TRANSCRIPT OF PROCEEDINGS

IN THE MATTER OF:)
)
PUBLIC HEARING ON PROPOSED)
AMENDMENTS TO THE FEDERAL)
RULES OF CIVIL PROCEDURE)
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JUDICIAL CONFERENCE)
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ADVISORY COMMITTEE ON CIVIL)
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IN THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS

IN THE MATTER OF:	)
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PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE	)
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ADVISORY COMMITTEE ON CIVIL RULES	)

Mecham Conference Center
Thurgood Marshall Federal
Judiciary Building
1 Columbus Circle, N.E.
Washington, D.C.

Thursday,
November 3, 2016

The parties convened, pursuant to notice, at 9:01 a.m.

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PROFESSOR EDWARD H. COOPER
Advisory Committee Reporter

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I N D E X

P R O C E E D I N G S

(9:01 a.m.)

JUDGE BATES: All right. Good morning. We're going to begin things on time this morning if we can keep on time and we'll hope that everybody can stay awake who stayed up late last night watching the game.

But this is the first public hearing that we're having on the proposed amendments to the Civil Rules that were published for comment in August of this year and those are proposed amendments to Rules 5, 23, 62, and 65.1. I expect that the focus of the testimony that we'll hear today from 11, I believe, witnesses will be on Rule 23, but it may include others.

And I would remind the witnesses that we have asked you to limit your comments to 10 minutes. There may be some questions from Members of the Committee, the Advisory Committee, after your comments, but if you could try to limit your comments to 10 minutes and then have time for some questions, that way we can keep things on schedule or relatively close to schedule this morning as we proceed.

We've received some helpful written submissions from many of you and we appreciate that

and we've reviewed those and we'll continue to review those. The testimony of each witness and the comments will be valuable to us as we move forward with this process.

Without further delay, therefore, I want to get right into the witnesses, and our first witness -- we've changed the schedule just slightly by moving the person we had scheduled for first down to last at his request. So our first witness will be Jeffrey Holmstrand from DRI. Mr. Holmstrand.

MR. HOLMSTRAND: Thank you. My name is Jeff Holmstrand and I'm delighted to be here today to testify on behalf of DRI's views. DRI, The Voice of the Defense Bar, is an organization of 22,000 lawyers who primarily represent American businesses in civil litigation. I'm also the past president of our State Defense Organization and I have a significant amount of experience in West Virginia, which is where I'm from, defending class actions both in state and in federal court.

I'd like to thank the Committee for allowing me to present DRI's views on this. I'd also like to mention that 30 years ago I sat in a class on the other side while Professor Cooper showed me just how little I knew about antitrust law. I'm hoping I know

a little bit more about Rule 23 than I did about that.

I know that a significant amount of work has gone into the Committee's work. We were involved in one of the speaking tours for the Rule 23 Subcommittee and I think generally speaking the amendments that the Committee has under consideration are addressing issues that are of concern that as the Advisory Committee notes note are issues that have emerged since 2003 when the last amendments were made.

My testimony today is going to focus on two areas of concern, both of which are issues that have emerged since the last amendment to the rules. The first is the Committee's proposed amendment to Rule 23(f) and the second is an issue that is not within there but I wanted to talk about a little bit, which is the ascertainability issue.

The proposed amendments to Rule 23(f) do two things as I understand it. One is to make clear that the so-called preliminary approval process is not subject to the interlocutory review that's available under Rule 23(f). I think that that's very supportable. We believe that that should have been implicit, but to make it explicit makes complete sense to us.

The second portion is the amendment to allow

the government additional time to seek review of a class certification decision from the 14 days that's generally available under Rule 23(f) to Rule 40 to 45 days in recognition of the needs of the government.

While we support that provision as well, we don't believe as we've said in our submissions previously that that goes far enough, and the reason for that is is that we believe that Rule 23(f) should be amended to provide for immediate mandatory or at least appellate review as of right of class certification decisions either granting or denying certification and we have proposed language that would affect that result.

The class certification decision, as everybody recognizes, is the seminal legal decision in most cases that are brought under Rule 23, and Rule 23(f) was added, as we understand it, in order to allow the settlement pressure that comes from a certification decision to at least potentially be reviewed.

And the promise was is that defendants or plaintiffs who were aggrieved by an erroneous certification decision would have the ability to seek review, but they wanted to set an expedited process for it and that happened to some extent.

Included in our papers are the data that Institute of Legal Reform and Skadden Arps had put together addressing exactly what's been happening with 23(f) petitions since 2006 and it covers a seven-year period and what the data show is that while there were initially more grants of review, as time passed and as the manual for complex litigation explicitly recognizes, the circuit courts have set standards that effectively limit the ability of a party to seek review of an erroneous certification decision unless it's an abuse of discretion, for example, or a novel legal issue or there is sort of a death knell provision that some circuits recognize, but it's just not being applied.

And we fully appreciate the workload that our federal appellate judges already face, but this is in our view the single most important decision that most defendants and most plaintiffs face in class action litigation because it's going to determine whether or not they can go forward.

From the defendants' side, for example, I defend a lot of TCPA class actions and in those cases there are often millions and millions of calls that are at issue. At even $500 per call, which is the statutory minimum that's recoverable for a violation

of the TCPA, you're talking hundreds of millions or billions of dollars for companies that can't afford to take that risk, so an erroneous certification decision effectively deprives them of any ability to seek review of what has happened below and oftentimes in our view an erroneous decision.

So we would propose and, again, we propose specific language that the court return to what the ALI had suggested in the original drafts of the proposed restatement on aggregate litigation and recognize that there ought to be a right to appellate review after certification and prior to anything else of the -- of a certification decision, whether it's from the plaintiffs or defendants' side.

The other issue that I wanted to talk about that has emerged somewhat since 2003 is the issue of ascertainability, and we have proposed an amendment to Rule 23(a)(1) that would adopt a specific provision that permits or requires the district court to make an ascertainability determination.

As you know, that is now a subject of a circuit split. Some courts recognize that the ability to objectively and reliably identify class members is something that is implicit in the rules as part of the typicality analysis, for example, and what we're

suggesting is is that that's an issue that ought to be resolved at the rule level and not on a circuit-by-circuit basis.

So what we would propose is that the court adopt -- or excuse me, that the Committee adopt a provision that simply states that the members of the class are objectively identifiable by reliable and feasible means without individual testimony from putative class members and without substantial administrative burden.

We believe that there's a number of benefits to adopting this approach to ascertainability. Primarily at a fundamental fairness level, we all recognize that class actions are the exception, the exception to the typical American model of one plaintiff and one defendant or one party, one side, plaintiff's side, one defendant's side, and the defendant knows who's suing them, the defendant knows what they're being sued for, and the defendant knows what the claims are.

And without an ascertainability requirement, something that happens upfront as part of the certification decision, you're put in a place where the defendants and the courts don't know who the parties are, don't know who the claims are, and it

impacts the fundamental fairness of the process.

The ultimate point and I think some of the other testimony that you're going to hear today will touch on this. Lawyers love process and class action lawyers love procedure. I mean, it's just kind of who we are and the way we think.

But Rule 23, as a rule of procedure, isn't intended to affect substantive rights of the parties, either the plaintiffs, the absent class members or the defendants. We feel that keeping that in mind, keeping in mind that it's a rule of procedure drives a lot of the suggestions that we've made.

The ascertainability is not a huge leap. It's what some circuits already concede is included in the rule. The amendment to Rule 23(f) that we've proposed is simply a matter of ensuring that, again, the single most important decision, oftentimes legal decision that's made in a case that is capable of appellate review.

I have a bit of time left, but unless there are questions I'm happy to stand down.

JUDGE BATES: Thank you, Mr. Holmstrand. Questions? Professor Marcus.

PROF. MARCUS: Mr. Holmstrand, I think you mentioned that you handled cases in both state and

federal court in West Virginia?

MR. HOLMSTRAND: That is correct.

PROF. MARCUS: And that includes class actions in both court systems?

MR. HOLMSTRAND: That's correct.

PROF. MARCUS: How would you compare the practice in West Virginia state courts with the federal courts? Is it better in some ways? Does it have the features you would like to see added to the federal rule?

MR. HOLMSTRAND: West Virginia is sort of a pre-amend -- pre-2003 amendment Rule 23. I'll say that we make significant use of CAFA in West Virginia, which you can take from that what you will as to which court I would prefer to be in.

I will mention just in passing that West Virginia is currently -- the Supreme Court is currently considering an amendment to Rule 23 in West Virginia to address unclaimed settlement funds in a way that is a little bit different than what's been done in the past that -- and you may hear some people talk about cy-prés issues today, I don't know.

But one of the concerns that the West Virginia Supreme Court has is what's happening with all of these unclaimed settlement funds, especially

when there isn't a reversion provision in the agreement, and how that's going to play out.

I would say that the federal courts are stronger on issues like Daubert from a defense perspective. I can't speak for my colleagues on the other side of the V, but certainly the Daubert issue is much more well defined in West Virginia.

The other issue is that West Virginia's Rule 23, there aren't a significant number of class actions. They're spread around the state. We now have a mass litigation panel that has a little bit more experience with those. I think that if you ask me this question in five years I may have a significantly different answer as our courts develop an expertise that currently doesn't exist.

JUDGE BATES: Professor Klonoff.

PROF. KLONOFF: On the ascertainability issue, first of all, you would acknowledge that the trend in the case law seems to be against you. You have Mullins, you've got some other cases. The Third Circuit in Byrd has backed off to some extent some of its earlier cases.

As I read your proposal, it seems to go beyond what any circuit now requires in terms of ascertainability, so can you explain how you justify a

proposal that really from my reading no court has followed?

MR. HOLMSTRAND: I think, Your Honor, going to the first point is that we believe that you should have the ability to know who is suing you, and if we're going to adopt a procedural model that allows for representative litigation, that that representative litigation ought to as near as possible and as efficiently as possible track what would happen if this were not a representative suit.

So our proposal was simply a way to try to, one, identify the appropriate litigants, identify who those class members are, put the burden on that upfront because we believe that should be part of the representative litigation. And, finally, when you devolve down into litigation over who's a class member, you lose some of the efficiencies that Rule 23 was initially intended to address.

PROF. KLONOFF: No, I'm just wanting to make sure I'm understanding your proposal correctly and that you would acknowledge that what you're proposing is really beyond what any court as of now has done.

MR. HOLMSTRAND: I would say that it's certainly worded slight -- well, two points. One, you're right about the recent trends seem to be moving

away from that or at least not continuing to follow cases that had originally recognized ascertainability as an explicit or, excuse me, as an implicit element of it.

In terms of whether I feel like it's going further, I feel like we're more succinctly defining what the court needs to find in order to find that the membership in the class is ascertainable.

JUDGE BATES: John Barkett.

MR. BARKETT: Is this on? Yes. So I'm wondering from a procedural standpoint whether it's your view that we have the ability even to consider your two suggestions without going back through the rulemaking process that we've followed and so the basic question is, do we keep going with what we've proposed and then take these under consideration? Is that your proposal, or are you suggesting that we stop doing what we've planned to do here depending upon how the public process ends up turning out and take up these ideas even if it means starting over a little bit?

MR. HOLMSTRAND: Well, certainly the ascertainability issue is something that's not even within the current scope of the proposed amendments and to that extent, you know, we've proposed that

before. Certainly that would need to go through the rulemaking process.

With respect to the Rule 23(f) issue, that's already under consideration and we feel that we're simply suggesting a different path for an amendment to Rule 23(f), so I'm not convinced that you would need to redo everything at this point in order to get to there.

Certainly there's other provisions in this, the settlement provisions, the objector provisions that I think pretty much everyone will agree are, you know, kind of middle of the road provisions that -- this is why I wanted to recognize all the work because there were so many proposals out there and everybody was submitting so many comments, and to winnow out to come down to the ones that are at least in our view pretty uncontroversial is a heck of a task.

But to answer your question, the 23(a)(1), I think, would need further work. I think the 23(f) is within the scope of the Committee's work because it's a comment on a rule that the Committee is proposing to amend.

JUDGE BATES: I'm going to try to keep us relatively on schedule, but we have time for one more question. Professor Cooper.

PROF. COOPER: I can't let you go without one question after 30 years. This is one you can answer quickly. Your written statement suggests that we recommend superseding Shady Grove and the question is, how often do members of DRI encounter federal class actions seeking to bypass state rules that say you cannot maintain a class action for this sort of statutory penalty?

MR. HOLMSTRAND: I don't have that specific number available, but I'll certainly have it when we make our final comments. However, it's an increasing issue for us.

PROF. COOPER: Right. Thank you.

MR. HOLMSTRAND: Thank you. I appreciate the time.

JUDGE BATES: The next witness will be Mark Chalos from Lieff, Cabraser, Heimann & Bernstein. Mr. Chalos.

MR. CHALOS: Thank you very much. I am here today presenting comments on behalf of the Tennessee Trial Lawyers Association and not on behalf of my law firm, so I'm speaking for myself and for our trial lawyer organization.

First of all, I'd like to echo the comments, I thank the Committee for the opportunity to be here

today and I want to echo that the roadshow was particularly helpful. I have spoken with lawyers on both sides of the bar and they felt that that opportunity to be heard and the opportunity to interact with the Subcommittee Members and Committee Members was valuable and gave us a real sense that we're part of the process and that our voices and our clients' voices were being heard. So thank you for that and know that it's appreciated by the practitioners.

Overall, the Tennessee Trial Lawyers Association supports the proposed amendments. I find myself in a different position from the last time I was in front of this Committee and we had some issues with some of the proposals that I think were largely addressed in the final version.

But here we're expressing our support. We also are expressing our support for the Committee's decision to defer some of these other issues, for example, ascertainability and the so-called pick off issue until the courts have had an opportunity to fully address both of those issues and allow the Article III process to work its way to a conclusion or at least until we get to a uniform standard that the Committee then may take up if necessary.

I have three suggestions and they all relate to the objector, the proposed amendments relating to objectors and which is 23(e)(5). It's clear from the May 2016 memo and the Committee notes that the objector rule amendments are designed to address a particular issue, which is one of serial or professional objectors objecting not for the purpose of making a settlement better or for adjudicating any particular rights but rather for their own personal financial gain or some other improper motive.

And I reference the May 12 memo where it says that there's a widespread concern about the behavior of some objectors or objector counsel and also the Committee notes at page 229, which is also page 27 that says "some objectors may be seeking only personal gain and using objections to obtain benefits for themselves rather than assisting in the settlement review process and they've sought in some cases to exact a tribute to withdraw their objections."

So, with those goals in mind of the amendments, I have three suggestions and I'll also be following this up with a written submission. But, first, the -- and this is -- this relates to 25 -- sorry, 23(e)(5)(A), the disclosures.

One challenge for parties and for courts

facing objections is to determine whether the objector and the objector's counsel fits into this, you know, bucket of an improperly motivated objection and whether this is something they do as part of how they earn a living versus somebody who is coming along with a legitimate objection.

And district courts fairly routinely allow discovery into the notion of whether this is somebody that is a serial objector, have they done this lots of other times, is the result of their objections in other cases one that makes the settlements better or is this somebody who is filing the objection for the purpose of getting a payout to withdraw his or her objection.

So I would suggest in 23(e)(5)(A) including explicitly a requirement that the objector and the objector's counsel, if there is counsel, must list among the pieces of information by case name, court and docket number all other cases in which he or she interposed an objection, class cases. This is information that may or may not be dispositive, but certainly it's information that would be helpful, I think, to a court and to the parties in evaluating the objection that's presented.

Secondly, a second suggestion, and

Suggestions 2 and 3 are kind of flipsides of the same coin. They relate to 23(e)(5)(A) and (B). Taken together, (A) and (B) remove the requirement that the objection -- withdrawal of an objection be approved by the court unless there is payment or other consideration made to the objector or to the objector's counsel.

So Proposal No. 2 would be to close a potential loophole and I think this is a fairly minor wording issue, but right now, as the rule is proposed, it only applies to payments made to the objector or objector's counsel. We have seen in practice where objectors say don't pay me, pay some other third party. Pay, for example, a nonprofit or a think tank.

So what I would propose to avoid that potential loophole and these objectors are clever would be to say it's a payment directly or indirectly made to the objector or objector's counsel, so it's anticipating where they may go next and being explicit about that.

And, thirdly, this is addressing the striking of the requirement that an objection being withdrawn must be approved by the court and it's sort of striking middle ground where an objector withdrawing an objection has an affirmative obligation

under the rule as I've proposed the language to file a notice with the court that they are withdrawing their objection and affirmatively state that no payment or other consideration has been made directly or indirectly to the objector or objector's counsel.

And what we're anticipating here is an objector who withdraws his or her objection and is silent as to whether payment is made. Now maybe that's an implicit certification that no payment has been made because they are not seeking court approval of the payment in connection with the withdrawal.

But if we make explicit that they have a requirement to give notice to the court to affirmatively state no payment has been made or other consideration directly or indirectly, that would give the court explicitly and expressly the power under both Rule 11 and the other court's powers to address somebody who may not be fully disclosing the circumstances.

So those are the three proposals we have all relating to 23(e)(5) and I have a little bit of time, but I'll stop there and thank you again for the opportunity to be here today.

JUDGE BATES: Thank you, Mr. Chalos. Questions for Mr. Chalos? Professor Marcus.

PROF. MARCUS: Mr. Chalos, you mentioned that you agree with the idea of deferring attention to the pick off issue. The Supreme Court made a decision in the Campbell-Ewald case in January that was about the same general subject, but are you aware of significant pick off issues that have emerged since then from your side? I guess you're more often on the plaintiff's side than defendant's side?

MR. CHALOS: I am on the plaintiff's side and, no, I'm not aware of any sort of new tactics in light of Campbell-Ewald. You know, the decision, you know, I think clearly left some room for certain defendants to attempt some maneuvers and, you know, that may play out, I don't know.

And I'm not suggesting by our support of deferring that that it ever needs to be addressed. I'm not suggesting that. But I think the Committee has chosen the appropriate course, which is to do nothing right now and let's see where that ends up.

JUDGE BATES: Other questions?

(No response.)

JUDGE BATES: Mr. Chalos, thank you very much.

MR. CHALOS: Okay. Thank you.

JUDGE BATES: The next witness will be John

Beisner from Skadden Arps. Good morning.

MR. BEISNER: Good morning. I appreciate the opportunity to appear before this group today and I also wanted to also note appreciation as the prior testifier noted to the members of the Committee for the process that was used here. I think that many of us have concluded that whenever five attorneys over the last two years have gathered anywhere to talk about class actions you were bound to find a member of this Committee there, especially a member of the class action Subcommittee, and for those of us practicing, I think everyone is very appreciative of the time that's been invested in developing these proposed amendments.

I think that my fundamental view is that the amendments that are proposed here are all directionally correct. I think like any practitioner you'd have some preferences of ways of doing things, but I think that the Committee has found the right spot on these issues as a general matter, and for that reason my comments I fear may be a bit more in the weeds, but they really go to the text of some of the Advisory Committee notes.

I apologize to the Committee for not having my written comments in before the hearing today and do intend to submit them, but let me go through the

several thoughts that I wanted to offer.

The first thought that I wanted to offer is on the comment to Subdivision C-2, this is on page 219 of the master book I believe that you have, and it's the provision that speaks to the information that the court should be gathering and, in particular, to the sentence in the first full paragraph on page 219 that says, "In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class action settlement, it may be important to include a report about the proposed method of giving notice to the class."

My suggestion to the Committee is to make that more emphatic and more mandatory. I think that many settlements, there's a real question that the court must confront as to whether the efforts that the parties envision to achieve distribution of the benefits is adequate, and that is really to my mind in many of these settlements the key issue.

The defendant may have agreed to create a fund of $10 million to benefit the class members, but it becomes sort of a de facto cy-prés settlement providing little or no benefit to the class unless the parties have a decent plan to achieve distribution.

And I think the court needs to know what that plan is at this juncture to make an assessment as to whether this is just a de facto cy-prés settlement that isn't necessarily going to benefit the class or whether the parties to the settlement really do have a plan that would achieve distribution or at minimum make available the knowledge that the compensation is available there to the class members.

And so I think that this should be beefed up to say that this is something the court should be asking for, that there should be considerable detail about the distribution plan at that juncture.

The next comment I had is in the commentary on Subdivision E-1, this is on page 222 of the books I believe you were referencing, and this is the sentence at the end of the first full paragraph on that pages that said, "If the settlement is not approved and certification for purposes of litigation is later sought, the parties' earlier submissions in regard to the proposed certification for settlement should not be considered in deciding on certification."

I simply wanted to say that I think that sentence is extremely important because I do believe that with this frontloading process in particular, I think defendants are going to be particularly or

increasingly nervous about engaging in settlements of class actions.

The reason a defendant usually engages in a settlement is to create some certainty about the outcome of the litigation, but I think especially with the frontloading aspect of this and the, I think, increasing scrutiny that courts are correctly giving to class settlements, there will be a greater hesitancy to go down that path if there's any feeling of a residual adverse effect of proposing a settlement, proposing a settlement class that is ultimately rejected and the parties go forward with litigation, and I think therefore that sentence is of critical importance.

Another concern I wanted to express is this full discussion of Subdivision E-1 I think is very thorough and commendably so with respect to the information that the court should be gathering to make this determination as to whether notice should be issued regarding the proposed settlement.

What I fear is lacking in the notes, though, is if the court concludes that this is not a proposed settlement that the court is likely able to approve, what should the court do? And I think that it would be helpful to have some further explication of that.

Obviously, the court should not approve the notice at that point, but I think it would be helpful to have some discussion here of what the court should do at that juncture.

Obviously, the court is not going to say to the parties the court is not approving the settlement, but I'm not going to tell you why. I think obviously the court, as many have done recently, provides some explanation. But I think there's a tension there between the court explaining its concerns about the proposed settlement and the line of cases that have been out there for many years indicating that the court ought to either approve or reject the proposal that is placed before it and not get involved in dictating terms.

And there's a tension there that I think needs to be addressed. And I think it perhaps is in the form of suggesting to the court that what it ought to be doing is indicating the areas of deficiencies in the settlement to allow the parties an opportunity to improve the settlement to a form that the court perhaps might view itself in the position to approve or at least at the notice stage, but perhaps provide some warning about being overly specific in that regard.

The court gets involved in saying here's the specific dollar amount that needs to be provided here, I think that may cross the line and get the court into the realm of dictating terms that I think the case law suggests that courts should not do, but obviously, if it finds that the compensation levels are insufficient, it needs to provide that. But I think some guidance in that regard, it seems to me that is a void in the notes and that some discussion of what the court should do if it finds itself unable to approve notice would be beneficial.

The last comment that I wanted to raise is with respect to the discussion of paragraphs C and D on page 227 and this involves the discussion of the criteria that the court should be looking at in giving final approval to the settlement.

I wanted to focus on the second paragraph on page 227, which is the paragraph that says that the relief actually delivered to the class can be an important factor in determining the appropriate fee award. I think that's a very important point to be made here and I'm very happy to see that that observation has been included in the discussion.

My concern is that there may be a little bit of a disconnect, though, between that paragraph and

the paragraph I believe that it links to in the rule itself, which is the paragraph that indicates that one of the criteria that the court may consider are the terms of any proposed award of attorney's fees, including timing of payment.

I think it would be helpful to more explicitly in this note indicate that when the rule speaks about timing of payment what it's getting at is the question whether the court will pause in making the fee award until it has knowledge about the distribution to class members. I don't think that's entirely clear what that timing reference in the rule means with respect to this paragraph.

I also think the Committee may want to consider the ordering of these paragraphs because I believe the paragraph I was just referencing refers to Subpart 3(i), but then the following one speaks about double i, which is the preceding paragraph. And so I think that part of the confusion here may be the ordering of the paragraph in the notes, but I think it would be useful to more explicitly link this discussion, these paragraphs to the provisions in the rule itself that they are intended to consider. And thank you for the opportunity to offer those comments.

JUDGE BATES: Thank you, Mr. Beisner.

Questions for Mr. Beisner? Professor Klonoff.

PROF. KLONOFF: John, I just want to make sure on your second point dealing -- we'll call it the no judicial estoppel point, you're not suggesting any change in the language. You just wanted to point out that it's important?

MR. BEISNER: Yes. I just wanted to emphasize that I am very happy to see that there and I hope that no change is made to that during this process.

PROF. KLONOFF: Okay.

JUDGE BATES: Others? Professor Marcus.

PROF. MARCUS: Mr. Beisner, you mentioned on your first point the need to make certain that the parties have got a plan for giving notice. More generally, we have received some reports about concerns that the change to encompass 21st century electronic means and not insist or emphasize first class mail is an unwise move.

I wonder if you have views on what's actually going on and whether first class mail might still be the preferred means of giving notice?

MR. BEISNER: I am smiling because my daughter who is in college and who is certainly a person of the electronic age recently got in the mail

a notice about a class action settlement and this was sort of the event of the year because she gets nothing by mail and it sort of emphasized to me that maybe first class mail isn't so bad because we've all migrated so thoroughly to the electronic age that the important stuff still comes by first class mail.

JUDGE BATES: And now you know how you can get in touch with your daughter.

(Laughter.)

MR. BEISNER: Yes, right. She won't answer my texts or my emails, but now I know how to get her attention. I think, Professor, that the Committee has that about right. I think that the rule and the explanation of it has it right.

I think the court's got to look at, as the commentary suggests here, who's in the class, what are they most likely to respond to, and really make that assessment and make some judgments. Some classes first class mail is best. You have other classes where you need a combination.

I think what worries me a little bit here, though, is that the focus of a lot of this is on the formal notice process, and a lot of the settlements that we have now in classes are of individuals where you don't know who is in the class. You're going out

and trying to find them to let them know that the settlement is available. And so you have advertising, you have other mechanisms going on to try to get the class members aware that they need to look at the formal notice and look at the other information that is being provided.

And that's what I -- I worry a little bit that that plan I think needs to be spelled out to the court and I also think the court ought to explicitly approve it so that it is part of the overall deal. One of the things that worries me in some cases is that you have the settlement approved and then it comes to time for attorney's fees, the claim rate is very low, and the plaintiff's counsel say well, that's because the notice program -- you know, the defendant didn't provide enough money for that or whatever or ought to provide more now.

And I think that needs to be part of the deal that the court approves upfront very explicitly, very specifically what is going to be done in terms of making class members aware that this opportunity to make a claim is available to them.

JUDGE BATES: We have time for one more question. John Barkett?

MR. BARKETT: And this actually is a follow-

up to what you just said. Your point related to page 219 of the submission to the public for public comment. My notes read that you suggest that there be a decent plan to achieve distribution, and I know you haven't submitted your written comments yet and it'll be much more elegant when you submit your comments.

But I'm tying up, tying to what you just said about figuring out who's in the class, how does a court determine whether or not this distribution plan is one that rises to the level of approval on a pre-certification basis anyway of the proposed class action settlement.

MR. BEISNER: What I've seen in some cases, which I think is what the court ought to be looking for, is that the parties, and usually this is at the behest of plaintiff's counsel, retain an expert that is really a marketing, advertising expert that is looking at the demographics of the class, what they use in terms of being aware of what's going on in the world and what's most likely to reach them and provide some expert views on that subject and a recommendation as to an overall plan to make the public aware and specifically to make the class members aware that this settlement is available to them out there.

And it's usually beyond just, you know,

here's the formal notice and here's how we're going to mail it to them or email it to them. If it's a class that is difficult to identify, that plan will talk about how we reach the consumers who may have bought a particular product, for example.

MR. BARKETT: When you submit your written comments, would you submit some examples along the lines to start?

MR. BEISNER: Yes, be happy to do that, be happy to do that.

MR. BARKETT: Thank you.

JUDGE BATES: Thank you again.

MR. BEISNER: Thank you very much.

JUDGE BATES: The next witness will be Alan Morrison from George Washington University Law School. Professor Morrison.

PROF. MORRISON: Good morning and thank you for allowing me to appear here today. You have my written comments; some of them are quite detailed. I'm going to talk about two main issues. Just for the record, I have generally been class actions -- representing objectors to class settlements, although I have on occasion represented the plaintiffs in class actions as well.

So I want to make two main points here

today, first about the early submission changes and the second the standards for determining when notice can and should be sent.

So on the first, the early submission on Rule 23(e)(1)(A), I very strongly support this approach. I think it's important for the judges to get this information upfront. I think it's important that it be in the record at an early stage.

I was recently involved in the NFL concussion class settlement where 1,000 pages of affidavits were submitted a week before the hearing, six weeks after objectors had to file. That's simply backwards, and this is a very important matter for objectors. All this information should be in the record for the judge at the time of the determination as to whether to send out notice, and it needs to be available well before the time for objections and opt outs in that regard, so I strongly support that.

I have two suggestions in this regard, both I think can be done and comments I'm mindful that the rule is getting bigger and bigger all the time and I think these things can be put in comments and appropriate for it given the text.

The first one is, and this issue arose in the NFL concussion settlement not by me but by

somebody else, and that is whether the application for attorney's fees has to be submitted at the time of the settlement hearing -- I would say yes, but before -- regardless of whether the judge is actually going to pass on the attorney's fees application at that time, I agree that the court can decide at the hearing or can postpone it on the question of attorney's fees.

But the reason that the application ought to be in is because applications tell class members a lot about what the plaintiffs have done, how the negotiations have gone, whether all the time after settlement has been reached.

There are just many things that you can see at that time. There's no reason why it shouldn't be in at the time at least 21 days or so, as I put in my proposal, before any objections are due. I do not think it has to be available for the judge before the judge decides whether to send out notice. Seems to me to be unnecessary. Typically there will be a statement in the settlement as to the amount of fees and how it's going to be sought, and I think that's enough.

But a second step of requiring the application to be filed, it's going to have to be filed sometime, it shouldn't have to be filed at the

time of the settlement notice, but it should be time to be filed before objections and determinations of opt outs are due. So that's my first suggestion.

The second suggestion is that efforts be made to bring in people at the time the judge is making the determination as to whether to send out notice and, if so, in what form. Other interested persons in the cases. Typically today class actions arise in multi-district litigation. Everybody's got signed onto the docket. All the judge has to do is send out announcements saying that there will be a hearing on such and such a day, not a formal hearing but an opportunity to communicate with the judge about the potential problems in the settlement.

This is an area where class counsel and defendants are not going to help the judge as much as people who are on the outside who will see the problems and can inform the judge about problems with both the merits of the settlement, the definition of the class, and, equally important, the form of the notice.

Sometimes notices are very good; sometimes they're much less good. I had a very important experience in the silicone gel breast implant with Judge Sam Pointer. He brought everybody in, amici,

class members, attorneys who had these cases, and this was, of course, well before the time that we had websites and people were able to communicate that way.

He had a couple of days of informal proceedings down in Birmingham and he went through the notice, he went through the frequently asked questions, he went through the settlement agreement, and many problems were resolved and people felt that they had an opportunity to present these issues at a very early stage.

Today, with websites and very other means, I think the court should be encouraged to have an opportunity for persons who are not directly involved in the settlement negotiations to be there for the judge to help the judge sort through these problems both with regard to the notice to the class and the important issue of the timing, how long it’s going to be, when papers have to be submitted.

Those things are not going to be helped for the judge by the class counsel or by the defendants. So that’s my first set of suggestions on the front end, but I first want to say I strongly support the effort to bring this information upfront.

The second relates to the conditions under which notice can be determined to be sent out. The

Committee has wisely in my view rejected the notion of preliminary approval that sends out a signal to the class and I might say to the judge, him or herself, that this is essentially a done deal, I've preliminarily approved it and you have to have a very high burden to get me to change my mind.

I don't think that's what was intended and I think it's not good for the class and I don't think it's good for the interests of justice.

I am troubled, however, by the words that the committee has now used instead of preliminary approval and let me read a few of them. Words justified and is likely to be able to be approved, those seem to me to be very little different between those and preliminary approval.

I and several of my colleagues tried to work on some language and I want to be clear I'm not wedded to this language, but it's in my written testimony and so let me read it to you now.

It's sufficient possibility that the proposal will warrant approval. As I say, I'm not convinced that's better, but I think it's more in the right direction. Clearly we want to make the point that it's not automatic and that there's no chance of being approval on the other end.

I have submitted, in addition to my proposed language, some additional comments on page 7 of my written statement that would elucidate what I'm trying to get at at this time and I think they're consistent with what the cases say and what the committee has been saying and I think they'll be helpful to understand.

In the end, we have to leave it to the judge's discretion, but I think by giving -- and what I've tried to do is to give some things that the judge should look at along the way as a means of determining whether it's appropriate to give notice at this time.

I have a number of specific other suggestions in there. I'm glad to talk about the two I've mentioned here as well as those and thank the Committee for my opportunity to be here today.

JUDGE BATES: Thank you very much, Professor Morrison. So questions on those two suggestions or other things in the written submission that has been made? Virginia Seitz.

MS. SEITZ: Do you think there are due process concerns with your first suggestion? I mean, it sounds like a possibility at least of consideration of extra-record material or material that might come to the judge in a form where, you know, the other side

would not be present. I'm just, I'm wondering about the shape of your first suggestion that the judge be kind of generally educated on the topic in an informal way.

PROF. MORRISON: Well, I wanted to be clear that I didn't think that we should have a formal hearing like the final Rule 23 hearing, but judges have proceedings in open court all the time and this would be an opportunity for people to appear in open court to make written submissions that would be filed and on the record, anything the judge wanted to do.

I certainly didn't expect this to be ex parte in any way. I fully support the notion that the class counsel and defendants should have opportunities to review these materials and take a different view or a modified view.

MS. SEITZ: I just may have misunderstood what you meant by informal.

PROF. MORRISON: Yes, yes, thank you. I didn't want to add another level of formality to hearings in this area.

JUDGE BATES: Professor Klonoff.

PROF. KLONOFF: Alan, on your first point on the application for attorney's fees, are you suggesting just strong language that it's a good idea,

or are you suggesting a mandatory rule and if it's a mandatory rule, can that really be done in the comments?

PROF. MORRISON: Strong language I think would be enough. I don't think a judge would be committing reversible error if he or she didn't do it, but I think most judges will say that ought to be done and, indeed, if my first suggestion on -- my second suggestion on additional people coming in, objectors and class members would say how about let's seeing that the attorney's fees and the judge would be -- would recognize that it has to be submitted at some point, the question is when.

JUDGE BATES: Other questions?

(No response.)

JUDGE BATES: All right. Thank you very much, Alan.

PROF. MORRISON: Thank you.

JUDGE BATES: We appreciate it greatly.

PROF. MORRISON: Thank you.

JUDGE BATES: We'll turn now to John Parker Sweeney, another representative from DRI.

MR. SWEENEY: Good morning. I am John Parker Sweeney, past president of DRI, The Voice of the Defense Bar. I've never appeared before this

group before. This feels a lot like an en banc argument.

I've practiced law for over 40 years and I've been involved in class action work for much of that time, beginning when I was a young lawyer with the Securities and Exchange Commission filing amicus briefs on class action issues and then for most of the last 35 years practicing on behalf of businesses.

First I want to thank the Advisory Committee on Civil Rules for allowing DRI to testify today. Over the past five years we've submitted over two dozen amicus briefs to the Supreme Court providing our views in class action cases. We also commissioned the nation's only annual national opinion poll devoted exclusively to the Civil Justice System, and I'll refer to that a little bit later in my remarks.

I would also like to express our appreciation today for the work of the Rule 23 Subcommittee. Among its many efforts to reach out to interested parties, Chairman Dow and other members of the Rule 23 Committee attended the DRI class action seminar in July 2015, heard oral comments, and engaged in a lively dialogue with attendees, and we thank them for that. We greatly appreciate that courtesy and recognize that this group has afforded that

opportunity for many other interested organizations in the Rule 23 amendment process.

DRI has also provided written comments to the Rule 23 Subcommittee on September 10, 2015. I will concentrate my remarks this morning on the issue of no-injury class actions.

The Supreme Court recently confirmed the importance of Article III standing in Spokeo, requiring a class action plaintiff to have suffered an injury in fact that must be both concrete and particularized. If the individual class representative must demonstrate injury in fact, so too must the definition of any certified class require that each class member similarly have suffered injury in fact.

This principle was acknowledged or perhaps more appropriately assumed it appears in the Tyson Food decision, but there was a suggestion that the issue would be dealt with on a post-certification summary judgment rather than class certification.

Yet American businesses face many class actions brought by plaintiffs who cannot establish they've been injured on behalf of a proposed class of similarly uninjured individuals. In these no-injury class actions, plaintiffs ask the courts to ignore the

requirements of injury in fact, often by seeking to recover some fixed amount or range of statutory damages without any showing of injury to any or many of the class members. Examples include claims brought under the consumer fraud or deceptive practices act of various states.

In a typical case, the plaintiff contends the defendant committed widespread technical violations of some statute but fails to demonstrate that he or she in the purported class sustained any actual injury as a result of the violations, or even if some are injured many are not.

They then seek to have the court certify the class and award aggregated damages based on some formulated calculation or range of statutory penalties or in the Tyson case an opinion based upon aggregate data providing estimates of injury across the class.

They also raise broad policy concerns about using the Civil Justice System to punish defendants for technical statutory violations, and punishment it is because the class members are by definition uninjured, there’s nothing compensatory about the process.

Permitting aggregated actions by uninjured individuals places enormous pressure on defendants to

settle claims that would be valueless if tried on an individual basis. The Rules Enabling Act, as this group well knows, prevents the use of procedural rules such as Rule 23 to abridge or enlarge substantive rights. Permitting class actions under Rule 23 on behalf of the uninjured absent class members who lack Article III standing flies in the face of this important congressional mandate.

Because some courts permit such aggregation of no-injury claims while others do not, the current environment is unpredictable for our members and our clients. More importantly, however, permitting litigation by and on behalf of uninjured parties burdens already limited judicial resources and impairs the ability of the Civil Justice System to process meritorial claims for actual injury.

This concern is not academic. The problem is very real. Professor Joanna Shepherd of Emory University Law School recently studied no-injury class actions. Professor Shepherd’s study was provided to the Rule 23 Subcommittee by Lawyers for Civil Justice in its May 14, 2015 comments.

Professor Shepherd’s research team identified 2,158 class actions resolved between 2005 and 2015. Of these, 432 cases in federal and state

court across 33 states met the study criteria for no-injury classes.

Now, of these, of course, most were settled, 97-1/2 percent, and only less than a dozen actually went to judgment during this period. So perhaps it is quite wise for this group to have focused on tweaking the settlement process for class actions based upon this sample.

Defendants paid an estimated $4 billion to resolve these no-injury class actions, not including their own cost of defense. They paid out an average of over $9 million a case. These litigation expenses, attorney's fees, settlement costs are initially borne by businesses but are ultimately passed on to consumers through increased prices, discontinued product lines, and the like.

As an organization devoted to improving the Civil Justice System, DRI believes rulemaking can address the problem of no-injury class actions. At the DRI class action seminar, the Rule 23 Subcommittee requested that DRI submit proposed language changes to Rule 23(b)(3) that would address DRI's concerns on this issue.

We submitted that language to the Subcommittee in our September 10, 2015, comments to

clarify that the class certification under Rule 23(b)(3) requires each class member to have suffered actual injury. The Lawyers for Civil Justice has also proposed similar language, and DRI supports that approach.

DRI is not alone in the belief that reform is necessary. For the past four years we have conducted the DRI national opinion poll on the Civil Justice System. Details on that polling and its certification by Quinnipiac can be found in my February 27, 2015, testimony to the House Judiciary Committee that's been provided to this group.

In our 2013 poll, 68 percent of the respondents, fully two-thirds, said they would require plaintiffs to show actual harm rather than just the potential for harm to join a class action.

In 2014, we asked if the respondent would support a law requiring a person to show they were actually harmed by a company's product, services, or policies rather than just showing the potential for harm. An overwhelming 78 percent of the respondents would support such a law.

Large majorities support this reform across many demographic categories in that survey, including 86 percent of Republicans and 71 percent of Democrats,

73 percent of liberals and 85 percent of conservatives.

The American people think it makes no sense to pay damages to people who have suffered no harm. They support reform. It's just common sense to them, as it is to us. Thank you. I look forward to answering any questions you may have.

JUDGE BATES: Thank you, Mr. Sweeney. Questions for Mr. Sweeney? John Barkett.

MR. BARKETT: I have the same question that I asked your colleague. Is that something that you think should hold up consideration of the changes that we've proposed, or do you believe it's something that fits within the changes we proposed and we would not need to restart the process?

MR. SWEENEY: Fortunately, I've had some time to think about that since you originally asked the question and the answer is I think this group should go ahead with what's on the table under the rulemaking. I acknowledge that your rulemaking process would require any proposal to be put out and further comment obtained on it.

There are two approaches before you that you can consider in that regard, but I don't see that there is going to be any congressional action on this

issue if for no other reason HR 1927 that would have affected this sort of change is held up in the Senate probably behind a judicial appointment log jam that won't come unclogged anytime soon, and I believe that that makes the desire for rulemaking all the more acute in the interim.

JUDGE BATES: Other questions? David Campbell.

MR. CAMPBELL: Mr. Sweeney, would your proposal eliminate all medical monitoring class actions?

MR. SWEENEY: Not necessarily.

MR. CAMPBELL: How do you draw the line between medical monitoring for an injured versus a non-injured person when the purpose is to determine whether there's an illness developing?

MR. SWEENEY: Well, medical monitoring requires for it to be a cause of action upon which you can get relief in most jurisdictions. Some injury, if there is injury, then medical monitoring necessarily would be a relief that's attendant to that actual injury.

If there is no injury whatsoever and all you have is the specter of developing a disease that perhaps you have a greater risk, that is a much

murkier question from an Article III actual injury point of view, but I would submit that many of those claims would not satisfy that criteria, but many would.

JUDGE BATES: All right. Thank you, Mr. Sweeney. We appreciate it.

MR. SWEENEY: Thank you.

JUDGE BATES: I think we'll hear one more witness before we take a morning break and that will be Stuart Rossman from the National Consumer Law Center and National Association of Consumer Advocates. Mr. Rossman.

MR. ROSSMAN: Thank you very much. As said, my name is Stuart Rossman. I am the Director of Litigation at the National Consumer Law Center in Boston and also the immediate past president of the National Association of Consumer Advocates, and I appear today on behalf of both organizations.

The National Consumer Law Center is a national nonprofit public interest organization representing the interests of low-income and elderly consumers in the areas of consumer credit, affordable home ownership, and access to utilities.

The National Association of Consumer Advocates is a membership organization made up of

public and private sector attorneys, legal services attorneys, and law professors whose primary areas of practice and areas of specialty are in the areas of protection and representation of consumers.

And I want to direct my comments today to the unique perspective that these two organizations have with respect to the proposed rule changes. From the National Association of Consumers Advocates' perspective, the unique issues that are faced in consumer class actions, which as you're well aware of, often involve classes of very large sizes and the aggregation of fairly small in perspective claims under the various statutes at least compared to other forms of class actions and from the NCLC perspective, the unique interests of low-income and elderly consumers as they are affected by the proposed changes to Rule 23.

I do want to point out before going forward that I appreciated the opportunity to participate in providing comments twice before to the Rule 23 Subcommittee and we have submitted both in April and September of 2015, and one of the things that we had provided to this Committee and that I would refer you to as well are the standards and guidelines for litigation and settling consumer class actions which

have been adopted by the National Association of Consumer Advocates. We are up to the third edition, which was issued in 2014 and it appears at 299FRD160.

These are what we believe are the best practices that consumer advocates should follow in pursuing class actions. Class actions are integral to the work that we do and we believe that we should hold ourselves up to standards that perhaps even are higher than those required by the Rules of Civil Procedure, and some of my comments will refer to those standards themselves.

I'd like to comment on three specific areas today. One is on the notice provisions, the second is on the issue of objectors, and the third is to briefly touch upon the issue of cy-prés.

On the issue of notice, which appears on page 219 and 220 of the materials that have been provided, I'm particularly pleased that the comments reflected a very important, I thought, discussion that took place at the conference in Dallas in September of 2015 and I'm referring -- I know Professor Marcus just asked the question beforehand, but I had raised the point at that time and it is, in fact, reflected in the comments that there are two issues when it comes to notice as far as my clients are concerned.

The first is the means of providing them with the notice, and although we are all aware of the fact that in the 21st century there are ways of contacting and reaching people into the community that were not even on anyone's mind in 1966, but that you do have to take into the fact that some of us are luddites and that there are issues out there that if you are going to more modern forms of notice that you're going to perhaps leave behind many of my clients and they will not be effectively notified of what their rights may be.

In particular, I refer you to the fact that there have been studies done within the last year by the Census Bureau, by the FCC, and by the Pew Research Center, and I'm happy to provide access to those materials if you want, but all of them find that there are material discrepancies between various groups in our community with regards to their current access to the internet and that's broken down by age understandably, income, by race and ethnicity, by whether or not you live in an urban, suburban or rural setting, whether you live on tribal lands, and also on your educational level.

Interestingly, by the way, all three studies found that there was no discrepancy in terms of

gender, but in the other areas there were material discrepancies, and relying solely upon the electronic means of contacting people and giving them notice would be problematic.

And so I appreciate the fact that the comments recognize that and I would strongly indicate that the language be made mandatory rather than just suggestive, that these be taken into account given the nature of the case and the nature of the class members who would be available, and I would suggest that it is the burden of the parties who are proposing the settlement to recognize that issue and bring it to the court's attention and how they would suggest that it be addressed, because there are very successful means out there to be able to reach those people.

The second part of notice, however, is with regards to the content of the notices themselves and on that I have just three comments. One does not appear in the comments right now but we had discussed in the past and that is that we very often find in consumer class actions that given the nature of the population that we are dealing with that it is very effective to use what we call summary notice.

It is a short form notice that either accompanies a full notice or is separate, sent out

separately from them, and in our standards and guidelines we set forth what should be included in those summary notices. In all cases they should include in plain and understandable terms the nature of the class, the relief sought and the means of obtaining further information, and in a settlement class you also want to be able to make sure that there's a clear description of the relief that is going to be available and the opportunities for opting out or objecting to the settlement itself.

The language that can be used can be simplified, it is short, it is understandable, it is clear, and for many of our clients that summary notice is really the thing that allows them to understand what's going on as opposed to getting a 15-page, single spaced small typed notice as to their rights. They're entitled to both, but we suggest that the summary notice makes it far more effective.

The second thing that is I think also recognized in the comments is the readability factor. Unfortunately, the average reading age in the United States is at a fifth grade reading level and we suggest strongly that folks take cognizance of that in preparing their notices, working with their administrators to try to find ways. There are

specialists in readability and even most word processing systems will allow you to determine the readability.

I will tell you honestly I've never been able to get a class action notice below seventh grade reading level. It's just virtually impossible, but it's an issue that is very important.

And the third area which is not mentioned in the comments and I would suggest that it now be included is language accessibility. We suggest that courts take into account, once again, given the nature of the case, that we have a multilingual society. It's a reality and providing requirements that language, that notice be provided in multiple languages, once again, given the nature of the case and the population that makes up the class, is something that should be included in the comments, similar to the other issues I've mentioned.

On the objectors, I just wanted to state that we strongly support the rule proposal that has been proposed by the Rule 23 Subcommittee and I only have one comment with regards to what appears on page 229. If an objector adds real value to settlement, the comment, I think, correctly provides that they should be compensated, whether it be by lodestar or a

lodestar plus multiplier for what they've contributed to the improved settlement. However, I think it should be added in the comment and we support that it should be added in the comment that any amounts that are provided to the objectors or to the counsel be paid for by the defendants or from the attorney's fees being paid from the plaintiff, and it should be made explicit that that improvement should not come from the common fund that would otherwise go to the members of the class and the claimants. It should not be deducted from the common fund.

And then finally I just want to refer to the fact that cy-prés was an issue that we believe that correctly the Subcommittee suggested not be included in this particular set of proposed changes or amendments. But on page 222 and 223 there is a reference to the ALI Principles of Aggregate Litigation, Section 3.07, and that is consistent exactly with Guideline No. 7 of the NACA Guidelines that I referred to beforehand.

And we think that, once again, above and beyond courts being encouraged to use 3.07 as the model for dealing for best practices with regards to cy-prés awards when directing distributions in those cases where monies are left over and it's no longer

viable, efficient, or feasible to hand it over to the actual members of the class that there be a strong recommendation that 3.07 is, in fact, the proper and appropriate way to handle cy-prés. We think that the ALI got it right and we think the Subcommittee got it right and that courts should be encouraged to follow that particular rule. And with that, I'd be happy to answer any questions.

JUDGE BATES: Thank you, Mr. Rossman. Questions? Professor Klonoff.

PROF. KLONOFF: Aren't there circumstances where you might want to take the objector's payments out of the common fund where the objections say results are doubling and recovery goes to the class --

JUDGE BATES: Just a second, use the microphone and we'll pick it up then.

PROF. KLONOFF: Okay. Aren't there circumstances in which it would make sense to pay out of the common fund, for example, where the objection results in doubling the compensation to the class? I'm a little nervous about an absolute rule regardless of the circumstance. I was wondering what you thought about that.

MR. ROSSMAN: My concern there is that, once again, if the settlement doubles, then obviously the

attorney's fees will commensurately in most cases be reflected, at least the plaintiff's parties' attorney's fees. And if, in fact, someone has increased the value of the settlement, I could easily see taking it out of the additional amount that was given to the class. There shouldn't be a windfall to the class. I agree with you on that.

But I also want to make sure that it's understood that if a settlement is increased then, once again, the plaintiff's attorneys should -- the ones who had proposed the original settlement at the lower amount should not get a commensurate amount of a windfall at the same time.

So I think you're probably right under those circumstances you'd want to share the additional increase but making sure, once again, that the class members were not disproportionately affected by the increase or benefit proposed to the class.

JUDGE BATES: Professor Marcus.

PROF. MARCUS: This is a question I think I asked somebody else and I would imagine your organization would be in a position to hear about such things. Since the Supreme Court's Campbell-Ewald decision in January, are you aware if there's been a pickup of pick off, so to speak, or has it gone away?

What is happening out there?

MR. ROSSMAN: Well, I don't want to turn this into a public service announcement, but right before I came here we were working on amending or changing our class action manual that NCLC publishes because we've been monitoring the cases after Gomez and there have been not a huge number, certainly not like it was after Spokeo, but there have been a significant number of cases that have come down, some on one side, some down on the other side.

But our experience has been and what we will be pointing out in our manual is that courts seem to be handling it just fine by themselves and it seems my suspicion is is that a year from now the pick off situation will have resolved itself. The courts are following Gomez, they're working out the details and the circumstances, and it seems to be working just fine on its own through the judicial process.

JUDGE BATES: Judge Oliver.

JUDGE OLIVER: You addressed in your written comments some things that you didn't discuss this morning and perhaps that's because you think those are not things we should be taking up right now. But you proposed a change to 23(c)(1)(A). You had some concerns about judges denying class certification by

just looking at complaints and you had suggested I think in your written comments that you would amend that to allow briefing or a reasonable time for discovery. Are you suggesting that's something that should be part of this package, or what's your view on that?

MR. ROSSMAN: Thank you very much for raising that. We still strongly believe -- I believe what's being referred to is that we had suggested that there is an issue that there have been instances where class action pleadings have been stricken under Rule 12(f) at a very early stage of the litigation and that what is actually happening here is that, unlike the Supreme Court's requirement under Dukes that there be a full and thorough vetting of the class action principles before making a determination to clear certification, that it's being decided at the pleading stage when no one has had an opportunity to do full discovery or present all of their appropriate arguments.

And so we were suggesting that there be an explicit change to (c)(1)(A) that would include language that says that the -- I believe the actual language we had that the determination should not be based solely on the complaint but rather on class

certification briefing and evidence submitted after a reasonable time for discovery.

We proposed that to the Rule 23 Subcommittee. It did not make it into the final cut and very mindful of the question about whether we thought that -- I included it in there because I wanted you to be aware that we still feel that it's important, but I left it out, heeding some of the previous comments that I don't believe that this process should be held up because of that. That may be something for further consideration at a later time. It's something we still believe in, but it should not be something that should hold up this particular process.

JUDGE BATES: Other questions?

(No response.)

JUDGE BATES: Mr. Rossman, thank you very much for your time.

MR. ROSSMAN: Thank you very much for this opportunity.

JUDGE BATES: I think maybe this is a good point, sort of a midpoint in terms of the witnesses to take a morning break. It's 10:20 by my watch. If we could be ready to go again at 10:35, but let's take a 15-minute break and thank you.

(Whereupon, a brief recess was taken.)

JUDGE BATES: We'll proceed with additional witnesses. This has really been helpful so far and I look forward to the remaining witnesses. We'll start with Brent Johnson from the Committee to Support Antitrust Laws.

MR. JOHNSON: Hello. My name's Brent Johnson. I'm a partner at Cohen, Milstein, Sellers & Toll here in Washington, D.C., where I focus on bringing antitrust class actions. I'm also a member of COSAL, the Committee to Support the Antitrust Laws, and I'm expressing COSAL's views here today.

COSAL is comprised of law firms throughout the country who represent individuals and businesses who have been harmed by violations of the antitrust laws. We hope to offer our practical knowledge and insight about how the Rule 23 Amendments might be interpreted. I'm very grateful for the opportunity to testify, and I refer the Committee to our written comments.

COSAL generally supports the proposed amendments to the Civil Rules and thanks the Committee for its hard work and initiative. I am here only to address one narrow issue with one of the amendments to Rule 23 and specifically Rule 23(e)(2)(C)(ii) and make

a hopefully concrete and modest proposal for slightly different language.

The current amendment to Rule 23 requires courts to take into account in deciding whether to approve a settlement the effectiveness of the proposed method of distributing relief to the class, including the method of processing class member claims if required.

While we do not believe it to be the correct interpretation of the Committee's proposed language, some courts could mistakenly interpret the inclusion of such a factor and particularly the use of the word effectiveness to mean there are categorically ineffective methods of distributing relief to classes and courts may use that factor to impose a heightened standard for identifying class members, processing claims, and distributing settlement proceeds that for certain groups of cases no method of distributing relief could meet. Such a standard could lead to the rejection of settlements for the sole reason of not meeting it.

So essentially this factor is, as some other folks have talked about, it could be misconstrued as imposing a heightened ascertainability standard. The Advisory Committee put this issue on hold in its

November 2015 meeting minutes and noted that it was still under study in its May 12, 2016, memo to the overall Rules Committee.

We think that's unsurprising since it's the subject of much debate and a fairly stark circuit split and is best left probably to resolution ultimately by the Supreme Court.

So given that hold, my purpose is not to argue either side of the ascertainability debate but to try to help the Committee ensure that it stays out of that fray in the current rulemaking process.

We believe that our new language does that and that it has no down side whatsoever. Our proposal is that when weighing approval of a settlement under Rule (e)(2)(C)(ii) that courts consider whether the proposed method of distributing relief to the class, including the method of processing class member claims if required, is the best method that is practicable under the circumstances.

So we eliminate the words "the effectiveness of" and add "whether" and then "is the best method that is practicable under the circumstances". Our letter omitted the word "whether" in our proposed new language. Our apologies for that.

This new language has a number of virtues.

We believe that it eliminates any confusion as to whether the proposed language of the Committee should be read to add or impose any type of ascertainability requirement in approving a class settlement. We also think it eliminates arguments that could be made at class certification that might reference this factor to bolster arguments for a heightened ascertainability requirement at that stage.

It gives courts and litigants a familiar guideline on how to apply the standard because it mirrors the language in Rule 23(c)(2)(B) as it relates to notice, and we also believe that it more appropriately balances the concerns that are outlined in the comments to the proposed amendments. It ensures that the claims processing method does everything it can to deter unjustified claims, but it stops shy of having a standard that could be read to and could be used to preclude settlements entirely.

So that’s the sum of my comments on that very narrow issue, and I welcome any questions the Committee has.

JUDGE BATES: All right. Well, thank you very much, Mr. Johnson. Questions?

(No response.)

JUDGE BATES: Clear as a bell for us I

guess, Mr. Johnson. Thank you very much. We appreciate it.

MR. JOHNSON: Thank you.

JUDGE BATES: Next witness will be Mary Massaron from Plunkett Cooney.

MS. MASSARON: Good morning.

JUDGE BATES: Good morning.

MS. MASSARON: I'd like to thank you for giving me some time to speak about the rules. My name is Mary Massaron. I head the appellate practice group at Plunkett Cooney. I should also mention I'm the current president of Lawyers for Civil Justice.

I want to thank you also for the huge amount of time, energy, and care that I know that the Rule 23 Subcommittee has taken in going around the country and listening to the voices of practitioners and academics and judges on all sides of the very complicated issues that arise in the context of Rule 23. I think everyone appreciates that, and it's really quite inspiring to see the process by which the rules that we live under and that we rely upon to effectuate the rule of law are adopted in such a careful, thoughtful way.

I want to speak very briefly this morning about a couple of points. First, I want to touch on

the question of cy-prés. Then I want to talk briefly about typicality and its relationship to the whole question about approval of settlements and some of the problems that arise in that area.

In terms of cy-prés, Lawyers for Civil Justice took the position which the Committee did not adopt of an outright ban on cy-prés and it did so because of the view that the use of cy-prés settlements, which has been increasing, is problematic on multiple grounds -- it results -- there's no clear legal authority for it and it creates a host of problems with the whole class action context.

The Committee chose not to go there, which I think was certainly a centrist view, that is, we're not going to endorse or exclude cy-prés. Based upon that, in my view, the reference in the note to the ALI principles should be removed. It seems to me by having that language in there what the Committee is essentially doing is putting its imprimatur on the use of cy-prés, which is a change in what the rules currently do and a change for which in our view, in my view there's no authority for.

That's a substantive legal change that raises Rules Enabling Act problems, and that's aside from all of the practical problems that I believe are

associated with the use of cy-prés settlements. Given that the rules are not blessing cy-prés as a solution, it seems to me that the comments should not also place the weight of the Committee behind that solution.

And certainly even those who support the use of cy-prés, it's not necessary for the Committee to do that because courts are certainly aware of the ALI provisions. They're referenced in any number of judicial opinions.

Secondly, I want to talk briefly about the question of typicality. LCJ proposed language in its comment allowing certification only if the claims or defenses and type and scope of injury of representative parties are typical of the type and scope of injury of the class.

Many of the problems that the Committee has heard about and that you can see in the case law arise from classes which combine injured and non-injured members or classes which combine people whose injuries are not yet manifest with people whose injuries are manifest, and many of the efforts in the rule to focus more on approval, the approval process for settlement are intended at the back end to try to prevent some of the abuses that can arise out of these conflicts of interest from classes that have such disparate groups.

In my view, the stronger way to address that is at the front end by making sure that the class representatives and the class are defined in a way that is consistent so those conflicts of interest don't arise. That's particularly useful because -- and this I think can be seen if you read some of the cases involving conflicts of interest or issues around settlement -- it's very difficult even with this effort to provide additional information which might be useful to the court for the court to really evaluate and see in depth where these problems might arise, and therefore, it seems to me a better approach is to adopt this language about typicality which really would prevent that.

That's really all I wanted to focus on today. I see that there's time left, which I'm happy to use to answer questions or give back to the Committee for the other witnesses.

JUDGE BATES: Thank you, Ms. Massaron. Questions? Judge Dow.

JUDGE DOW: Sorry about that. One question I have is, so what happens at the end of a case when settlement is proposed, the defendant says, I don't want to get into any question about reverter here, I don't want to have a fight about that, it's going to

be easier if we just say this is the amount of money we're going to pay, and then we've done two rounds of distributions to the named class members and anybody we can identify who are absent class members, and then there's this small amount of money left?

And if you flat out ban cy-prés, that money, you could either pay it to the claims administrator and they'll exhaust it to try to find more people or you can pay it to some cy-prés recipient. What's the position of yourself or DRI on that scenario?

MS. MASSARON: Well, I'll give my position because I don't want to misspeak organizationally. It seems to me that in that circumstance there's really two situations. One is where the amount that's going out to the class members is less than their injury because it's a settlement, and in that circumstance it seems to me, if the class is properly defined, you should be able in one or two distributions to get that money to the class members.

On the other hand, if the settlement amount is fully compensating people, then it seems to me it should revert to the defendant because it's no longer compensatory. But the idea of paying it to some third party that's not a party to the lawsuit has a punitive aspect which is not consistent with a compensatory

Civil Justice System and certainly is a substantive legal measure which it seems to me raises real Enabling Act issues.

JUDGE BATES: John Barkett.

MR. BARKETT: Is your specific suggestion to delete the line on page 223 of this book that we've all been handed out now? Many courts have found guidance on this subject in Section 3.07 of the American Law Institute Principles of Aggregate Litigation 2010, is that the specifics is just to delete that sentence?

MS. MASSARON: That's correct.

JUDGE BATES: Other questions?

(No response.)

JUDGE BATES: Ms. Massaron, thank you very much. We appreciate your comments.

MS. MASSARON: Thank you very much for the opportunity.

JUDGE BATES: Next up from Georgetown University Law Center will be Brian Wolfman. Professor Wolfman.

PROF. WOLFMAN: Thank you very much for having me. If you don't mind, the last statement piqued my interest, so let me opine on it even though I wasn't planning to with respect to the cy-prés,

which is that, while I understand the last witness's concerns, it seems to me that you would know better than I but that the reference to the ALI principles is not so much to endorse or not endorse the use of cy-prés but to endorse the use of cy-prés only when you cannot get the money in the hands of the class members in a practicable way. So I would urge the Committee not to delete that sentence.

Anyway, let me talk now about what I was planning to talk about, which is first Rule 23(e)(5)(B), which is the subject of my written comments. This is the rule, as you know, that requires approval for payments to objectors and their lawyers not only when the case is pending in a district court but when the case is pending on appeal. I think it's a very, very good rule.

Given the importance of the rule, I was surprised that neither the proposed rule nor the Committee notes said anything as to the standard for approval or disapproval or factors for the court's consideration. I was particularly surprised given that the current proposal seeks to provide even more guidance for settlement approval under (e)(2) and yet, as I say, there's no guidance with respect to approvals or disapprovals under (e)(5)(B).

I believe that a standard for approval should take into account two basic ideas: one, wherever possible a class settlement should treat similarly situated class members alike and, two, class settlements exist for purposes of aggregated, not individual, treatment of class members' claims.

As to the first point, equal treatment, which I stressed in my 1999 proposal on this topic which I attached to my current testimony, the Committee proposal has adopted this concept in Rule (e)(2)(D), requiring the court to consider whether a proposed class settlement treats members equitably relative to each other, that is in essence an equal treatment idea.

As to the second point that class action settlements are for class treatment, the rules also speak to this, I think, as a general matter authorizing individual treatment in one way only by allowing members to opt out, but by not giving them super opt out rights to use the class device to extract enhanced individual gain at the expense of the class.

So I've proposed language to take into account these two concepts. It would authorize the district court to approve an individual objector side

deal only where, one, the objector is uniquely situated such that she has a genuine claim to disparate and more favorable treatment and, two, it is impractical or impossible for her to opt out and pursue her own litigation.

As I said in my written comments, if the objector can't meet this standard, then surely the objector's lawyer can't meet that standard and be entitled to special treatment.

If an objector's lawyer wants a fee, that lawyer, like any other lawyer, should seek a fee openly under Rules 23(h) and 54(d) as part of the settlement consideration process.

Finally, my final point here is that the proposed note says, I think quite accurately, and I'm quoting here, "Class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors," meaning these objectors seeking to extort the process.

I'd add that defendants sometimes feel the same way, but I'm concerned that without further comment lawyers and courts may view this concern about delay even as a possible basis for approving a side payment to objectors and their lawyers.

And, you know, to be blunt about it, the extortion itself should never be a reason to approve it, and I urge the Committee to consider my proposed language clarifying on that score.

I do want to address one other thing which is not yet the subject of comments and I will submit written comments before the deadline on notice. In particular, I'm concerned about the proposed new statement in 23(c)(2) about notice going by mail or electronic means or other appropriate means.

The note endorses that nod to electronic notice on the ground that, you know, things have changed since Eisen. You know, under the current rule, the current rule doesn't require U.S. Mail notice, but it doesn't give that nod or green light to email or even banner notice. And the problem is, I think, that the effectiveness of these forms of notice particularly as a form of notice that you're using to effectuate relief to the class have not been proved.

And I point to Todd Hilsey's comments in this regard and I'll say nothing further, although I think his comments are well taken. So then what is in my judgment sort of going on here or what's the problem? I think where class members' mailing addresses are known and significant monetary relief is

likely available to many or all class members, I don't know of a case in my experience -- I've been doing this for a while -- in which electronic notice is likely going to be the most reliable means of getting notice and the relief to the class members.

So where class members' mailing addresses are known, you know, what are the circumstances where electronic notice might be reasonable and appropriate? And I can think of this, a situation in which the amounts available to the class members are so small that no rational class member would pursue his or her own litigation.

And if that's so, then the problem is not to improve notice in (b)(3) cases but to rethink the notice regime in Rule 23 more generally. So, in a (b)(1) or a (b)(2) case, notice must simply be appropriate or at the settlement stage, you know, reasonable, but there's no requirement of individual notice to all members who can be identified through reasonable effort as there is under (b)(3).

And that's true for two related reasons. One is that the treatment of the class needs to be unitary or should be unitary and that the individuals, as I say, don't need to control their own litigation. And, in fact, in (b)(1) and (b)(2) cases, there's

good reason that individuals not be allowed to control their own litigation.

But the same could be said for my hypothetical, you know, small claims (b)(3) case. Take, for example, a case in which class members' claims at their maximum are $100 each. Much like the (b)(1) and (b)(2) case, this hypothetical calls for unitary treatment precisely because there's no reason for a person to pursue their own litigation.

So, in this circumstance, you want appropriate notice, you want appropriate notice, and that may not require individualized notice of any kind to all class members. So, in that situation, particularly at the certification stage, you want notice to a fair cross-section of the class and maybe to others whom the court and parties already know have an interest in the litigation to enable a fair cross-section of absent class members to intervene and to object to aid the process that brings insights to bear on the litigation.

But in my hypothetical, you don't need individual notice there any more than you do in the (b)(1) or (b)(2) case and so you may save money in that circumstance not particularly because you're using electronic notice but by not having to notify

the entire class individually by any means.

So what I'm suggesting here is stepping back and looking at notice under Rule 23 more generally and asking what are the circumstances in which full-scale individualized notice are or are not required. But I don't think we want to suggest weakening the means by which we do individualized notice when individualized notice is truly desirable.

So let me put it another way. I don't think we should assume that email notice or banner notice, banner ads are truly providing individualized notice to the whole class as opposed to acknowledging that there may be some cases now typed as Rule 23(b)(3) cases in which individualized notice of the whole class is neither desirable, particularly at the certification stage, or legally required.

So I urge the Committee to delete the new reference to these various forms of notice and maybe take up at a future time this more holistic approach to the perspective I've just described.

JUDGE BATES: All right. Thank you, Professor Wolfman. Are there questions? Professor Marcus.

PROF. MARCUS: It strikes me that I'm referring to your last subject, the question of I take

it limiting or abolishing what's in the rule currently for individual notice in (b)(3) class actions?

PROF. WOLFMAN: No, no, I think that's not what I'm saying. What I'm saying is -- and when I submit my comments I will draw this out a little more. This is in a 2006 article I wrote along with Alan Morrison that in a way there's two really different kinds of (b)(3) cases going on.

There's one where there's a substantial amount at stake or there could be a real reason for someone to individually control their litigation, like even though, for instance, the amounts available are small, there's a fee shifting provision that makes individual litigation sensible.

In those situations, sure, individualized notice should remain there, but not everything typed is a (b)(3) case necessarily. Take the $5 case in which there's no rational basis for individual control of the litigation. I don't see that as being significantly different from why you don't demand individualized notice in the (b)(1) and (b)(2) situations.

PROF. MARCUS: Well, I guess what crossed my mind is that your imaginary hypothetical $100 claim case sounds a whole lot like Eisen --

PROF. WOLFMAN: Yes, that's right.

PROF. MARCUS: -- and Eisen interprets the current. So you are asking that we alter the result in Eisen not in terms of means of notice but in terms of giving notice at all?

PROF. WOLFMAN: Not at all, but it would be a different type of notice. Notice always has to be reasonable.

PROF. MARCUS: You're saying the alternative means would work okay then?

PROF. WOLFMAN: Yes. Let me put it this way. Eisen is a rule case. It's not a constitutional case, right. So the question is what --

PROF. MARCUS: That's probably correct.

PROF. WOLFMAN: Well, at least on its face there's constitutional implications in it but sort of on its face the bare holding. And it just -- again, I draw this out in this 2006 NYU Law Review article and it's not that -- believe me, it's not that I don't -- you know, I represent objectors, I represent class members. It's not that I don't care from that side of the V.

It's the problem if you increase the cost dramatically in cases where there's no sensible reason for people to increase -- handle their -- control

their own litigation, particularly at the certification stage, you're increasing the -- you're lowering the amount that might be available for the class and creating more ground for a possible sell out settlement because, you know, only the defendant is going to be willing to pay the notice, for the notice, that huge notice to get the case out of their hair, whereas that money that's being used for very little purpose, particularly at the certification stage -- we're not talking about getting relief to people -- could be used to the benefit of the class.

Again, I'm just saying in that $100 case, maximum $100, maximum $3, maximum $4, there are cases like that. There are cases like that and why are we spending our money for that any more than in the (b)(1) and (b)(2) situation.

JUDGE BATES: Ms. Cabraser.

MS. CABRASER: Are you essentially suggesting that for future purposes we ought to consider a proportionality rule with respect to whether there should be individualized notice in any given class action?

PROF. WOLFMAN: I don't know there would be proportionality. I think it would be trained on the question whether it's rational or sensible or feasible

to control one's own litigation. I think that, and again, you know, you could be a small claims case, but there's reason to do individual litigation because under that statute there's fee shifting, so people might want to opt out and litigate on their own.

So it would depend. Again, I have in mind actually a proposed rule which sort of carves (b)(3) into two segments. I think most (b)(3) cases would go forward as they do today with the individualized notice, but some of them wouldn't necessarily have to.

A reason I raise this in conjunction with the nod towards email notification, because the obvious reason for email notification is to reduce costs in some or all circumstances.

But if we know going in that that notification is less effective, and that's what Todd Hilsey says. I think he's right. I think it's right in my experience in the few cases I've seen it in. If that's correct, then why don't we, you know, jigger it in a different way and say spend the money in cases where it makes sense to spend the money and don't spend the money in cases where it doesn't, but don't use the email notification sort of as an excuse to deal with the high costs.

JUDGE BATES: John Barkett.

MR. BARKETT: It doesn't say email. It says electronic means.

PROF. WOLFMAN: Right.

MR. BARKETT: But it seems to me that your focus is on the prior sentence, that including individual notice to all members who can be identified through reasonable effort. I am understanding you to be saying that individual notice to all members who can be identified may not make sense in certain cases.

PROF. WOLFMAN: In this, sir, and probably a probably narrow set of cases, yes, but I'm certainly not saying take that out for now because that would require further study, you know, and that's what I'm saying.

But I have a sense that what's going on with electronic notice, which is frequently in the form of email, but it could be banner ads, it could be other things, is that you're using that as a way to reduce costs when I don't think -- you know, if you have a case where you have $1,000 claims, you know, legitimate $1,000 claims, you can go find those people.

I've done it in my cases. I've had cases where we got 94 percent of the money paid out to 92 percent of the class members because we went and found

them. We would never have been able to do that if you had email notice or a banner ad notice serving as the underlying -- the undergirding of that process.

MR. BARKETT: No, I'm not saying that. In our discussions, I was on the Subcommittee and as I recall anyway, one of the reasons why this sentence was added, I think quite innocently, was simply to make sure that courts understood that you didn't necessarily have to use mail in every circumstance. It wasn't suggesting you shouldn't use U.S. Mail, but it wasn't designed to do anything more than indicate that there may be other appropriate means depending upon the facts of the case so that the judge knew that the judge had discretion, that Eisen didn't necessarily say it always had to be first class mail.

PROF. WOLFMAN: Right.

MR. BARKETT: So that was a rather innocent addition. But I'm hearing you suggest it was so innocent that we should remove it.

PROF. WOLFMAN: That's right. I mean, I think that's fair. I mean, you know, again, you know, Todd Hilsey, his comments take the same view as I do that it could be read in a wrong way. I'm obviously not questioning the motivations. You know, I didn't know whether it was innocent or not. I was just

questioning the words as I saw them on the paper.

Don't forget the current rule doesn't say U.S. Mail, so there's nothing about the current rule that wouldn't allow different means and courts are already using different means, so this seems like a nod in that direction and that would be -- if any courts or lawyers are going to construe it that way, that would concern me because I don't believe that there is an empirical basis.

You know, I've read some of the materials that Todd cited and based on my experience, I don't think there's an empirical basis for saying that, you know, banner ads, for instance, or other forms of electronic notice are a good way to reach people in a meaningful way so they take action, you know, when there are $1,000 claims out there or $5,000 claims out there.

MR. BARKETT: Can you foresee no case in which electronic notice might be as good as or better than U.S. Mail notices?

PROF. WOLFMAN: That's it, that's a great question. I would put it this way. Let's say you had a case in which you weren't seeking -- I think I can think of two circumstances. One of them relates to a case I worked on.

The first is that let's say you're not attempting to get at everybody to begin with, you're just doing a (b)(2) type of notice, you know, you want everybody to come in, potential interveners, you want to really inform the process. You know, it's possible that email notice would be at least part of a reasonable scheme in that situation.

I can also think of a situation where let's say there's a product that's uniquely tied to the use of email between the purchaser and the seller and such that that's how on a regular basis the class member deals with the defendant and only that way.

And there was a case I had that somewhat presented that scenario. I would seek --

MR. BARKETT: Another example of that might be members or past members of a professional organization.

PROF. WOLFMAN: It's possible, but, again, I want to stress one thing and, again, I think these are empirical questions, exactly why I think as Todd said in his comments to step back before you even hint in this area.

I think that's possible, but I'd only stress that people are more likely to open, read and take seriously the massive amounts of email they get if

they're regularly in contact with somebody about the topic, not just that they're, you know, that they're in contact once in a while.

Let me be very open about this. I don't read every email from the D.C. Bar. I read some of them because there's a lot of them and so forth. I don't want to mention any other organizations.

(Laughter.)

JUDGE BATES: Other questions?

MS. CABRASER: Yeah.

JUDGE BATES: Elizabeth.

MS. CABRASER: I think what the Subcommittee was trying to get at is to make sure that the best practicable means of notice could be employed under the circumstances of the case, which raises two questions.

I understand the empirical debate. I also recall a number of declarations by Todd Hilsey, among others, that when you have a stale mailing list first class mail is a waste of time and money and it's not the best way to do it and should not be used, so it's circumstantial.

PROF. WOLFMAN: Right.

MS. CABRASER: I was wondering if what you're suggesting is something along the lines of what

the California Rules of Court provide? California is unburdened by Eisen and so those class action rules provide that the court has essentially untrammeled discretion to dispense with notice entirely, determine the form and content of notice, and to decide who pays for it, and it is proportional to the issues involved and the amount at stake, is that?

PROF. WOLFMAN: No, I mean, I think that's too much discretion.

MS. CABRASER: Too much discretion.

PROF. WOLFMAN: Again, I don't think you want it in a case where people are likely going to want to cash in and are likely -- you know, there's a decent chance they might want to control their own litigation, and I think you want to go with what you have now but generally not rely on electronic means to get ahold of them.

You know, I can't speak for what Todd did in the past when he was in the business, but I can tell you what he says now and, as I say, I've read some of the underlying materials that he cites and they seem pretty convincing as a general matter that mailing lists plus additional work.

In the case I mentioned in which we found 92 percent of the people and handed out 94 percent of the

money, we did mail and then we did additional work to get these folks because real money was at stake.

JUDGE BATES: I'm going to bring this to a close.

PROF. WOLFMAN: Yeah.

JUDGE BATES: But, Judge Oliver, last question for Professor Wolfman.

JUDGE OLIVER: Yes. So you're suggesting a whole new regime in regard to (b)(1), (2) and (3) and kind of a rethinking of notice, period. And that probably is something that's not part of this project but beyond that sounds like you're suggesting that the rule is okay as it is because there's no need to tell people that Eisen allows something other than first class mail. Is that what you're --

PROF. WOLFMAN: Exactly. Precisely.

JUDGE BATES: All right. With that final word, we will move on to the next witness. Thank you very much, Professor Wolfman.

The next witness is Hassan Zavareei from Tycko & Zavareei.

MR. ZAVAREEI: Good morning. Thank you for the opportunity to testify here today. I have been practicing for a little bit over 20 years. I began my practice at Gibson, Dunn & Crutcher as a defense

attorney, including doing class action work, and for the past approximate 15 years our firm has been doing plaintiff side class action litigation.

I've litigated probably over 20 class actions, settled not quite as many unfortunately, and I'm here as a practitioner to talk about my experience and I want to address three specific issues that I believe have come up today in some fashion or another. The first is the changes to Rule 23 that provide for electronic notice; the provisions in Rule 23(e)(1) and (2) relating to the type of notice and the means for determining whether to give notice to class members, sort of this frontloading process that we used to refer to as preliminary approval; and then I want to address some of the changes relating to objections.

First, with respect to the electronic notice change, I disagree with what we just heard from Professor Wolfman with respect to the importance of electronic notice. I have in many cases experienced the benefit of electronic notice and including in class action settlements involving professional associations, as Judge Bates just mentioned, but I think it's becoming the rule, not the exception, that most businesses, associations, organizations communicate primarily with their customers through

electronic means, predominantly through email, and I think that the provision just simply acknowledging that and providing that as an opportunity or an option is absolutely -- it does no harm and I think it does some good. I think it allows the clarity.

There are some judges that are reluctant to do electronic notice and I think that the rule makes it clear that the proposed rule, change to the rule makes it clear that that is acceptable and I think that is helpful.

I can give another example. In addition to the association, we had a case involving college students who had a bank account set up through an outside organization. Almost all of their communications were done through email.

I think one of the first witnesses talked about his daughter in college not receiving first class mail. My daughter’s the same. I sent her a letter; she didn’t really know what it was. And I think that is what a significant segment of our population and our consumer population has turned to now, which is electronic mail, and I think in addition to it being efficient also it saves the class money.

Typically who pays for this notice? Notice is incredibly expensive and the class typically pays

for it. Now there are times where you can negotiate and depending on the state of negotiations where the defendant pays for it, but that's not always the case. And so doing anything you can to make that notice process efficient and inexpensive I think is beneficial to the interests of the class.

The second thing that I want to address and this is a minor point, which is, with respect to the factors that the Subcommittee has added with respect to what the courts should consider when giving notice to the class, what we used to call preliminary approval, I think that it is important as somebody who litigates in state and federal courts all across the country, there are factors in virtually every different circuit. There is a lot of overlap, but there's also some factors that appear in one circuit and not in another, and I think this is a fine effort by the Subcommittee to try and get some uniformity and I think that they've brought in the most important factors from all of the different circuits.

I would also, however, like to talk a little bit about one of those suggested changes which is in Rule 23(e)(2)(C)(iii), which relates to the effectiveness of the proposed method of distribution to the class. That was something that Mr. Johnson

testified about earlier.

My concern is a little bit different than the one that Mr. Johnson testified about. My concern is that the provision speaks to the method of distribution to the class, and I think that there are instances in which the distribution is not necessarily to the class but for the benefit of the class.

For example, when the class members are unreachable, when the money is going to be distributed to an appropriate cy-prés organization or through escheatment, so I think that an appropriate change would be to simply remove the word “to” and replace it with “for the benefit of”.

I want to devote the rest of my comments to what I think is probably the most important change that the Committee is considering, which is the change to the standards for objections and how objections will be treated. This is something that I deal with as a litigator, as a practitioner on a constant basis, including in cases in front of Judge Dow and Judge Bates here, and I think that there is an important place for objectors in the class action process and I think we’ve also acknowledged and we’ve learned that that is also a place that has been abused and has caused a lot of trouble not just for plaintiff’s

attorneys but also for defense attorneys and for the courts. They've wasted a lot of judicial resources and they've really sort of used a mechanism designed to promote fairness for the entire class in a way that has really turned into a self-serving blackmail or greenmail situation.

And unfortunately I don't believe that the proposed rule change is going to work. I understand the rationale behind it and the economics behind it. The idea is that if we force these people, these professional or bad faith objectors -- and I would make a distinction between professional and bad faith objectors. I think we had two professors who say that they frequently represent objectors. You could argue that those are professional objectors, and I don't think that that's what we're really concerned about. I think that what we're concerned about are bad faith objectors, people who bring objections for the sole purpose of trying to extract monetary compensation, and I think that's what the rule is aimed at.

Unfortunately, it ignores what I think is the practical implication of how this really plays out in a case. Specifically, all of the action with respect to objections happens after an appeal is docketed. The objectors don't ask for money. They

don't even speak to plaintiff's counsel while the case is still before the district court. They wait until after the final approval order has been granted and then they file their appeal, and at that time, that's when they go to the plaintiff's counsel and demand ransom to allow the settlement to go forward.

Now the rule as written attempts to address that by directing the parties to Rule 62.1, and unfortunately I just, as a practical matter, I don't think that that is going to work. I don't think that it is an appropriate mechanism for addressing the issues primarily because once the appeal has been docketed the district court no longer has jurisdiction over the appeal, and I don't even think that there's anything that requires the litigants, including the objector or the plaintiff's attorneys to even follow those procedures because I don't think they're properly before the district court anymore.

So I think that you're opening, potentially opening up a -- well, I guess leaving intact a loophole that's already been there. And for me, I think that probably the most effective way of addressing this issue is not through Rule 23, changes to Rule 23. I appreciate that the Subcommittee has probably heard a lot about this problem and many

members of the Subcommittee have dealt with this issue themselves and have been trying to solve this very serious problem, but I'm afraid that Rule 23 is probably not the best avenue for addressing the change.

I think that the most appropriate method of fixing this problem is through the Federal Rules of Appellate Procedure, providing for an expedited appeal process for certain objections, and allowing for the courts of appeals to use expedited appeals or summary affirmance, which we have done in many cases when we've been dealing with bad faith objections.

And alternatively I've made a proposal. I believe it's probably not something that the Committee could consider at this point, but if the Committee wanted to do something with respect to Rule 23, I think it would be important to call out what we're really talking about and that's bad faith objectors and to make a determination if an objector is a bad faith objector and allow the court of appeals to use that information to expedite the appeal or to make a summary disposition. Thank you for the opportunity to address you today.

JUDGE BATES: Thank you, Mr. Zavareei. Questions? John Barkett.

MR. BARKETT: Maybe we should let Rick go first.

PROF. MARCUS: No.

JUDGE BATES: He was still getting ready.

MR. BARKETT: No problem. This was a topic of enormous debate, the objectors' discussion. I've heard both sides of the story in numerous meetings and there are large members of folks who prosecute class actions who take a different view from you. They think that this will work.

I don't know who's right and who's wrong, but in terms of your experience and even in preparing for today, have you communicated with your colleagues who have different views and is it just the case that you and they do not agree, you think it won't work and others think it will work? Is that where we are?

MR. ZAVAREEI: Well, I'm not sure that due consideration has been given to the jurisdictional issue. You know, I participated in one of the roadshows that the Subcommittee generously provided, I think it was here in D.C., the Duke University Law Center's roadshow, and I think these proposals came after that, so there was really no discussion about the jurisdictional issue on appeal and that's my concern.

MR. BARKETT: It has been studied and it's not clear to me that you're right that there isn't jurisdiction, there's at least a genuine question here. But the way the language is worded is such that courts can take advantage of indicative orders and follow the procedure and it's an interesting question, but it's not clear to me that there isn't jurisdiction because I know I was a part of calls where we looked at lots of cases. But is that your concern, that you have decided as a matter of law that that can't work and therefore this rule doesn't make sense? Is that where you are?

MR. ZAVAREEI: Well, I guess I'm not a constitutional scholar, I'm not in a position to determine whether it can or cannot work. It's my opinion based on my study of the cases that there's at least a significant question as to whether or not there's jurisdiction at that point, and so I think it creates some potential unintended consequences and potential for abuse. So I think where it is unclear like that that I think that it's just, it's ill-advised to tread.

JUDGE BATES: Judge Dow.

JUDGE DOW: So I'm curious about your proposal here about the request for finding the

objection was filed in bad faith and so many years ago, before I was on the Civil Committee, I was on the Appellate Committee, and we studied this issue starting about 2010, maybe even before that.

The proposal I had was for a certificate of appealability, which sounds a lot like this, and I was persuaded that we'd have a Rules Enabling problem because congress is the one that gives district judges the ability or the authority to issue certificates of appealability in habeas cases because I thought that was a good example.

District courts, by the time the settlement is approved, a district court knows the case very, very well and is in perfect position to decide whether this is good faith or bad faith.

But here's the other issue, the point of my question here is, you said and consistent with my practice these guys just lay low while the case is in the district court, and one solution we have to that problem is that objections now need to be stated with specificity, and my hope is that district judges will get either these phantom objections or no objection and say that's a waiver and that the court of appeals will affirm that and say we're not even going to consider an objection that wasn't raised in the

district court because it wasn't stated with particularity.

But how would the district court get this issue here where you're saying there's a request for a finding that the objection was filed in bad faith if, again, the objection really doesn't surface in toto until it's already in the court of appeals?

MR. ZAVAREEI: Well, I guess I'm not sure I understand because, in my experience, the objector files an objection and makes itself known in the district court.

JUDGE DOW: But it says nothing.

MR. ZAVAREEI: Well, often it's a boilerplate objection, but if it says nothing, I think that together with the other factors that I proposed or other factors that the Rules Committee could consider as a basis for determining whether or not it's a good faith or a bad faith appeal.

JUDGE DOW: Because sometimes we don't know, I mean, it could be we don't know unless it's a notorious serial objector that that nothing was furtiveness or cluelessness.

MR. ZAVAREEI: There may be no basis to make the --

JUDGE DOW: And quite often it's the second.

MR. ZAVAREEI: Right. And there may be no basis to make that determination but I think there will be some instances where that determination can be made and that might ease the process for the court of appeals.

JUDGE BATES: Professor Marcus.

PROF. MARCUS: I think this is following on not only to some of the other questions but also to some suggestions we heard from others earlier today, and I'm wondering about your reaction to them.

One suggestion was that every objector must file with the court a statement that he or she or it has abandoned or is withdrawing the objection and receiving no consideration for it, and I'm wondering given that I understand it may often happen that quite innocently class members send in objections and then realize those are unwarranted and decide not to pursue them, how you think that might work.

And, also, I think there's been some reference to discovery in relation to who the objectors are and how often they've objected in the past, maybe requiring them to reveal that or to assert that in their objections.

In connection with findings of bad faith or something like that, would you contemplate that we

would have possibly extended discovery? So I've got two kind of practical questions about how your concerns or the concerns of others might be addressed concerning objectors and I'm basing those on things we heard earlier today from other people.

MR. ZAVAREEI: So, with respect to your first question, I believe that, unfortunately, as written, there is not an express prohibition or bar on compensation. There's just a requirement that there be a court hearing and the district court be notified and that the district court approve it. And I think that there's a problem there because these objectors that we're talking about that this rule is aimed at addressing are really quite shameless with respect to that.

PROF. MARCUS: Well, I guess the specific thing that occurred to me is that there may be a large number of other people out there who are behaving very differently and I'm wondering whether you think that's correct and, if so, whether some rule that said they may not abandon their objections without filing some document in court would be a good idea.

MR. ZAVAREEI: Oh, I see what you're saying. Well, I guess I don't read the rule to be saying that. It's my --

PROF. MARCUS: No, the rule is -- no, I'm only saying that was, I believe, suggested by someone else this morning, so I'm asking you about that.

MR. ZAVAREEI: Yeah, no, I agree with you, I think that would be a bad idea. I think there are a lot of objectors who simply object, they have their opinions heard, the district courts often take those opinions into consideration and then they wish to dismiss their appeal, and I don't think there should be any impediment to that.

PROF. MARCUS: And then the other is discovery in relation to who the objectors are and what they've been doing in their past lives.

MR. ZAVAREEI: Yeah, I have never experienced a court that is unwilling to allow for such discovery where appropriate. There have been, I think, some instances that I'm aware of where it has been abused and where discovery of legitimate objectors has been unduly intrusive and could potentially chill legitimate objectors. So I really don't know what the correct balance is on that.

JUDGE BATES: Judge Campbell.

JUDGE CAMPBELL: I want to make sure I understand your concern about the practical problem of how the rule would work. So assuming a settlement is

approved, an objector who's never said anything to anybody appeals, that objector then comes to counsel and says give me some money, Rule 25 -- or 23(e)(5)(B) would then say that the objector can receive no payment in connection with dismissing the appeal unless it's approved by the court, which means the parties can say to the objector, sorry, we can't give you any money unless it's approved.

And Subpart C would say that since it's on appeal 62.1 applies, meaning the court of appeals looks to the district court as to whether or not they're going to approve payment.

What's the way around that? What is your concern about what the objector will do to evade that procedure?

MR. ZAVAREEI: Well, it would have to be the objector and the plaintiff's counsel together paying -- who would be the one paying the objector, and the way around it would be to simply just ignore the rule because arguably the rule has no bearing once the case is -- once the district court has been divested of jurisdiction.

And so I have a concern that the rule may be inapplicable at that point. And, in addition, even if they do follow through and they do bring a request for

an advisory opinion from the district court under Rule 62.1, what power and authority does the district court have at that point?

Let's say that they come together and say, judge, we -- district court judge, we have agreed to pay $100,000 to the objector, he's going to dismiss his appeal, this is going to allow everybody to get their money soon, and the district court says, okay, well, under 62.1, I'm going to issue an advisory opinion that says that if the case was remanded to me then I would permit it, because that's really all that the district court can do under 62.1 is to say what it would do if it was remanded back.

But what practical effect does that have on the appeal? The court of appeals is free to simply ignore that and to do nothing with it. If the parties then, after that hearing is done and the district court says, I don't think that the case should be dismissed, I think that it's inappropriate, that's not binding on the court of appeals. And the court of appeals, if the parties come to it and dismiss, is still free to dismiss the case at that point and allow the compensation to go forward.

JUDGE CAMPBELL: Well, on your first concern, which is that the parties may just ignore the

rule and do a side deal they don't tell anybody about, that's true whether the case is pending in the district court or the court of appeals, right? I mean, we can't prevent that by language in the rule it seems to me.

MR. ZAVAREEI: Well, I guess my concern and maybe this is wrong, but my concern is is that I don't know that the -- it's not that they're ignoring an applicable rule. It's they're ignoring a rule that doesn't apply because they're no longer in front of the district court, that they're in front of the court of appeals and the rules that apply at this point are not -- there's no reservation of jurisdiction that I'm aware of for this particular purpose.

If you look at the cases that I've cited in my written submission, the preservation of jurisdiction is very narrow, and I don't see anything in the cases to suggest that there would be a preservation of jurisdiction for an issue like this.

JUDGE BATES: Professor Klonoff.

PROF. KLONOFF: I think Judge Campbell really articulated what I was going to get at. I think there may just be a disagreement on how Rule 62.1 works and what impact it has is the sense that I'm getting.

MR. ZAVAREEI: Perhaps, but my concern is is that Rule 62.1 is not something that -- I mean, if you look for case law in Rule 62.1, you won't find very much. It's not a rule that has ever been used for something like this to my knowledge, and I think it's sort of putting a square peg in a round hole and it's going to present some unintended consequences because of that.

PROF. KLONOFF: I mean, what's your solution then? I know you mentioned the appellate remedies. There already are appellate procedures for expediting appeals and so forth. Those haven't solved the problem and that's not really something that this Committee could address anyhow because that would be the Appellate Committee.

MR. ZAVAREEI: Yeah, the one suggestion that I had was to allow the district court to make a finding that an objection is in bad faith so that that can help facilitate an expedited appeal.

JUDGE BATES: All right. Thank you very much. We appreciate your comments.

MR. ZAVAREEI: Thank you.

JUDGE BATES: We have one more witness. We'll have that witness in just a moment.

(Pause.)

JUDGE BATES: All right. Our next witness is Sai. We appreciate him coming today, and when he's ready, we're happy to hear from you.

SAI: Thank you, Your Honor, and may it please the Committee. It is unfortunate, though perhaps unsurprising, that in a room full of class action lawyers not one has stepped forward to represent the class of people who do not have a lawyer. So, on my own behalf and those similarly situated, in the mood of the day --

JUDGE BATES: Let's, excuse me, let's adjust the microphone a little bit so we can hear somewhat better. I'm sorry to interrupt.

SAI: Sure.

JUDGE BATES: Here, we're using another microphone now.

SAI: There, better, yes?

JUDGE BATES: Yes, I think so.

SAI: Sorry. So thank you, Your Honor, and may it please the Committee. It is unfortunate, though unsurprising, that in a room full of class action lawyers none have stepped forward to represent the interests of those who do not have counsel, so in the spirit of the day, on my own behalf and on behalf of all those similarly situated, I would like to raise

some objections to the proposed Rules for CM/ECF as applies to pro se filers.

This Committee, as have the parallel committees in the appellate bankruptcy and criminal rules, has proposed a change to the rules that not simply excuses pro se filers from electronic filing, which is wholly appropriate, but prohibits pro se filers from filing electronically unless they first show good cause essentially.

And I believe that this is improper. There are notes in previous minutes of the Committee and other committees that give some reasons why one may want to do so. I believe they're erroneous and I'll address them later, but the notes of the current Committee, the report and the rules notes make no such claim.

The only claim that's made is that some pro se litigants may not be able to deal with CM/ECF filing, which is true, and that for that reason they are to be excused from the requirement that is being imposed on those who are represented by counsel that everything must be e-filed.

The problem is that if you don't permit pro se parties to e-file unless they first obtain leave of the court, which I would add is on a case-by-case

basis, even if someone has permission from even the same court in another case to e-file, they must file again in paper with case opening or so forth and must file again a motion for permission to use CM/ECF even if they've used it for years, as I have, for instance.

There are a number of harms that are quite significant and sometimes, in fact, dispositive that come to pro se litigants because they are uniquely targeted by this prohibition on pro se filing.

So, for instance, there's the case delays. So, if I as a pro se litigant wish to open a case, I can only do so not by CM/ECF even though I have CM/ECF access and have used it successfully. I have to file it by paper. That takes a week to print and mail and so forth, it arrives to the court in a non-electronic format, which I'll get to in a moment, and that's even if I have successfully litigated before, and incidentally I have. Just as full disclosure, I have filed pro se and in the one case adjudicated on the merits against the TSA I was declared the prevailing party and awarded costs against the Department of Justice.

So it's not that people who file pro se are necessarily vexatious, but essentially that is the presumption baked into the rules. If I filed with

CM/ECF and I note that I'm not going to meet a deadline, I can confer with opposing counsel, call them up, say, do you object to me having an extension of a week or whatever the case is and at 11:58 p.m. file a motion for extension which will be timely.

If I notice that I am late even on the day of, it is literally not possible for me to file a motion for extension. That would be completely timely if I had CM/ECF access and cannot be timely in paper.

In some cases, this can be dispositive. For instance, if I am replying or seeking leave to extend an opposition to a motion for summary judgment or a motion to dismiss, the court rules on it during the pendency of that filing window when it would be in the mail on paper. The court could dispose of it, to my detriment, simply because I didn't have access to ask for an extension immediately.

If I would want to file a PITRO case in a new case, say that there's some eminent action that I want a restraining order against, it's next week, for instance, electronic filing, that's no big deal. I mean, you have to serve it and all that, but it can be done more or less immediately.

If I am restricted for no good reason from filing electronically, it is not possible for me to

file such a case even if it is completely meritorious.

If I want leave, sick leave to file as an amicus or to intervene, which incidentally I've done. I've sought leave to intervene in one case which is ongoing as a member of the press to unseal or unredact some documents, which is a standard, widely accepted permissive intervention. Because the court in that case does not permit pro se filing at all by CM/ECF, I have to file that on paper, incurring costs, incurring delays. In fact, there was a scrub with the agent that sends my mail for me, and that imposed extra delays. There's no good reason to have that.

Similarly, if I'm a pro se filer and I don't yet have CM/ECF, I don't get NEFs, Notices of Electronic Filing. So I find out about it after an additional delay because it takes time for me to get mail, which because I travel a lot I have a mail receiving agent that scans it for me and sends it and so forth, but it takes like a week for me to get something by mail.

So functionally what happens is I go every day on PACER and pay PACER 10 cents to a buck every time just to check the docket to see if there's an update, and there's no reason for that when I could just be getting an NEF like everybody else.

So I mentioned costs. There's printing, mailing. If somebody is IFP, and incidentally I am, it goes against the spirit of the IFP statute for somebody to incur costs that are completely avoidable.

If I file by CM/ECF, it costs a millicent perhaps to upload a PDF. If I file the same document on paper, it can cost me five to 40 bucks depending on how much paper, how fast, is it certified, et cetera, and there's absolutely no reason for that.

Furthermore, as may be obvious, I have some concerns about accessibility of judicial records both to myself and to the public. Paper records, when they are ingested by the courts, are scanned, they're typically not OCR'd, and even if they were, OCR is really poor by comparison to native electronic documents. So the documents that I submit suffer in readability for myself and for other people, including those with disabilities.

I use links in my documents to exhibits, to resources available, to publicly available court decisions, things like that. Those are all obviously completely destroyed by printing even though in my PDFs they're fine.

The structure of a PDF is harmed. In a simple filing, okay, that's not a big deal, but in a

more complex filing like a motion for summary judgment, which may have various exhibits and structure and so forth, that impairs the utility.

And, of course, many courts have requirements that documents that are originally electronic be submitted as native electronic documents, which is entirely appropriate, and I cannot obey if I must file on paper.

So I'm happy to elaborate in detail and I will be submitting written comments, so if anyone has questions or comments for me to elaborate on in writing I'm happy to do so.

But coming back to the statements in the Committee's minutes and in the notes, clearly some pro se litigants do not have the means to access CM/ECF. They may not have internet access regularly. They may be imprisoned in such a way that they're restricted from having internet access on a regular basis or from email that may be necessary for NEFs and so forth. They may simply not have the skills necessary to do so.

But for those of us who are not, there's this presumption which is entirely on its head. The presumption should be that I need not show cause to be excused from electronic filing, that being pro se is a

presumed good cause as the rules provide for attorney filers. Attorney filers can show good cause to be excused. So it should be simply that I am presumed to have cause to be excused, but I should also be presumed permission to file electronically if I wish.

There have been concerns expressed about docketing errors, for instance, that I may misdocket something and then a clerk needs to go in and correct it. Well, the clerk already has to do all of the work if I file on paper and bluntly put, they have, in fact, gotten it wrong sometimes and I've had to have them correct the errors.

There's cases where there may be an assumption that pro se filers may -- I believe it's in the minutes of previous meetings – they may file porn, they have file something that's libelous and so forth and that would be immediately on PACER and available to all.

Well, you know, they can just put it on blog or something, this is not a prevention and there are sanctions that are available. So what is baked into the rules by this rule is essentially a presumption of a sanction that is commonly applied to vexatious litigants, namely that they're not permitted to file without leave of court.

So functionally I am not permitted to file without leave of court, though I'm not vexatious at all, and the same applies to all other pro se filers. I think that is completely backwards. I will preserve any time that I have left and happy to answer any questions and, as I said, I'm going to be filing written comments, so if you would like me to elaborate, I'm happy to do so.

JUDGE BATES: Thank you, Sai. We appreciate your comments thus far and will appreciate any written comments you file as well. We do have at least one question. Professor Cooper.

PROF. COOPER: And this is something that I missed and I'd simply like to have the details. I think I heard you say that you encounter or know of circumstances in which the court requires a party to do something that cannot be done on paper, can only be done by e-filing. If so, just some elaboration of that would be welcome.

SAI: Sure. The Northern District of California, for instance, has a rule that requires in general that electronic documents be filed electronically; that is, if you have something that is a native electronic PDF, you have to upload it as a native electronic format. You can't scan it and

rasterize it and then re-upload it as something that's not accessible.

I believe that that rules does have an exemption for parties who are not electronic filers, but the clear intent of the rule is correct. To the extent possible things should be filed in electronic format. It improves accessibility, improves usability for everybody.

But although that rules does make an exemption for non-electronic filers, so it is not that I can't comply with the rule technically, I cannot comply with the spirit of the rule, which I should be able to do and can if I am allowed electronic access.

JUDGE BATES: All right. Other questions? John Barkett.

MR. BARKETT: What regimes are you working under right now? We're talking about the change that would provide for filing by an unrepresented person, the proposed language of Rule 5 says, "When allowed or required, a person not represented by attorney may file electronically only if allowed by court order or by local rule." And Romanette 2 says, "may be required to file electronically only by court order or by a local rule that includes reasonable exceptions."

Are you under these limitations now before

any changes to the rule anywhere?

SAI: In some courts yes, in some courts no. So I've filed in D.C. District, D.C. Appellate, Massachusetts District, which never granted me electronic filing, First Circuit, Northern District of California, and Ninth Circuit.

In Massachusetts District, I was never allowed e-filing, although I've used e-filing for years, and there was no reason given. In direct contrast, in the Ninth Circuit where I had an appeal, although I could not open a case newly in the Ninth Circuit, so if there's original action under, for instance, 49 U.S. Code 46110, which is original actions in court of appeals, so if it's an appeal, the Ninth Circuit allows automatically if you have a case open you can file electronically, all you have to do is go on PACER, sign a form and it's done, which is great, although that still has the problems that I mentioned for opening a case.

But, yes, the current rules are very similar in many courts. As I mentioned, the Western District of Tennessee, I filed to intervene, filed for leave to file electronically to reduce costs, for instance, if I'm granted costs, and there's been no ruling on that, so by default I'm forced to file on paper for no

reason.

MR. BARKETT: And the District of Massachusetts, is that a local rule that requires you to seek leave of court?

SAI: Yes, I believe so. I believe all of the courts I mentioned have local rules that require seeking leave of court, except for Western District of Tennessee has no rule and therefore by default prohibits it by unrepresented parties, whereas the Ninth Circuit's local rule says that anyone who has a case can just go on PACER and sign up.

MR. BARKETT: Is there any district court where you've appeared where you've been able to file electronically?

SAI: Yes, all of the above except for Massachusetts and Tennessee. So I've filed electronically in D.C. District, in D.C. Circuit, in First Circuit, in Ninth Circuit, and Northern District.

MR. BARKETT: Without seeking leave of court?

SAI: With seeking leave of court in all of those except for Ninth Circuit.

MR. BARKETT: And then has a court order actually been issued with any kind of explanation, or

is it just pro forma you're allowed?

SAI: Generally it's pro forma. The Northern District of California initially denied my first motion because I hadn't certified some technical things that were in the local rules exactly to the judge's preference, so I submitted a supplemental affidavit and renewed the motion and it was granted.

In Massachusetts District, it was denied without reason. I moved for clarification. No reason was given. I have absolutely no idea why the court denied access. I use PACER all the time.

JUDGE BATES: All right. Any further questions?

(No response.)

JUDGE BATES: Sai, thank you very much. We appreciate your comments here today.

SAI: Thank you, Your Honor.

JUDGE BATES: And we'll look forward to any written submission that you make.

SAI: Thank you, Your Honor.

JUDGE BATES: Thank you for coming.

That, I believe, concludes our hearing for today. We appreciate all of the very valuable information that we've received from the variety of witnesses.

I want to express a few thanks, first of all, to those who have helped put this on smoothly. The rules office staff under the leadership of Rebecca Womeldorf but Julie Wilson and Shelly Cox and everyone else who's helped put this on.

Most of the testimony focused on Rule 23, and a special thanks to the Rule 23 Subcommittee under the leadership of Judge Dow and with Professor Marcus as reporter, but all those members of the Subcommittee, thank you very much for all your work, which continues next with a hearing scheduled in Phoenix, Arizona, on January 4.

So that concludes this portion of today's activities for the Advisory Committee. We're a little bit early, so maybe I need a little bit of advice on what exactly the schedule will be with respect to lunch and so forth. But let's call the hearing to a close at this point, but just hold on for a second.

(Whereupon, at 12:01 p.m., the meeting in the above-entitled matter adjourned.)

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REPORTER'S CERTIFICATE

DOCKET NO.: N/A

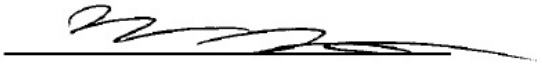
CASE TITLE: Advisory Committee on Civil Rules

HEARING DATE: November 3, 2016

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Administrative Office of the U.S. Courts.

Date: November 3, 2016



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