be a complicated and costly process, with the parties paying not only their own expenses but also the expenses of the court-appointed investigator. In addition, this court-directed investigation is a substantial departure from our general tradition that the court in an adversary system functions as umpire, not as inquisitor.

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

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

The final part of the proposals, apart from the attorney appointment and attorney fee provisions, is new draft 23(g). This draft aims at establishing control of overlapping, competing, and successive class actions. The power of control is established by authorizing the court, before deciding whether to certify a class

or after certifying a class, to enter an order directed to any member of a proposed or certified class respecting litigation in any other court that involves the class claims, issues, or defenses. This power need not be exercised. Often there will be no occasion even to consider the impact of separate litigation. When other litigation threatens effective control of the federal proceedings, the response may take many forms, including a decision to let the other proceedings continue untouched. Orders may be directed to class members with respect to proceedings in other courts. It may be useful to consider the possibility of orders directed to arbitration. Concerns have been expressed recently that arbitration agreements are being used to prevent effective enforcement of important rights through class actions; employment agreements and a variety of consumer agreements are cited as examples. But arbitration is a substantive right, commonly arising from contract, and may deserve special protection. The very purpose of arbitration, for that matter, is to avoid judicial resolution in favor of an alternative mode of resolution. It also must be clear that this provision is not designed to allow a single federal court to control acts by the Judicial Panel on Multidistrict Litigation.

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

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

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

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

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

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

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

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

The appointment procedure of (2)(A) recognizes the possibility

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Overlapping Classes

Overlapping classes and other related litigation are addressed

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

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

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

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

The most fundamental question asked what purpose is served by

precluding a state court from certifying a class that a federal court has refused to certify. This is a powerful tool, or weapon. A defendant can renew in the second court the arguments that persuaded the first court to deny certification. It can point to the fact that the first court did deny certification. Preclusion is an "extraordinary reach." The response pointed to a federal refusal to certify a nationwide class. State-court certification of the same class, reaching people in many other states, may take on issues that no court should undertake to address in a class setting. The federal court, for example, may have been deterred by choice-of-law difficulties; should a state court be free to ignore the same difficulties, or to presume to resolve them?

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

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

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

will generate "a lot of grief," and the attempt is so feeble that it does not justify the grief.

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

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

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

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

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

presented by its representative and approved by the court, is equally bound by the court's refusal to approve a settlement presented by the class representative. This response met a renewed expression of uncertainty.

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

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

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

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

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

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

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

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

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

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

Another perspective was that the draft would achieve the advantages of the federal multidistrict litigation procedure for all courts, state and federal. It could support, among other things, coordinated discovery to be used in all actions, without necessarily interfering with the progress of other actions in other ways. There are real benefits in going forward in one forum. Parties to other litigation do not always get notice when an application is made to the multidistrict litigation panel.

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

these distinctions in the rule, speaking directly to discovery, races to certify, and races to judgment.

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

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

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

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

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

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

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

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

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

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

This discussion was seen as revealing different philosophies. The settlement-review draft seeks to make settlement review meaningful. The review is meaningful only if rejection carries real consequences. Real consequences require closing off subsequent attempts to win approval of the same settlement, absent meaningful changes in the circumstances that bear on

reasonableness. The opposing view is that review is a subtle process, and that we need a safety valve that protects against unwise rejection, even though unwise approval is limited only by appellate review for abuse of discretion. This view may be satisfied, as its proponent suggests, by giving the first court power to release the preclusion — reconsideration by a second court does not automatically mean approval, and the initial rejection will be considered as part of the reconsideration. On the other hand, there are reasons to believe that the draft is too lenient — the arguments that changed circumstances justify reconsideration should be made to the first court, which is much better able to evaluate the purported changes in relation to all of the information considered in reaching the initial rejection. And there is no apparent reason to suppose that another court should be free to reopen a prior decision simply because the decision involved large elements of discretion. A discretionary finding that a settlement is adequate results in judgment and res judicata; a discretionary finding that a judgment is not adequate deserves equal respect.

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

Objector Settlement

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

Observer Observations

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

Melvin Weiss offered several observations. First, there is a

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

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

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

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

Settlement Review

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

The first question addressed the proposed settlement opt-out.

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

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

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

The next question was why the rule should be drafted to "presume" that there is an opportunity to opt out, to be defeated only on showing good cause. The explanation was again found in drafting history. Earlier Rule 23(e) drafts included strong support for objectors. The support included mandatory fees for "successful" objections, and discretionary fees for unsuccessful objections. It also included a right to discovery sufficient to appraise the merits of the claims being settled. These provisions were discarded one by one. Mandatory fees for successful objectors were the first to fall, confronted by the fact that a successful objection may lead not to increased class recovery but to rejection

of any settlement and perhaps decertification of the class. The other provisions also were stripped away, in part because of the direct burdens and in part because of concern that objectors frequently appear for reasons that have little to do with protecting the class. There are, to be sure, "good" objectors whose motives are to enhance the class-action process and who contribute in important ways to evaluation of proposed settlements. But there also are "bad" objectors, who seek to seize the strategic opportunities created by the objection process to gain private advantage. Growing discouragement with the prospect of enhancing settlement review by supporting objectors focused attention on the settlement opt-out. The initial draft would have provided an absolute right to opt out of settlement in any class action, whether it be a "mandatory" (b)(1) or (b)(2) class or an opt-out (b)(3) class. An added complication would have allowed a class member to opt out of the settlement without opting out of the class, so as to retain the advantages of class membership if the settlement should be rejected. This provision too was reduced, first by eliminating the complications and by limiting it to (b)(3) classes. Then the court's power to defeat a second opt-out at settlement was added for cases in which there already had been one opportunity to request exclusion. This gradual process does not mean that the perfect concluding point has been reached; it merely explains why the burden of justification was placed on those who would defeat a second opt-out opportunity on settlement.

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

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

An observer asked whether there is a limitations problem with the settlement opt-out, observing that defendants will argue that somehow the suspension of the limitations period that began when the class-action complaint was filed has been triggered retroactively as to those who opt out on settlement, defeating any opportunity to file a new action after opting out. The answer was that this limitations argument is not plausible. The limitations period must be tolled until a class member elects to opt out; it makes no difference whether opting out occurs as the first opportunity in a (b)(3) action or as a second opportunity established — again, only for a (b)(3) action — under the proposed settlement opt-out provision. The observer suggested nonetheless that it would be better to make an express provision in the rule to

address the limitations issue, even though Rule 23 itself does not speak to the tolling effect in other circumstances.

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

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

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

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

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

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

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

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

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

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

It also was observed that the settlement opt-out proposal has been found workable both by judges and others with rich experience in supervising class-actions and by equally experienced defense attorneys. And it was asked whether the settlement opt-out will be an issue in anything but mass-tort personal injury cases; will consumers opt out of small-claims class settlements? Is the settlement opt-out a good answer to the "Bank of Boston" case, in which class members found that their liability for class-attorney fees exceeded their individual recoveries? The opt-out then is not to preserve a realistic opportunity to pursue separate litigation,

but to protect against burdens imposed on class members by the settlement. In other cases, the opt-out might be used to signal disapproval of the settlement even without any thought of pursuing individual actions. As to the mass-tort cases, the basis for concern with the settlement opt-out seems to be that the "opt-out farmers" will solicit opt-outs for purposes that are likely to result in fees so high as to lead to lower net recoveries by class members who elect exclusion for the purpose of pursuing individual actions. Is it protection enough against this risk that the judge has the authority to deny any settlement opt-out?

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

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

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

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

Early drafts included a lengthy list of "factors" to be considered in reviewing a settlement. These factors have been moved to the Note, and the review standard expressed in many cases has been put into the draft as part of (e)(5)(B) — the court must find that the settlement is "fair, reasonable, and adequate." It

was urged that it would be good to return the list of factors to the text of the rule. The list will help the judge who does not confront many class actions. An observer seconded this thought — good judges do not need to have the list in the rule, but for judges less well-versed in class-action practice, a list in the rule will help both the lawyers and the judge. Another observer noted that a judge is bound by the text of the rule, but is not bound by the Note. Others, however, expressed a preference for keeping the list in the Note. Placement in the rule will generate arguments that the Rule has been violated. The list, moreover, addresses an evolutionary process of review — the factors to be considered will change over time, but the text of the rule will be hard to change. And lists could be added to many rules, but have been avoided. A list of factors is appropriate for inclusion in a rule only if the list is very short and self-contained. It was agreed that the factors should not be in the text of the Rule.

Draft subdivision (e)(2) confirms the court's discretionary authority to direct parties seeking approval of a settlement to file copies or summaries of "any agreement or understanding made in connection with a proposed settlement." The concern is that the process of negotiating a settlement may at times be surrounded by events that are not directly reflected in the settlement terms presented to the court for approval. The best-known illustrations are provided by the process in which asbestos class-action settlements were negotiated after the class lawyers had first negotiated settlements of large numbers of pending individual actions. There also may be agreement on positions to be taken on fee applications, division of fees among counsel, discovery cooperation, or other matters.

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

Another observer suggested that in mass torts, a settlement may establish a pot of money that is allocated among claimants by the lawyer. This seems to happen mostly in state courts, and at times may include unseemly arrangements to allocate some part of the money to individuals who were not injured as compensation for

bringing clients to the lawyers. But other observers said that such events occur only when there are de facto aggregations by filing many individual claims, either in consolidated proceedings or as formally separate actions. They do not happen in class actions.

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

Attorney Appointment and Fee Provisions

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

Subdivision (h)(1)(B) defines the duty of the class attorney. Even now, it is prudent for an attorney to tell a client who would be a class representative that upon certification, the attorney no longer represents the client alone. But no one is really clear on what the relationship between class attorney and class members is. This definition of duty requires the attorney to "fairly and adequately represent the interests of the class." That part has not stirred much controversy. Four additional words are set out in brackets; these words would specify that the attorney must represent the class "as the attorney's client." Those four words have stirred considerable controversy. Defining the class as client may be seen as a beginning step toward the theory that the class is an entity, but this step would not begin to address the many other issues that might be affected by viewing a certified class as a jural entity of some unspecified type. Defining the class as client also would have an uncertain impact on the relations between federal procedural law and state professional-responsibility law. In one sense, state law would be limited by the federal concept that the class attorney represents the class, not individual class members. But state law would remain free to determine the nature of the attorney's responsibility to the class client.

It was urged that the question whether to define the class as the class attorney's client "is very complicated." There will be problems even without adding these four words. But adding them

will exacerbate the problems. The Federal Rules of Attorney Conduct project shows how pervasive these problems are. States have their own rules on conflicts of interest, competence, and zealousness. The Conference of Chief Justices will believe that this rule trespasses on the domain of state law. Many states seek to regulate the activities of their lawyers in federal court. Many local federal-court rules take over the local state rules of professional conduct. This is not only a question of discipline; it will be a malpractice rule. The federal-state jurisdiction committee has an interest in these questions.

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

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

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

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

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

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

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

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

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

Further discussion of the "as the attorney's client" phrase suggested that the federal court creates the class, and state law defines the professional-responsibility consequences. It was asked whether omission of this phrase is "deciding it the other way," or whether the statement that the appointed attorney must fairly and

adequately represent the interests of the class actually means the same thing but more obscurely? An observer suggested that in practice there usually is a committee of attorneys appointed by the court to represent all interests, giving a "blurred situation." Another observer suggested that if the client is defined as the class, it is impossible to have a defendant class action. It was suggested again that stating the duty of representation does not carry the "connotations for trouble with state law" that arise from adding an explicit statement that the class is client.

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

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

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

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

and it will be easy to provide it.

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

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

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

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

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

The first suggestion was that the list should be put in the Note. Some of the items in the list may be redundant with each other — the quality of representation, for example, may overlap the focus on results achieved. Each case is different, and each representation is different. This suggestion was seconded by an observer, who remarked that we have 20 or 25 years of experience and opinions that provide guidance. Another observer added that it really makes little difference what the rule says. Different circuits have generated different lists of factors, but the results seem to be substantially the same. Still, there are areas of present practice that should be improved. Most courts refuse to pay for work done in litigating fee petitions; that is not fair. And class counsel often have to advance large sums to cover out-of-pocket expenses; awards for nontaxable expenses ordinarily have not

allowed interest, even in cases that have dragged on for a decade or more. That too is not fair. And if there is to be a list, it might help to add a "market-place" test that asks not what is the "right" fee, but what fee would the market pay. The market test can be measured by what individual counsel get — if individual counsel for mass-tort class opt-outs can command 33% fees, class counsel should get that. And, to repeat, the differences in the lists of factors generated by different circuits make little difference to the lawyers.

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

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

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

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

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

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

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

answer was that certification often sets aside the contingent-fee agreement.

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

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

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

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

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

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

Turning to drafting details, it was suggested that there is too much repetition in the bracketed materials in (i)(1) dealing with agreements or undertakings. The reference to Rule 54(d)(2)(B) should be retained, displacing the alternative that would require a fee motion to be made "as directed by the court." The reference is valuable in establishing the relationship between Rule 23(i) and Rule 54; without the reference, people would be uncertain on the

relationship. The time allowed for fee motions in Rule 54 may not be sufficient in all class-action situations, but Rule 54 allows the court to set a different time. That is protection enough.

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

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

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

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

Respectfully submitted,

Edward H. Cooper
Reporter