MEMORANDUM

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable David G. Campbell, Chair
Advisory Committee on Civil Rules

DATE: May 2, 2015

RE: Report of the Advisory Committee on Civil Rules

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on April 9, 2015. Draft Minutes of this meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter, and various subcommittee chairs.

Part I of this Report presents recommendations to approve for adoption several proposals that were published for comment in August, 2014. Each deals with distinctive topics presented separately as I.A., Rule 4(m); I.B., Rule 6(d); and I.C., Rule 82.

Part II presents information about pending and possible future Civil Rules work. The first topic explores amendments to Rule 5 addressing electronic filing, electronic service, and electronic certificates of service. Because continuing expansion of electronic communication

binds these issues together, these drafts are presented as one package. These drafts emerged from the April meeting as recommendations for publication. Prolonged exchanges of messages with the Reporters for the other advisory committees, however, have shown the wisdom of delaying action until all committees have moved as far as possible toward uniform language for parallel rules. The other topics presented as information items are not as far advanced.

I. RECOMMENDATIONS TO APPROVE FOR ADOPTION

I.A. RULE 4(m) - RULE 4(h)(2)

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 4(m). The amendment adds service on an entity in a foreign country to the list in the last sentence that exempts service in a foreign country from the presumptive time limit set by Rule 4(m) for serving the summons and complaint. It is recommended that the proposed amendment be recommended for adoption. The reasons are described in the Committee Note.

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90[1] days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

* * * * *

COMMITTEE NOTE

Rule 4(m) is amended to correct a possible ambiguity that appears to have generated some confusion in practice. Service in a foreign country often is accomplished by means that require more than the 120 days originally set by Rule 4(m)[, or than the 90 days set by amended Rule 4(m)]. This problem is recognized by the two clear exceptions for service on an individual in a foreign country under Rule 4(f) and for service on a foreign state under Rule 4(j)(1). The potential ambiguity arises from the lack of any explicit reference to service on a corporation, partnership, or other unincorporated association. Rule 4(h)(2) provides for service on such defendants at a place outside any judicial district of the United States "in any manner prescribed

[1] This anticipates adoption of the proposed amendment transmitted to Congress on April 29, 2015.

by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." Invoking service "in the manner prescribed by Rule 4(f)" could easily be read to mean that service under Rule 4(h)(2) is also service "under" Rule 4(f). That interpretation is in keeping with the purpose to recognize the delays that often occur in effecting service in a foreign country. But it also is possible to read the words for what they seem to say—service is under Rule 4(h)(2), albeit in a manner borrowed from almost all, but not quite all, of Rule 4(f).

The amendment resolves this possible ambiguity.

Gap Report

No changes were made in the published rule text or Committee Note.

I.B. RULE 6(d)

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 6(d). Present Rule 6(d) provides 3 added days to respond after service "made under Rule 5(b)(2)(C), (D), (E), or (F)." The amendment deletes (E), service by electronic means consented to by the person served. It also adds parenthetical descriptions of the modes of service that continue to allow the 3 added days: "(C)(mail), (D)(leaving with the clerk), or (F)(other means consented to)." Parallel proposals to delete electronic service from the 3-added days provision were published for the other sets of rules that included it. It is recommended that the proposed amendment be recommended for adoption as published. It is further recommended that a new paragraph be added to the Committee Note to reflect concerns raised by the Department of Justice and several other public comments. This brief new paragraph is discussed below.

A variety of concerns were raised by the public comments. One theme is that the time periods allowed by the Civil Rules are too short as they are. Any provision that allows even some relief should be retained. A related theme focuses on strategic opportunities to manipulate the amount of time practically available to respond after electronic service. This concern is illustrated by electronic filings made just before midnight on a Friday or the eve of a holiday. "No one goes home until after midnight." Suggested remedies include either a rule barring electronic filing after 5:00 or 6:00 p.m., or treating any later filing as made the next day (or on the next day that is not a weekend or legal holiday).

The Federal Magistrate Judges Association expressed a different concern — that some hasty readers would conclude that because Rule 5(b)(2)(E) currently requires consent for electronic service, electronic service is an "other means consented to" under Rule 5(b)(2)(F), restoring the 3 added days after all. Magistrate Judges are all too familiar with the ways in which rule text can be misread. But the Committee decided not to revise the recommended rule text. Apart from the hope that few will fall into this patent misreading, it is unlikely that a court would visit any serious consequences for a filing made 3 days late. The occasion for misreading,

moreover, will be reduced when the proposed amendment of Rule 5(b)(2)(E) described below is approved for publication, and if it survives the public comment process. Consent would no longer be required for service on a registered user through the court's transmission facilities. That is likely to govern an ever-growing swath of civil litigation.

The Department of Justice, after expressing concerns with failed electronic transmission, late-night filing in general, and strategic use of late-night filing in particular, recommended that language be added to the Committee Note to remind courts of the reasons to allow extensions of time when appropriate to respond to such problems. Adding anything to the Committee Note on this account could be resisted as unnecessary. Judges do not need to be told to make reasonable adjustments for these or any of the other myriad circumstances that may counsel that a time limit be extended. Brevity, moreover, is increasingly emphasized in framing Committee Notes. The Department's extensive experience with these and similar problems throughout the country, however, deserves some deference. The several advisory committees have agreed to add the new paragraph underlined in the Committee Note set out below. Considering the question independently, the Committees took different positions. The Civil, Appellate, and Bankruptcy Rules Committees preferred not to add any new language. But the Criminal Rules Committee strongly favored adding some language, moved in part by concern that many criminal defense lawyers are occupied in court or otherwise away from their small offices and may not actually view e-service for some time after it arrives. Each Committee authorized its chair to agree to a common solution. Given the strength of the Criminal Rules Committee's position, and the value of uniformity, the joint recommendation is to adopt a much-shortened version proposed by the Department of Justice in the Committee Notes to each set of rules.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after being served[2] and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

COMMITTEE NOTE

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

[2] This anticipates adoption of the proposed amendment transmitted to Congress on April 29, 2015.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

The ease of making electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3 added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

Gap Report

No changes are made in the rule text as published. A new paragraph in the Committee Note is underlined.

I.C. RULE 82

The Standing Committee approved the August, 2014 publication of a proposed amendment of Rule 82. It is recommended that the proposed amendment be recommended for adoption.

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390 ~~not a civil action for purposes of 28 U.S.C. §§ 1391-1392~~.

COMMITTEE NOTE

Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

Gap Report

No changes are made in the rule text or Committee Note as published.

Clean Rules Text

Rule 4(m)

Rule 4. Summons

* * * * *

(m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1).

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Rule 6(d)

Rule 6. Computing and Extending Time; Time for Motion Papers

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(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 6(a).

Rule 82

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390.

REPORTER'S SUMMARY OF COMMENTS, AUGUST, 2014 PUBLICATION

The scheduled public hearings on the proposals published in August, 2014 were cancelled for lack of interested witnesses.

Summary of Comments Rule 4(m)

CV-2014-0009, Federal Magistrate Judges Association: Supports the proposal. Experience shows that "significant delays can often occur in effecting service in a foreign country, and that the rules governing service should be uniform and apply equally to individuals, foreign states, corporations, partnerships, and associations."

CV-2014-0010, Association of the Bar of the City of New York: The Association had suggested this amendment in commenting on the 2013 proposal to shorten the presumptive time for service, and agrees with the proposal.

2014-CV-0011, Federal Courts Committee, New York County Lawyers Association: "[S]upports this clarification, which appears to comport with the intent of the rule as originally written." The importance of this amendment will increase if the Supreme Court adopts the proposal to shorten to 90 days the presumptive time for service set by Rule 4(m).

CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice: "The Department supports this proposal."

Summary of Comments Rule 6(d)

CV-2014-0003, Auden L. Grumet, Esq.: Opposes the proposal. (1) Response times throughout the Civil Rules are too restrictive. They should not be shortened further. (2) The idea that this will "simplify" time counting "is absurd and illogical." (a) The 3-added-days provision will continue to apply to some other modes of service, generating opportunities for confusion. (b) Calculating time is far less complex than "the much more convoluted aspects of being a practitioner in federal court." (c) The value of the added 3 days far outweighs any putative confusion. (d) The value of counting days in increments of 7 would be better served by adding 7 days after service.

CV-2014-0004, Deanne Upson: "Being pro se, I completely agree [with Auden L. Grumet, 0003] that more time is warranted and wise, not less."

CV-2014-0007, Jolene Gordo, Esq.: This comment focuses on Rule 5(b)(2)(A) as the place to "make it absolutely clear that using the ECF system is considered 'personal' service." But it ties to the concern that e-filing may be deliberately delayed to 11:59 p.m. The idea is that if e-service

is treated as "personal service," it will have to be made by the standard close of business, 5:00 or 6:00 p.m.

CV-2014-0008, Bryan Neal: Disagrees with the proposal. (1) When e-service is made directly between the parties, not through the ECF system, problems still occur with incompatible systems and spam filters. (2) More importantly, filing may be deliberately delayed to as late as 11:59 p.m. There should be more time to respond than is allowed when personal service is made by hand delivery during business hours. (3) E-service may be made on weekends and holidays: If it is made on Saturday, does Sunday count as Day 1? So if filing and service are made at 11:59 p.m. on Friday, that can effectively shave 2 days off the response time. (4) Why is there any need to shorten time periods? It just makes modern litigation more difficult. (5) Discovery response times typically are set at 30 days, so the advantages of 7-day increments do not apply. It would make more sense to reset the times to 28 days, plus 7 days for anything but personal service. Or, still better, to provide a flat 35 days regardless of the method of service.

Separately, suggests that service by commercial carrier should be allowed under Rule 5 without requiring consent of the person to be served.

CV-2014-0009, Federal Magistrate Judges Association: "[G]enerally endorses" the proposal. But is concerned that the drafting creates a potential confusion that will not be dispelled by the explicit statement in the Committee Note. As published, parentheticals are used to describe the enumerated modes of service that continue to allow 3 added days: "(mail)," "(leaving with the clerk)," and "(other means consented to)." Simply looking at the new rule text will not reveal that e-service, covered by Rule 5(b)(2)(E), has been omitted. An incautious reader may look back to Rule 5(b)(2), discover that consent is required for service by electronic means, and conclude that this is "other means consented to" and continues to allow 3 added days. The confusion could be eliminated by deleting the parenthetical descriptions, or by amending the last one to read: "(F)(other means consented to except electronic service)."

2014-CV-0010, Association of the Bar of the City of New York: Agrees that advances in technology, along with greater sophistication in using electronic communication, "have substantially alleviated concerns over delays and other difficulties in receiving, opening, and reviewing electronic documents." Supports the proposal.

2014-CV-0011, Federal Courts Committee, New York County Lawyers Association: New York courts treat electronic service in the same way as in-hand service; this has not caused any problems. Generally counsel work out briefing schedules, and can address the timing of electronic service in their agreements. The dissenters in the Committee point to problems that are not serious. To be sure, it is possible to effect electronic service at 11:59 pm on Friday, and time is required to print out lengthy filings. A party who needs more time because of such practices will almost invariably get the needed time. (The dissenters believe that the prospect of gamesmanship requires that the present 3-added days provision be retained.)

CV-2014-0012, Cheryl Siler, for Aderant CompuLaw: Endorses elimination of the 3 added days. But suggests that Rule 6 should be further amended to provide that a document served electronically after 6:00 p.m. is considered served on the next day. As a practical matter, that will make e-service equivalent to in-hand service. In addition, it will establish a uniform national practice that displaces local rules that establish similar but variable provisions — a document filed or served after 5:00 p.m., or after 6:00 p.m., is treated as filed the next day. It also would affect the many local rules that require filing and service by 11:59 p.m. in the court's time zone.

CV-2014-0013, Pennsylvania Bar Association: Opposes the amendment. "[T]he additional three days serves a useful purpose in alleviating the burdens that can arise if a filing is electronically served at extremely inconvenient times." With one dissent, arguing that service at inconvenient times is not a problem.

CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice: Expresses concerns about the consequences of eliminating the 3 added days. "Unlike personal service, electronic distribution does not assure actual receipt by a party." Prejudice is particularly likely when local rules require a response within 14 or fewer days. A filing in a different time zone can mean that e-service reaches a computer in the Eastern Time zone as late as 3:00 a.m., or even later. And the service may be made on a Friday, or the day before a holiday weekend. A 10-day period could become, in effect, 5 business days. "It is foreseeable that some attorneys will try to take advantage of the elimination of the three additional days * * *." But if the Committee decides to go ahead with the proposal, the Department recommends language for the Committee Note to recognize the need for additional time to respond in appropriate cases. This language is quoted above.

(Largely similar comments have been made in response to the parallel proposals published by the Appellate, Bankruptcy, and Civil Rules Committees.)

Summary of Comments Rule 82

CV-2014-0009, Federal Magistrate Judges Association: Notes but does not comment on the proposal.

2014-CV-0011, Federal Courts Committee, New York County Lawyers Association: "[E]ndorses these proposed amendments."

CV-2014-0014, Hon. Joyce R. Branda, U.S. Department of Justice: "The Department supports the proposal."

II. INFORMATION ITEMS

II.A. e-RULES: CIVIL RULE 5

The Standing Committee Subcommittee on matters electronic has suspended operations. The several advisory committees, however, are cooperating in carrying forward consideration of the ways in which the several sets of rules should be revised to reflect the increasing dominance of electronic means of preserving and communicating information. For the Civil Rules, the Committee initially worked through to recommendations to publish three rules amendments for comment in August, 2015: Rule 5(d)(3) on electronic filing; Rule 5(b)(2)(E) on electronic service, with the corresponding abrogation of Rule 5(b)(3) on using the court's transmission facilities; and Rule 5(d)(1) on using the Notice of Electronic Filing as a certificate of service. But, as noted in the Introduction, continuing exchanges with the other advisory committees show that further work is needed to achieve as much uniformity as possible in language, and at times in meaning. The drafts presented here have gone through several variations, but cannot yet be regarded as the assuredly final recommendations to approve for publication. There is no urgent need to publish now, and good reason for delay. Criminal Rule 49(b) now directs that "service must be made in the manner provided for a civil action." The Criminal Rules Committee hopes to move free from this cross-reference, adopting a self-contained provision that will avoid the need to consult another set of rules. And the familiar problems with signing an electronic filing continue to resist confident drafting resolution.

Earlier work considered an open-ended rule that would equate electrons with paper in two ways. The first provision would state that a reference to information in written form includes electronically stored information. The second provision would state that any action that can or must be completed by filing or sending paper may also be accomplished by electronic means. Each provision would be qualified by an "unless otherwise provided" clause. Discussion of these provisions recognized that they might be suitable for some sets of rules but not for others. For the Civil Rules, many different words that seem to imply written form appear in many different rules. The working conclusion has been that at a minimum, several exceptions would have to be made. The time has not come to allow electronic service of initiating process as a general matter — the most common example is the initial summons and complaint, but Rules 4.1, 14, and Supplemental Rules B, C, D, E(3) and G also are involved. And a blanket exception might not be quite right. Rule 4 incorporates state grounds of personal jurisdiction; if state practice recognizes e-service, should Rule 4 insist on other modes of service?

Determining what other exceptions might be desirable would be a long and uncertain task. Developing e-technology and increasingly widespread use of it are likely to change the calculations frequently. And there is no apparent sense that courts and litigants are in fact having difficulty in adjusting practice to ongoing e-reality.

The conclusion, then, has been that the time has not come to propose general provisions that equate electrons with paper for all purposes in all Civil Rules. The Evidence Rules already have a provision. It does not appear that the Appellate, Bankruptcy, or Criminal Rules Committees will move toward proposals for similar rules in the immediate future.

A related general question involves electronic signatures. Many local rules address this question now, often drawing from a Model Rule. A proposal to amend the Bankruptcy Rules to address electronic signatures was published and then withdrawn. There did not seem to be much difficulty with treating an electronic filing by an authorized user of the court's e-filing system as the filer's signature. But difficulty was encountered in dealing with papers signed by someone other than the authorized filer. Affidavits and declarations are common examples, as are many forms of discovery responses.

It seems to have been agreed that it is too early to attempt to propose a national rule that addresses electronic signatures other than the signature of an authorized person who makes an e-filing. The draft Rule 5(d)(3) does provide that the user name and password of an attorney of record serves as the attorney's signature. And some issues may remain in drafting even that proposal.

Rule 5(d)(3): Electronic Filing

The draft Rule 5(d)(3) amendment would establish a uniform national rule that makes e-filing mandatory except for filings made by a person proceeding without an attorney, and with a further exception that paper filing must be allowed for good cause and may be required or allowed for other reasons by local rule. A person proceeding without an attorney may file electronically only if permitted by court order or local rule. And the user name and password of an attorney of record serves as the attorney's signature.

This proposal rests on the advantages that e-filing brings to the court and the parties. Attorneys in most districts already are required to file electronically by local rules. The risks of mistakes have been reduced by growing familiarity with, and competence in, electronic communication. At the same time, deliberation in consultation with other advisory committees showed that the general mandate should not extend to pro se parties. Although pro se parties are thus exempted from the requirement, the proposal allows them access to e-filing by local rule or court order. This treatment recognizes that some pro se parties have already experienced success with e-filing, and reflects an expectation that the required skills and access to electronic systems will expand. The court and other parties will share the benefits when pro se litigants can manage e-filing.

RULE 5. SERVING AND FILING PLEADINGS AND OTHER PAPERS

(d) Filing * * *

(3) *Electronic Filing and Signing ~~, or Verification~~.*

(A) *When Required or Allowed; Paper Filing.* ~~A court may, by local rule, allow papers to be filed, signed, or verified~~ All filings, except those made by a person proceeding without an attorney, must be made by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Electronic Filing by Unrepresented Party.* A person proceeding without an attorney may file by electronic means only if allowed by court order or by local rule.

(C) *Electronic Signing.* The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature. A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

COMMITTEE NOTE

Electronic filing has matured. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it mandatory in all districts, except for filings made by a person proceeding without an attorney. But exceptions continue to be available. Paper filing must be allowed for good cause. And a local rule may allow or require paper filing for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in these and other courts, along with the growing availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication.

The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature.

Clean Rule Text

(3) *Electronic Filing and Signing.*

(A) *When Required or Allowed; Paper Filing.* All filings, except those made by a person proceeding without an attorney, must be made by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. But paper filing must be allowed for good cause, and may be required or allowed for other reasons by local rule.

(B) *Electronic Filing by Unrepresented Party.* A person proceeding without an attorney may file by electronic means only if allowed by court order or by local rule.

(C) *Electronic Signing.* The user name and password of an attorney of record[, together with the attorney's name on a signature block,] serves as the attorney's signature. A paper filed electronically is a written paper for purposes of these rules.

Rule 5(b)(2)(E): e-Service

Present Rule 5(b)(2)(E) allows service by electronic means only if the person to be served consented in writing. It is complemented by Rule 5(b)(3), which provides that a party may use the court's transmission facilities to make electronic service "[i]f a local rule so authorizes." The proposal deletes the requirement of consent when service is made through the court's transmission facilities on a registered user. It also abrogates Rule 5(b)(3) as no longer necessary.

Consent continues to be required for electronic service in other circumstances, whether the person served is a registered user or not. A registered user might consent to service by other electronic means for papers that are not filed with the court. In civil litigation, a common example is provided by discovery materials that must not be filed until they are used in the action or until the court orders filing. A pro se litigant who is not a registered user — and very few are — is protected by the consent requirement. In either setting, consent may be important to ensure effective service. The terms of consent can specify an appropriate address and format, and perhaps other matters as well.

Although consent remains important when it is required, the Committee recommends deletion of the requirement that consent be in writing. Consent by electronic means is the most likely form; many people now rely routinely on e-communication rather than paper. Beyond that, the Committee believes that in some circumstances less formal means of consent may do, such as a telephone conversation.

Rule 5. Serving and Filing Pleadings and Other Papers

(b) Service: How Made. * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person * * *

(E) sending it through the court's electronic transmission facilities to a registered user or by other electronic means ~~if~~ that the person consented to ~~in writing — in which event~~. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

COMMITTEE NOTE

Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service through the court's transmission facilities as to any registered user. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service through the court's facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court's facilities. [Consent can be limited to [service at] a prescribed address or in a specified form, and may be limited by other conditions.]

Because Rule 5(b)(2)(E) now authorizes service through the court's facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(b) Service: How Made. * * *

(2) *Service in General.* A paper is served under this rule by:

(A) handing it to the person * * *

> (E) sending it through the court's electronic transmission facilities to a registered user or by other electronic means that the person consented to. Electronic service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or * * *

Permission to Use Court's Facilities: Abrogating Rule 5(b)(3)

As noted above, this package of drafts includes a proposal to abrogate Rule 5(b)(3) to reflect the amendment of Rule 5(b)(2)(E) that allows service through the court's facilities on a registered user without requiring consent. Rule 5(b)(3) reads:

> (3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

The basic reason to abrogate (b)(3) is to avoid the seeming inconsistency of authorizing service through the court's facilities in (b)(2)(E) and then requiring authorization by a local rule as well. Probably there is no danger that a local rule might opt out of the national rule, but eliminating (b)(3) would ensure that none will. It remains important to ensure that a court can refuse to allow a particular person to become a registered user. It may be safe to rely on the Committee Note to (b)(2)(E), with added support in a Committee Note explaining the abrogation of (b)(3).

The published proposal would look like this:

> ~~(3) *Using Court Facilities.* If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~

COMMITTEE NOTE

Rule 5(b)(3) is abrogated. As amended, Rule 5(b)(2)(E) directly authorizes service on a registered user through the court's transmission facilities. Local rule authority is no longer necessary. The court retains inherent authority to deny registration [or to qualify a registered user's participation in service through the court's facilities].

Notice of Electronic Filing as Proof of Service

Rule 5(d)(1) was amended in 1991 to require a certificate of service. It did not specify any particular form. Many lawyers include a certificate of service at the end of any paper filed in the court's electronic filing system and served through the court's transmission facilities. This practice can be made automatic by amending Rule 5(d)(1) to provide that a Notice of Electronic Filing constitutes a certificate of service on any party served through the court's transmission

facilities. The draft amendment does that, retaining the requirement for a certificate of service following service by other means.

Treating the Notice of Electronic Filing as the certificate of service will not save many electrons. The certificates generally included in documents electronically filed and served through the court's facilities are brief. It may be that cautious lawyers will continue to include them. But there is an opportunity for some saving, and protection for those who would forget to add the certificate to the original document, whether the protection is against the burden of generating and filing a separate document or against forgetting to file a certificate at all. Other parties will be spared the need to check court files to determine who was served, particularly in cases in which all parties participate in electronic filing and service.

The Notice of Electronic Filing automatically identifies the means, time, and e-address where filing was made and also identifies the parties who were not authorized users of the court's electronic transmission facilities, thus flagging the need for service by other means. There might be some value in amending Rule 5(d)(1) further to require that the certificate for service by other means specify the date and manner of service; the names of the persons served; and the address where service was made. Still more detail might be required. The Committee considered this possibility but decided that there is no need to add this much detail to rule text. Lawyers seem to be managing nicely without it.

The draft considered by the Committee included, as a subject for discussion, a further provision that the Notice of Electronic Filing is not a certificate of service if "the serving party learns that it did not reach the person to be served." That formula appears in Rule 5(b)(2)(E), both now and in the proposed revision. The Committee concluded that this caution need not be duplicated in Rule 5(d)(1). Learning that the attempted e-service did not work means there is no service. No service, no certificate of service.

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

(1) *Required Filings: Certificate of Service.*

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served ~~— together with a certificate of service —~~ must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service, but a notice of electronic filing constitutes a certificate of service on any party[3] served through the court's transmission facilities.

COMMITTEE NOTE

The amendment provides that a notice of electronic filing generated by the court's CM/ECF system is a certificate of service on any party served through the court's transmission facilities. But if the serving party learns that the paper did not reach the party to be served, there is no service under Rule 5(b)(2)(E) and there is no certificate of the (nonexistent) service.

When service is not made through the court's transmission facilities, a certificate of service must be filed and should specify the date as well as the manner of service.

Clean Rule Text

Rule 5. Serving and Filing Pleadings and Other Papers

(d) Filing.

(1) *Required Filings: Certificate of Service.*

(A) *Papers after the Complaint.* Any paper after the complaint that is required to be served must be filed within a reasonable time after service.

(B) *Certificate.* A certificate of service must be filed within a reasonable time after service — a notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed * * *.

[3] We have yet to resolve the question whether this should change to "person." The Civil Rules participants report that persons who are not yet formal parties are treated as if parties for filing purposes. "Party" in rule text could — and should — be read to include anyone who is asking the court to do something. Opening a miscellaneous docket to enforce a discovery subpoena in aid of litigation pending in another district would be an example. The applicant-movant would count as a party.

II.B. RULE 68

The offer-of-judgment provisions of Rule 68 have stirred controversy for many years. Proposals for dramatic amendments were published in 1983 and then again, with many changes, in 1984. They were withdrawn after encountering vigorous protests. Rule 68 was taken up again in the early 1990s. That effort was abandoned without advancing to publication of any proposals. Successive drafts had become increasingly complex in attempts to address the uncertainties that continued to compound as specific difficulties were examined. There also was some doubt about the nature of the Rule 68 enterprise.

If Rule 68 has proved difficult to manage in the rulemaking process, it has continued to be a popular subject of proposals requesting that the Committee amend it. The proposals rest on the shared perception that Rule 68 is not much used, even in cases where it can cut off a statutory right to attorney fees if a plaintiff wins a judgment less favorable than a rejected Rule 68 offer. And most of the proposals advance a common suggestion that Rule 68 should be invigorated by requiring a party who rejected an offer to pay post-offer attorney fees incurred by the offeror if the judgment is not more favorable than the offer.

Discussion at the October, 2014 meeting concluded that Rule 68 should not be put aside again without attempting to learn something more about possible revisions. The first avenue of inquiry will examine state practices to see whether actual experience shows good results from working under a different model. The Administrative Office has done preliminary work in identifying state rules that correspond to Rule 68 and in assembling a bibliography of secondary literature, some of it empirical. Resources were not available to delve deeper into these materials in time for the Committee's April, 2015 meeting. Rule 68 remains on the agenda

The Committee remains eager to receive information about experience with Rule 68 or similar state-court rules, and for suggestions whether Rule 68 should be developed to become more "effective," left alone, or studied for abrogation.

II.C. RULE 23 SUBCOMMITTEE

The Rule 23 Subcommittee has made significant strides in identifying issues on which to focus and in exploring ideas about how rule changes might address those issues. For the Advisory Committee's April, 2015, meeting, it submitted for discussion a series of preliminary sketches of possible amendment ideas, designed to prompt more concrete discussion than presentation of the issues alone would stimulate. A copy of the Subcommittee's memorandum, including the sketches, is attached to this report as Appendix I.

In order to broaden its appreciation of the issues presented, the Subcommittee has undertaken to send representatives to a variety of meetings and conferences convened by a variety of groups. The groups include bar organizations regarded as both plaintiff- and defense-side, ABA conferences, and law professor conferences. The day before the Advisory Committee's April meeting, the George Washington Law School arranged an extremely

informative roundtable discussion involving prominent judges, lawyers, and law professors. The Subcommittee is also planning to hold a mini-conference to address pending Rule 23 issues on Sept. 11, 2015, and hopes to have draft rule ideas and some Committee Note language available for review by participants in that mini-conference. A complete listing of those events is contained in Appendix I.

The Subcommittee's "outreach" efforts have already borne fruit. Nearly 20 submissions to the Advisory Committee from various groups and individuals have endorsed consideration of various issues. These submissions can be found on the A.O. website via the link for "Archived Rules Suggestions" for the Civil Rules Committee.

The suggestions received so far range from fundamental reformulation of Rule 23 to more focused attention to specific issues. The Subcommittee is not presently inclined to favor major structural changes to the rule.

Instead, the Subcommittee's focus has been on more limited amendment ideas, as presented in Appendix I. In developing these ideas, it has been much aided by the American Law Institute's Principles of Aggregate Litigation (2010). The "front burner" ideas can generally be grouped into seven categories, which are summarized below.

As it has worked forward, the Subcommittee has invited suggestions about additional topics that seem to warrant serious attention, as well as suggestions about removing issues it had identified from the "front burner" list. As noted below, one result of the April Advisory Committee meeting and the George Washington University roundtable has been to identify two additional issues that the Subcommittee intends to examine carefully in the coming months.

"Front burner" issues

1. Settlement Approval Criteria: Until 2003, Rule 23(e) said nothing about how a court was to decide whether to approve the settlement or dismissal of a class action. Every circuit developed criteria, largely during the 1970s, for performing that task. As the ALI put it, this case law "is in disarray" because courts of appeals have "articulate[d] a wide range of factors to consider," leaving district judges with long lists of "checkoff" factors but little guidance on how to weigh those factors. ALI, Principles of Aggregate Litigation § 3.05, Comment a at 205 (2010).

In 2003, Rule 23(e) was amended to specify that the criterion for settlement approval is whether the proposed settlement is "fair, reasonable, and adequate." The ALI proposed substituting a set of four criteria for the long and divergent lists of factors in many circuits, adapted by the Subcommittee as follows in its sketch:

> (i) the class representatives and class counsel have been and currently are adequately representing the class;

(ii) the relief awarded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair, reasonable, and adequate given the costs, risks, probability of success, and delays of trial and appeal;

(iii) class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole; and

(iv) the settlement was negotiated at arm's length and was not the product of collusion.

The Subcommittee's sketch permits settlement approval only if the court finds all four of these criteria satisfied, but it also would permit the court to reject a settlement that supports all four findings on the basis of any other matter pertinent to approval. During the Advisory Committee meeting, it was suggested that the Subcommittee reconsider recognizing authority to reject a settlement that satisfies all four listed criteria, and it will reexamine that question.

The goal of this approach would be to substitute the above four criteria for the variety of additional factors identified in decisions from the various circuits, thus fostering both national uniformity and more focused settlement review. At least some of the criteria used in some circuits — support for the settlement from the lawyers who negotiated it is a recurrent example — seem not to be helpful. But one might argue that the elasticity of the rule sketch may leave courts free to consider most or all of the factors on a given circuit's checklist in determining what is fair, reasonable, and adequate.

The discussions in April focused particular attention on the court's decision whether a proposed settlement has enough apparent merit to justify sending notice to the class. The Subcommittee intends to focus on this subject as it moves forward. The topic is introduced under the heading "additional possible issues" at the end of this section of the agenda book. It is possible that a more focused set of criteria for final approval of a settlement, like the ideas above, might assist both the court and the lawyers in making that initial decision about whether to give notice to the class.

2. Settlement class certification: In 1996, the Committee published a proposal to add a new Rule 23(b)(4), permitting certification for purposes of settlement in a Rule 23(b)(3) class action even though the proposed class might not meet all the certification requirements for purposes of trial. At that time, some prominent cases had stated that, to be certified for settlement, cases had to satisfy the same certification criteria as for certification for trial. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997), ruled that those seeking certification for settlement need not satisfy everything that is required of certification for trial. But uncertainty remained — particularly about the role of predominance — and there followed a move toward use of MDL procedures to achieve settlements in situations that might also be suitable for class-action treatment.

The Subcommittee's sketches of a new Rule 23(b)(4) concept have focused attention on several issues. The first is whether present obstacles to achieving settlement class certification actually justify serious consideration of a new category of class action. A related question is whether a new Rule 23(b)(4) should be limited (like the 1996 proposal) to cases seeking certification under Rule 23(b)(3). On that subject, it has been suggested that Rule 23(b)(2) class actions for injunctive relief may often be settled. That still leaves open the question whether a settlement class should be certified for (b)(2)-type relief when the same class could not be certified for trial. Another question is whether a settlement should require satisfaction of all Rule 23(a) factors or only some of them.

Some of the ideas under consideration diverge from the Supreme Court's analysis in *Amchem*. One is to remove predominance as a critical factor in approving settlement certification. Because predominance is required only for Rule 23(b)(3) classes, downplaying it would fit with opening up settlement certification approval for Rule 23(b)(2) class actions. It might be that separate settlement class certification rules could be designed for (b)(2) and (b)(3) cases, but that possibility seems cumbersome and could involve intricate drafting. And there is also the question whether settlement class certification should be available for "mandatory" Rule 23(b)(1) class actions.

Another issue is whether to place primary emphasis on Rule 23(e) review of the fairness of the proposed settlement rather than the Rule 23(a) and (b) factors. In *Amchem*, the Court said that Rule 23(e) is not a substitute for vigorous application of the Rule 23(a) and (b) requirements (even in the settlement context), except to the extent that the Rule 23(b)(3) manageability factor may play a reduced role.

(3) Addressing *cy pres* settlement provisions in the rule: It may be that cy pres provisions are becoming more frequent in proposed settlements. Chief Justice Roberts reflected concerns about this practice in his statement in *Marek v. Lane*, 134 S. Ct. 8 (2013), that the Supreme Court "may need to clarify the limits on the use of such remedies." More recently, the court in *In re BankAmerica Securities Litigation*, 775 F.3d 1060 (8th Cir. 2015), noted a concern about "the substantial history of district courts ignoring and resisting circuit court cy pres concerns." *Id.* at 1064.

Sketches prepared by the Subcommittee have attempted to address these concerns; the present effort is not designed to expand authority for using *cy pres* provisions so much as to develop criteria and guidelines for using them. One recurrent reality is that any claims procedure creates a possibility that a residue will be left once distributions are made in accordance with settlement guidelines to all class members who seek compensation through the claims process. Unless this residue is to revert to the settling defendant, some alternative provision should be made for it. This concern might support vigorous Committee Note admonitions (or even rule provisions) regarding reverter provisions and/or simplified settlement claims processes (to ward off the risk that reverter provisions might tempt defendants to insist on unreasonably demanding claims processes). At the same time, the existence of a possibility there will be a residue may

justify including *cy pres* provisions in a significant number of settlements, given the possibility that notice might have to be sent to the class a second time (concerning such *cy pres* treatment) if the possibility were not included in the original settlement agreement.

Issues that have been identified in the discussions so far include whether the rule should affirmatively authorize the court to approve *cy pres* provisions. The Subcommittee has not embraced amending the rule to create new authority; as the Eighth Circuit noted (quoted above), it seems that many courts presently are exercising such authority. Instead, the focus of the Subcommittee (building on the proposal of the ALI Principles of Aggregate Litigation, which has already been adopted by some courts) is to provide guidelines for what is already going on. Accordingly, the Subcommittee's current sketch articulates limits on use of *cy pres*:

> **(A)** If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds must be distributed directly to individual class members;
>
> **(B)** If the proposal involves individual distributions to class members and funds remain after distributions, the settlement must provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair;
>
> **(C)** The proposal may provide that, if the court finds that individual distributions are not viable under Rule 23(e)(3)(A) or (B), a cy pres approach may be employed if it directs payment to a recipient whose interests reasonably approximate those being pursued by the class. [The court may presume that individual distributions are not viable for sums of less than $100.] [If no such recipient can be identified, the court may approve payment to a recipient whose interests do not reasonably approximate the interests being pursued by the class if such payment would serve the public interest.]

This sketch raises questions. A basic one is whether to permit *cy pres* provisions only "if authorized by law." Some states have such statutory authorizations, but it is likely that not many do. More importantly, this is a settlement, and settlements are not usually limited to relief "authorized by law." To the contrary, they may be attractive because they include features (such as an apology) that cannot be obtained by a court judgment. At the same time, settlement by a class representative may differ in important ways from settlement by a participating party. It is not obvious that defendant's agreement, elicited by the desire for res judicata, justifies surrender of class members' interests.

Bracketed language above identifies further questions. The Subcommittee has been informed that class action settlement administration has improved to a point that makes excusing distributions smaller than $100 (suggested by a proposed uniform class-action law for states) inappropriate. And the question whether to affirmatively authorize distribution to "public service" organizations whose interests do not correspond to the claims asserted in the action may be a step too far.

(4) Issues about objectors: In 2003, Rule 23(e)(5) was added, providing that any class member may object to a settlement submitted for the court's approval, and that any such objection "may be withdrawn only with the court's approval."

The starting point is that objectors play a valuable role for the court, which is ordinarily called upon to evaluate a proposed resolution that is supported by all the lawyers and parties with whom the court has been dealing. The refinement of the factors to be considered in approving such proposed settlements (Issue (1) above), and the possible additional focus on what must be submitted at the outset when the court is asked to direct notice to the class (mentioned below), may make more useful information available to class members in deciding whether to raise questions about the proposed settlement.

But another starting point is that repeated reports indicate that some objectors seek to exploit the process to extract unjustified tribute. The requirement of court approval for withdrawing objections added in 2003 was designed to curtail such activity. Reports indicate that it has worked reasonably well. The problem has been that the Rule 23(e)(5) requirement ceases to constrain objectors after a notice of appeal is filed. And the time necessary to resolve an appeal means that a bad-faith objector gets considerable additional leverage from filing a notice of appeal, while also seemingly escaping from the requirement for court approval to withdraw the appeal.

The problem has drawn suggestions to the Appellate Rules Committee that it amend the FRAP to provide that withdrawal of the appeal also require court approval, and to direct further that the appellate courts may not approve such a withdrawal if anything of value is provided to the objector or the objector's counsel in return for withdrawing the appeal.

Absolutely forbidding any consideration for dropping the appeal might unduly limit the ability to resolve appeals asserting that the objector's special situation justifies special treatment. But permitting some withdrawals to be approved despite consideration could produce further difficulties. Much might be said in favor of having such a decision made, at least initially, by the district court (which is very familiar with the case) rather than by the appellate court (which is not). Moreover, assuming that the appellate court has motions panels to rule on such matters that are constituted separately from merits panels, the issue might be presented to a panel of appellate judges who would never be involved in passing judgment on the underlying settlement approval, imposing a possibly substantial burden on the appellate court when the district court would be entirely up to speed.

The Rule 23 Subcommittee stands ready to collaborate with the Appellate Rules Committee in addressing methods of achieving the desired goal.

Meanwhile, the Rule 23 Subcommittee has sketched two possible ideas for changing Rule 23. One would add a requirement that "side agreements" be submitted along with a request for permission to withdraw an objection before the district court. The other would add to Rule 23 some sanction authority for bad-faith objections. It is uncertain whether either of these ideas would make productive additions to the rule.

(5) Mootness and Rule 68 offers of judgment: In recent years, Rule 68 offers of judgment have been used with some frequency in efforts to moot proposed class actions by offering "full" relief to the individual plaintiff who brings the suit. They may become more common due to a recent Supreme Court decision in a Fair Labor Standards Act collective action, although the Court was at some pains to say that collective actions and class actions are different in this regard. The Subcommittee has developed various ideas about how to address this issue, seeking a simple solution. The question whether rulemaking is justified by this problem remains also.

(6) Issue Classes: Rule 23(b)(3) says that a court may certify a class only on finding that common questions predominate and that class treatment is superior to individual litigation. Rule 23(c)(4) says that, "if appropriate," a court may certify with regard only to "particular issues." Whether there is an inherent tension between these two provisions can be debated. At least at a point in time, the Fifth and Second Circuits seemed at loggerheads about whether a court could resort to issue certification under (c)(4) only in cases that already have been found certifiable under (b)(3). The Fifth Circuit said that "nimble use" of (c)(4) could not circumvent the predominance requirement of (b)(3). But it may be that more recent Fifth Circuit decisions show that issue certification is (at least sometimes) approved by that court.

The Subcommittee has developed a sketch of a change to Rule 23(b)(3) designed to show that a court may resort to issue certification under (c)(4) even though it cannot conclude that, overall, common issues predominate. That leaves unresolved the question what happens next after the common issues are resolved, since that would not ordinarily lead to entry of a judgment. The Subcommittee therefore has also developed a sketch of an amendment to Rule 23(f) that would permit discretionary court of appeals review of the resolution of the common issue before further (and possibly burdensome) proceedings in the district court or elsewhere to resolve remaining issues. One variation of that provision would require that the district court find that immediate review would be desirable before a petition to the appellate court would be allowed.

(7) Notice: *In Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), the Court said that in (b)(3) actions individual notice (seemingly by first class mail) was required for every class member who could be identified with reasonable effort. Requiring snail mail seems inappropriate in the 21st century. It also seems that courts have moved to embrace more modern methods of giving notice to class members. *See, e.g., In re Online DVD-Rental Antitrust Litigation*, 779 F.3d 934, 941 (9th Cir. 2015): "Initial e-mail notice of the settlement was

provided to some 35 million class members. Notice was mailed to more than 9 million class members whose email addresses were invalid such that the email notice 'bounced back.' * * * The notice encourages class members to visit the class website for more details."

The Subcommittee sketch would add the phrase "by electronic or other means" to Rule 23(c)(2)(B) to take account of improvements in methods of communication.

In addition, the Subcommittee has had some discussions about whether some notice requirement should exist for litigated (b)(1) and (b)(2) actions. At present, the rule does not require any notice in those cases, although Rule 23(c)(2)(A) does say that "the court may direct appropriate notice to the class." But it is possible that a fully litigated (b)(2) case would proceed to judgment without any notice at all to class members. (If a settlement were proposed, Rule 23(e) would require "notice in a reasonable manner to all class members who would be bound by the settlement.") In 2001, a proposal to direct some notice to class members was published for comment, but then not pursued after adverse public comment, which focused on the cost of giving such notice. Whether technological development since then has changed the situation is uncertain.

Additional possible issues

As noted above, the April Advisory Committee meeting and the George Washington roundtable brought to the fore two additional issues that the Subcommittee expects to examine as it moves forward:

(1) Specifics necessary for decision to order notice to class about proposed settlement: Recent discussions have emphasized the importance of the initial decision whether to direct that notice be sent to the class about the proposed settlement (thereby triggering the time to object). Although the rule does say that notice should be sent to the class, it does not address the standards a court should use in making that decision or the showing that the settling parties should make to support giving notice to the class. In some cases, it may be that the court does not get a full picture of the proposed settlement until later, when the matter is presented for final approval. Similarly, it may be that full information about the proposed settlement would be beneficial to class members in making decisions whether to object, so that having that information before the court from the outset could have the additional advantage of making it available to class members trying to evaluate the proposed resolution.

The Subcommittee expects to examine these issues as it moves forward, with an eye to the possibility of adding something to the rule. The ALI Principles of Aggregate Litigation caution against regarding the decision to send notice as a "preliminary approval" of the settlement, on the ground that class members have not even had a chance to evaluate the settlement and that the court should not already be taking a position in favor of it. But if information roughly identical to that required at the final approval stage must be provided before notice is authorized, it may appear that the decision to give notice should assume even more importance.

A related potential problem is that, as one increases the information available at this stage, one also strengthens arguments for immediate appellate review under Rule 23(f), even before the class members get a chance to object. If a "preliminary approval" includes approval of settlement class certification, that might arguably fit within Rule 23(f), which authorizes immediate review of "an order granting or denying class-action certification." In *In re National Football League Players Concussion Injury Litigation*, 775 F.3d 570 (3d Cir. 2014), the court held that such approval for purposes only of giving notice is not an event that supports immediate Rule 23(f) appeal. If the Subcommittee goes forward on this issue, that potential problem will be kept in mind; the Subcommittee's current thinking is not to multiply the occasions for interlocutory review.

(2) Ascertainability: Recently there has been much concern about what must be shown to demonstrate that a proposed class is "ascertainable," largely resulting from Third Circuit decisions. This concern seems to be limited to Rule 23(b)(3) class actions. *See Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2014) (ascertainability is not required in a class action seeking only injunctive relief). And the Third Circuit treatment of the issue may be evolving. See, e.g., *Byrd v. Aaron's Inc.*, ___ F.3d ___, 2015 WL 3887938 (3d Cir., April 16, 2015), in which the panel stated that "it is necessary to address the scope and source of the ascertainability requirement that our cases have articulated" and added that "[w]e seek here to dispel any confusion." (Judge Rendell, concurring in reversal of the district court's denial of certification, suggested that "it is time to retreat from our heightened ascertainability requirement in favor of following the historical meaning of ascertainability under Rule 23.")

The Subcommittee intends to examine this issue; it is not certain at present whether a rule change might be indicated.

* * * * *

The Subcommittee continues to seek input on whether the issues listed above should be pursued, and whether others should considered as well.

II.D. DISCOVERY: REQUESTER-PAYS

The Discovery Subcommittee continues to have the "requester pays" topic on its agenda. The Advisory Committee had an initial discussion of these issues at its November, 2013, meeting, but the full Committee was occupied thereafter addressing the public commentary on the amendment package published for public comment in August, 2013. On April 29, 2015, the Supreme Court adopted rule changes resulting from that effort.

In early 2015, the Discovery Subcommittee had two conference calls about these issues. At its April, 2015, meeting the Advisory Committee had a further discussion. The issues appear both difficult and contentious, and the Advisory Committee is not recommending any rulemaking action at this time.

One reason for caution in proceeding along this line is that the package of amendments approved by the Supreme Court on April 29, 2015, includes changes designed to address the problems some seek to solve with requester pays rules. Those amendments go into effect on Dec. 1, 2015, unless Congress takes action to defer their effective date. Time will be needed to gauge their effects, but knowing about those effects would be important in determining whether to proceed with requester pays ideas.

Another reason for proceeding gradually is the difficulty of predicting the changes that would result from a requester pays system. There are presently a number of provisions that authorize something like requester pays under some circumstances. Examples include:

> Rule 26(g)(1)(B) & (3) say that the signature of a lawyer on a discovery request certifies that the request has not been made for an improper purpose, such as increasing the cost of litigation, and that the request is not unduly burdensome or expensive. If there is an unjustified certification, the court "must impose an appropriate sanction" on the violator, which may include "the reasonable expenses, including attorney's fees, caused by the violation."
>
> Rule 26(b)(2)(C)(iii) requires the court to limit or prohibit discovery that would disproportionately burden the responding party. [The amendments adopted by the Supreme Court on April 29 move this provision up into Rule 26(b)(1), on the scope of discovery, and also revise it a bit.]
>
> Rule 26(c) now authorizes a protective order to protect a party from "undue burden or expense." In *Oppenheimer Fund v. Sanders*, 437 U.S. 340 (1978), the Supreme Court recognized that Rule 26(c) provided authority for "orders conditioning discovery on the requesting party's payment of the costs of discovery." *See id.* at 358.
>
> Rule 26(b)(2)(B) explicitly authorizes the court to condition discovery from sources of electronically stored information that are not reasonably accessible due to burden or expense, and the Committee Note confirms that cost-bearing is one such condition.
>
> Rules 37(a)(5) & 37(b)(2)(C) require the court to impose the expenses incurred in relation to a discovery motion on the losing party on the motion, unless that party's position was "substantially justified."
>
> 28 U.S.C. § 1927 authorizes the court to impose "the excess costs, expenses, and attorneys' fees" on any attorney or party that "multiplies the proceedings in any case unreasonably and vexatiously."

It is not certain how often these provisions are employed, but some assert that the number of such provisions already in existence shows that there is really no need for more such provisions. It may be that abusive discovery that would warrant shifting costs from the producer

to the requester is not commonplace in civil litigation in federal court, and so adopting across-the-board requester pays rules would be dubious. But it also seems to be true that there are cases in which disproportionate discovery is a serious problem. It will be very difficult to draft a rule that will help courts and litigants distinguish discovery requests that justify imposing on the requester part or all of the cost of responding from those that do not.

Some other legal systems — particularly the UK — have loser pays provisions that might be compared. But it is possible that such a system could even encourage disproportionate expenditures on case preparation if that preparation significantly increased the likelihood of success, which would make the cost of the preparation recoverable. Difficult questions could arise about whether a requester who had to pay for discovery should be able to recoup those costs upon prevailing in the action.

In the UK, the "full indemnity" approach to recovery of litigation costs makes necessary an extensive regime of judicial officers whose job is to assess the propriety of recovery of certain costs. Any effort to calibrate more precisely the cost of responding to specific discovery requests might prove even more challenging. Making such costs recoverable might also prompt responding parties not to be frugal in expenditures on their discovery responses. It might, in addition, raise difficult questions about whether expenditures were actually prompted by the discovery requests or instead trial preparation activities that would have happened in any event.

The UK comparison also suggests another direction in which this discussion could lead — looking again at disclosures as an alternative to formal discovery. In 1991, the Committee published a proposed initial disclosure rule designed to require each side to disclose the "core information" seemingly involved in the case to the other side at the outset. That approach might be a model that would hold some promise, but initial disclosure caused a firestorm of protest when proposed in 1991. Eventually, the 1993 amendments added an initial disclosure requirement that directed disclosure of witnesses and documents with information relevant to disputed facts alleged with particularity in the pleadings, but allowed district courts to opt out of this disclosure requirement. Many districts did opt out, and the rule was amended in 2000 to its current form, which applies nationwide and directs disclosure only of material the disclosing party may use to prove its claim or defense. The possibility of focusing again on initial disclosure was raised during the Advisory Committee discussion of these issues in April.

Something like initial disclosure may already be resulting from adoption by many judges of the protocols for individual employment discrimination actions developed by a committee made up of leading plaintiff- and defense-side lawyers under the guidance of Judge Koeltl over the period of more than a year. The hope is that having this basic information on the table at the outset could obviate much wasted motion that now occurs. But whether a similarly tailored set of disclosures could be designed for other sorts of cases is uncertain.

Yet another comparison may be to various provisions in "patent troll" bills introduced in Congress. Some of those bills call for the requester to pay after "core information" is disclosed.

It is possible that, if directed by Congress, the Committee will find itself called upon to attempt to draft rules that implement core discovery and requester pays for patent cases.

The whole area is thus beclouded by uncertainties. The prospect that disproportionate discovery costs will cause parties to settle meritless claims or abandon meritorious claims is very troubling. But it is important to appreciate that proceeding with requester pays could generate passionate opposition. In 1998, a proposed amendment to Rule 34 would have permitted the court to order discovery otherwise forbidden under Rule 26(b)(2)(C) as disproportionate if the requesting party had to pay part or all of the cost of responding. Even though that amendment was limited to disproportionate discovery (which the rule said the court was required to forbid entirely), and did not invariably require full payment for it, the proposal drew considerable criticism, and eventually did not go forward.

It is important to appreciate, therefore, that strong access-to-justice concerns bear on any requester pays proposal. Proceeding would likely depend on having a solid empirical basis for identifying the problem and, perhaps, the solution. Yet it is not clear how solid empirical work could be done to provide that information base.

The Committee will undertake further information-gathering efforts. Any suggestions about where or how to obtain useful information would be welcome. Among the questions addressed by the Subcommittee, which it called to the attention of the Advisory Committee, were the following:

> (1) Is there a serious problem of over-discovery that might be solved by some form of requester pays rule? We know that in much litigation it seems that the discovery is roughly proportional to the stakes. We know also that in a significant number of cases high discovery costs are reported. How should one try to identify over-discovery? How can one evaluate the potential utility of requester pays approaches to dealing with those problem cases?
>
> (2) Should any rules along this line focus mainly on certain kinds of cases, or on certain kinds of discovery?
>
> > (a) In general, the rules are to be "transsubstantive," applying to all cases with relative equality. But there are rules that are keyed to specific types of cases, such as Rule 9(b), with its specific pleading requirements for fraud. Is there a workable way for a rule to identify "problem" or "contentious" cases? [Note that, as mentioned above, "patent troll" legislation may call for rules specific to some or all patent cases.]
> >
> > (b) Since discovery regarding electronically stored information has assumed such great importance, should a "requester pays" idea be considered only for that sort of discovery? The current Rule 37(e) proposed amendment is similarly limited,

as is current Rule 37(e). Even more pertinent, current Rule 26(b)(2)(B), with its cost-bearing possibility, is also only about electronically stored information.

(3) Should cost-bearing ever be mandatory? All models of possible rule changes that have been actively considered so far have essentially been discretionary. That means that the court must become involved before cost-bearing is a possibility. Perhaps cost bearing could be presumed in certain situations unless the court directed otherwise. But if so, how would one define those situations? Defining them could be quite difficult, and disputes about whether given discovery fell on one side or the other side of such a line could themselves impose significant costs on the litigants and burdens on judges.

(4) Would it be useful to consider broadening initial disclosure if requester pays changes are actively studied? As amended in 2000, Rule 26(a)(1) only requires disclosure of information the disclosing party may use to prove its claims or defenses. Some question the utility of the current rule. It could be that broadening initial disclosure would be a useful adjunct to adding requester pays provisions.

(5) Could introduction or emphasis on these issues itself justify substantial discovery? If the question is whether providing requested discovery will be highly burdensome, or would not provide useful evidence, it may be that some parties will seek to explore these issues using discovery. One method for making Rule 26(b)(2)(B) determinations about whether to order discovery from "inaccessible" sources of electronically stored information is to see what can be found in a sample of those sources, and at what cost. Perhaps that is a model that would be useful, but it might also suggest "discovery about discovery," something that may be unnerving.

(6) Would requester pays provisions have a significant effect on judicial workload? It is likely such provisions would focus on something like "reasonable expenses." Determining what is "reasonable" could be an effort for the court. But perhaps that inquiry is sufficiently implicated in the basic proportionality analysis -- balancing the cost of proposed discovery against its apparent value -- so that there would not be significant added effort for the court.

II.E. MANUFACTURED FINALITY

The two projects of the Appellate-Civil Subcommittee reported here began in the Appellate Rules Committee. As often happens, potential solutions to problems identified by the Appellate Rules Committee seem to lie as much in the Civil Rules as in the Appellate Rules. Joint subcommittees have proved invaluable in focusing the work of both committees.

Both of the present topics have lingered for some time. Manufactured finality was considered in some depth by an earlier Subcommittee. The provisions of Rule 62 addressing stays of execution pending post-judgment motions and appeal have been considered in the

Appellate Rules Committee and then transferred to the Subcommittee. Manufactured finality is discussed here. Rule 62 comes next.

"Manufactured finality" refers to attempts to accelerate the time when an appeal can be taken following an interlocutory ruling that is not independently appealable under any other elaboration of the final decision requirement of 28 U.S.C. § 1291 or under the statutes that permit interlocutory appeals.

Many circumstances may lead a party to prefer an immediate appeal to test an interlocutory order that is not appealable without more. A few common illustrations set the stage. A plaintiff may have several demands for relief. An order dismissing some of them may leave only fragments that, standing alone, do not seem to warrant the costs and uncertainties of continuing litigation. Even if the plaintiff can afford to litigate the rest of the way to a final judgment, banking on the prospect that the interlocutory order will be reversed, the cost may be high, and can easily be wasted whether the result on appeal is reversal or affirmance. And delay is an inevitable cost. So too, the court may dismiss some theories that support a single claim, leaving only theories that the plaintiff thinks weaker either as a matter of law or as a matter of available evidence. Or the court may enter an in limine order excluding the most important — and perhaps indispensable — parts of the plaintiff's evidence.

Faced with these, and often enough more complicated circumstances, an attempt may be made to "manufacture" finality by arranging voluntary or stipulated dismissal of all, or substantial parts, of what otherwise remains to be done in the trial court.

Three rough categories of manufactured finality can be identified. Most decisions agree that most of the time a final judgment cannot be manufactured by dismissing without prejudice everything that remains unfinished in the action. Most decisions agree that most of the time a dismissal with prejudice of all unfinished parts of an action does establish finality. And most circuits reject the approach of "conditional prejudice" that has been accepted in the Second Circuit and apparently the Federal Circuit. This tactic dismisses all unfinished parts of the action with prejudice, subject to the condition that they can be revived — the prejudice dissolves — if the interlocutory orders thus made final are reversed on appeal.

The question whether to propose rules provisions addressing manufactured finality is beset by two major concerns.

One major concern is that the cases have recognized circumstances in which a dismissal without prejudice does achieve appealable finality. At times finality is found by finding "de facto prejudice" in circumstances that would bar a new action. A rule that rejects finality for all dismissals without prejudice might come at significant cost.

A related concern is that a rule recognizing that a dismissal with prejudice can achieve finality accomplishes nothing useful. Courts understand that now. A rule that states that only a

dismissal with prejudice can achieve finality, on the other hand, runs into the same problems as a rule that rejects finality for all dismissals without prejudice.

Discussions of conditional prejudice have tended to divide practicing lawyers from judges. It may be that the division is more accurately described as between practicing lawyers and trial judges on one side and appellate judges on the other. Practicing lawyers believe that a dismissal with conditional prejudice can be a valuable means of achieving finality. Since most appeals lead to affirmance, the opportunity to revive the parts of the action that were dismissed with conditional prejudice will not cause as much risk of repeated appeals in the same action as might be feared. The party who is willing to risk all that remains in the action on the opportunity to win reversal of the interlocutory orders made before the dismissal will be able to continue only if there is reversible error. If the alternative is to persist in litigating to a true final judgment the parts that would be dismissed with conditional prejudice, both the trial court and the opposing party pay a price that is not redeemed even if the eventual appeal leads to affirmance. And those proceedings are likely to become pure waste on reversal of the interlocutory orders that would have been reviewed on a conditional-prejudice appeal.

Judges (at least appellate judges), on the other hand, fear that dismissals with conditional prejudice will threaten the core values of the final-judgment rule. As with an avowedly interlocutory appeal, the result may be added cost and delay and a risk that the appellate court will have to revisit familiar terrain on a subsequent appeal.

One way of viewing the conditional-prejudice issue is to ask whether there is a real need to address it by rules amendments. There is no indication that the Second Circuit regrets its approach. Apart from the Federal Circuit, the other circuits that have confronted the question refuse to allow manufactured finality on these terms. Is there a need to adopt a rule that prohibits reliance on conditional prejudice by the courts that find it a useful adjustment of the final-judgment rule?

The Subcommittee, building on work by an earlier subcommittee, discussed these issues at length. The competing arguments on all sides continue to defy confident resolution. Failing to achieve consensus, the Subcommittee reported four alternatives for Committee consideration.

The first alternative is to do nothing. The reasons for doing nothing are easily summarized. Most situations are governed by two clear rules that are generally recognized. A voluntary dismissal without prejudice, even if it sweeps away an entire action, does not achieve finality. A voluntary dismissal with prejudice that sweeps away an entire action does achieve finality. Little would be accomplished by adopting a rule that states either or both of these points. And so simple a rule would create a risk of undoing decisions that now recognize finality in circumstances that would not seem to fit within the new rule. The most obvious example is conditional prejudice, discussed further below. Other examples were described in a memorandum discussing the choices between simple rules, complex rules, or no rules and providing a welter of examples of complex finality theory.

The argument for going ahead with simple rules is direct. It is important to have clear rules of appeal jurisdiction. And uniformity across the circuits is an important component of clarity — no matter how clear the rules may seem within any particular circuit, disuniformity will encourage attempts to manufacture finality that backfire against sloppy or risk-taking lawyers. This argument, however, is subject to challenge on the ground that no rule text will be so perfect as to exclude all opportunities for interpretation and thus for disuniform interpretation.

The second alternative is to adopt a rule that says only that a plaintiff — or perhaps any party asserting a claim for relief — can achieve appeal finality by dismissing with prejudice all claims and parties that remain in the action. Although this rule is accepted as a general matter now, recognition in rule text would provide guidance for lawyers who are not expert in the complexities of the final-judgment rule. It also would provide reassurance for lawyers who are familiar with the idea, but feel pressure to confirm their understanding by expensive research.

This simple rule would leave ambiguities at the margin. The clearest example is a dismissal with conditional prejudice. Is that with prejudice or without prejudice? Other examples occur in cases that, on one theory or another, recognize de facto prejudice. One illustration is a dismissal without prejudice in circumstances that seem to preclude any new action because the applicable limitations period has run. Litigants and lawyers would face new uncertainties in the attempt to reconcile existing decisions with the new rule text.

The third alternative is to adopt a rule that says that only a dismissal with prejudice achieves finality. This rule would actually do something, as compared to a rule that recognizes finality on a dismissal with prejudice but that does not expressly foreclose other means of manufacturing finality. But the ambiguities would remain, and expressly foreclosing all but dismissals with prejudice would raise the stakes of uncertainty.

A fourth alternative is to adopt a rule that recognizes or requires that a voluntary dismissal be with prejudice and that also expressly addresses conditional prejudice. Either answer could be given. Conditional prejudice could be recognized as a valid path to finality. This answer might be adopted in a form that would defer to courts that recognize conditional prejudice now, and leave the choice open for courts that have not expressly rejected it, without requiring other circuits to change their views. That path would leave disuniformity. Instead, the rule might require all courts to recognize conditional prejudice. That path likely would stir significant opposition. Or conditional prejudice could be rejected, not so much because of any sense that it has proved undesirable when recognized as because of a desire to achieve national uniformity. A clear majority of the decisions that address the question reject conditional prejudice. There is no indication that it is frequently used in circuits that do recognize it. Uniformity, on this view, would be achieved at little cost, and indeed would be an added benefit if conditional prejudice is in fact a bad means of achieving finality.

A choice among these alternatives will be influenced by a more general sense of the need to prevent further erosion of the final-judgment rule. The rule is far more complicated than the initial statement that finality requires complete disposition of an entire case, leaving nothing to

be done in the trial court apart from execution of a judgment that provides relief. Expansions, exceptions, and occasional evasions are familiar in practice. The complication reflects case-specific, or at times more general, rebalancing of the competing needs that allocate jurisdiction between trial courts and appellate courts. An openly ad hoc approach that allows a court of appeals to assert jurisdiction whenever a present appeal seems a good idea would destroy the balance achieved by a general requirement of finality. But many more restricted qualifications are recognized by statute, court rule, and interpretation of 28 U.S.C. § 1291 itself. The choices are seldom easy. But it may be difficult to identify any general practical losses incurred by ongoing and somewhat divergent approaches to manufactured finality. If so, the more abstract desire for more precise rules in this particular corner of appeal jurisdiction may not be enough to justify the potential costs of more precise rules.

Discussion of these four alternatives explored the competing pressures that have expanded appeal finality beyond the paradigm judgment that leaves nothing more to be done in the trial court. The best-known example is the collateral-order doctrine, which itself has an uneven history. It does not seem possible to craft a court rule that would accurately identify the circumstances that justify an appeal before the trial court has completely finished its work. At the least, it does not seem possible to craft a rule that would embody the actual and often conflicting decisions on finality. Any clear rule would be bought at the price of sacrificing some desirable, at times important, opportunities to appeal.

In the end, the Committee voted, with one dissent, to advise the Appellate Rules Committee that the Civil Rules Committee does not believe that an effort should be made to draft rules to govern the many phenomena that can be characterized as "manufactured finality." The Reporter for the Appellate Rules Committee has reported that, at least for the time being, they do not intend to pursue further the effort to develop rule text that would address manufactured finality.

II.F. RULE 62: STAYS PENDING APPEAL

Discussion of Rule 62 stays of execution began in the Appellate Rules Committee. The initial focus was on the fit of Rule 62 with a convenient practice adopted by some appellate lawyers. Rather than arrange separate bonds to secure a stay pending post-judgment proceedings and then to secure a stay pending appeal, they arrange a single bond designed to secure a stay until completion of all appeal proceedings. It has not been clear how this strategy fits Rule 62.

Rule 62 is presented for discussion to guide further work in the Subcommittee and the Appellate and Civil Rules Committees. The work has focused on money judgments. The present provisions addressing injunctions, receiverships, and an order for an accounting in an action for patent infringement are carried forward unchanged, at least for the time being.

A particular twist on the single-bond question arises from the fit between the 14-day automatic stay provided by Rule 62(a) and the Rule 62(b) provision for a stay "pending disposition of" post-judgment motions that may be made up to 28 days after entry of judgment.

Before the Time Calculation Project the Rule 62(a) automatic stay lasted for 10 days, and 10 days also was the period for making the post-judgment motions. The automatic stay was redefined as 14 days (the prior conventions for counting meant that a 10-day period was always at least 14 days, and might run longer). The times for the post-judgment motions, however, were extended to 28 days because experience had shown that more time was needed in many complex cases. The result is an apparent "gap." A district judge wrote to the Civil Rules Committee that the gap creates uncertainty whether the court can order a stay after expiration of the automatic stay but before a post-judgment motion is made. The Committee concluded that a court has inherent power to stay its own judgment, and that there was no need to revise Rule 62(b) unless practice should show persistent confusion.

Consideration of these initial questions led to other questions. Successive sketches of possible Rule 62 revisions have taken on ever more possible changes. Should the court be able to dissolve the automatic stay before it expires of its own force? Should it be able to require that the judgment creditor post security as a condition of dissolving a stay or refusing to grant one? Should it be able to recognize security other than a bond? To set the amount of security less than the judgment? And is it wise to carry forward the supersedeas bond provision of Rule 62(d) that many understand to create a right to a stay pending appeal? And, to return to the questions that launched the inquiry, why not recognize that a single security may be accepted for a stay that continues from expiration (or supersession) of the automatic stay through issuance of the appellate mandate and disposition of proceedings on a petition for certiorari?

Subcommittee consideration of these questions is in mid-stream. It has been supported by detailed memoranda prepared by Professor Struve, Reporter for the Appellate Rules Committee. These memoranda reach beyond the questions that have been actively considered. The Subcommittee has yet to determine whether to recommend that consideration of Rule 62 extend beyond subdivisions (a) through (d).

One simple starting point in exploring Rule 62 was to ask whether Committee members have encountered difficulty as a result of the "gap" between expiration of the automatic Rule 62(a) stay and the time allowed to make the motions that support a stay under Rule 62(b). Rule 62(b) speaks of a stay "pending disposition" of these post-judgment motions. Are courts receptive to ordering a stay before a motion is filed under Rules 50, 52, 59, or 60, either in general or after an express representation that a motion will be, or is quite likely to be, filed? Would problems arise from extending the automatic stay to 28 or 30 days? Would the problems be reduced if Rule 62 is amended to make clear the court's authority to modify or dissolve the automatic stay?

How often do problems arise in agreeing on the form of security, whether a bond or something else? Are there practical difficulties in arranging a convenient and seamless form of security that runs from expiration of the automatic stay through final disposition of an appeal?

More generally, would it be desirable to amend Rule 62 to provide more explicit recognition of the district court's authority to modify, dissolve, or deny any stay? And its

authority to set appropriate terms both for the form and amount of security? And to exact security as a condition of allowing immediate execution of part or all of a judgment?

These questions are set against the background of Appellate Rule 8(a)(1), which directs that a party must ordinarily move first in the district court for a stay pending appeal or approval of a supersedeas bond. When the court of appeals does act, Rule 8(a)(2)(E) says blandly that it "may condition relief on a party's filing a bond or other appropriate security in the district court." The combination of district-court primacy and appellate-court flexibility suggest the possible value of recognizing a full range of district-court discretion in Rule 62.

Discussion of these issues in the Committee focused on the more adventuresome of two initial drafts presented to illustrate possible approaches to revising Rule 62. This draft aims at explicit statement of the district court's several responsibilities. The automatic stay remains, and is extended to 30 days to reach beyond the 28-day limit for post-judgment motions under Rules 50, 52, and 59. The district court, however, has authority to dissolve the automatic stay or to supersede it during the 30-day period. The district court, further, has authority to order a stay, during or after the period set for the automatic stay, that may last until issuance of the mandate on appeal. The court has discretion as to the form and amount of security. It can modify or dissolve a stay. And it can require security as a condition of refusing or dissolving a stay. The right to obtain a stay on posting a supersedeas bond is tentatively retained, but flagged as a question for further deliberation; if it is retained, the revised rule might direct that the amount be set at 125% of the judgment.

The central point made in Committee discussion was that neither the judges nor the lawyers have encountered difficulties with stays of money judgments pending appeal. Ordinarily the parties work out a reasonable solution, albeit with occasional "power struggles." Still, the draft set out below was addressed by some members as a clear and useful reformulation.

The Subcommittee will continue work on Rule 62.

Rule 62. Stay of Proceedings to Enforce a Judgment.

(a) STAY OF JUDGMENT TO PAY MONEY. Execution on a judgment to pay money, and proceedings to enforce it, are stayed as follows:

(1) *Automatic Stay.* Unless the court orders otherwise, for 30 days after the judgment is entered.[4]

[4] The 30-day period allows only 2 days after expiration of the 28-day period for post-judgment motions under Rules 50, 52, and 59. A longer period could be adopted. Or separate provision could be made for cases in which a timely motion is made under Rules 50, 52, or 59, or a motion is made under Rule 60 within the time allowed to move under Rules 50, 52, or 59.

(2) *By Court Order*. The court may at any time order a stay until a time designated by the court[, which may be as late as issuance of the mandate on appeal].

(3) *By Supersedeas Bond.*[5] If an appeal is taken, the appellant may obtain a stay by supersedeas bond or other security [in an amount equal to one hundred and twenty-five percent of the amount of the money judgment]. The bond [or other security] may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond or other security.

(b) TERMS [OF STAY].

(1) *Terms.* The court may set appropriate terms for the opposing party's security[6] for any[7] stay or on denying or terminating a stay.[8]

(2) *Dissolving or Modifying a Stay*. The court may[, for good cause,] dissolve the stay or modify [the terms set under Rule 62(b)(1)] [its terms].

(c) STAY OF INJUNCTION, RECEIVERSHIP, AND PATENT ACCOUNTING ORDERS.

(1) Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(A) an interlocutory or final judgment in an action for an injunction or a receivership; or

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[5] This is carried forward for the moment, without attempting to answer the question whether a stay should require a court order, compare the injunction provisions carried forward here as subdivision (c).

11 Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 2905, states flatly that a stay on posting a supersedeas bond is a matter of right. It also asserts that the courts have inherent power to dispense with any security, to set the amount at less than the judgment, and to specify a form of security other than a bond.

[6] Is this clear enough to support discretion to deny any security, and discretion as to the form and amount of security?

[7] "any" rather than "a" to emphasize that the court can terminate the automatic stay.

[8] This is new, but seems to make sense: Execution cannot always be undone. It may be useful to allow execution only if there is security for the judgment debtor.

(B) a judgment or order that directs an accounting in an action for patent infringement.

(2) While an appeal is pending from an interlocutory order or final judgment that grants,[9] dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(A) by that court sitting in open session; or

(B) by the assent of all its judges, as evidenced by their signatures.

II.G. PILOT PROJECTS

The discussion of pilot projects at the January meeting of the Standing Committee stimulated further discussion of the opportunities to foster projects that will advance the base of empirical information that can be used in crafting improved rules of procedure.

Rule 83, reflecting 28 U.S.C. § 2071(a), directs that a local rule must be consistent with Enabling Act rules. A proposal to amend Rule 83 to allow experimentation with local rules inconsistent with the national rules, upon approval by the Judicial Conference and with a 5-year time limit, was studied and abandoned more than 20 years ago. The Committee agreed that attention must be paid to the problem of inconsistency when a pilot project is implemented through local court rules, but recognized that many of the national rules are sufficiently flexible to avoid inconsistency with a more directive local rule. Often the pilot project rule will simply prescribe something that could be ordered under the national rule.

Several possible subjects for pilot projects were discussed.

One subject, often identified in the past, is to expand the scope of initial disclosures under Rule 26(a)(1). The project might simply recreate the original version of Rule 26(a)(1) that took effect in 1993, only to be scaled back in 2000 in order to win support for eliminating the provision that allowed districts to opt out by local rule. Or it might test a rule demanding still greater disclosures, perhaps modeled on part or all of Arizona Rule 26.1. In a different direction, developing experience with the protocols for initial discovery in individual employment actions may provide useful empirical data.

Discussion of initial disclosure pointed to an issue that may prove common to many possible pilot projects. Implementing a project on initial disclosure in the District of Arizona

[9] Should this list include the other categories in § 1292(a)(1): orders that modify or continue an injunction? That refuse to dissolve or modify an injunction? For that matter, should "denies" become "refuses" to parallel § 1292(a)(1)?

would provide a much quicker start up because most lawyers in the federal court would be accustomed to state-court disclosure requirements. On the other hand, information on how a rule would work in a system populated by lawyers with two decades of experience in a similar regime may not be as valuable as information gathered in courts where broad initial disclosure would come as a "shock to the system."

Discussion of docket practices designed to speed cases toward conclusion, including "rocket docket" practices, branched out into discussion of the tracking systems used by some federal courts to assign cases to different procedural regimes depending on general characteristics. These systems might be developed into more formal means to identify simplified procedures that could be adopted more generally. This discussion led to still other means to expedite litigation, including such matters as summary jury trials, e-discovery neutrals, and e-discovery experts on the court's staff. Means of facilitating disposition of cases that require review and decision on an administrative record or an employee-benefit record also were mentioned.

The Committee will develop the opportunities for advancing pilot projects through a newly appointed Subcommittee on Pilot Projects. The Subcommittee has begun its work. It will look for guidance in both state courts and federal courts. Experience with actual pilot projects will be one target. Examples of state rules or practices, and of local federal rules and practices, also may provide inspiration for innovations that might profitably be tested through formal pilot projects in the federal courts.

APPENDIX

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RULE 23 SUBCOMMITTEE REPORT

The Rule 23 Subcommittee has continued to work on the areas it identified before the Advisory Committee's October, 2014, meeting. This work has included conference calls on Dec. 17, 2014, Feb. 6, 2015, and Feb. 12, 2015. Notes on those calls should be included with these agenda materials.

The Subcommittee continues its efforts to become fully informed about pertinent issues regarding Rule 23 practice today. Besides generally keeping an eye out to identify pertinent developments and concerns, Subcommittee members have attended, and expect to attend a considerable number of events about class action practice that together should offer a broad range of views. These events include the following:

ABA 18th Class Action Institute (Chicago, Oct. 23-24, 2014).

Lawyers for Civil Justice Membership Meeting (New York, Dec. 4-5, 2014).

The Impact Fund 13th Annual Class Action Conference (Berkeley, CA, Feb. 26-27, 2015).

George Washington University Roundtable on Settlement Class Actions (Washington, D.C. April 8, 2015).

ALI discussion of Rule 23 issues (Washington, D.C., May 17, 2015).

ABA Litigation Section Meeting (San Francisco, June 19)

American Assoc. for Justice Annual Meeting (Montreal, Canada, July 11-14)

Civil Procedure Professors' Conference (Seattle, WA, July 17)

Duke Law Conference on Class-Action Settlement (Washington, D.C., July 23-24)

Defense Research Institute Conference on Class Actions (Washington, D.C., July 23-24)

Discovery Subcommittee Mini-Conference (DFW Airport, Sept. 11, 2015).

Association of American Law Schools Annual Meeting (New York, Jan. 6-10, 2016) [Participation in this event has not been arranged, but efforts are underway to make such arrangements.]

As should be apparent, the Subcommittee is trying to gather information from many sources as it moves forward. Its present intention is to be in a position to present drafts for possible amendments to the full Committee at its Fall 2015 meeting. If that proves possible, it may be that a preliminary discussion of those amendment ideas can be had with the Standing Committee during its January, 2016, meeting, and a final review of amendment proposals at the Advisory Committee's Spring, 2016, meeting. That schedule would permit submission of proposed preliminary drafts to the Standing Committee at its meeting in May or June of 2016, with a recommended August, 2016,

date for publication for public comment. If that occurred, rule changes could go into effect as soon as Dec. 1, 2018. But it is by no means clear that this will prove to be a realistic schedule.

For the present, the key point is that **there is no assurance that the Subcommittee will ultimately recommend any amendments. In addition, although it has identified issues that presently seem to warrant serious examination, it has not closed the door on other issues. Instead, it remains open to suggestions about other issues that might justify considering a rule change, as well as suggestions that the issues it has identified are not important or are not likely to be solved by a rule change. Even if the Subcommittee does eventually recommend that the full Committee consider changes to Rule 23, the recommendations may differ from the ideas explored in this memorandum.**

The purpose of this memorandum, therefore, is to share with the full Committee the content and fruit of the Subcommittee's recent discussions. The hope is that the discussion at the full Committee meeting will illuminate the various ideas generated so far, and also call attention to additional topics that seem to justify examination by the Subcommittee.

The time has come for moving beyond purely topical discussion, however. In order to make the discussion more concrete, this memorandum presents conceptual sketches of some possible amendments, sometimes accompanied with possible Committee Note language that can provide an idea of what a Note might actually say if rule changes along the lines presented were proposed. **These conceptual sketches are not intended as initial drafts of actual rule change proposals, and should not be taken as such. By the time the Subcommittee convenes its mini-conference in September, 2015, it may be in a position to offer preliminary ideas about such drafts. But as the array of questions in this memorandum attests, it has not reached that point yet.**

The Subcommittee's work has been greatly assisted by review of the ALI Principles of Aggregate Litigation. Those Principles embody a careful study of some of the issues covered in this memorandum, and occasionally provide a starting point in analysis of those issues, and in drafting possible rule provisions to address them.

The topics covered in this memorandum are:

(1) Settlement Approval Criteria

In 2003, Rule 23(e) was amended to expand its treatment of judicial review of proposed class-action settlements. To a considerable extent, those amendments built on existing case law on settlement approval. As amended in 1966, Rule 23(e) required court approval for settlement, compromise, or voluntary dismissal of a class action, but it provided essentially no direction about what the court was to do in reviewing a proposed settlement.[1]

Left to implement the rule's requirement of court approval of settlement, the courts developed criteria. To a significant extent, that case law development occurred during the first two decades after Rule 23 was revised in 1966. It produced somewhat similar, but divergent, lists of factors to be employed in different circuits. The Subcommittee has compiled a list of the factors used in the various circuits that is attached as an Appendix to this memorandum.

Several points emerge from the lists of factors. One is that, although they are similar, they are not the same. Thus, lawyers in different circuits, even when dealing with nationwide class actions, would need to attend to the particular list employed in the particular circuit. A second point is that at least some of the factors that some courts adopted in the 1970s seem not to be very pertinent to contemporary class action practice. Yet they command obeisance in the circuits that employ them even though they probably do not facilitate the court's effort to decide whether to approve a proposed settlement. A third point is that there are other matters, not included in the courts' 1970s-era lists, that contemporary experience suggests should matter in assessing settlements.

The ALI Aggregate Litigation Principles proposed a different approach, which is partly reflected in the conceptual discussion draft below. The ALI explanation for its approach was as follows:

> The current case law on the criteria for evaluating settlements is in disarray. Courts articulate a wide range of factors to consider, but rarely discuss the significance to be given to each factor, let alone why a particular factor is probative. Factors mentioned in the cases include, among others [there follows a list of about 17 factors].
>
> Many of these criteria may have questionable probative value in various circumstances. For instance, although a court might give weight to the fact that counsel for the class or the defendant favors the settlement, the court should keep in mind that the lawyers who negotiated the settlement will rarely offer anything less than a strong favorable endorsement.

ALI Aggregate Litigation Principles § 3.05 Comment (a) at 205-06.

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[1] From 1966 to 2003, Rule 23(e) said, in toto: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal shall be given to all members of the class in such manner as the court directs."

There are two appendices at the end of the memorandum that offer further details and ideas. Appendix I is the draft Committee Note developed early in the evolution of Rule 23(e) amendments in 2000-02. It offers a list of factors that might be added to a rule revision, or to a Committee Note. The approach of the conceptual draft of the rule amendment idea below, however, trains more on reducing the focus to four specified considerations that seem to be key to approval, adding authority to decline approval based on other considerations even if positive findings can be made on these four topics.

Appendix II offers a review of the current "approval factors" in the various circuits, plus additional information about the California courts' standards for approving settlements and the ALI Principles approach.

As Committee members consider this conceptual draft and the alternative details in Appendix I and Appendix II, one way of approaching the topic is to ask whether adopting a rule like this would provide important benefits. Balanced against that prospect is the likelihood that amending the rule would also produce a period of uncertainty, particularly if it supersedes current prevailing case law in various circuits. At the same time, it may focus attention for courts, counsel, and even objectors, on matters that are more important than other topics included on some courts' lists of settlement-approval factors.

Conceptual Discussion Draft of Rule 23(e)
Amendment Idea

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(2) If the proposal would bind class members,

Alternative 1

(A) the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate. The court may make this finding only on finding that:

Alternative 2

(A) the court may approve it only after a hearing and on finding that: ~~it is fair, reasonable, and adequate.~~

(i) the class representatives and class counsel have been and currently are

adequately representing the class;

(ii) the relief awarded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair, reasonable, and adequate given the costs, risks, probability of success, and delays of trial and appeal;

(iii) class members are treated equitably (relative to each other) based on their facts and circumstances and are not disadvantaged by the settlement considered as a whole; and

(iv) the settlement was negotiated at arm's length and was not the product of collusion.

(B) The court may also consider any other matter pertinent to approval of the proposal, and may refuse to approve it on any such ground.

Conceptual Sketch of Committee Note Ideas

In 2003, Rule 23(e) was amended to direct that a court may approve a settlement proposal in a class action only on finding that it is "fair, reasonable, and adequate." This provision was based in large measure on judicial experience with settlement review. Since 2003, the courts have gained more experience in settlement review.

Before 2003, many circuits had developed lists of "factors" that bore on whether to approve proposed class-action settlements. Although the lists in various circuits were similar, they differed on various specifics and sometimes included factors of uncertain utility in evaluating proposed settlements. The divergence among the lists adopted in various circuits could sometimes cause difficulties for counsel or courts.

This rule is designed to supersede the lists of factors adopted in various circuits with a uniform set of core factors[2] that the court must find satisfied before approving the proposal. Rule 23(e)(2)(A) makes it clear that the court must affirmatively find all four of the enumerated factors satisfied before it may approve the proposal.

But this is not a closed list; under Rule 23(e)(2)(B) the court may consider any matter pertinent to evaluating the fairness of the proposed settlement.[3] The rule makes it clear that the court

[2] Is this really accurate? The rule permits the court to refer to "any other matter pertinent to approval of the proposal." Should the point be to offer evaluations of factors endorsed in the past by some courts? See Appendix II regarding the factors presently employed in various circuits.

[3] It might be that a much more extensive discussion of other factors could be added here, along the lines of the material in Appendix I.

may disapprove the proposal on such a ground even though it can make the four findings required by Rule 23(e)(2)(A). Some factors that have sometimes been identified as pertinent seem ordinarily not to be, however. For example, the fact that counsel for the class and the class opponent support the proposal would ordinarily not provide significant support for a court's approval of the proposal. Somewhat similarly, particularly in cases involving relatively small individual relief for class members, the fact the court has received only a small number of objections may not provide significant support for a finding the settlement is fair.[4]

[Before notice is sent to the class under Rule 23(e)(1), the court should make a preliminary evaluation of the proposal. If it is not persuaded that the proposal provides a substantial basis for possible approval, the court may decline to order notice. But a decision to order notice should not be treated as a "preliminary approval" of the proposal, for the required findings and the decision to approve a proposal must not be made until objections are evaluated and the hearing on the proposal occurs.][5]

The first factor calls for a finding that the class representatives and class counsel have provided adequate representation. This factor looks to their entire performance in relation to the action. One issue that may be important in some cases is whether, under the settlement, the class representatives are to receive additional compensation for their efforts.[6] Another may in some instances be the amount of any fee for class counsel contemplated by the proposed settlement.[7] In

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[4] Is this discussion of "suspect" factors sufficient?

[5] This paragraph attempts to introduce something endorsed by the ALI Principles – that preliminary authorization for notice to the class not become "preliminary approval." Whether saying so is desirable could be debated. Whether saying so in the Note is sufficient if saying so is desirable could also be debated. One could, for example, consider revising Rule 23(e)(1) along the following lines:

> **(1)** The court must, after finding that giving notice is warranted by the terms of the proposed settlement, direct notice in a reasonable manner to all class members who would be bound by the proposal.

[6] This factor seems worth mentioning, but perhaps it should not be singled out. It could cut either way. In a small-claim case, it might be sensible to provide reasonable additional compensation for the representative, who otherwise might have had to do considerable work for no additional compensation. The better the "bonus" corresponds to efforts expended by the representation working on the case, the stronger this factor may favor the settlement. The more the amount of compensation reflects some sort of "formula" or set amount unrelated to effort from the representative, the more it may call the fairness of the settlement into question. When the individual recovery is small and the incentive bonus for the class representatives is large, that may, standing alone, raise questions about the settlement, given that the class representatives may have much to lose if the settlement is not approved but little to gain if the case goes to trial and the class recovers many times what the settlement provides.

[7] This factor also seems worth mentioning in the Note. Presumably an agreement that says the court will set the attorney fee, and nothing more, raises fewer concerns than one that says the defendant will not oppose a fee up to $*X*. But the amount of the fee is often included in the Rule 23(e) notice of proposed settlement so that an additional notice is not mandated by Rule 23(h)(1).

some instances, the court has already appointed class counsel under Rule 23(g).[8] The court would then need only review the performance of counsel since that time. In making this determination about the performance of class counsel in connection with the negotiation of the proposal, the court should be as exacting as Rule 23(g) requires for appointment of class counsel.

The second factor calls for the court to assess the relief awarded to the class under the proposed settlement in light of a variety of practical matters that bear on whether it is adequate. In connection with this factor, it may often be important for counsel to provide guidance to the court about how these considerations apply to the present action. For example, the prospects for success on the merits, and the likely dimensions of that success, should be evaluated. It may also be important for the court to attend to the degree of development of the case to determine whether the existing record affords a sufficient basis for evaluation of these factors. There is no "minimum" amount of discovery, or other work, that must be done before the parties reach a proposed settlement, but the court may seek assurance that it has a firm foundation for assessing the considerations listed in the second factor.[9]

The third factor requires the court to find that the proposed method of allocating the benefits of the settlement among members of the proposed class is equitable. A pro rata distribution is not required, but the court may inquire into the proposed method for allocating the benefits of the settlement among members of the class. [It is possible that this inquiry may suggest the need for subclassing.][10]

The fourth factor partly reinforces the first factor, and may take account of any agreements identified pursuant to Rule 23(e)(3). The court should pay close attention to specifics about the manner and content of negotiation of the proposed settlement. Any "side agreements" that emerged from the negotiations deserve scrutiny. These inquiries may shed light on the second and third factors as well.

Any other factors that are pertinent to whether to approve the proposed settlement deserve attention in the settlement-review process. The variety of factors that might bear on a given proposed settlement is too large for enumeration in a rule, although some that have been mentioned by some courts – such as support from the counsel who negotiated the settlement – would ordinarily not be entitled to much weight.

This rule provides guidance not only for the court, but also for counsel supporting a proposed

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[8] This would include the appointment of "interim counsel" under Rule 23(g)(3), and that fact could be mentioned in the Note if it were considered desirable to do so.

[9] This paragraph attempts to invite appropriate judicial scrutiny of the possible risks of a cheap "early bird" settlement, but also to ward off arguments that no settlement can be approved until considerable "merits" discovery has occurred, or something of the sort.

[10] Is this bracketed language a desirable thing to include in the Note? The point seems obvious in some ways, but the consequences of subclassing may be to delay, or perhaps derail, a settlement.

settlement and for objectors to a proposed settlement. [The burden of supporting the proposed settlement falls initially on the proponents of the proposal. As noted above, the court's initial decision that notice to the class was warranted under Rule 23(e)(1) does not itself constitute a "preliminary" approval of the proposal's terms.][11]

[As noted in Rule 23(e)(4) regarding provision of a second opt-out right, the court may decline to approve a proposed settlement unless it is modified in certain particulars. But it may not "approve" a settlement significantly different from the one proposed by the parties. Modification of the proposed settlement may make it necessary to give notice the class again pursuant to Rule 23(e)(1) to permit class members to offer any further objections they may have, or (if the modifications increase significantly the benefits to class members) for class members who opted out to opt back into the class.][12] [13]

(2) Settlement Class Certification

The Committee is not writing on a blank slate in addressing this possibility. In 1996, it published a proposal to adopt a new Rule 23(b)(4) explicitly authorizing certification for settlement purposes, under Rule 23(b)(3) only, in cases that might not qualify for certification for litigation

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[11] This language about the burden of supporting the settlement seems implicit in the rule, and corresponds to language in ALI § 3.05(c).

[12] This paragraph pursues suggestions in ALI § 3.05(e). Are these ideas worthy of inclusion in the Note?

[13] The above sketch of a draft Note says little about the claims process. It may be that more should be said. ALI § 3.05 comment (f) urges that, when feasible, courts avoid the need for submission of claims, and suggests that direct distributions are usually possible when the settling party has reasonably up-to-date and accurate records. This suggestion is not obviously tied to any black letter provision.

The whole problem of claims processing may deserve attention. It is not currently the focus of any rule provisions. It may relate to the cy pres phenomenon discussed in part (3) below. If defendant gets back any residue of the settlement funds, it may have an incentive to make the claims procedure long and difficult. Keeping an eye on that sort of thing is a valid consideration for the court when it passes on the fairness of the settlement. In addition, in terms of valuing the settlement for the class as part of the attorneys' fee decision, the rate of actual claiming may be an important criterion. Cf. 28 U.S.C. § 1712(a) (requiring, in "coupon settlement" cases, that the focus in setting attorney fees be on "the value to class members of the coupons that are redeemed"). If there is a way to avoid the entire effort of claims submission and review, that might solve a number of problems that have plagued some cases in the past.

At the same time, a "streamlined" claims payment procedure may benefit some class members at the expense of others. A more particularized claims process might differentiate between class members in terms of their actual injuries in ways not readily achievable using only the defendant's records.

Altogether, these issues present challenges. Whether they are suitable topics for a rule provision is another matter. Up until now, they have largely been regarded as matters of judicial management rather than things to be addressed by rule. See Manual for Complex Litigation (4th) § 21.66 (regarding settlement administration).

purposes. This history may be very familiar to some members of the Committee, but for some it may have receded from view. In order to provide that background, the 1996 rule proposal and accompanying Committee Note are set out. In addition, footnotes call attention to developments since then and contemporary issues that seem relevant to the matter currently before the Committee.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * *

(4) the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial.

* * * * *

The draft Committee Note that accompanied that proposal was as follows (with some footnotes to mention issues presented by doing the same thing as before).

Subdivision (b)(4) is new. It permits certification of a class under subdivision (b)(3) for settlement purposes, even though the same class might not be certified for trial. Many courts have adopted the practice reflected in this new provision. See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 72-73 (2d Cir.1982); In re Beef Industry Antitrust Litigation, 607 F.2d 167, 170-71, 173-78 (5th Cir.1979). Some very recent decisions, however, have stated that a class cannot be certified for settlement purposes unless the same class would be certified for trial purposes. See Georgine v. Amchem Products, Inc., 83 F.3d 610 (3d Cir.1996); In re General Motors Corp. Pick-Up Trick Fuel Tank Litigation, 55 F.3d 768 (3d Cir. 1995). This amendment is designed to resolve this newly apparent disagreement.[14]

Although subdivision (b)(4) is formally separate, any class certified under its terms is a (b)(3) class with all the incidents of a (b)(3) class, including the subdivision (c)(2) rights to notice and to request exclusion from the class. Subdivision (b)(4) does not speak to the question whether a settlement class may be certified under subdivisions (b)(1) or (b)(2).[15]

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[14] Obviously resolving that 1996 circuit conflict is no longer necessary given the Amchem decision; the issue now is whether to modify what Amchem said or implied.

[15] Deleting the limitation to (b)(3) classes would speak to that question. In speaking to it, one could urge that, at least where there really is "indivisible" relief sought, it does seem that a settlement class should be possible. Perhaps a police practices suit would be an example. Could the SDNY stop-and-frisk class action have been resolved as a settlement class action? It may be that using a class action would be essential to avoid standing issues. See City of Los Angeles v. Lyons, 461 U.S. 95 (1983) (holding that plaintiff injured by police use of choke-hold could sue for damages, but not for an injunction because he could not show it would likely be used on him again). Issues of class definition, and particularly ascertainability, may present

As with all parts of subdivision (b), all of the prerequisites of subdivision (a) must be satisfied to support certification of a (b)(4) settlement class.[16] In addition, the predominance and superiority requirements of subdivision (b)(3) must be satisfied.[17] Subdivision (b)(4) serves only to make it clear that implementation of the factors that control certification of a (b)(3) class is affected by the many differences between settlement and litigation of class claims or defenses. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated.[18] Settlement can be reached, however, on terms that surmount such difficulties. Many other elements are affected as well. A single court may be able to manage settlement when litigants would require resort to many courts. And, perhaps most important, settlement may prove far superior to litigation in devising comprehensive solutions to large-scale problems that defy ready disposition by traditional adversary litigation.[19] Important benefits may be provided for those who, knowing of the class settlement and the opportunity to opt out, prefer to participate in the class judgment and avoid the costs of individual litigation.

For all the potential benefits, settlement classes also pose special risks. The court's Rule 23(e) obligations to review and approve a class settlement commonly must surmount the information difficulties that arise when the major adversaries join forces as proponents of their settlement agreement.[20] Objectors frequently appear to reduce these difficulties, but

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challenges in such cases. But it may be that recognizing that settlements are available options in such cases as to future conduct is desirable. It is worth noting that Rule 23 currently has no requirement of notice of any sort to the class in (b)(2) actions unless they are settled.

[16] On this score, the application of (a)(2) in Wal-Mart Stores, Inc. v. Dukes may be of particular importance.

[17] This sentence was written before Amchem was decided; the Supreme Court fairly clearly said that predominance remained important, but that manageability (a factor in making both the predominance and superiority decision) did not. Whether to continue to require predominance to be established in (b)(4) class actions is open to discussion and raised by an alternative possible rule change explored below in text.

[18] Choice-of-law challenges might be precisely the sort of thing that could preclude settlement certification under a strong view of the predominance requirement. As Sullivan v. DB Investment suggests, differing state law may be accommodated in the settlement context.

[19] Arguably there is a principled tension among the courts of appeal that is pertinent to this point. The Third Circuit has said several times that class-action settlements are desirable to achieve a nationwide solution to a problem. The Seventh Circuit, on the other hand, has on one occasion at least said that "the vision of 'efficiency' underlying this class certification is the model of the central planner. * * * The central planning model – one case, one court, one set of rules, one settlement price for all involved – suppresses information that is vital to accurate resolution." In re Bridgestone/Firestone, 288 F.3d 1012, 1020 (7th Cir.2002).

[20] It should be noted that when this draft Note was written Rule 23(e) was relatively featureless, directing only that court approval was required for dismissal. In 2003, it was augmented with many specifics, and part (1) of this memorandum offers a proposal to refine and focus those specifics.

it may be difficult for objectors to obtain the information required for a fully informed challenge. The reassurance provided by official adjudication is missing. These difficulties may seem especially troubling if the class would not have been certified for litigation, or was shaped by a settlement agreement worked out even before the action was filed.

These competing forces are reconciled by recognizing the legitimacy of settlement classes but increasing the protections afforded to class members. Certification of a settlement class under (b)(4) is authorized only on request of parties who have reached a settlement. Certification is not authorized simply to assist parties who are interested in exploring settlement, not even when they represent that they are close to agreement and that clear definition of a class would facilitate final agreement.[21] Certification before settlement might exert untoward pressure to reach agreement, and might increase the risk that the certification could be transformed into certification of a trial class without adequate reconsideration.[22] These protections cannot be circumvented by attempting to certify a settlement class directly under subdivision (b)(3) without regard to the limits imposed by (b)(4).

Notice and the right to opt out provide the central means of protecting settlement class members under subdivision (b)(3),[23] but the court also must take particular care in applying some of Rule 23's requirements. As to notice, the Federal Judicial Center study suggests that notices of settlement do not always provide the clear and succinct information that must be provided to support meaningful decisions whether to object to the settlement

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[21] Note that, as added in 2003, Rule 23(g)(3) authorizes appointment of interim class counsel, a measure that may enable the court to exercise some control over the cast authorized to negotiate a proposed class settlement in the pre-certification phase of the litigation. The Committee Note accompanying this rule addition in 2003 explained:

> Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. [The new rule provision] authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

[22] This comment seems designed to make the point in ALI § 3.06(d) – that statements made in support of settlement class certification should not be used against a party that favored such certification but later opposes litigation certification. Perhaps that asks too much of the judge.

[23] Needless to say, this comment is not applicable to (b)(1) or (b)(2) certification, if those were included in (b)(4). It could be noted that 23(e) requires notice (but not opt out) in such cases.

or – if the class is certified under subdivision (b)(3) – whether to request exclusion.[24] One of the most important contributions a court can make is to ensure that the notice fairly describes the litigation and the terms of the settlement. Definition of the class also must be approached with care, lest the attractions of settlement lead too easily to an over-broad definition. Particular care should be taken to ensure that there are not disabling conflicts of interests among people who are urged to form a single class. If the case presents facts or law that are unsettled and that are likely to be litigated in individual actions, it may be better to postpone any class certification until experience with individual actions yields sufficient information to support a wise settlement and effective review of the settlement.

Conceptual Draft of 23(e) Amendment Idea

The animating objective of the conceptual draft below is to place primary reliance on superiority and the invigorated settlement review (introduced in part (1) of this memorandum) to assure fairness in the settlement context, and therefore to remove emphasis on predominance when settlement certification is under consideration.

An underlying question is whether such an approach should be limited to (b)(3) class actions. There may be much reason to include (b)(2) class actions in (b)(4) but perhaps less reason to include (b)(1) cases.

Another question is whether it should be required that in any case seeking certification for purposes of settlement under (b)(4) the parties demonstrate that all requirements of Rule 23(a) are satisfied. Arguably, some of those – typicality, for example – don't matter much at the settlement stage. Concern that the past criminal history of the class representative might come into evidence at trial (assuming that makes the representative atypical) may not matter then. On the other hand, introducing a new set of "similar" criteria that are different could produce difficulties. This conceptual draft therefore offers an Alternative 2 that does not invoke Rule 23(a), but the discussion focuses on Alternative 1, which does invoke the existing rule. If the Alternative 2 approach is later preferred, adjustments could be made.

(b) Types of Class Actions. A class action may be maintained if Rule 23(a) is satisfied and if:

* * * * * *

Alternative 1

(4) the parties to a settlement [in an action to be certified under subdivision (b)(3),] request certification and the court finds that the action satisfies Rule 23(a), that the

[24] Note that, as amended in 2003, Rule 23(c)(2)(B) responds to the sorts of concerns that were raised by the FJC study.

proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).

Alternative 2

(4) the parties to a settlement [in an action to be certified under subdivision (b)(3),] request certification and the court finds that significant common issues exist, that the class is sufficiently numerous to warrant classwide treatment, and that the class definition is sufficient to ascertain who is and who is not included in the class. The court may then grant class certification if the proposed settlement is superior to other available methods for fairly and efficiently adjudicating the controversy, and that it should be approved under Rule 23(e).[25]

This approach seems clearly contrary to Amchem, which said that Rule 23(e) review of a settlement was not a substitute for rigorous application of the criteria of 23(a) and (b). It also may appear to invite the sort of "grand compensation scheme" quasi-legislative action by courts that the Court appeared to disavow in Amchem. Particularly if this authority were extended beyond (b)(3),[26] and a right to opt out were not required, this approach seems very aggressive. Below are some thoughts about the sorts of things that might be included in a sketch of a draft Committee Note.

Sketch of Draft Committee Note ideas
[Limited to Alternative 1]

Subdivision (b)(4) is new. In 1996, a proposed new subdivision (b)(4) was published for public comment. That new subdivision would have authorized certification of a (b)(3) class for settlement in certain circumstances in which certification for full litigation would not be possible. One stimulus for that amendment proposal was the existence of a conflict among the courts of appeals about whether settlement certification could be used only in cases that could be certified for full litigation. That circuit conflict was resolved by the holding in *Amchem Products, Inc. v.*

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[25] ALI § 3.06(b) says that "a court may approve a settlement class if it finds that the settlement satisfies the criteria of [Rule 23(e)], and it further finds that (1) significant common issues exist; (2) the class is sufficiently numerous to warrant classwide treatment, and (3) the class definition is sufficient to ascertain who is and who is not included in the class. The court need not conclude that common issues predominate over individual issues."

[26] On this score, note that ALI § 3.06(c) said:

> In addition to satisfying the requirements of subsection (b) of this Section [quoted in a footnote above], in cases seeking settlement certification of a mandatory class, the proponents of the settlement must also establish that the claims subject to settlement involve indivisible remedies, as defined in the Comment to § 2.04.

Needless to say, "indivisible remedies" is not a term used in the civil rules. Attempting to define them, or some alternative term, might be challenging. § 2.04 has three subsections, and is accompanied by six pages of comments and six pages of Reporters' Notes.

Windsor, 521 U.S. 591 (1997), that the fact of settlement is relevant to class certification. The (b)(4) amendment proposal was not pursued after that decision.

Rule 23(f), also in the package of amendment proposals published for comment in 1996, was adopted and went into effect in 1998. As a consequence of that addition to the rule, a considerable body of appellate precedent on class-certification principles has developed. In 2003, Rule 23(e) was amended to clarify and fortify the standards for review of class settlements, and subdivisions (g) and (h) were added to the rule to govern the appointment of class counsel, including interim class counsel, and attorney fees for class counsel. These developments have provided added focus for the court's handling of the settlement-approval process under Rule 23(e).

Concerns have emerged about whether it might sometimes be too difficult to obtain certification solely for purposes of settlement. Some reported that alternatives such as multidistrict processing or proceeding in state courts have grown in popularity to achieve resolution of multiple claims.

This amendment is designed to respond to those concerns by clarifying and, in some instances, easing the path to certification for purposes of settlement. Like the 1996 proposal, this subdivision is available only after the parties have reached a proposed settlement and presented it to the court. Before that time, the court may, under Rule 23(g)(3), appoint interim counsel to represent the interests of the putative class.

[Subdivision (b)(4) is not limited to Rule 23(b)(3) class actions. It is likely that actions brought under subdivision (b)(3) will be the ones in which it is employed most frequently, but foreclosing pre-certification settlement in actions brought under subdivisions (b)(1) or (b)(2) seems unwarranted. At the same time, it must be recognized that approving a class-action settlement is a challenging task for a court in any class action. Amendments to Rule 23(e) clarify the task of the judge and the role of the parties in connection with review of a proposed settlement.[27]]

Like all class actions, an action certified under subdivision (b)(4) must satisfy the requirements of Rule 23(a).[28] Unless these basic requirements can be satisfied, a class settlement should not be authorized.

Increasing confidence in the ability of courts to evaluate proposed settlements, and tools available to them for doing so, provide important support for the addition of subdivision (b)(4). For that reason, the subdivision makes the court's conclusion under Rule 23(e) an essential component

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[27] This treatment may be far too spare. Note that the ALI proposal limited the use of "mandatory class action" settlement to cases involving "indivisible relief," a term that is not presently included in the civil rules and that the ALI spent considerable effort defining.

[28] This is a point at which Alternative 2, modeled on the ALI approach, would produce different Committee Note language. Arguments could be made that Wal-Mart Stores, Inc. v. Dukes has raised the bar under Rule 23(a)(2) too high. The ALI approach is to say that "significant common issues" are presented. See ALI § 3.06(b).

to settlement class certification. Under amended Rule 23(e), the court can make the required findings to approve a settlement only after completion of the full Rule 23(e) settlement-review process. Given the added confidence in settlement review afforded by strengthening Rule 23(e), the Committee is comfortable with reduced emphasis on some provisions of Rule 23(a) and (b).[29]

Subdivision (b)(4) also borrows a factor from subdivision (b)(3) as a prerequisite for settlement certification – that the court must also find that resolution through a class-action settlement is superior to other available methods for fairly and efficiently adjudicating the controversy. Unless that finding can be made, there seems no reason for the court or the parties to undertake the responsibilities involved in a class action.

Subdivision (b)(4) does not require, however, that common questions predominate in the action. To a significant extent, the predominance requirement, like manageability, focuses on difficulties that would hamper the court's ability to hold a fair trial of the action. But certification under subdivision (b)(4) assumes that there will be no trial. Subdivision (b)(4) is available only in cases that satisfy the common-question requirements of Rule 23(a)(2), which ensure commonality needed for classwide fairness. Since the Supreme Court's decision in Amchem, the courts have struggled to determine how predominance should be approached as a factor in the settlement context. This amendment recognizes that it does not have a productive role to play and removes it.[30]

Settlement certification also requires that the court conclude that the class representatives are typical and adequate under Rule 23(a)(3) and (4).[31] Under amended Rule 23(e), the court must also find that the settlement proposal was negotiated at arms length by persons who adequately represented the class interests, and that it provides fair and adequate relief to class members, treating them equitably.

In sum, together with changes to Rule 23(e), subdivision (b)(4) ensures that the court will give appropriate attention to adequacy of representation and the fair treatment of class members relative to each other and the potential value of their claims. At the same time, it avoids the risk that a desirable settlement will prove impossible due to factors that matter only to a hypothetical trial scenario that the settlement is designed to avoid.

[Should the court conclude that certification under subdivision (b)(4) is not warranted – because the proposed settlement cannot be approved under subdivision (e) or because the requirements of Rule 23(a) or superiority are not met – the court should not rely on the parties' statements in connection with proposed (b)(4) certification in relation to later class certification or

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[29] Without exactly saying so, this sentence is meant to counter the assertion in Amchem that Rule 23(e) is an additional factor, not a superseding consideration, when settlement certification is proposed.

[30] This material attempts to address Amchem's assertion that superiority continues to be important. Is it persuasive? If so, should the Note say that it is changing what the Supreme Court said in Amchem, perhaps by citing the passage in the decision where the court discussed superiority?

[31] As at other points, adopting Alternative 2 would change this.

merits litigation.][32]

[32] The ALI Principles include such a provision in the rule. This suggests a comment the Note. The ALI provision seems to have been prompted by one 2004 Seventh Circuit decision, Carnegie v. Household Int'l, Inc., 376 F.3d 656, 660 (7th Cir. 2004). Carnegie was a rather remarkable case. It first came to the Seventh Circuit in Reynolds v. Beneficial National Bank, 288 F.3d 277 (7th Cir. 2002), after the district judge granted settlement class certification and, on the strength of that, enjoined litigation in various state courts against the same defendants on behalf of statewide classes. The Court of Appeals reversed approval of the proposed settlement in the federal court, "concerned that the settlement might have been the product of collusion between the defendants, eager to minimize their liability, and the class lawyers, eager to maximize their fees." 376 F.3d at 659.

The Court of Appeals (under its Local Rule 36), then directed that the case be assigned on remand to a different judge, and the new judge approved the substitution of a new class representative (seemingly an objector the first time around) and appointed new class counsel. This new judge later certified a litigation class very similar to the settlement class originally certified. Defendants appealed that class-certification decision, objecting that the new judge had improperly directed the defendants initially to state their objections to litigation certification, thereby imposing on them the burden of proving that certification was not justified instead of making plaintiff justify certification. The Seventh Circuit rejected this argument because the new judge "was explicit that the burden of persuasion on the validity of the objections [to certification] would remain on the plaintiffs." 376 F.3d at 662.

The Court of Appeals also invoked the doctrine of judicial estoppel, which it explained involved an "antifraud policy" that precluded defendants "from challenging [the class's] adequacy, at least as a settlement class," noting that "the defendants benefitted from the temporary approval of the settlement, which they used to enjoin the other * * * litigation against them." Id. at 660. At the same time, the court acknowledged "that a class might be suitable for settlement but not for litigation." It added comments about the concern that its ruling might chill class-action settlement negotiations (id. at 663):

> The defendants tell us that anything that makes it easier for a settlement class to molt into a litigation class will discourage the settlement of class actions. * * * * But the defendants in this case were perfectly free to defend against certification; they just didn't put up a persuasive defense.

Whether this decision poses a significant problem is debatable. The situation seems distinctive, if not unique. The value of a rule provision concerning the "binding" effect of defendants' support for certification for settlement, or even a comment in the Note is therefore also debatable. In any event, it might not prevent a state court from doing what it says should not be done. Recall that in the original Reynolds appeal (described above), there was an injunction against state-court litigation. Whether a federal rule can prevent a state court from giving weight to these sorts of matters is an interesting issue. As a general matter, this subject reminds us of other provisions about the preclusive effect of class-certification rulings or to decisions disapproving a proposed class settlement. That has been an intriguing prospect in the past, but one the Advisory Committee has not followed.

(3) Cy pres

The development of cy pres provisions in settlements has not depended meaningfully on any precise provisions of Rule 23. The situations in which this sort of arrangement might be desired probably differ from one another. Several come to mind:

(1) Specific individual claimants cannot be identified but measures to "compensate" them can be devised. The famous California case of Daar v. Yellow Cab, 433 P.2d 732 (Cal. 1967), is the prototype of this sort of thing – because the Yellow Cab meters had been set too high in L.A. for a period of time, the class action resolution required that the Yellow Cab meters be set a similar amount too low for a similar period, thereby conferring a relatively offsetting benefit on more or less the same group of people, people who used Yellow Cabs in L.A. (Note that competing cab companies in this pre-Uber era may not have liked the possibility that customers would favor Yellow Cab cabs because they would be cheaper.)

(2) Individual claimants could be identified, but the cost of identifying them and delivering money to them would exceed the amount of money to be delivered.

(3) A residue is left after the claims process is completed, and the settlement does not provide that the residue must be returned to the defendant. (If it does provide for return to the defendant, there may be an incentive for the defendant to introduce extremely rigorous criteria class members have to satisfy to make claims successfully.)

Whether all these kinds of situations (and others that come to mind) should be treated the same is not certain. In some places state law may actually address such things. See Cal. Code Civ. Proc. § 384, which contains specific directions to California judges about residual funds left after payments to class members.

Much concern has been expressed in several quarters about questionable use of cy pres provisions, and the courts' role in approving those arrangements under Rule 23. Most notable is the Chief Justice's statement regarding denial of certiorari in Marek v. Lane, 134 S.Ct. 8 (2013) that the Court "may need to clarify the limits on the use of such remedies." Id. at 9. That case involved challenges to provisions in a settlement of a class action against Facebook alleging privacy claims.

§3.07 of the ALI Principles directly addresses cy pres in a manner that several courts of appeals have found useful. One might argue that the courts' adoption of §3.07 makes a rule change unnecessary. On the other hand, the piecemeal adoption by courts of the ALI provision seems a dubious substitute, and it may be wise to have in mind the Chief Justice's suggestion that the Supreme Court may need to take a case to announce rules for the subject.

The ALI provision could be a model for additions to Rule 23(e):

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's

approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

(3) The court may approve a proposal that includes a cy pres remedy [if authorized by law][33] even if such a remedy could not be ordered in a contested case. The court must apply the following criteria in determining whether a cy pres award is appropriate:

(A) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds must[34] be distributed directly to individual class members;

(B) If the proposal involves individual distributions to class members and funds remain after distributions, the settlement must provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair;

(C) The proposal may provide that, if the court finds that individual distributions are not viable under Rule 23(e)(3)(A) or (B), a cy pres approach may be employed if it directs payment to a recipient whose interests reasonably approximate those being pursued by the class. [The court may presume that

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[33] This bracketed qualification is designed to back away from creating new authority to use cy pres measures. It is clear that some courts have been authorizing cy pres treatment. Indeed, the Eighth Circuit's recent opinion in In re BankAmerica Corp. Securities Lit., 775 F.3d 1060 (8th Cir. 2015), suggested that it is impatient with their willingness to do so. It is less clear where the authority for them to do so comes from. In some places, like California, there is statutory authority, but there are probably few statutes. It may be a form of inherent power, though that is a touchy subject. Adding a phrase of this sort is designed to make clear that the authority does not come from this rule.

On the other hand, one might say that the inclusion of cy pres provisions in the settlement agreement is entirely a matter of party agreement and not an exercise of judicial power. But one might respond that the binding effect of a settlement class action judgment is dependent on the exercise of judicial power, and that the court has a considerable responsibility to ensure the appropriateness of that arrangement before backing it up with judicial power. So the rule would guide the court in its exercise of that judicial power.

In any event, it may be that there is not need to say "if authorized by law" in the rule because – like many other agreements included in settlements – cy pres provisions do not depend on such legal authorization, even if their binding effect does depend on the court's entry of a judgment.

[34] The ALI uses "should," but "must" seems more appropriate.

29 individual distributions are not viable for sums of less than $100.][35] [If no
30 such recipient can be identified, the court may approve payment to a recipient
31 whose interests do not reasonably approximate the interests being pursued by
32 the class if such payment would serve the public interest.][36]
33

(4~~3~~) The parties seeking approval * * *

As noted above, the ALI proposal has received considerable support from courts. A recent example is In re BankAmerica Securities Litigation, 775 F.3d 1060 (8th Cir. 2015), in which the majority vigorously embraced ALI § 3.07, in part due to "the substantial history of district courts ignoring and resisting circuit court cy pres concerns and rulings in class action cases." It also resisted the conclusion that the fact those class members who had submitted claims had received everything they were entitled to receive under the settlement is the same as saying they were fully compensated, which might respond to arguments against proposed (3)(B) above that further distributions to class members who made claims should not occur if they already received the maximum they could receive pursuant to the settlement.

The possibility of Enabling Act issues should be noted, but the solution may be that this is an agreement subject to court approval under Rule 23(e), not a new "remedy" provided by the rules for litigated actions. The situation in California may be illustrative.

Cal. Code Civ. Proc. § 384 directs a California state court to direct left-over funds to groups furthering the proposes sought in the class action or to certain public interest purposes. In a federal court in California, one might confront arguments that §384 dictates how such things must be handled. Reports indicate that the federal courts in California do not regard the statute as directly applicable to cases in federal court, but that they do find it instructive as they apply Rule 23.

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[35] There have been reports that in a significant number of cases distributions of amounts less than $100 can be accomplished. This provision is borrowed from a proposed statutory class-action model prepared by the Commissioners on Uniform State Laws. It may be that technological improvements made such an exclusion from the mandatory distribution requirements of (e)(3)(A) and (B) unnecessary.

[36] This bracketed material is drawn from the ALI proposal. It might be questioned on the ground that it goes beyond what the Enabling Act allows a rule to do. But this provision is about approving what the parties have agreed, not inventing a new "remedy" to be used in litigated actions. It may be that in some litigated actions there is a substantive law basis for a court-imposed distribution measure of the sort the bracketed language describes. Claims for disgorgement, for example, might support such a measure. Though the substantive law upon which a claim is based might, therefore, support such a measure, this provision does not seek to authorize such a remedy.

Note that the Class Action Fairness Act itself has a small provision that authorizes something along this line. Thus, 28 U.S.C. § 1712(e) provides: "The court, in its discretion, may also require that a proposed settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to 1 or more charitable or governmental organizations, as agreed to by the parties." This section of the statute deals with coupon settlements more generally, and not in a manner that encourages parties to use them. It is not certain whether resort to the cy pres aspect of CAFA has been attempted with any frequency.

An argument in favor of Enabling Act authority could invoke the Supreme Court's Shady Grove decision and say that Rule 23 occupies this territory and the state law provision on cy pres treatment cannot be applied in federal court as a result. If that argument is right, it seems to provide some support for a rule that more explicitly deals with the sort of thing addressed above. But the bracketed sentence at the end of (C) might raise Enabling Act concerns. The bracketed "if authorized by law" suggestion in the draft rule above is a first cut at a way to sidestep these issues.

It may be said that the bracketed language is not necessary because this provision is only about settlement agreements. Settlement agreements can include provisions that the court could not order as a remedy in a litigated case. So there is latitude to give serious attention to adding references to cy pres treatment in the settlement-approval rule. But it can also be emphasized that the real bite behind the agreement comes from the court's judgment, not the agreement itself.

If the rule can provide such authority, should it so provide? Already quite a few federal judges have approved cy pres arrangements. Already some federal courts have approved the principles in the ALI's § 3.07, from which the first sketch above is drawn.

Despite all those unresolved issues, it may nonetheless be useful to reflect on what sorts of things a Committee Note might say:

Sketch of Draft Committee Note ideas

When a class action settlement for a payment of a specified amount is approved by the court under Rule 23(e), there is often a claims process by which class members seek their shares of the fund. In reviewing a proposed settlement, the court should focus on whether the claims process might be too demanding, deterring or leading to denial of valid claims.[37] Ideally, the entire fund provided will be used (minus reasonable administrative costs) to compensate class members in accord with the provisions of the settlement.

On occasion, however, funds are left over after all initial claims have been paid. Courts faced with such circumstances have resorted on occasion to a practice invoking principles of *cy pres* to support distribution of at least some portion of the settlement proceeds to persons or entities not included in the class. In some instances, these measures have raised legitimate concerns.

Subdivision (e)(3) recognizes and regularizes this activity. The starting point is that the settlement funds belong to the class members and do not serve as a resource for general "public interest" activities overseen or endorsed by the court.[38] Nonetheless, the possibility that there will

[37] It might be attractive to be more forceful (and probably negative) somewhere about reversionary provisions. For example, the Note might say that if there is a reverter clause the court should look at the claims process very carefully to make sure that it does not impose high barriers to claiming. Probably that belongs in the general Rule 23(e) Committee Note about approving settlement proposals. It seems somewhat out of place here, even though it logically relates to the topic at hand.

[38] Is this too strongly worded, or too much a bit of "political" justification?

be a residue after the settlement distribution program is completed makes provision for this possibility appropriate. Unless there is no prospect of a residue after initial payment of claims, the issue should be included in the initial settlement and evaluated by the court along with the other provisions of that proposal.[39] [If no such provision is included in the initial proposal but a residue exists after initial distribution to the class, the court may address the question at that point, but then should consider whether a further notice to the class should be ordered regarding the proposed disposition of the residue.[40]]

Subdivision (e)(3) does not create a new "remedy" for class actions. Such a remedy may be available for some sorts of claims, such as disgorgement of ill-gotten funds, but this rule does not authorize such a remedy for a litigated class action. The cy pres provision is something the parties have included in their proposal to the court, and the court is therefore called upon to decide whether to approve what the parties have agreed upon to resolve the case.

Subdivision (e)(3) provides rules that must be applied in deciding whether to approve cy pres provisions. Paragraph (A) requires that settlement funds be distributed to class members if they can be identified through reasonable effort when the distributions are large enough to be to make distribution economically viable. It is not up to the court to determine whether the class members are "deserving," or other recipients might be more deserving.[41] Thus, paragraph (A) makes it clear that cy pres distributions are a last resort, not a first resort.

Paragraph (B) follows up on the point in paragraph (A), and provides that even after the first distribution is completed there must be a further distribution to class members of any residue if a further distribution is economically viable. This provision applies even though class members have been paid "in full" in accordance with the settlement agreement. Settlement agreements are compromises, and a court may properly approve one that does not provide the entire relief sought by the class members through the action. Unless it is clear that class members have no plausible legal right to receive additional money, they should receive additional distributions.[42]

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[39] Is this too strong? It seems that addressing these issues up front is desirable, and giving notice to the class about the provision for a residue is also valuable. That ties in with the idea that this is about the court's general settlement review authority, and it may prompt attention to whether the claims process is too demanding.

[40] Note that the Eighth Circuit raised the question whether, in the latter situation, there would be a need to notice the class a second time about this change in circumstances and the cy pres treatment under consideration. It seems that the better thing is to get the matter on the table at the outset, although that might make it seem that the parties expect the claims process to have faults. Probably devising a "perfect" claims process is very difficult, so a residue is not proof that the claims process was seriously flawed.

[41] This responds to an argument made in the Eight Circuit case -- that the funds distributed would be to institutional investors, who were less deserving than the legal services agencies that would benefit from the cy pres distributions.

[42] This is an effort to deal with the "paid in full" or "overcompensation" point.

Paragraph (C), therefore, deals only with the rare case in which individual distributions are not viable. The court should not assume that the cost of distribution is prohibitive unless presented with evidence firmly supporting that conclusion.[43] It should take account of the possibility that electronic means may make identifying class members and distributing proceeds to them inexpensive in some cases.[44] [The rule does provide that the court may so assume for distributions of less than $100.[45]] When the court finds that individual distributions would be economically infeasible, it may approve an alternative use of the settlement funds if the substitute recipient's interests "reasonably approximate those being pursued by the class." In general, that determination should be made with reference to the nature of the claim being asserted in the case. [Only if no such recipient can be identified may the court authorize distribution to another recipient, and then only if such distribution would serve the public interest.[46]]

(4) Objectors

The behavior of some objectors has aroused considerable ire among class-action practitioners. But it is clear that objectors play a key role in the settlement-approval process. Rule 23(e)(5) says that class members may object to the proposed settlement, and Rule 23(h)(2) says they may object to the proposed attorney fee award to class counsel. Judges may come to rely on them. CAFA requires that state attorneys general (or those occupying a comparable state office) receive notice of proposed settlements, and they may be a source of useful information to the judge called upon to approve or disapprove a proposed settlement.

The current rules place some limits on objections. Rule 23(e)(5) also says that objections may be withdrawn only with the court's permission. That requirement of obtaining the court's permission was added in 2003 in hopes that it would constrain "hold ups" that some objectors allegedly used to extract tribute from the settling parties.

Proposals have been made to the Appellate Rules Committee to adopt something like the approval requirement under rule 23(e)(5) for withdrawing an appeal from district-court approval of a settlement. Since the delay occasioned by an appeal is usually longer than the period needed to

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[43] If we are to authorize the "only cy pres" method, what can we say about the predicate for using it? The Note language addresses cost. How about cases in which there simply is no way to identify class members? Should those fall outside this provision?

[44] This assertion is based on a hunch.

[45] Should we include such a provision? As noted above, smaller distributions are reportedly done now. Suppose a bank fee case in which the bank improperly charged thousands of account holders amounts less than $100. Assuming the bank could easily identify those account holders and the amount of improperly charged fees, why not direct that their accounts be credited?

[46] This is in brackets in the rule and the Note because, even if the parties agree and the class receives notice of the agreement, it seems a striking use of judicial power. Perhaps, as indicated above in the Note, it is mainly the result of the parties' agreement, not the court's power, which is limited to reviewing and deciding whether to approve the parties' agreement.

review a proposed settlement at the district-court level, that sort of rule change might produce salutary results. But it might be that the district judge would be better positioned to decide whether to permit withdrawal of the appeal than the court of appeals. The Rule 23 Subcommittee intends to remain in touch with the Appellate Rules Committee on these issues as it proceeds with its attention to the civil rules.

Another set of ideas relates to requiring objectors to post a bond to appeal. In Tennille v. Western Union Co., 774 F.3d 1249 (10th Cir. 2014), the district court, relying on Fed. R. App. P. 7, entered an order requiring objectors who appealed approval of a class-action settlement to post a bond of over $1 million to cover (1) the anticipated cost of giving notice to the class a second time, (2) the cost of maintaining the settlement pending resolution of the appeals, and (3) the cost of printing and copying the supplemental record in the case (estimated at $25,000). The court of appeals ruled that the only costs for which a bond could be required under Appellate Rule 7 were those that could be imposed under a statute or rule, so the first two categories were entirely out, and the third category was possible, but that the maximum amount the appellate court could uphold would be $5,000. Other courts have occasionally imposed bond requirements. But the Subcommittee is not presently suggesting any civil rule changes on this subject.

Regarding the civil rules, it is not certain whether the adoption of the approval requirement in Rule 23(e)(5) in 2003 had a good effect in district court proceedings, although some reports indicate that it has. Two sets of ideas are under consideration. One slightly amplifies the Rule 23(e)(5) process by borrowing an idea from Rule 23(3)(2) -- that the party seeking to withdraw an objection advise the court of any "side agreements" that influenced the decision to withdraw. The other follows a suggestion in the ALI Aggregate Litigation principles for imposition of sanctions on those who make objections for improper purposes.

Adding a reporting obligation to (e)(5)

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

* * * * *

Alternative 1

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval, and the parties must file a statement identifying any agreement made in connection with the withdrawal.

Alternative 2

(5) Any class member may object to the proposal if it requires court approval under this

subdivision (e); the objection may be withdrawn only after the filing of a statement identifying any agreement made in connection with the withdrawal, and court approval of the request to withdraw the objection ~~with the court's approval~~.

If it is true that the current provision requiring court approval for withdrawing an objection does the needed job, there may be no reason to add this reporting obligation. There is at least some reason to suspect that class counsel may take the position that there is already some sort of implicit reporting obligation. Experience with the efficacy of the existing reporting provision in (e)(3) may also shed light whether adding one to (e)(5) would be desirable.

Objector sanctions

§ 3.08(d) of the ALI Principles says:

> If the court concludes that objectors have lodged objections that are insubstantial and not reasonably advanced for the purpose of rejecting or improving the settlement, the court should consider imposing sanctions against objectors or their counsel under applicable law.

Comment c to this section says that it "envisions that sanctions will be invoked based upon existing law (e.g., Fed. R. Civ. P. 11, 28 U.S.C. § 1927)."

This proposal raises a number of questions. One idea might be to say explicitly that any objection is subject to Rule 11. That may seem a little heavy handed with lay objectors, and a statement in the class settlement notice appearing to threaten sanctions might do more harm than good. Another idea might be to indicate in a rule that § 1927 is a source of authority to impose sanctions. But that would be a peculiar rule, since it would not provide any authority but only remind the court of its statutory authority. The ALI proposal's "should consider" formulation seems along that line. It does not say the court should do it, but only that the court should think about imposing sanctions.

It seems that a provision along these lines could serve a valuable purpose. In the 2000-02 period, when the 2003 amendments were under consideration, there was much anguish about how to distinguish "good" from "bad" objectors. There is no doubt whatsoever that there are good ones, whose points assist the court and improve the settlement in many instances. But it seems very widely agreed that there are also some bad objectors who seek to profit by delaying final consummation of the deal.

Defining who is a "good" or a "bad" objector in a rule is an impossible task. But there is reason to think that judges can tell in the specific context of a given case and objection. So the goal here would be to rely on the judge's assessment of the behavior of the objector rather than attempt in a rule to specify. Discussion on this topic has only begun in the Subcommittee, but for purposes of broader airing of the issues the following conceptual draft ideas might be informative:

Alternative 1

(5) Any class member may, subject to Rule 11, object to the proposal if it requires court approval under this subdivision (3); the objection may be withdrawn only with the court's approval.

Alternative 2

(5) Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court's approval. If the court finds that an objector has made objections that are insubstantial [and] {or} not reasonably advanced for the purpose of rejecting or improving the settlement, the court [should] {may} impose sanctions on objectors or their counsel {under applicable law}.

Simply invoking Rule 11 (Alternative 1) may be simplest. But as noted above, it may also deter potential objectors too forcefully. One might debate whether the certifications of Rule 11(b) are properly applied here. Invoking Rule 11(c) in this rule might be simpler than trying to design parallel features here. On the other hand, (e)(5) says that the objector may withdraw the objection only with the court's approval while Rule 11's safe harbor provision seems not to require any court approval but instead to permit (perhaps to prompt) a unilateral withdrawal. Rule 11(c) also requires that the party who seeks Rule 11 sanctions first prepare and serve (but not file) a motion for sanctions, which might be a somewhat wasteful requirement.

Alternative 2 is more along the lines of the ALI proposal. But perhaps a provision like this one should create authority for imposing sanctions. The ALI approach seems to rely on authority from somewhere else. If the rule does not create such authority, it sounds more like an exhortation than a rule. The choice between possible verbs – "should" or "may" – seems to bear somewhat on this issue. To say "may" is really saying only that courts are permitted to do what the rules already say they may do; it's like a reminder. To say "should" is an exhortation. Does it supplant the "may" that appears in Rule 11? Perhaps judges are to be quicker on the draw with objectors than original parties. One could also consider saying "must," but since that was rejected for Rule 11 it would seem odd here. In any event, if the rule creates authority to impose sanctions, perhaps it should say what sanctions are authorized.

The description in Alternative 2 of the finding that the court must make to proceed to sanctions on the objector deserves attention. There is a choice between "and" and "or" regarding whether objections that are "insubstantial" were also not advanced for a legitimate purpose. Probably a judge would not distinguish between these things; if the objection is substantial, maybe it is nonetheless advanced for improper reasons. But would a judge ever think so? Does the fact of proposed withdrawal show that an objection was insubstantial? Seemingly not. Objectors often abandon objections when they get a full explanation of the details of the proposed settlement. So for them the use of "and" seems important; they withdraw the objections when they learn more about the deal, and that shows that they were not interposing the objections for an improper purpose. Could an objector who raises substantial objections but also has an improper purpose be sanctioned? The ALI proposal does not condition sanctions on a finding that the objection is meritless. Maybe the judge will act on the objection even though the objector has tried to withdraw it.

It seems worthwhile to mention another question that might arise if sanctions on objectors were considered – should the court consider sanctions on the parties submitting a flawed proposal to settle? If it is really a "reverse auction" type of situation – odious to the core – should the court be reminded that Rule 11 surely does apply to the submissions in support of the proposal? Should it at least be advised to consider replacing class counsel or the class representative or both to give effect to the adequate representation requirements of Rule 23(a)(4)?

It is obvious that much further attention will be needed to sort through the various issues raised by the sanctions possibility. For the present, the main question is whether it is worthwhile to sort through those difficult questions. The sketches above are offered only to provide a concrete focus for that discussion.

(5) Rule 68 Offers and Mootness

The problem of settlement offers made to the proposed class representative that fully satisfy the representative's claim and thereby "pick off" and moot the class action seems to exist principally in the Seventh Circuit. Outside the 7th Circuit there is little enthusiasm for "picking off" the class action with a Rule 68 offer or other sort of settlement offer. Below are three different (perhaps coordinated) ways of dealing with this problem. The first is Ed Cooper's sketch circulated on Dec. 2.

First Sketch: Rule 23 Moot
(Cooper approach)

(x) (1) When a person sues [or is sued] as a class representative, the action can be terminated by a tender of relief only if
(A) the court has denied class certification and
(B) the court finds that the tender affords complete relief on the representative's personal claim and dismisses the claim.
(2) A dismissal under Rule 23(x)(1) does not defeat the class representative's standing to appeal the order denying class certification.

Committee Note

A defendant may attempt to moot a class action before a certification ruling is made by offering full relief on the individual claims of the class representative. This ploy should not be allowed to defeat the opportunity for class relief before the court has had an opportunity to rule on class certification.

If a class is certified, it cannot be mooted by an offer that purports to be for complete class relief. The offer must be treated as an offer to settle, and settlement requires acceptance by the class representative and approval by the court under Rule 23(e).

Rule 23(x)(1) gives the court discretion to allow a tender of complete relief on the representative's claim to moot the action after a first ruling that denies class certification. The tender

must be made on terms that ensure actual payment. The court may choose instead to hold the way open for certification of a class different than the one it has refused to certify, or for reconsideration of the certification decision. The court also may treat the tender of complete relief as mooting the representative's claim, but, to protect the possibility that a new representative may come forward, refuse to dismiss the action.

If the court chooses to dismiss the action, the would-be class representative retains standing to appeal the denial of certification. [say something to explain this?]

[If we revise Rule 23(e) to require court approval of a settlement, voluntary dismissal, or compromise of the representative's personal claim, we could cross-refer to that.]

Rule 68 approach

Rule 68. Offer of Judgment

* * * * *

(e) Inapplicable in Class and Derivative Actions. This rule does not apply to class or derivative actions under Rules 23, 23.1, or 23.2.

This addition is drawn from the 1984 amendment proposal for Rule 68. See 102 F.R.D. at 433.

This might solve a substantial portion of the problem, but does not seem to get directly at the problem in the manner that the Cooper approach does. By its terms, Rule 68 does not moot anything. It may be that an offer of judgment strengthens an argument that the case is moot, because what plaintiffs seek are judgments, not promises of payment, the usual stuff of settlement offers. Those judgments do not guarantee actual payment, as the Cooper approach above seems intended to do with its tender provisions. But a Committee Note to such a rule might be a way to support the conclusion that we have accomplished the goal we want to accomplish. Here is what the 1984 Committee Note said:

> The last sentence makes it clear that the amended rule does not apply to class or derivative actions. They are excluded for the reason that acceptance of any offer would be subject to court approval, see Rules 23(e) and 23.1, and the offeree's rejection would burden a named representative-offeree with the risk of exposure to potentially heavy liability that could not be recouped from unnamed class members. The latter prospect, moreover, could lead to a conflict of interest between the named representative and other members of the class. See, Gay v.Waiters & Dairy Lunchmen's Union, Local 30, 86 F.R.D. 500 (N.D. Cal. 1980).

Alternative Approach in Rule 23

Before 2003, there was a considerable body of law that treated a case filed as a class action

as subject to Rule 23(e) at least until class certification was denied. A proposed individual settlement therefore had to be submitted to the judge for approval before the case could be dismissed. Judges then would try to determine whether the proposed settlement seemed to involve exploiting the class-action process for the individual enrichment of the named plaintiff who was getting a sweet deal for her "individual" claim. If not, the judge would approve it. If there seemed to have been an abuse of the class-action device, the judge might order notice to the class of the proposed dismissal, so that other class members could come in and take up the litigation cudgel if they chose to do so. Failing that, the court might permit dismissal.

The requirement of Rule 23(e) review for "individual" settlements was retained in the published preliminary draft in 2003. But concerns arose after the public comment period about how the court should approach situations in which the class representative did seem to be attempting to profit personally from filing a class action. How could the court force the plaintiff to proceed if the plaintiff wanted to settle? One answer might be that plaintiff could abandon the suit, but note that "voluntary dismissal" is covered by the rule's approval requirement. Another might be that the court could sponsor or encourage some sort of recruitment effort to find another class representative. In light of these difficulties, the amendments were rewritten to apply only to claims of certified classes.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) **Before certification.** An action filed as a class action may be settled, voluntarily dismissed, or compromised before the court decides whether to grant class-action certification only with the court's approval. The [parties] {proposed class representative} must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(2) **Certified class.** The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(A1) The court must direct notice in a reasonable manner * * * * *

(3) **Settlement after denial of certification.** If the court denies class-action certification, the plaintiff may settle an individual claim without prejudice to seeking appellate review of the court's denial of certification.

The Committee Note could point out that there is no required notice under proposed (e)(1). It could also note that prevailing rule before 2003 that the court should review proposed "individual" settlements. The ALI Principles endorsed such an approach:

> This Section favors the approach of requiring limited judicial oversight. The potential risks of precertification settlements or voluntary dismissals that occur without judicial scrutiny warrant a rule requiring that such settlements take effect only with prior judicial approval, after the court has had the opportunity to review the terms of the settlement, including fees paid to counsel. Indeed the very requirement of court approval

may deter parties from entering into problematic precertification settlements.

ALI Principles § 3.02 comment (b).

Proposed (e)(3) seeks to do something included also in the Cooper approach above -- ensure that the proposed class representative can appeal denial of certification even after settling the individual claim. Whether something of the sort is needed is uncertain. The issues involved were the subject of considerable litigation in the semi-distant past. See, e.g., United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); Deposit Guaranty Nat. Bank v. Roper, 445 U.S. 326 (1980); United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). It is not presently clear whether this old law is still good law. It might also be debated whether the class representative should be allowed to appeal denial of certification. Alternatively, should class members be given notification that they can appeal? In the distant past, there were suggestions that class members should be notified when the proposed class representative entered into an individual settlement, so that they could seek to pursue the class action.

(6) Issue Classes

A major reason for considering possible rule amendments to deal with issue classes is that there has seemed to be a split in the circuits about whether they can only be allowed if (b)(3) predominance is established. At a point in time, it appeared that the Fifth and Second Circuits were at odds on this subject. But recent reports suggest that all the circuits are coming into relative agreement that in appropriate cases Rule 23(c)(4) can be used even though full Rule 23(b)(3) certification is not possible due to the predominance requirement. If agreement has arrived, it may be that a rule amendment is not in order. But even if agreement has arrived, an amendment might be in order to permit immediate appellate review of the district court's decision of the issue on which the class was certified, before the potentially arduous task of determination of class members' entitlement to relief begins.

Clarifying that predominance is not
a prerequisite to 23(c)(4) certification

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, subject to Rule 23(c)(4), and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: * * * *

The goal of placement here is to say that predominance, but not superiority, is subject to Rule 23(c)(4). A Committee Note could amplify this point. It might also say that a court trying to decide whether issue certification is "appropriate" (as (c)(4) says it should decide) could consider the factors listed in (A) through (D) of (b)(3). It does not seem there would be a need to consider changing (A) through (D) in (b)(3). In 1996, draft amendments to those factors were published for public comment and, after a very large amount of public comment, not pursued further. The relation between (b)(3) and (c)(4) does not seem to warrant considering changes to the factors.

Allowing courts of appeals to review
decision of the common issues
immediately rather than only after final judgment

Because the resolution of the common issue in a class action certified under Rule 23(c)(4) is often a very important landmark in the action, and one that may lead to a great deal more effort to determine individual class members' entitlement to relief, it seems desirable to offer an avenue of immediate review. Requiring that all that additional effort be made before finding out whether the basic ruling will be reversed may in many instances be a strong reason for granting such immediate review. But there may be a significant number of cases in which this concern is not of considerable importance.

§ 2.09(a) of the ALI Principles endorses this objective: "An opportunity for interlocutory appeal should be available with respect to * * * (2) any class-wide determination of a common issue on the merits * * * ." The ALI links this interlocutory review opportunity to review of class certification decisions (covered in ALI § 2.09(a)(1)). It seems that the logical place to insert such a provision is into Rule 23(f), building on the existing mechanism for interlocutory review of class-certification orders:

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, or from an order deciding an issue with respect to which [certification was granted under Rule 23(c)(4)] {a class action was allowed to be maintained under Rule 23(c)(4)} [if the district court expressly determines that there is no just reason for delay], if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. * * *

The Subcommittee has only recently turned its attention to these issues; as a result the above conceptual sketch is particularly preliminary. Several choices are suggested by the use of brackets or braces around language in the draft above.

One is whether to say "certification was granted under Rule 23(c)(4)" or to stick closer to the precise language of (c)(4) – "was allowed to be maintained under Rule 23(c)(4)." It may be that referring to "class certification" would be preferred because it ties in with the term used in the current provisions of the rule. Rule 23(b) says "may be maintained" but that terminology is not repeated in current 23(f) when addressing the decision that it may be maintained. On the other hand, it is not that decision that would be subject to review under the added provision of the rule. Instead, it is the later resolution of that issue by further proceedings in the district court.

Another choice is suggested by the bracketed language referring to district-court certification that there is no just reason for delay. That is modeled on Rule 54(b). It might be useful to intercept premature or repeated efforts to obtain appellate review with regard to issues as to which (c)(4) certification was granted. For example, could a defendant that moved for summary judgment on the common issue contend that the denial of the summary-judgment motion "decided" the issue? Perhaps it would be desirable to endow the district court with some latitude in triggering the opportunity to seek appellate review, since a significant reason for allowing it is to avoid wasted

time resolving individual claims of class members in the wake of the decision of the individual issue.

On the other hand, if the goal of the amendment is to ensure the losing party of prompt review of the decision of the common issue, it might be worrisome if the district judge's permission were required. It is not required with regard to class-certification decisions, and there may be instances in which parties contend that the district court has delayed resolution of class certification, thereby defeating their right to obtain appellate review of certification.

Lying in the background is the question whether this additional provision in Rule 23(f) would serve an actual need. As noted above, it appears that use of issue classes has become widespread. What is the experience with the "mop up" features of those cases after that common issue is resolved? Does that "mop up" activity often consume such substantial time and energy that an interlocutory appeal should be allowed to protect against waste? Are those issues straightened out relatively easily, leading to entry of a final judgment from which appeal can be taken in the normal course? Is there a risk that even a discretionary opportunity for interlocutory appeal would invite abuse? Are there cases in which the court declines to proceed with resolution of all the individual issues, preferring to allow class members to pursue them in individual litigation? If so, how is a final appealable judgment entered in such cases? If that route is taken, what notice is given to class members of the need to initiate further proceedings?

So there are many questions to be addressed in relation to this possible addition to the rules. Another might be whether it should be considered only if the amendment to Rule 23(b)(3) went forward. If it seems that amendment is not really needed because the courts have reached a consensus on whether issue classes can be certified even when (b)(3) would not permit certification with regard to the entire claim, there could still be a need for a revision to Rule 23(f) along the lines above. Answers to the questions in the previous paragraph about what happens now might inform that background question about the importance of proceeding on the 23(f) possibility.

(7) Notice

Changing the notice requirement
in (b)(3) cases

In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the Court observed (id. at 173-71, emphasis in original):

> Rule 23(c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members who not requesting exclusion. To this end, the court is required to direct to class members "the best notice practicable under the circumstances *including individual notice to all members who can be identified through reasonable effort*." We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.

The Advisory Committee's Note to Rule 23 reinforces this conclusion. The Advisory Committee described subdivision (e)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class procedure is of course subject." [The Court discussed Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), and Schroeder v. City of New York, 371 U.S. 208 (1962), emphasizing due process roots of this notice requirement and stating that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable."]

Viewed in this context, the express language and intent of Rule 23(c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort.

Research would likely shed light on the extent to which more recent cases regard means other than U.S. mail as sufficient to give "individual notice." The reality of 21st century life is that other means often suffice. The question is whether or how to alter Rule 23(c)(2) to make it operate more sensibly. Here are alternatives:

(2) Notice

* * * * *

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice <u>by electronic or other means</u> to all members who can be identified through reasonable effort. * * * * *

It is an understatement to say that much has changed since Eisen was decided. Perhaps it is even correct to say that a communications revolution has occurred. Certainly most Americans are accustomed today to communicating in ways that were not possible (or even imagined) in 1974. Requiring mailed notice of class certification seems an anachronism, and some reports indicate that judges are not really insisting on it.

Indeed, the current ease of communicating with class members has already arisen with regard to the cy pres discussion, topic (3) above. There, the possibility of excusing payouts to class members for amounts smaller than $100 is raised as a possibility, but it is also suggested that much smaller payouts can now be made efficiently using refined electronic means. More generally, it appears that enterprises that specialize in class action administration have gained much expertise in communicating with class members. Particularly in an era of "big data," lists of potential class members may be relatively easy to generate and use for inexpensive electronic communications.

For the present, the main question is whether there is reason not to focus on some relaxation of the current rule that would support a Committee Note saying that first class mail is no longer required by the rule. Such a Note could presumably offer some observations about the variety of alternative methods of communicating with class members, and the likelihood that those methods

will continue to evolve. The likely suggestion will be that courts should not (as Eisen seemed to do) embrace one method as required over the long term.

Notice in Rule 23(b)(1) or (b)(2) actions

Another question that could be raised is whether these developments in electronic communications also support reconsideration of something that was considered but not done in 2001-02.

The package of proposed amendments published for comment in 2001 included a provision for reasonable notice (not individual notice, and surely not mandatory mailed notice) in (b)(1) and (b)(2) class actions. Presently, the rule contains no requirement of any notice at all in those cases, although Rule 23(c)(2)(A) notes that the court "may direct appropriate notice to the class." In addition, Rule 23(d)(1)(B) invites the court to give "appropriate notice to some or all class members" whenever that seems wise. And if a settlement is proposed, the notice requirement of Rule 23(e)(1) applies and "notice in a reasonable manner" is required. But if a (b)(1) or (b)(2) case is fully litigated rather than settled, the rule does not require any notice at any time.

It is thus theoretically possible that class members in a (b)(1) or (b)(2) class action might find out only after the fact that their claims are foreclosed by a judgment in a class action that they knew nothing about.

In 2001-02, there was much forceful opposition to the proposed additional rule requirement of some reasonable effort at notice of class certification on the ground that it was already difficult enough to persuade lawyers to take such cases, and that this added cost would make an already difficult job of getting lawyers to take cases even more difficult, and perhaps impossible. The idea was shelved.

Is it time to take the idea off the shelf again? One question is whether the hypothetical problem of lack of notice is not real. It is said that (b)(2) classes exhibit more "cohesiveness," so that they may learn of a class action by informal means, making a rule change unnecessary. It may also be that there is almost always a settlement in such cases, so that the Rule 23(e) notice requirement does the needed job. (Of course, that may occur at a point when notice is less valuable than it would have been earlier in the case.) And it may be that the cost problems that were raised 15 years ago have not abated, or have not abated enough, for the vulnerable populations that are sometimes the classes in (b)(2) actions.

The Subcommittee has not devoted substantial attention to these issues. For present purposes, this invitation is only to discuss the possibility of returning to the issues not pursued in 2002. If one wanted to think about how a rule change might be made, one could consider replacing the word "may" in Rule 23(c)(2)(A) with "must." A Committee Note might explore the delicate issues that courts should have in mind in order to avoid unduly burdening the public interest lawyers often called upon to bring these cases, and the public interest organizations that often provide support to counsel, particularly when the actions may not provide substantial attorney fee or cost awards.

Appendix I

Settlement Review Factors: 2000 Draft Note

As an alternative approach to factors, particularly not on the list of four the conceptual draft rule endorses as mandatory findings for settlement approval, the following is an interim draft of possible Committee Note language considered during the drafting of current Rule 23(e).

Reviewing a proposed class-action settlement often will not be easy. Many settlements can be evaluated only after considering a host of factors that reflect the substance of the terms agreed upon, the knowledge base available to the parties and to the court to appraise the strength of the class's position, and the structure and nature of the negotiation process. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir.1998). Any list of these factors must be incomplete. The examples provided here are only examples of factors that may be important in some cases but irrelevant in others. Matters excluded from the examples may, in a particular case, be more important than any matter offered as an example. The examples are meant to inspire reflection, no more.

Many of the factors reflect practices that are not fully described in Rule 23 itself, but that often affect the fairness of a settlement and the court's ability to detect substantive or procedural problems that may make approval inappropriate. Application of these factors will be influenced by variables that are not listed. One dimension involves the nature of the substantive class claims, issues, or defenses. Another involves the nature of the class, whether mandatory or opt-out. Another involves the mix of individual claims — a class involving only small claims may be the only opportunity for relief, and also pose less risk that the settlement terms will cause sacrifice of recoveries that are important to individual class members; a class involving a mix of large and small individual claims may involve conflicting interests; a class involving many claims that are individually important, as for example a mass-torts personal-injury class, may require special care. Still other dimensions of difference will emerge. Here, as elsewhere, it is important to remember that class actions span a wide range of heterogeneous characteristics that are important in appraising the fairness of a proposed settlement as well as for other purposes.

Recognizing that this list of examples is incomplete, and includes some factors that have not been much developed in reported decisions, among the factors that bear on review of a settlement are these:

(A) a comparison of the proposed settlement with the probable outcome of a trial on the merits of liability and damages as to the claims, issues, or defenses of the class and individual class members;

(B) the probable time, duration, and cost of trial;

(C) the probability that the [class] claims, issues, or defenses could be maintained through trial on a class basis;

(D) the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other facts that bear on the ability to assess the probable outcome of a trial and appeal on the merits of liability and individual damages as to the claims, issues, or defenses of the class and individual class members;

(E) the extent of participation in the settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master;

(F) the number and force of objections by class members;

(G) the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of the probable judgment predicted under Rule 23(e)(5)(A);

(H) the existence and probable outcome of claims by other classes and subclasses;

(I) the comparison between the results achieved for individual class or subclass members by the settlement or compromise and the results achieved — or likely to be achieved — for other claimants;

(J) whether class or subclass members are accorded the right to opt out of the settlement;

(K) the reasonableness of any provisions for attorney fees, including agreements with respect to the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors;

(L) whether the procedure for processing individual claims under the settlement is fair and reasonable;

(M) whether another court has rejected a substantially similar settlement for a similar class; and

(N) the apparent intrinsic fairness of the settlement terms.

Apart from these factors, settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal an effort to homogenize conflicting interests of class members and with that demonstrate the need to redefine the class or to designate subclasses. Redefinition of the class or the recognition of subclasses is likely to require renewed settlement negotiations, but that prospect should not deter recognition of the need for adequate representation of conflicting interests. This lesson is entrenched by the decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Appendix II

Prevailing Class Action Settlement Approval Factors
Circuit-By-Circuit

First Circuit

No "single test." See: In re Compact Disc Minimum Advertised Price Antitrust Litigation, 216 F.R.D. 197-206-207 (D. Me. 2003) (Hornby, J.):

> "There is no single test in the First Circuit for determining the fairness, reasonableness and adequacy of a proposed class action settlement. In making this assessment, other circuits generally consider the negotiating process by which the settlement was reached and the substantive fairness of the terms of the settlement compared to the result likely to be reached at trial. See, e.g., Weinberger v. Kendrick, 698 F.2d 61, 73-74 (2d Cir. 1982). Specifically, the appellate courts consider some or all of the following factors: (1) comparison of the proposed settlement with the likely result of litigation; (2) reaction of the class to the settlement; (3) stage of the litigation and the amount of discovery completed; (4) quality of counsel; (5) conduct of the negotiations; and (6) prospects of the case, including risk, complexity, expense and duration. [citing cases.] Finally, the case law tells me that a settlement following sufficient discovery and genuine arm's-length negotiation is presumed fair." [citing cases.]

Second Circuit

"*Grinnell* Factors"

City of Detroit v. Grinnell, 495 F.2d 448, 463 (2d Cir. 1974):

> ". . (1) the complexity, expense and likely duration of the litigation . . .; (2) the reaction of the class to the settlement . . .; (3) the stage of the proceedings and the amount of discovery completed . . .; (4) the risks of establishing liability . . .; (5) the risks of establishing damages . . .; (6) the risks of maintaining the class action through the trial . . .; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . .; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. . . ."

Third Circuit

"*Girsh* Factors" (adopts *Grinnell* factors)

Girsh v. Jepson, 521 F.2d 153, 157 (3rd Cir. 1975)

Fourth Circuit

"*Jiffy Lube* Factors"

In re Jiffy Lube Securities Litigation, 927 F.2d 155, 158-159 (4th Cir. 1991):

> "In examining the proposed . . . settlement for fairness and adequacy under Rule 23(e), the district court properly followed the fairness factors listed in Maryland federal district cases which have interpreted the Rule 23(e) standard for settlement approval. See In re Montgomery County Real Estate Antitrust Litigation, 83 F.R.D. 305 (D. Md. 1979).) The court determined that the settlement was reached as a result of good-faith bargaining at arm's length, without collusion, on the basis of (1) the posture of the case at the time settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of securities class action litigation. . . .
>
> The district court's assessment of the adequacy of the settlement was likewise based on factors enumerated in Montgomery: (1) the relative strength of the plaintiffs' case on the merits, (2) the existence of any difficulties of proof or strong defenses the plaintiffs are likely to encounter if the case goes to trial, (3) the anticipated duration and expense of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the settlement."

Fifth Circuit

"*Reed* Factors"

Reed v. General Motors Corp., 703 F.2d 170, 172 (5th Cir. 1983):

> "(There are six focal facets: (1) the existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of the class counsel, class representatives, and absent members."

Sixth Circuit

"*UAW* Factors"

Int'l Union, United Auto. Workers, etc. v. General Motors Corp., 497 F.3d 615 (Sixth Cir. 2007):

> "Several factors guide the inquiry: (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest. See

Granada Invs., Inc. v. DWG Corp., 962 F.2d 1203, 1205 (6th Cir. 1992); Williams v. Vukovich, 720 F.2d 909, 922-23 (6th Cir. 1983).

Seventh Circuit

"*Armstrong* Factors"

Armstrong v. Jackson, 616 F.2d 305, 315 (7th Cir. 1980):

"Although review of class action settlements necessarily proceeds on a case-by-case basis, certain factors have been consistently identified as relevant to the fairness determination. The district court's opinion approving the settlement now before us listed these factors:

Among the factors which the Court should consider in judging the fairness of the proposal are the following:

"(1) " * * * the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement';

"(2) "(T)he defendant's ability to pay';

"(3) "(T)he complexity, length and expense of further litigation';

"(4) "(T)he amount of opposition to the settlement';"

Professor Moore notes in addition the factors of:

"(1) * * *

"(2) Presence of collusion in reaching a settlement;

"(3) The reaction of members of the (class to the settlement;

"(4) The opinion of competent counsel;

"(5) The stage of the proceedings and the amount of discovery completed."

3B Moore's Federal Practice P 23.80(4) at 23-521 (2d ed. 1978)"

Eighth Circuit

"*Grunin* Factors"

Grunin v. International House of Pancakes, 513 F.2d 114, 124 (8th Cir. 1975):

> "The district court must consider a number of factors in determining whether a settlement is fair, reasonable, and adequate: the merits of the plaintiff's case, weighed against the terms of the settlement; the defendant's financial condition; the complexity and expense of further litigation; and the amount of opposition to the settlement. Grunin, 513 F.2d at 124. . . .; Van Horn v. Trickey, 840 F.2d 604, 607 (8th Cir. 1988)."

Ninth Circuit

"*Hanlon* Factors"

Hanlon v. Chrysler Corp., 150 F.3d 1011, 1026 (9th Cir. 1998):

> "Assessing a settlement proposal requires the district court to balance a number of factors: the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement."

Tenth Circuit

"*Jones* Factors"

Jones v. Nuclear Pharmacy, 741 F.2d 322 (10th Cir. 1984):

> "In exercising its discretion, the trial court must approve a settlement if it is fair, reasonable and adequate. In assessing whether the settlement is fair, reasonable and adequate the trial court should consider:
>
> (1) whether the proposed settlement was fairly and honestly negotiated;
>
> (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt;
>
> (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and
>
> (4) the judgment of the parties that the settlement is fair and reasonable."

Eleventh Circuit

"*Bennett* Factors"

Bennett v. Behring Corp., 737 F.2d 982, 986 (11th Cir. 1984) (quoting Cotton v. Hinton, 559 F.2d at 1330-31 (5th Cir. 1977):

> "Our review of the district court's order reveals that in approving the subject settlement, the court carefully identified the guidelines established by this court governing approval of class action settlements. Specifically, the court made findings of fact that there was no fraud or collusion in arriving at the settlement and that the settlement was fair, adequate and reasonable, considering (1) the likelihood of success at trial; (2) the range of possible recovery; (3) the point on or below the range of possible recovery at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and amount of opposition to the settlement; and (6) the stage of proceedings at which the settlement was achieved."

D.C. Circuit

No "single test." Courts consider factors from other jurisdictions.

See *In re Livingsocial Marketing and Sales Practice Litigation*, 298 F.R.D. 1, 11 (D.R.C. 2013):

> "There is "no single test" for settlement approval in this jurisdiction; rather, courts have considered a variety of factors, including: "(a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation to the strengths of plaintiffs' case; (c) the status of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel." In re Lorazepam & Clorazepate Antitrust Litig., 205 F. R. D. 369, 375 (D.D.C. 2002) ("Lorazect") (collecting cases)."

Federal Circuit

Dauphin Island Property Owners Assoc. v. United States, 90 Fed. Cl. 95 (2009):

> "The case law and rules of this court do not provide definitive factors for evaluating the fairness of a proposed settlement. Many courts have, however, considered the following factors in determining the fairness of a class settlement:
>
> > (1) The relative strengths of plaintiffs' case in comparison to the proposed settlement, which necessarily takes into account:
> >
> > > (a) The complexity, expense and likely duration of the litigation; (b) the risks of establishing liability; (c) the risks of establishing damages; (d) the risks of maintaining the class action through trial; (e) the reasonableness of the settlement fund in light of the best possible recovery; (f) the reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation; (g) the stage of the proceedings and the amount of discovery completed; (h) the risks of maintaining the class action through trial;
> >
> > (2) The recommendation of the counsel for the class regarding the proposed settlement, taking into account the adequacy of class counsels' representation of the

class;

(3) The reaction of the class members to the proposed settlement, taking into account the adequacy of notice to the class members of the settlement terms;

(4) The fairness of the settlement to the entire class;

(5) The fairness of the provision for attorney fees;

(6) The ability of the defendants to withstand a greater judgment, taking into account whether the defendant is a governmental actor or a private entity. . . .

Most importantly, this court must compare the terms of the settlement agreement with the potential rewards of litigation and consider the negotiation process through which agreement was reached."

California

Kullar v. Foot Locker Retail Inc., 168 Cal. App. 4th 116, 128 (Cal. App. 2008) (quoting *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (Cal. App. 1996):

"The well-recognized factors that the trial court should consider in evaluating the reasonableness of a class action settlement agreement include "the strength of plaintiffs' case, the risk, expense, complexity and likely duration of further litigation, the risk of maintaining class action status through trial, the amount offered in settlement, the extent of discovery completed and the stage of the proceedings, the experience and views of counsel, the presence of a governmental participant, and the reaction of the class members to the proposed settlement."

Principles of Aggregate Litigation (ALI 2010)

§ 3.05 Judicial Review of the Fairness of a Class Settlement

(a) Before approving or rejecting any classwide settlement, a court must conduct a fairness hearing. A court reviewing the fairness of a proposed class-action settlement must address, in on-the-record findings and conclusions, whether:

(1) the class representatives and class counsel have been and currently are adequately representing the class;

(2) the relief afforded to the class (taking into account any ancillary agreement that may be part of the settlement) is fair and reasonable given the costs, risks, probability of success, and delays of trial and appeal;

(3) class members are treated equitably (relative to each other) based on their

facts and circumstances and are not disadvantaged by the settlement considered as a whole; and

(4) the settlement was negotiated at arm's length and was not the product of collusion.

(b) The court may approve a settlement only if it finds, based on the criteria in subsection (a), that the settlement would be fair to the class and to every substantial segment of the class. A negative finding on any of the criteria specified in subsections (a)(1)-(a)(4) renders the settlement unfair. A settlement may also be found to be unfair for any other significant reason that may arise from the facts and circumstances of the particular case.

(c) The burden is on the proponents of a settlement to establish that the settlement is fair and reasonable to the absent class members who are to be bound by that settlement. In reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable.

(d) A court may approve or disapprove a class settlement but may not of its own accord amend the settlement to add, delete, or modify any term. The court may, however, inform the parties that it will not approve a settlement unless the parties amend the agreement in a manner specified by the court. This subsection does not limit the court's authority to set fair and reasonable attorneys' fees.

(e) If, before or as a result of a fairness hearing, the parties agree to modify the terms of a settlement in any material way, new notice must be provided to any class members who may be substantially adversely affected by the change. In particular:

(1) For opt-out classes, a new opportunity for class members to opt out must be granted to all class members substantially adversely affected by the changes to the settlement.

(2) When a settlement is modified to increase significantly the benefits to the class, class members who opted out before such modifications must be given notice and a reasonable opportunity to opt back into the class.

(f) For class members who did not opt out of the class, new notice and opt-out rights are not required when, as a result of a fairness hearing, a settlement is revised and the new terms would entitle such class members to benefits not substantially less than those proposed in the original settlement.

TAB 3B

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MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 9, 2015

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on April 9, 2015. (The meeting was scheduled to carry over to April 10, but all business was concluded by the end of the day on April 9.) Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W. Grimm; Dean Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Judge John D. Bates, Chair-designate, also attended. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S. Sutton, Chair, Judge Neil M. Gorsuch, liaison, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt. Rebecca A. Womeldorf and Julie Wilson represented the Administrative Office. Judge Jeremy Fogel and Emery G. Lee attended for the Federal Judicial Center. Observers included Donald Bivens (ABA Litigation Section); Henry D. Fellows, Jr. (American College of Trial Lawyers); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Alex Dahl, Esq. (Lawyers for Civil Justice); John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); Pamela Gilbert, Esq.; Ariana Tadler, Esq.; Henry Kelsen, Esq.; William Butterfield, Esq.; Nathaniel Gryll, Esq., and Michelle Schwartz, Esq. (Alliance for Justice); Andrea B. Looney, Esq. (Lawyers for Civil Justice); Stuart Rossman, Esq. (NACA, NCLC); and Ira Rheingold (National Association of Consumer Advocates).

Judge Campbell opened the meeting by greeting newcomers Acting Assistant Attorney General Benjamin Mizer and Rebecca Womeldorf, the new Rules Committee Officer. He also noted the hope that Sheryl Walter, General Counsel of the Administrative Office, would attend parts of the meeting.

This is the last meeting for Committee members Grimm and Diamond. Deep appreciation was expressed for "both Pauls." Judge Diamond has been a direct and incisive participant in Committee discussions, and has taken on a variety of special tasks, including the task of working with the Internal Revenue Service and the Administrative Office to establish means of paying taxes on funds deposited with the courts that avoided the need to consider amending Rule 67(b). Judge Grimm chaired the Discovery Subcommittee through arduous work, especially including the revision of Rule
37(e) that we hope will take effect this December 1 and advance resolution of disputes arising from the loss of electronically stored information. His contributions in guiding this work were invaluable.

Judge Campbell further noted that Judge Bates has been named by the Chief Justice to become the next chair of this Committee. Judge Bates has recently been Director of the Administrative Office. He also has served as a member of an important parallel committee of the Judicial Conference, the Court Administration and Case Management Committee.

Judge Campbell also reported on the meeting of the Standing Committee in January. The Civil Rules Committee did not seek approval of any proposals at that meeting. But there was a

stimulating discussion of pilot projects, a topic that will be explored at the end of this meeting.

Judge Sutton said that this Committee did great work on the Duke Rules package. It will be important to support educational efforts that will guide lawyers and judges toward effective implementation of the new rules. He also noted that the Standing Committee is enthusiastic about the prospect that carefully designed pilot projects will help further advance the goals of good procedure.

Judge Campbell reminded the Committee that the Supreme Court had asked whether a couple of changes might be made in the Committee Notes to the amendments now pending before the Court. The changes were approved by an e-mail vote of the Committee, and were approved by the Judicial Conference without discussion. If the Court approves the amendments and transmits them to Congress, it will be important that the Committee find ways to educate people to use the rules and to encourage all judges to engage in active case management. These efforts are not a sign that the Committee is presuming that Congress will approve the rules if transmitted by the Supreme Court. Instead they will just begin the process of preparing people to implement them effectively. Judge Fogel says that the Federal Judicial Center is ready for judicial education programs. The Committee can help to prepare educational materials that can be used in Judicial Conferences in 2016, in bar associations, Inns of Court, and other forums. The Duke Law School is planning a parallel effort. This work can be advanced by designating a Subcommittee of this Committee. Members who are interested in participating should make their interest known.

A member noted that a package of CLE materials "available for free" would be seized by many law firms for their own internal programs. Judge Fogel noted that the Federal Judicial Center "really wants to collaborate with this Committee." The Center has two TV studios, and does many video productions. Videos, webinars, and like means can be used to get the word out.

Judge Campbell suggested that it will be good to use Committee alumni to get the word out, especially those who were involved in shaping the proposals. One important need is to say what is intended, to forestall use of the new rules in ways not intended. The Committee Notes were changed in light of the public comments to dispel several common misunderstandings, but ongoing efforts will be important.

October 2014 Minutes

The draft minute of the October 2014 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Rebecca Womeldorf provided the legislative report for the Administrative Office. Two familiar sets of bills have been introduced in this Congress.

The Lawsuit Abuse Reduction Act (LARA) would amend Rule 11 by reinstating the essential aspects of the Rule as it was before the 1993 amendments. Sanctions would be mandatory. The safe harbor would be removed. In 2013 Judge Sutton and Judge Campbell submitted a letter urging respect for the Rules Enabling Act process, rather than undertake to amend a Civil Rule directly.

H.R. 9, the Innovation Act, embodies patent reform measures like those in the bill that passed in the House last year. There are many provisions that affect the Civil Rules. Parallel bills have been introduced in the Senate, or are likely to be introduced. There are some indications that a bipartisan

bill will be introduced in the Senate.

A participant observed that informal conversations suggest that some form of patent legislation will pass this year. The President agrees with the basic idea. The question for Congress is to reach agreement on the details.

Judge Campbell noted that H.R. 9 directs the Judicial Conference to prepare rules. Logically, the Conference will look to the rules committees. But the bill does not say anything of the Enabling Act process; the simple direction that the Judicial Conference act seems to eliminate the roles that the Supreme Court and Congress play in the final stages of the Enabling Act process.

Parts of H.R. 9 adopt procedure rules directly, without adding them to the Civil Rules. Discovery, for example, is initially limited to issues of claim construction in any action that presents those issues. Discovery expands beyond that only after the court has construed the claims.

Other parts of H.R. 9 direct the Judicial Conference to adopt rules that address specific points. The rules should distinguish between discovery of "core documents," which are to be produced at the expense of the party that produces them, and other documents that are to be produced only if the requester pays the costs of production and posts security or shows financial ability to pay. These rules also are to address discovery of "electronic communications," which may or may not embrace all electronically stored information. The party requesting discovery can designate 5 custodians whose electronic communications must be produced; the court can order that the number be expanded to 10, and there is a possibility for still more.

A participant suggested that Congressional interest in these matters is inspired by the Private Securities Litigation Reform Act.

Experience with the Bankruptcy Abuse Prevention and Consumer Protection Act was recalled. The Bankruptcy Rules Committee was responsible for adopting interim rules on a truly rush basis, and then for adopting final rules on a somewhat less pressed schedule. The press of work was incredible.

It was agreed that it will be important to keep close track of these bills in order to be prepared to act promptly if urgent deadlines are set.

A matter of potential interest also was noted. The Litigation Section of the American Bar Association will present a resolution on diversity jurisdiction to the House of Delegates this August. The recommendation will be to amend 28 U.S.C. § 1332 to treat any entity that can be sued in the same way as a corporation. Partnerships, limited partnerships, limited liability companies, business trusts, unions, and still other organizations would be treated as citizens of any state under which they are organized and also of the state where they have their principal place of business. The effect would be to expand access to diversity jurisdiction because present law treats such entities as citizens of any state of which any member is a citizen. The reasons for this recommendation include experience with the difficulty of ascertaining the citizenship of these organizations before filing suit, the costs of discovery on these issues if suit is filed, and the particularly onerous costs that may result when a defect in jurisdiction is discovered only after substantial progress has been made in an action.

Discussion noted that in the Judicial Conference structure, primary responsibility for issues affecting subject-matter jurisdiction lies with the Federal-State Jurisdiction Committee. The Civil Rules Committee cannot speak to these questions as a committee.

One question was asked: How would a court determine the citizenship of a law firm — for example a nationwide, or international firm, with offices in many different places. Can a "nerve center" be identified in the way it may be identified for a corporation?

The conclusion was that if individual Committee members have thoughts about this proposal, they can be taken to the Litigation Section.

Rules Recommended for Adoption

Proposals to amend Rules 4(m), 6(d), and 82 were published for comment in August, 2014. This Committee now recommends that the Standing Committee recommend them for adoption, with a possible change in the Committee Note for Rule 6(d).

RULE 4(m)

Rule 4(m) sets a presumptive limit on the time to serve the summons and complaint. The present rule sets the limit at 120 days; the Duke Package of rule amendments now pending in the Supreme court would reduce the limit to 90 days as part of a comprehensive effort to expedite the initial phases of litigation.

It has long been recognized that more time is often needed to serve defendants in other countries. Rule 4(m) now recognizes this by stating that it does not apply to service in a foreign country under Rule 4(f) or Rule 4(j)(1). These cross-references create an ambiguity. Service on a corporation in a foreign country is made under Rule 4(h)(2). Rule 4(h)(2) in turn provides for service outside any judicial district of the United States on a corporation, partnership, or other unincorporated association "in any manner prescribed by Rule 4(f) for serving an individual," except for personal delivery. It can be argued that by invoking service "in any manner prescribed by Rule 4(f)," Rule 4(h)(2) service is made under Rule 4(f). But that is not exactly what the rule says. At the same time, it is clear that the reasons that justify exempting service under Rules 4(f) and 4(j)(1) from Rule 4(m) apply equally to service on corporations and other entities. At least most courts manage to reach this conclusion. But many of the comments responding to the proposal to reduce the Rule 4(m) presumptive time to 90 days reflected a belief that the present 120-day limit applies to service on a corporation in a foreign country. It seems wise to amend Rule 4(m) to remove any doubt.

There were only a few comments on the proposal. All supported it.

The proposed amendment is commended to the Standing Committee with a recommendation to recommend it for adoption as published.

RULE 6(d)

Under Rule 6(d), "3 days are added" to respond after service is made in four described ways, including electronic service. The proposal published last August removes service by electronic means from this list. It also adds parenthetical descriptions of service by mail, leaving with the clerk, or other means consented to, so as to relieve readers of the need to constantly refer back to the corresponding subparagraphs of Rule 5(b)(2).

The 3-added days provision has been the subject of broader inquiry, but it has been decided that for the time being it is better to avoid eliminating the 3 added days for every means of service.

For service by electronic means, however, the conclusion has been that the original concerns

with imperfections in electronic communication have greatly diminished with the rapid expansion of electronic technology and the growing numbers of people who can use it easily.

This conclusion was challenged by some of the comments. One broad theme is that the time periods allowed by the rules are too short as they are. Busy, even harassed practitioners, need every concession they can get. More specific comments repeatedly complained of "gamesmanship." Electronic filing is delayed until a time after the close of the ordinary business day and after the close of the clerk's office. Many comments invoked the image of filings at 11:59 p.m. on a Friday, calculated to reach other parties no earlier than Monday.

A more specific concern was expressed by the Magistrate Judges Association. As published, the rule continues to add 3 days after service under Rule 5(b)(2)"(F)(other means consented to)." They fear that careless readers will look back to present Rule 5(b)(2)(E), which allows electronic service only with the consent of the person served, and conclude that 3 days are added because service by electronic means is an "other means consented to." This is an obvious misreading of Rule 5(b)(2), since (F) embraces only means other than those previously enumerated, including (E)'s provision for service by electronic means. Nonetheless, the magistrate judges have great experience with inept misreading of the rules, and it is difficult to dismiss this prospect out of hand. At the same time, there are reasons to avoid the recommended cures. One would eliminate the parenthetical descriptions added to illuminate the cross-references to subparagraphs (C), (D), and (F). These descriptions have been blessed by the Style Consultant as a useful addition to the rule, and they seem useful. The other would expand the parenthetical to subparagraph (F) to read: "(other means consented to, except electronic service.)" One reason to resist these suggestions is that it seems unlikely that serious consequences will be imposed on a party who manages to misread the rule. A 3-day overrun in responding is likely to be treated leniently. More important is that the proposals to amend Rule 5(b)(2)(E) discussed below will eliminate the consent requirement for registered users of the court's electronic system. The Committee agreed that neither of the recommended changes should be made.

The Department of Justice has expressed concerns about the 3-added days provision, and particularly about the prospect of gamesmanship in filing just before midnight on the eve of a weekend or legal holiday. It has proposed a lengthy addition to the Committee Note to describe these concerns and to state expressly that courts should accommodate those situations and provide additional time to discourage tactical advantage or prevent prejudice. An alternative shorter version was prepared by the Reporter to illustrate possible economies of language: "The ease of making electronic service outside ordinary business hours may at times lead to a practical reduction in the time available to respond. Eliminating the automatic addition of 3 days does not limit the court's authority to grant an extension in appropriate circumstances."

Discussion began with the statement that the Department of Justice feels strongly about adding an appropriate caution to the Committee Note. Some changes might be made in the initial Department draft — the list of examples of filing practices that may shorten the time to respond could be expanded by adding a few words to one example: "or just before or during an intervening weekend or holiday * * *." Their longer language is more helpful than the more compact version. "Our attorneys are often beset by gamesmanship."

A member asked whether there really will be difficulties in getting appropriate extensions of time. His experience is that this is not a problem, and problems seem unlikely. In any event, the shorter version seems better. The second sentence respects what most courts do.

Another member was "not keen on adding admonitions to judges to be reasonable." This is

not a general practice in Committee Notes. If we are to go down this road, it might be better to have a single general admonition in a Note attached to one rule.

A lawyer member reported that he recently had encountered a problem in delivering an electronic message. The recipient's firm had recently installed a new system and the message was sorted out by the spam filter. "Consent comforted me." It took a few days to clear up the difficulty. That leads to the question: when does the clock start? The sensible answer is not from the time of the transmission that failed, but from the time of sending a transmission that succeeded. On the broader question of gamesmanship, "I'm always served Friday afternoon at the end of the day."

A judge member "shares the ambivalence." Does a judge really need to be told to be reasonable? Should Committee Notes go on to suggest reasonable accommodations for extenuating family circumstances, or clinical depression?

Another lawyer member observed that "Judges are busy. They do not notice the abuses I see all the time." Adding to the Committee Note as the Department suggests serves a useful purpose because it implicitly condemns the abuses that judges do not — and should not — see on a regular basis.

Still another judge member suggested that the Department's draft language is opaque. The first sentence says the amended rule is not intended to discourage judges from granting additional time. The final sentence directs them that they should do so. Whatever else can be said, it needs editing.

A judge suggested that "Much of what we do here is to write rules for colleagues who do not do their jobs. Too often this is simply writing more rules for them to ignore. I do keep aware of counsel's behavior." The Duke Rules Package served the need to encourage judges to manage their cases. "We know this already."

The concern with preaching to judges in a Committee Note was addressed by suggesting that the Note could instead address advice to lawyers that they should not be diffident about seeking extensions in appropriate circumstances.

One more judge suggested that the kinds of gamesmanship feared by the Department "is obviously bad conduct, easily brought to the court's attention." The response for the Department was that "we try not to be whiners about bad lawyers." And the reply was that it can be done without whining.

The Department renewed the suggestion of the member who thought an addition to the Note would be a reminder to lawyers to behave decently. "At least the more economical version is helpful."

Actual practice behavior was described by another member. "Whether or not it's sharp practice, the routine filing is at 11:59 p.m. on Friday, unless the court directs a different time. No one gets to go home until after midnight." It would help to amend the rule to set 6:00 p.m. as the deadline for filing.

This observation was seconded by observing that sometimes late-night filing is bad behavior. Sometimes it is routine habit, or a simple reflection of routine procrastination. Adding something to the Note may be appropriate, but it should be more neutral than the reference to "outside ordinary business hours" in the compact sketch.

Judge Campbell summarized the discussion as showing that three of four practicing lawyers on the Committee say late filing is a common event. The Department says the same. Other advisory Committees are working on the same issue. Rather than work out final Note language in this Committee, it would be good to delegate to the Chair and Reporter authority to work out common language with the other committees, as well as to resolve with them whether anything at all should be added to the Committee Note.

The Committee voted unanimously to recommend the published text of Rule 6(d) for adoption. And it agreed to delegate to the Chair and Reporter responsibility for working with the other committees to adopt a common approach to the Committee Notes.

RULE 82

The published proposal to amend Rule 82 responds to amendments of the venue statutes. It has long been understood that admiralty and maritime actions are not governed by the general provisions for civil actions. When the admiralty rules were folded into the Civil Rules, this understanding was embodied in Rule 82 by providing that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391-1392. The recent statutory amendments repeal § 1392. They also add a new § 1390. Section 1390(b) excludes from the general venue chapter "a civil action in which the district court exercises the jurisdiction conferred by section 1333" over admiralty or maritime claims.

The proposed amendment provides that an admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390, and deletes the statement that the claim is "not a civil action for purposes of 28 U.S.C. §§ 1391-1392." It was not addressed in the comments after publication.

The Committee voted unanimously to recommend the published Rule 82 proposal for adoption.

Rules Recommended for Publication

The rules recommended for publication deal with aspects of electronic filing and service. Judge Solomon and Clerk Briggs were this Committee's members of the all-Committees Subcommittee for matters electronic, and have carried forward with the work after the Subcommittee suspended operations at the beginning of the year. The choice to suspend operations may have been premature. The Appellate, Bankruptcy, Civil, and Criminal Rules Committees are all working on parallel proposals. It is desirable to frame uniform rule text when there is no reason to treat common questions differently, recognizing that different sets of rules may operate in circumstances that create differences in what might have seemed to be common questions. But the process of seriatim preparation for the agendas of different committees meeting a different times has impeded the benefits of simultaneous consideration. For the Civil Rules, the result has been that worthy ideas from other Committees have had to be embraced in something of a hurry, and have been presented to the Civil Rules Committee in a posture that leaves the way open for accommodations for uniformity with the other Committees. The Committee Note language issue for Rule 6(d) is an illustration. The e-filing and e-service rules provide additional illustrations.

These proposals emerge from a process that winnowed out other possible subjects for e-rules. The Minutes for the October 2014 meeting reflect the decision to set aside rules that would equate electrons with paper. Filing, service, and certificates of service remain to be considered.

E-FILING: RULE 5(d)(3)

Rule 5(d)(3) provides that a court may allow papers to be filed, signed, or verified by electronic means. It further provides that a local rule may require e-filing only if reasonable exceptions are allowed. Great progress has been made in adopting and becoming familiar with e-filing systems since Rule 5(d)(3) was adopted. The amendment described in the original agenda materials directed that all filings must be made by electronic means, but further directed that paper filing must be allowed for good cause and that paper filing may be required or allowed for other reasons by local rule. This approach reflected the great advantages of efficiency that e-filing can achieve for the filer, the court, and other parties. Those advantages accrue to an adept pro se party as well as to represented parties. Indeed the burdens of paper filing may weigh more heavily on a pro se party than on a represented party.

The Criminal Rules Committee considered similar questions at its meeting in mid-March. Criminal Rule 49 incorporates the Civil Rules provisions for filing. Their discussion reflected grave doubts about the problems that could arise from requiring pro se criminal defendants and prisoners to file by electronic means. Access to e-communications systems, and the ability to use them at all are the most basic problems. In addition, training pro se litigants to use the court system could impose heavy burdens on court staff. Means must be found to exact payment for filings that require payment. There are risks of deliberate misuse if a court is unable to limit a defendant or prisoner's access by blocking access to all other cases. Constitutional concerns about access to court would arise if exceptions are not made. This array of problems could be met by adopting local rules, but the burden of adopting new local rules should not be inflicted on the many courts whose local rules do not now provide for these situations.

It was recognized that the problems facing criminal defendants and prisoners may be more severe than those facing pro se civil litigants, but questions were asked whether the differences are so great as to justify different provisions in the Criminal and Civil Rules. The Criminal Rules Committee asked that these issues be considered in addressing Civil Rule 5, and that if this Committee continues to prefer that adjustments for pro se litigants be made by local rules or on a case-by-case basis it consider deferring a recommendation to publish Rule 5 amendments while the Criminal Rules Committee further considers these issues.

A conference call was held by the Chair of the Criminal Rules Committee, the immediate past and current chairs of their subcommittee for e-issues, their Reporters, and the Civil Rules e-rules contingent. Thorough review of the Criminal Rules Committee concerns led to a revised Rule 5(d)(3) proposal. The revised proposal was circulated to the Committee as a supplement to the agenda materials, and endorsed by Judge Campbell, Judge Oliver, and Clerk Briggs.

The version of Rule 5(d)(3) presented to the Committee mandates e-filing as a general matter, except for a person proceeding without an attorney. E-filing is permitted for a person proceeding without an attorney, but only when allowed by local rule or court order. This approach is designed to hold the way open for pro se litigants to seize the benefits of e-filing as they are competent to do so. It well may be that these advantages will become more generally available to pro se civil litigants than to criminal defendants or prisoners filing § 2254 or § 2255 proceedings, but that event will not interfere with adopting local rules that reflect the differences.

Judge Solomon endorsed the revised approach. Although the Civil Rule draft started in a different place, the Criminal Rules Committee's concerns were persuasive. The pro se problem is greater in the criminal arena, but there also are problems in the civil arena. The new approach does no harm in the short run, and it is likely that we can live with it longer than that. And it is an advantage to have rules that are as parallel as can be.

Clerk Briggs agreed. It will not be burdensome to address pro se civil filings through local rules or by court order. For now, there will not be many pro se litigants that will be trusted with e-filing. But it should be noted that the present CM/ECF system can be used to ensure that a pro se litigant is able to file and access files only in his own case. And the system screens for viruses. And yes, there is a disaster recovery plan — everything is replicated on an essentially constant basis and stored in distant facilities.

A specific drafting question was raised: is there a better way to refer to pro se parties than "a person proceeding without an attorney"? It was agreed that this language seems adequate. One advantage is that it includes an attorney who is proceeding without representation by another attorney — such an attorney party may not be a registered user of the system, and may not be admitted to practice as an attorney in the court.

Another question is whether the rule should continue to say that a paper may be signed by electronic means, or whether it is better to provide only for e-filing, adding a statement that the act of filing constitutes the signature of the person who makes the filing. The reasons for omitting a statement about signing by electronic means are reflected in the history of a Bankruptcy Rule provision that was published for comment and then withdrawn. Many filings include things that are signed by someone other than the filer. Common civil practice examples include affidavits or declarations supporting and opposing summary-judgment motions, and discovery materials. Means for verifying electronic signatures are advancing rapidly, but have not reached a point of common acceptance and practice that would support attempted rules on the issue. It was agreed that the rule text should adhere to the approach that describes only filing by e-means, and then states that the act of filing constitutes the filer's signature. But it also was agreed that it would be better to delete the next-to-last paragraph of the draft Committee Note that discusses these possible signature issues.

Another issue was presented by the bracketed final paragraph in the Committee Note that raised the question whether anything should be said about verification. Present Rule 5(d)(3) recognizes local rules that allow a rule to be verified by electronic means. The proposed amendment omits any reference to verification. Not many rules provide for verification. Rule 23.1 provides for verification of the complaint in a derivative action. Rule 27(a) requires verification of a petition to perpetuate testimony. Rule 65(b)(1)(A) allows use of a verified complaint rather than an affidavit to support a temporary restraining order. Verification or an affidavit may be required in receivership proceedings. Verified complaints are required by Supplemental Rules B(1)(A) and C(2). Although these add up to a fair number of rules by count, they touch only a small part of the docket. It was concluded that it would be better to omit this paragraph from the recommendation to publish.

RULE 5(b)(2)(E): E-SERVICE

Rule 5(b)(2)(E) now allows service by electronic means if the person served consents in writing. Rule 5(b)(3) allows this service to be made through the court's transmission facilities if authorized by local rules. In practice consent has become a fiction as to attorneys — in almost all districts an attorney is required to become a registered user of the court's system, and access to the court's system is conditioned on consent to be served through the system. The proposed revision of Rule 5(b)(2)(E) set out in the agenda materials deletes the consent element, and simply provides that service may be made by electronic means. It further provides that a person may show good cause to be exempted from such service, and that exemptions may be provided by local rule.

This time it is preparation of the agenda materials for an Appellate Rules Committee meeting later this month that has raised complicating issues. The complications again involve pro se litigants. The concern is that many pro se litigants may not have routine, continuous access to means of

electronic communication, and in any event may not be adept in its use. This has not been a problem under the present rule, since it requires consent to e-service. A pro se party need not consent, and is not subject to the fictive consent that applies to attorneys. But eliminating consent will generate substantial work in case-specific court orders or in amending local rules.

These questions were presented on the eve of this meeting. Drafting to accommodate them can be considered, but subject to further polishing. The draft presented for consideration responded by distinguishing registered users of the court's system from others. It continues to say simply that service may be made by electronic means on a person who is a registered user of the court's system. But it requires consent for others. The consent can provide ample protection by specifying the electronic address to use, and a form of transmission that can be used by the recipient. Consent also will be available for registered user of the court's system who find it convenient to serve some papers by means other than the court's system. For civil cases, discovery requests and responses are a common example. These papers are not to be filed with the court until they are used in the case or the court orders filing. It may prove desirable to serve them by electronic means outside the court's system. Here too, consent will afford important protections by specifying the address to be used and the form of communication.

A judge observed that he encounters many pro se litigants who exchange with attorneys by e-mail.

Another judge noted that bankruptcy practice is moving to bar pro se filing, but to recognize consent to service by e-mail. "This saves costs."

It was noted that the CM/ECF system allows service without filing. One court, as an example, requires a court order after a litigant moves for permission. It would be good to have a rule that allows consent to serve this function without need for a court order.

A separate question was whether written consent should be required, as in the present rule. Why not allow consent in an e-communication? One way written consent can be accomplished would be to add consent to the check list of provisions on the pro se appearance form. Another judge suggested that it would be prudent to get written consent, but the rule should not specify it.

If the rule is framed to require consent for service outside the court's system, it was agreed that there is no need to carry forward from the agenda draft the exceptions that allow a person to be exempted for good cause or by local rule.

Further discussion reiterated the point that the revised draft distinguishes service through the court system on registered users, which would not require consent, from service by other electronic means, which would require consent. This is an advance over the original suggestion, which focused on service through the court's system. The Committee Note can address consent among the parties, refer to a check-the-box pro se appearance form, the availability of direct e-mail service with consenting parties, and the need for court permission for consent by a person who is not a registered user to receive service through the court system.

The Committee agreed to go forward with a recommendation to publish a version of Rule 5(b)(2)(E) that distinguishes between service on registered users through the court's system and service by other e-means with consent. Precise rule language and corresponding changes in the Committee Note will be settled, if possible in ways that achieve uniformity with other advisory committees.

(An observer raised a particular question outside the agenda materials. She has twice encountered difficulties with e-filing in this circumstance: A discovery subpoena is served on a nonparty outside the district where the action is pending. A motion to compel compliance becomes necessary in the district where the discovery will be taken. There is no current docket in the district for enforcement. Two courts have refused to allow her to use electronic means to open a miscellaneous docket item. They insisted on a personal appearance. This is an unnecessary inconvenience. There is a patchwork of rules around the country.

(This problem may not be a subject for rulemaking. Certainly it is not fit for rulemaking on the spur of the moment. But the problem may be helped by proposed Rule 5(d)(3), which will allow e-filing unless a local rule requires paper filing. It might be possible to add a comment on this problem to the Committee Note for Rule 5(d)(3). That possibility was taken under advisement.)

NOTICE OF ELECTRONIC FILING AS PROOF OF SERVICE: RULE 5(d)(1)

The agenda materials include an amendment of Rule 5(d)(1) that would provide that a notice of electronic filing constitutes a certificate of service on any party served through the court's transmission facilities. The draft includes in brackets a provision that would add a statement similar to Rule 5(b)(2)(E): the notice of electronic filing does not constitute a certificate of service if the serving party learns that the filing did not reach the party to be served.

Allowing a notice of electronic filing to constitute a certificate of service on any party served through the court's transmission facilities may not seem to do much. A party accustomed to serving through the court's system includes in the filing a certificate that says the paper was served through the court's system. Eliminating those lines is a small gain. But the amendment also protects those who do not think to add those lines, and also avoids the instinctive reaction of cautious filers that prompts filing a separate certificate just to be sure. The amended rule text was approved as a recommendation to publish.

Brief discussion concluded that the bracketed material addressing failed delivery is not necessary. As drafted, it is limited to service through the court's facilities. Ordinarily the court system will flag a failed transmission. It may be that a party will learn that a successful transmission somehow did not come to the recipient's attention, but that situation seems too rare to require rule text. That will be deleted from the recommendation to publish.

Judge Harris, after these questions were discussed in the Bankruptcy Rules Committee, suggested that it would be useful to expand the rule by adding a statement of what should be included in a certificate of service when service is not made through the court's electronic facilities. The added language would address the elements that should be included in a certificate: the date and manner of service; the names of the persons served; and the address used for whatever form of service was made. The advantage of adding this language to the several sets of rules that address certificates of service would be to establish a uniform certificate for all federal courts. Uniformity is desirable in itself, and uniformity would protect against the need to consult local rules, or the ECF manual, for each district. Certificates now may vary. It may be as bland as "I served by mail," or "I served by mail on this date, to this address," and so on. The proposed language is taken from Appellate Rule 25(d)(1)(B) for a proof of service. The language works there, and would work elsewhere.

This proposal was countered: the courts and parties seem to be doing well without help from a detailed rule prescription. And service by these other means is likely to decline continually as electronic service takes over and provides a notice of electronic filing. Another member added that

he routinely includes all of this information in the certificate of service. It was further noted that the Civil Rules did not provide for certificates of service until 1991. The present provision was added then to supersede a variety of local rules. The Committee then considered a provision that would prescribe the contents of the certificate, but feared that in some situations the party making service would not be able to provide all of the information that might be included.

Brief further discussion showed that no Committee member favored adding a provision that would define the contents of a certificate of service by means other than the court's transmission facilities.

A style question was left for resolution by the Style Consultant. Rule 5(d)(1) now concludes with a sentence introduced by "But." A paper that is required to be served must be filed. "But" disclosure and discovery materials must not be filed except in defined circumstances. The question is whether "but" remains appropriate after lengthening the first sentence.

RULE 68

Judge Campbell summarized the discussion of Rule 68 at the October 2014 meeting. Rule 68 was the subject of two published amendment proposals in 1983 and 1984. The project was abandoned in face of fierce controversy and genuine difficulties. Rule 68 was taken up again early in the 1990s and again the project was abandoned. Multiple problems surround the rule, including the basic question whether it is wise to maintain any rule that augments natural pressures to settle. But, aside from all the discovery rules taken together, Rule 68 is the most frequent subject of public suggestions that amendments should be undertaken. Most of the suggestions seek to add "teeth" to the rule by adding more severe consequences for failing to win a judgment better than a rejected offer. The Committee decided in October that the most fruitful line of attack will be to explore practices in state courts to see whether there are rules that in fact work better than Rule 68. Jonathan Rose undertook preliminary research that produced a chart of state rules, comparing their features to Rule 68. He also provided a bibliography. It was hoped that the Supreme Court Fellow at the Administrative Office could make time to explore these materials, and perhaps to look for state-court decisions. There have been too many competing demands on his time, however, and little progress has been made. This work will be pursued, aiming at a report to the meeting next November.

DISCOVERY: "REQUESTER PAYS"

Judge Grimm opened the subject of requester-pay discovery rules by noting that these questions were opened at the fall meeting in 2013 in response to suggestions that "requester-" or "loser-pays" rules be adopted to shift the costs of responding to discovery requests in cases where the burdens of responding to discovery are disproportionate among the parties or otherwise unfair. The focus of these suggestions ordinarily is Rule 34 document production. The background is the shared assumption, not articulated in any rule but recognized in the 1978 Oppenheimer opinion in the Supreme Court, that ordinarily the responding party bears the burdens and costs of responding. The Court noted then, and it is also widely understood, that a court order can shift the costs, in whole or in part, to the requesting party.

The Rule 26(c) proposal now pending in the Supreme Court as part of the Duke Rules Package expressly confirms the common understanding that a protective order can allocate the expenses of discovery among the parties.

The House of Representatives has held hearings to examine the possibilities of requester-pay practices. Patent law reform bills recently introduced in Congress contain such provisions.

Subcommittee work on these issues was sidetracked for a year while the Subcommittee concentrated on the Rule 37(e) provisions addressing loss of electronically stored information that now are pending before the Supreme Court. The work is resuming now.

Passionate views are held on all sides of requester pays. Much of the discussion focuses on asymmetric discovery cases in which one party has little discoverable information and is able to impose heavy burdens in discovering vast deposits of information held by an adversary. The explosion of discoverable matter embodied in electronically stored information adds to the passion. And it is often suggested that a data-poor party may deliberately engage in massive discovery for tactical reasons.

The other side of the debate is framed as an issue of access to justice. Often a data-poor party is poor in other resources as well, and cannot afford to pay the expenses of sorting through information held by a data-rich party. This viewpoint was expressed in public comments on many of the discovery rules provisions in the Duke Rules Package, and particularly in the comments on proposed Rule 26(c).

A 2014 publication of the Institute for the Advancement of the American Legal System provides information about these issues. A recent law review article catalogues the current rules that allow shifting litigation costs — most of them discovery rules — and explores many of the surrounding issues, including possible due process implications. The closed-case study done by the Federal Judicial Center in conjunction with the Duke Conference shows that most cases do not generate significant discovery burdens. But it also shows that there are outliers that involve serious burdens and present serious issues for possible reform. It remains a challenge to determine whether these problems are unique to identifiable types of cases. One particular opportunity will be to explore the experience of "patent courts." Other subject-matter areas may be identifiable. Or other characteristics of litigation may be associated with disproportionate discovery, whether or not it is possible to address them in any particular way by court rules.

One line of inquiry will be to attempt to find out through the Federal Judicial Center what kinds of cases are now associated with motions to order a requester to bear the costs of discovery.

Emery Lee reported that it is difficult to sort the cases out of general docket entries. He began an inquiry by key-citing the headnotes in the Zubulake opinions, which are prominent in addressing cost-shifting in discovery of ESI. They have not been much cited. Looking at the cases he found through Pacer, he developed search terms. Then he undertook a docket search in four districts that have high volumes of cases — S.D.N.Y., N.D.Ill, N.D.Cal., and S.D.Tex. A "fuzzy search" turned up nothing useful. There were, to be sure, "lots of hits" in the Northern District of Illinois because the e-pilot there requires the parties to discuss cost bearing. And a lot of the hits involved the costs of depositions, not documents. There were not many hits for document discovery.

Judge Grimm asked what further research might be done: law review articles? State experience? Case law? A survey or other empirical inquiry? The quest would be to refine our understanding of how often burdensome costs are encountered.

Judge Grimm further noted that England has cost shifting, but it also has broad bilateral initial disclosures.

The Subcommittee hopes to narrow what needs be considered. What guidance can be provided?

Judge Campbell reminded the Committee that the Committee Note to Rule 26(c) in the pending package of Duke Rules amendments was revised after publication to provide reassurance that it is not intended to become a general requester-pays rule. Many comments on the published proposal expressed fears on this score

A judge urged that it is not wise "to write rules for exceptional-exceptional cases. There is a cost of litigation. Part of that is the cost of discovery." It is really depositions that drive the cost of discovery in most cases. And the requesting party pays for most of the costs of a deposition. Document production does not drive discovery costs in most cases. There are not many cases where the plaintiff does not have to bear some discovery costs, especially depositions. The rules already limit the numbers of interrogatories and depositions, and proposals to tighten these limits were rejected for good reasons after publication of the Duke Rules Package. And "counsel has to invest time in depositions." It is better not to attempt to write rules for the massive document discovery cases that do come up.

Another judge asked what is the scope of the problem? We need to know that before making a rule. Whose problem needs to be fixed? Why do we think we should redistribute the costs of discovery?

Judge Grimm responded that the Subcommittee shares these concerns. "We can understand there are problem cases without knowing what to do about them. The source of the problems remains to be determined."

A member asked what protections there are for discovery from third parties who do not have a stake in the game? Rule 45(d)(1) directs that a party or attorney responsible for issuing and serving a subpoena take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. Rule 45(d)(2) further provides that a person directed to produce documents or tangible things may serve objections. An objection suspends the obligation to comply, which revives only when ordered by the court, and the order "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Perhaps that is protection enough.

One possible approach was suggested — to sample a pool of district judges to ask whether they have problems with excessive discovery that should be addressed by explicit requester-pays rules provisions. Much civil litigation now occurs in MDL proceedings; perhaps we could look there.

A different suggestion was that "this looks like a solution in search of a problem. The requester-pays proposals have the air of a strategic effort to deter access to justice in certain types of cases. District judges will have a much better sense of it — whether there are patterns of abuse that can be dealt with by rule, rather than case management. I litigate cases with massive discovery, but the pressures are to be reasonable because it's 2-way, and I have to search through what I get." Perhaps there are problems in asymmetric cases. "But the very fact that the Committee is struggling to figure out whether there is a problem suggests we pause" before plunging in.

Another member said that the mega cases tend to be MDL proceedings. The purpose of MDL is to centralize discovery, to avoid constant duplication. The management orders are for production that occurs once, and for one deposition per witness. MDL proceedings are likely to save costs, reaping the efficiency advantages of economies of scale. MDL judges seek to tailor cost sharing in ways that make sense.

Another lawyer member noted the many protective provisions built into the rules. Rule 45(c)(2)(B) expressly protects nonparties. Rule 26(b)(2)(B) regulates discovery of ESI that is not reasonably accessible, and contemplates requester-pays solutions. Rule 26(b)(2)(C)(iii) directs the court to limit discovery on a cost-benefit analysis. Rule 26(c) is used now to invoke requester-pays protections. Rule 26(g) requires counsel to avoid unduly burdensome discovery requests. The Duke Rules package pending before the Supreme Court is designed to invigorate these principles. If the Court and Congress allow the proposed rules to take effect, we will need to find out whether they have the intended effect. Among them is the explicit recognition in Rule 26(c) of protective orders for cost-sharing. Together, these rules provide many opportunities to control unreasonable discovery.

Continuing, this member noted that something like 300,000 cases are filed in federal courts every year. Perhaps 15,000 to 30,000 of them will involve document-heavy discovery. The FJC closed-case study shows that most cases have little discovery. We need to find out whether there are types of cases that generate problems. But even that inquiry might be deferred for a while to see how the proposed amended rules will work. "I do not know that it's a big problem now in most cases." Problems are most likely to arise when discovery pairs a data-poor party against a data-rich party. Perhaps we should defer acting on requester-pays rules for a while.

It was noted that the Department of Justice has a lot of experience with discovery, both asking and responding. Further inquiry probably is warranted. The Department can undertake further internal inquiries.

A judge said that there are not many reported cases invoking Rule 45(c)(2). That may suggest there is little need for new rules to protect nonparties. More generally, the rules we have now seem adequate to address any problems. "The need may be to use them, not to add new rules."

A lawyer echoed these views, observing that a great deal of work went into shaping the Duke Rules package with the goal of advancing proportionality in discovery. We should wait to see what effect the new rules have if they are allowed to become effective.

Another judge suggested that study of initial disclosure may be a good place to start. It may be helpful to return to the original rule, requiring disclosure of what is relevant to the case as a whole, not merely "your case." The present limited disclosure rule seems to fit awkwardly with our focus on cooperation and proportionality. Initial disclosure rules, indeed, will be discussed later in this meeting as a possible subject for a pilot project.

Discussion of initial disclosure continued. The original idea was to get the core information on the table at the outset. That proved too ambitious at the time — local rule opt-outs were provided to meet resistance, and many districts opted out in part or entirely. National uniformity was attained only by narrowing disclosure to "your case." The employment protocols now adopted by 50 judges may show that broad initial disclosure can work. So it was suggested that we could look to state practices. The Institute for the Advancement of the American Legal System has generated reports. Broad initial disclosure remains a controversial idea: "You can be right, but too soon."

The final observation was that the Committee undertook to study requester-pays rules in response to a letter from members of Congress.

Appellate-Civil Rules Subcommittee

A joint subcommittee has been reconstituted to explore issues that overlap the Appellate

Rules and Civil Rules. Judge Matheson chairs the Subcommittee. Virginia Seitz is the other Civil Rules member. Appellate Rules Committee members are Judge Fay, Douglas Letter, and Kevin Newsom.

The Subcommittee is exploring two sets of issues that first arose in the Appellate Rules Committee. As often happens, if it seems wise to act on these issues, the most likely means will be revisions of Civil Rules. That is why a joint Subcommittee is useful. The issues involve "manufactured finality" and post-judgment stays of execution under Civil Rule 62.

MANUFACTURED FINALITY

Judge Matheson introduced the manufactured finality issues. "This is not a new topic." An earlier subcommittee failed to reach a consensus. "Nor is consensus likely now." The Subcommittee seeks direction from the Appellate and Civil Rules Committees.

"Manufactured finality" refers to a wide variety of strategies that may be followed in an attempt to appeal an interlocutory order that does not fit any of the well-established provisions for appeal. Rule 54(b) partial finality is, for any of many possible reasons, not available. Other elaborations of the final-judgment rule, most obviously collateral-order doctrine, also fail. Avowedly interlocutory appeals under § 1292 are not available. The theoretical possibility of review by extraordinary writ remains extraordinary.

Many examples of orders that prompt a wish to appeal could be offered. A simple example is dismissal of one claim while others remain, and a refusal to enter a Rule 54(b) judgment. Or important theories or evidence to support a single claim are rejected, leaving only weak grounds for proceeding further.

If the would-be plaintiff manages to arrange dismissal of all remaining claims among all remaining parties with prejudice, courts recognize finality. Finality is generally denied, however, if the dismissal is without prejudice. And an intermediate category of "conditional prejudice" has caused a split among the circuits. This tactic is to dismiss with prejudice all that remains open in the case after a critical interlocutory order, but on terms that allow revival of what has been dismissed if the court of appeals reverses the order that prompted the appeal. Most circuits reject this tactic, but the Second Circuit accepts it, and the Federal Circuit has entertained such appeals. There is a further nuance in cases that conclude a dismissal nominally without prejudice is de facto with prejudice because some other factor will bar initiation of new litigation — a limitations bar is the most common example.

The Subcommittee has narrowed its discussion to four options: (1) Do nothing. The courts would be left free to do whatever they have been doing. (2) Adopt a simple rule stating what is generally recognized anyway — a dismissal with prejudice achieves finality. Although this is generally recognized, an explicit rule would provide a convenient source of guidance for practitioners who are not familiar with the wrinkles of appeal jurisdiction and reassurance for those who are. But the rule might offer occasion for arguments about implied consequences for dismissals without prejudice, particularly the "de facto prejudice" and "conditional prejudice" situations. (3) Adopt a clear rule saying that only a dismissal with prejudice establishes finality. Still, that might not be as clear as it seems. Only elaborate rule text could definitively defeat arguments for de facto prejudice or conditional prejudice. Committee Note statements might lend further weight. Assuming a clear rule could be drafted to close all doors, it would remain to decide whether that is desirable. (4) A rule could directly address conditional prejudice, whether to allow it or reject it.

Rules sketches illustrating the three alternatives for rules approaches are included in the agenda materials. The Subcommittee deliberated its way to the same pattern as the earlier subcommittee. It has not been possible to reach consensus. On the conditional prejudice question, the circuit judges on the Subcommittee would not propose a rule that would manufacture finality in this way. The lawyers seemed to like the idea, and there are indications that district judges also like the idea.

This introduction was followed by reflections on the general setting. The final-judgment rule rests on a compromise between competing values. The paradigm final judgment leaves nothing more to be done by the district court, apart from execution if there is a judgment awarding relief. Insisting on finality is a central element in allocating authority between trial courts and appellate courts. It also conduces to efficiency, both in the trial court and in the appellate court. Many issues that seem to loom large as a case progresses will be mooted by the time the case ends in the district court. Free interlocutory appeal from many orders would delay district-court proceedings and, upon affirmance, produce no offsetting benefit. Periodic interruptions by appeals could wreak havoc with effective case management.

The values of complete finality are offset by the risk that all trial-court proceedings after a critical and wrong ruling will be wasted. Some interlocutory orders, moreover, have real-world consequences or exert pressures on the parties that, if the order is wrong, are distorting pressures. These concerns underlie not only the provision for partial final judgments in Rule 54(b) but a number of elaborations of the final-judgment concept. The best known elaboration is found in collateral-order doctrine, an interpretation of the "final decision" language in § 1291 that allows appeals from orders that do not resemble a traditional final judgment. Other provisions are found in avowedly interlocutory-appeal provisions, most obviously in § 1292 and Rule 23(f) for orders granting or refusing class certification. Extraordinary writ review also provides review in compelling circumstances.

The recent process of elaborating § 1291 seems, on balance, to show continuing pressure from the Supreme Court to restrain the inventiveness shown by the courts of appeals. The courts of appeals embark on lines of decision that expand appeal opportunities, confident in their abilities to achieve a good balance among the competing forces that shape appeal jurisdiction on terms that at times seem to approach case-specific rules of jurisdiction. The Supreme Court believes that it is better to resist these temptations. The clearest illustrations are provided by the line of cases that have restricted collateral-order appeals by insisting that collateral-order appeal is proper only when all cases in a "category" of cases are appealable. Otherwise, no case in a particular "category" will support appeal.

These are the pressures that have shaped approaches to manufactured finality. A bewildering variety of circumstances have been addressed in the cases without generating clear patterns. The concept of "de facto prejudice" is an example. The seemingly clear example of dismissal nominally without prejudice in circumstances that would defeat a new action by a statute of limitations is clear only if the limitations outcome is clear. But the limitations question may depend on fact determinations, and even choice of law, that cannot easily be made in deciding on appeal jurisdiction. Another example is found in cases that have accepted jurisdiction when a dismissal is without prejudice to bringing a new action in a state court — often with very good reason if the critical ruling by the federal court is affirmed on appeal — but the dismissal is on terms that bar filing a new action in federal court. And a particularly clear example is provided by a case in which the University of Alabama filed an action, only to have the state Attorney General appear and dismiss the action without prejudice. The University was allowed to appeal to challenge the Attorney General's authority to assume control if the action.

The Rules Committees have clear authority under § 2072(c) to adopt rules that "define when a ruling of a district court is final for the purposes of appeal under section 1291." But regulating appeal jurisdiction is an important undertaking. There is great value in having clear rules. Attorneys who are not thoroughly familiar with appeal practice may devote countless hours to attempts to determine whether and when an appeal can be taken, and may reach wrong conclusions. Even attorneys who are familiar with these rules may seek reassurance by costly reexamination. And misguided attempts to appeal can disrupt district-court proceedings while imposing unnecessary work on the court of appeals.

Clear rules, however, may not always be the best approach. Clarity can sacrifice important nuances. The pattern of common-law elaborations of a simply worded appeal statute shows an astonishing array of subtle distinctions that may provide important protections by appeal.

The choice to proceed to recommend a clear rule, any clear rule, is beset by these competing forces.

Discussion began by recognizing that these are hard choices. Courts of appeals often believe strongly in the opportunity to shape appeal jurisdiction to achieve an optimal concept of finality. How would they react, for example, to a recommendation that adopts finality by dismissal with conditional prejudice?

A related suggestion was that it may be better to leave these issues to resolution by the Supreme Court in the ordinary course of reviewing individual cases. Circuit splits can be identified on some easily defined issues, such as conditional prejudice.

It was further suggested that the Committee does not believe that it must always act to resolve identifiable circuit splits. The conditional prejudice issue, for example, "is of first importance to appellate judges." The Subcommittee, as the earlier subcommittee, has shown the difficulty of the question through its divided deliberations. Do we need to act to establish clarity for lawyers?

These questions are not for the Civil Rules Committee alone. The Appellate Rules Committee shares responsibility for determining what is best. So far it has happened that actual rules provisions tend to wind up in the Civil Rules, in part because many appeal-affecting provisions remained in the Civil rules when the Appellate Rules were separated out from their original home in the Civil Rules. But it is possible to imagine that new rules could be located in the Appellate Rules, or even in a new and independent Federal Rules of Appeal Jurisdiction.

Further discussion suggested that everyone agrees that a dismissal with prejudice is final. It may be useful to say that in a rule. The Committee Note can say that the rule text does not address the question whether "conditional prejudice" qualifies as "with prejudice." It may be worth doing.

A response asked what is the value of a rule that states an obvious proposition widely accepted? The reply was that people who are not familiar with appellate practice may benefit.

Judge Sutton noted that these questions first came up in 2005. "My first reaction was that this is a manufactured problem." The circuit split on conditional prejudice may be worth addressing, but either answer could prove difficult to advance through the full Enabling Act process. And any more general rule would incur the risk of negative implications. The time has come to fish or cut bait.

Judge Matheson observed that it would be useful to have the sense of the Committee to report to the Appellate Rules Committee when it meets in two weeks.

The first question put to the Committee was whether the best choice would be to do nothing. Thirteen members voted in favor of doing nothing. One vote was that it would be better to do something.

STAYS OF EXECUTION: RULE 62

Judge Matheson began by observing that the questions posed by Rule 62 and stays of execution arose in part in the Appellate Rules Committee. They have not been as much explored by the Subcommittee as the manufactured-finality issues. The focus has been on execution of money judgments, not judgments for specific relief. The provisions for injunctions, receiverships, or directing an accounting may be relocated, but have not been considered for revision.

Rule 62(a) provides an automatic stay. Until the Time Computation Project the automatic stay provision dovetailed neatly with the Rule 62(b) provision for a court-ordered stay pending disposition of post-judgment motions under Rules 50, 52, 59, and 60. The automatic stay lasted for 10 days, and the time to make the Rule 50, 52, and 59 motions was 10 days. The Time Computation Project, however, set the automatic stay at 14 days, but extended to 28 days the time to move under Rules 50, 52, and 59. A district judge asked the Committee what to do during this apparent "gap." The Committee concluded at the time that the court has inherent authority to stay its own judgment after expiration of the automatic stay and before a post-judgment motion is made. The question of amending Rule 62 was deferred to determine whether actual difficulties arise in practice.

A separate concern arose in the Appellate Rules Committee. Members of that committee have found it useful to arrange a single bond that covers the full period between expiration of the automatic stay and final disposition on appeal. That bond encompasses the supersedeas bond taken to secure an stay pending appeal, and is already in place when an appeal is filed.

The Subcommittee has begun work focusing on Rule 62(a), (b), and (d). Other parts of Rule 62 have yet to be addressed. A detailed memorandum by Professor Struve, Reporter for the Appellate Rules Committee, addresses other issues that remain for possible consideration.

The Subcommittee brings a sketch of possible revisions to the Committee for reactions. The first question is whether in its present form Rule 62 causes uncertainties or problems.

The second of two sketches in the agenda book became the subject of discussion. This sketch rearranges subdivisions (a), (b), (c), and (d). Revised Rule 62(a) and (b) addresses "execution on a judgment to pay money, and proceedings to enforce it." It carries forward an automatic stay, extending the period to 30 days. But it also recognizes that the court can order a stay at any time after judgment is entered, setting appropriate terms for the amount and form of security or denying any security. The court also can dissolve the automatic stay and deny any further stay, subject to a question whether to allow the court to dissolve a stay obtained by posting a supersedeas bond. An order denying or dissolving a stay may be conditioned on posting security to protect against the consequences of execution. The order may designate the duration of a stay, running as late as issuance of the mandate on appeal. That period could extend through disposition of a petition for certiorari.

The question whether a supersedeas bond should establish a right to stay execution pending appeal remains open for further consideration. Consideration of the amount also remains open — if a stay is to be a matter of right, the rule might set the amount of the bond at 125% of the amount of a money judgment.

The purpose of this sketch is to emphasize the primary authority of the district court to deny a stay, to grant a stay, and to set appropriate terms for security on granting or denying a stay. It also recognizes authority to modify or terminate a stay once granted. Appellate Rule 8 reflects the primacy of the district court. Explicit recognition of matters that should lie within the district court's inherent power to regulate execution before and during an appeal may prove useful.

Discussion began with a judge's suggestion that he had not seen any problems with Rule 62. The question whether any other judge on the Committee had encountered problems with Rule 62 was answered by silence.

The next question was whether the lack of apparent problems reflects the practice to work out these questions among the parties. A lawyer member responded that "you wind up stipulating to a stay through the decision on appeal." Another lawyer member observed, however, that "there may be power struggles."

It was noted that the "gap" between expiration of the automatic stay and the time to make post-judgment motions seems worrisome, but perhaps there are no great practical problems.

Another member said that the "more efficient" draft presented for discussion is simple, and collects things in a pattern that makes sense. Most cases are resolved without trial. Even recognizing summary judgments for plaintiffs, problems of execution may not arise often. This "little rewrite" seems useful. A judge repeated the thought — this version "makes for a cleaner rule."

Judge Matheson concluded by noting that the Subcommittee is "still in a discussion phase." Knowing that Committee members have not encountered problems with Rule 62 "makes a point. But we can address the 'gap,' and perhaps work toward a better rule."

Rule 23 Subcommittee

Judge Dow began the report of the Rule 23 Subcommittee by pointing to the list of events on page 243 of the agenda materials. The Subcommittee has attended or will attend many of these events; some Subcommittee members will attend others that not all members are able to attend. The events for this year will culminate in a miniconference to be held at the Dallas airport on September 11. The miniconference will be asked to discuss drafts that develop further the approaches reflected in the preliminary sketches included in the agenda materials. The most recent of these events was a roundtable discussion of settlement class actions at George Washington University Law School. It brought together a terrific group of practitioners, judges, and academics. It was very helpful.

Suggestions also are arriving from outside sources and are being posted on the Administrative Office web site. The suggestions include many matters the Subcommittee has not had on its agenda. It is important to have the Committee's guidance on just how many new topics might be added to the Rule 23 agenda. The Subcommittee's sense has been that there is no need for a fundamental rewrite of Rule 23. But some of the submissions suggest pretty aggressive reformulations of Rule 23(a) and (b) that seem to start over from scratch. These suggestions have overtones of a need to strengthen the perspective that class actions should be advanced as a means of increasing private enforcement of public policy values.

A Subcommittee member noted that several professors propose deletion of Rule 23(a)(1), (2), and (3). Adequacy of representation would remain from the present rule. And they would add a new paragraph looking to whether a class action is the best way to resolve the case as compared

to other realistic alternatives. The question for the Committee is whether we should spend time on such fundamental issues.

A first reaction was that no compelling justifications have been offered for these suggestions. It was noted that in deciding to take up Rule 23, the Committee did not have a sense that a broad rewrite is needed, but instead focused on specific issues. "The burden of proof for going further has not been carried."

The next question was whether new issues should be added to the seven issues listed in the Subcommittee Report that will be brought on for discussion today.

Multidistrict proceedings were identified as a topic related to Rule 23. There was a presentation on MDL proceedings to the Judicial Conference in March. MDL proceedings overlap with Rule 23. It will be important to pay attention to developments in MDL practice. And it was noted that discussion at the George Washington Roundtable included the thought that some of the current Rule 23 sketches reflect approaches that could reduce the pressures that mass torts exert on MDL practice. Further development of settlement-class practice might move cases into Rule 23, with the benefits of judicial review and approval of settlements, and away from widespread private settlements of aggregated cases free from any judicial review or supervision. One way of viewing these possibilities is the idea of a "quasi class action" — a sensible system for certifying settlement classes could be helpful. So a big concern is how to settle mass-tort cases after Amchem.

Another suggestion was that the "biggest topic not on our list" is the concept of "ascertainability" that has recently emerged from Third Circuit decisions.

Settlement class certification: Discussion turned to the question whether there should be an explicit rule provision for certifying settlement classes. One question will be whether the rule should prescribe the information provided to the court on a motion to certify and for preliminary "approval." Should the concept be not preliminary "approval," but instead preliminary "review"? The review could focus on whether the proposed settlement is sufficiently cogent to justify certification and notice to the class. What information does the judge need for taking these steps? Something like what Rule 16 says should be given to the judge? An explicit rule provision could guide the parties in what they present, as well as help the judge in evaluating the proposal. There was a lot of interest in this at the George Washington Roundtable.

Further discussion noted that Rule 23(e) does not say anything about the procedure for determining whether to certify a settlement class in light of a proposed settlement. At best there is an oblique implication in the Rule 23(e)(1) provision for directing notice in a reasonable manner to all class members who would be bound by the proposal.

A judge observed that once the parties agree on a settlement and take it to the judge, the judge’s reaction is likely to be that it is good to settle the action. The result may be that notice is sent to the class without a sufficiently detailed appraisal of the settlement terms. Problems may appear as class members respond to the notice, but the process generates a momentum that may lead to final approval of an undeserving settlement. Another judge observed that there are great variations in practice. Some judges scrutinize proposed settlements carefully. Some do not. It would be helpful to have criteria in the rule.

A choice was offered. The rule could call for a detailed "front load" of information to be considered before sending out notice to the class. Or instead it could follow the ALI Aggregate Litigation Project, characterizing the pre-notice review as review, not "approval." Discussion at the

George Washington Roundtable "was almost all for front-loading."

A judge said that most of the time in a "big value case" the lawyers know they should front-load the information. "But when the parties are not so sophisticated, the late information that emerges after notice to the class may lead me to blow up the settlement." And if the settlement is rejected after the first notice, a second round of notice is expensive and can "eat up most of the case value."

Another judge observed that "it gets dicey when some defendants settle and others do not." What seems fairly straightforward at the time of the early settlement may later turn out to be more complicated.

A lawyer thought that front-loading sounds like it makes sense. But the agenda materials do not include rule language for this. What factors should be addressed by the parties and considered by the court? It was suggested that the factors are likely to be much the same as the factors a court considers in determining whether to give final approval. One perspective is similar to the predictions made when considering a preliminary injunction: a "likelihood of approval" test at the first stage.

Another judge said that the Third Circuit "is pretty clear on what I should consider. Lawyers who practice class actions understand the factors." But there are many class actions — for example under the Fair Credit Reporting Act — brought by lawyers who do not understand class-action practice. Those lawyers will not be helped by a new rule. There is no problem calling for a more detailed rule. A different judge agreed that the problem lies with the less experienced lawyers.

Yet another judge expressed surprise at this discussion. "We go through pretty much the same information as needed for final approval of a settlement." It may help to say that in generic terms in rule text, but it is less clear whether detailed standards should be stated in the rule.

And another judge said "I do less work on the front end than at the back end. But the factors are the same."

The final comment was that drafting a rule provision will require careful balancing. There are impulses to make the criteria for final approval simpler and clearer, as will be discussed. But there also are impulses to demand more information up front.

It was agreed that the Subcommittee agenda would be expanded to include a focus on the procedure for determining whether to approve notice to the class of a settlement, looking toward final certification and approval.

Rule 23(f) Appeal of Settlement Class Certification: The question whether a Rule 23(f) appeal can be taken from preliminary approval of a settlement class has come to prominence with the Third Circuit decision in the NFL case. Given the language of Rule 23(f) as it stands, the answer seems to turn on whether preliminary approval of a settlement and sending out notice to the class involves "certification" of the settlement class. The deeper question is whether it is desirable to allow appeal at that point, remembering that appeal is by permission and that it might be hoped that a court of appeals will quickly deny permission to appeal when there are not compelling reasons to risk derailing the settlement by the delays of appeal.

The question of appeal at the preliminary review and notice stage is not academic. High profile cases are likely to draw the attention of potential objectors well before the preliminary review. They may view the opportunity to seek permission to appeal at this stage as a powerful

opportunity to exert leverage.

The Third Circuit ruled that Rule 23(f) does not apply at this stage. But other courts of appeals have simply denied leave to appeal without saying whether Rule 23(f) would authorize an appeal if it seemed desirable. This issue will arise again. The Third Circuit reasoned that the record at this early stage will not be sufficient to support informed review. But if the rules are amended to require the parties to present sufficient information for a full-scale evaluation of the proposed settlement at the preliminary review stage, that problem may be reduced.

A judge observed that Rule 23(f) hangs on the seismic effect of certification or a refusal to certify. Certification of a settlement class is very important. It is rare to go to trial. Certification even for trial tends to end the case by settlement. So what, then, of certification for settlement? Will an opportunity to appeal enable objectors to derail settlements? Given the agreement of class and the opposing parties to settle, a court of appeals will be reluctant to grant permission to appeal.

Uncertainty was expressed whether the possibility of a § 1292(b) appeal with permission of the trial court as well as the court of appeals may provide a sufficient safety valve.

An observer stated that "the notice process is what brings out objectors." If Rule 23(f) appeal is available on preliminary review, the way may be opened for a second Rule 23(f) appeal after notice has gone out.

It was agreed that seriatim Rule 23(f) appeals would be undesirable.

The discussion concluded with some sense that the Third Circuit approach seems sensible. Whether Rule 23(f) should be revised to entrench this approach may depend on the text of any rule that formalizes the process of certifying a settlement class. If the rule calls for certification only after preliminary review, notice, review of any objections, and final approval of the settlement, then there will be no room to argue that the preliminary review grants certification, nor, for that matter, that refusal to send out notice after a preliminary review denies certification.

A final Rule 23(f) question was noted later in the meeting. The Department of Justice continues to experience difficulties with the requirement that the petition for permission to appeal be filed with the circuit clerk within 14 days after the order is entered. It will explore this question further and present the issue in greater detail in time for the fall meeting.

With this, discussion turned to the seven topics listed in the agenda materials.

Criteria for Settlement Approval: Rule 23(e) was revised in the last round of amendments to adopt the "fair, reasonable, and adequate" phrase that had developed in the case law to express the multiple factors articulated in somewhat different terms by the several circuits. At first a long list of factors was included in draft rule text. The factors were then demoted to a draft Committee Note that is set out in the agenda materials. Eventually the list of factors as abandoned for fear it would become a "check list" that would promote routinized presentations on each factor, no matter how clearly irrelevant to a particular case, and divert attention from serious exploration of the factors that in fact are important in a particular case.

The question now is whether the rule text should elaborate, at least to some extent, on the bland "fair, reasonable, and adequate" phrase. The ALI Aggregate Litigation Project criticized the "grab bag" of factors to be found in the decisions, but provided a model of a more focused set of criteria requiring four findings, looking to adequate representation; evaluation of the costs, risks,

probability of success, and delays of trial and appeal; equitable treatment of class members relative to each other; and arm's-length negotiation without collusion. These factors are stated in the agenda sketch as a new Rule 23(e)(2)(A), supplemented by a new (B) allowing a court to consider any other pertinent factor and to refuse approval on the basis of any such other factor. The goal is to focus attention on the matters that are useful. A related goal is to direct attention away from factors that have been articulated in some opinions but that do not seem useful. The common example of factors that need not be considered is the opinion of counsel who shaped the proposed settlement that the settlement is a good one.

One reaction to this approach may be "I want my Circuit factors." Another might be that the draft Committee Note touches on too many factors. And of course yet another reaction might be that these are not the right factors.

A participant recalled a remark by Judge Posner during the George Washington Roundtable discussion: "why three words? 'Reasonable' says it all" — the appropriate amendment would be to strike "fair" and adequate" from the present rule text. The response was that these three words had become widely used in the cases when Rule 23(e) was amended. They were designed to capture ongoing practice. There is little need to delete them simply to save two words in the body of all the rules.

The agenda materials include a spreadsheet comparing the lists of approval factors that have been articulated in each Circuit. It was asked whether each of these factors is addressed in the draft Committee Note. Not all are. Greater detail could be added to the Note. Some factors are addressed negatively in the note, such as support of the settlement by those who negotiated it. The formulation in rule text was built on the foundation provided by the ALI. The question is how far the Committee Note should go in highlighting things that really matter.

A judge observed that the sketch of rule text required the court to consider the four listed elements, but the text then went on to allow the court to reject a settlement by considering other matters even though the settlement had been found fair, reasonable, and adequate. Would it not be better to frame it to make it clear that these other factors bear on the determination whether the settlement is fair, reasonable, and adequate? What factors might those be?

A response was that this sketch of a Rule 23(e)(2)(B) is a catch-all for case- or settlement-specific factors. Such factors may be important. It might be used to invoke the old factors lists, but it seems more important to capture unique circumstances.

Subparagraph (B) also generated this question: Is this structure designed so that passing inspection under the required elements of subparagraph (A) creates a presumption of fairness that shifts the burden from the proponents of the settlement to the opponents? The immediate response was that this question requires further thought, but that often it is not useful to think of sequential steps of procedure as creating a "presumption" that invokes shifting burdens.

A different approach asked what is gained by this middle ground that avoids any but a broad list of considerations without providing a detailed list of factors? So long as these open-ended considerations remain, they can be used to carry forward all of the factors that have been identified in any circuit. All of those factors were used to elaborate the capacious "fair, reasonable, and adequate" formula, and they still will be.

A response was that various circuits list 10, or 12, or 15 factors. Some are more important than others. "Distillation could help." But the reply was that "then we should make clear that these

are the only factors."

The next step was agreement that if a proposal to amend Rule 23(e) emerges from this work, it should be sent out for comment without the "any other matter pertinent" provision sketched in subparagraph (B).

Turning back to subparagraph (A), it was noted that it will be difficult to implement criterion (iv), looking to arm's-length negotiation without collusion. The lawyers will always say that they negotiated at arm's length and did not collude. The response was that this element is one to be shown by objectors. If they make the showing of "collusion" — an absence of arm's length negotiation — the settlement must be disapproved. This was challenged by asking whether a court should be required to disapprove a settlement that in fact is fair, reasonable, and adequate — perhaps the best deal that can be made — simply for want of what seems an arm's-length negotiation?

A broader perspective was brought to bear. Courts commonly recognize separate components in evaluating a proposed settlement, one procedural and other substantive. There may be striking examples that combine both components, as in one case where a settlement was quickly arranged for the purpose of preempting a competing class action in a state court. It may be hoped that such examples are rare.

A twist was placed on the nature of "collusion." One dodge may be that parties who have engaged in amicable negotiations take the deal to some form of ADR — often a retired judge — for review and blessing. "If reputable counsel are involved, it's different from a rushed settlement by an inexperienced lawyer."

Item (iv), then, might be dropped. But the focus on procedural fairness and adequacy may be important. It may be useful to highlight it in rule text.

Discussion of these issues concluded with a reminder that the federal law of attorney conduct is growing. Collusion is prohibited by state rules of attorney conduct. These rules are adopted into the local rules of federal courts. Item (iv) will become "another rule governing attorney conduct."

Settlement Class Certification: A settlement-class rule was published for comment as a new subdivision (b)(4) at virtually the same time as the Amchem decision in the Supreme Court. The Committee suspended consideration to allow time to evaluate the aftermath of the Amchem decision. The idea of reopening the question is that certification to settle is different from certification to try the case. The ALI Aggregate Litigation Project is something like this. Most participants in the George Washington Roundtable discussion were of similar views.

One common thread that distinguishes proposals to certify a settlement class from trial classes is to downplay the role of "predominance" in a (b)(3) class.

Two alternative sketches are presented in the agenda materials. The first expressly invokes Rule 23(a), and includes an optional provision invoking subdivision (b)(3). Certification focuses on the superiority of the proposed settlement and on finding that the settlement should be approved under Rule 23(e). The second includes a possible invocation of Rule 23(b)(3), but focuses on reducing the Rule 23(a) elements by looking to whether the class is "sufficiently numerous to warrant classwide treatment," and the sufficiency of the class definition to determine who is in the class.

Is either alternative a useful addition to Rule 23?

A judge offered no answers, but only questions. "It is a big step to downplay predominance." At some point a settlement class judgment where common issues do not predominate might violate Article III or due process. "Huge numbers of cases will be moved from (b)(3) to (b)(4)."

The first response was that many predominance issues are obviated by settlement. The common illustration is choice of law. By adopting common terms, the settlement avoids the difficulties that arise when litigation would require applying different bodies of law, emphasizing different elements, to different groups within the class. But the reply was that the sketch does not refer to predominance for settlement.

The next observation was that "manageability" appears in the text of Rule 23(b)(3) now, and at the time of Amchem, but the Court ruled in Amchem that manageability concerns can be obviated by the terms of settlement. Commonality, on the other hand, provides protection to class members, even if its significance is reduced by the terms of settlement.

That observation led to the question whether, if Rule 23(a) continues to be invoked for settlement classes, the result will be to place greater weight on typicality. The first response was that "typicality is easy." But what of common causation issues, and defenses against individual claimants, that are not common? The only response was that if class treatment is not recognized, cases will settle by other aggregated means that provide no judicial review or control.

Cy pres: The agenda materials include a sketch that would add an extensive set of provisions for evaluating cy pres distributions to Rule 23(e)(1). The sketch is based on the ALI Aggregate Litigation Project, § 3.07. The value of addressing these issues in rule text turns in part on the fact that cy pres distributions seem to be rather common, and in part on the hesitations expressed by Chief Justice Roberts in addressing a denial of certiorari in a cy pres settlement case. Nothing in the federal rules addresses cy pres issues now. Some state provisions do — California, for example, has a cy pres statute.

The sketch narrowly limits cy pres recoveries. The first direction is to distribute settlement proceeds to class members when they can be identified and individual distributions are sufficiently large to be economically viable. The next step, if funds remain after distributions to individual class members, is to make a further distribution to the members that have participated in the first distribution unless the amounts are too small to be economically viable or other specific reasons make further individual distributions impossible or unfair. Finally, a cy pres approach may be employed for remaining funds if the recipient has interests that reasonably approximate the interests of class members, or, if that is not possible, to another recipient if that would serve the public interest. This cy pres provision includes a bracketed presumption that individual distributions are not viable for sums less than $100, but recent advice suggests that in fact claims administrators may be able to provide efficient distributions of considerably smaller sums.

The opening lines of the sketch include, in brackets, a provision that touches a sensitive question. These words allow approval of a proposal that includes a cy pres remedy "if authorized by law." There is virtually no enacted authority for cy pres remedies in federal law. The laws of a few states to address the question. It may be possible to speak to the sources of authority in the general law of remedies. But the question remains: courts are approving cy pres distributions now. If the practice is legitimate, there should be authority to regulate it by court rule. If it is not legitimate, it would be unwise to attempt to legitimate it by court rule.

The value of cy pres distributions depends in large measure on how effective the claims process is in reducing the amounts left after individual claims are paid. Courts are picking up the

ALI principle. It seems worthwhile to confirm it in Rule 23.

The first question was whether the rule should require the settlement agreement to address these issues. That would help to reduce the Article III concerns. This observation was developed further. Suppose the agreement does not address disposition of unclaimed funds. What then? Must there be a second (and expensive) notice to the class of any later proposal to dispose of them? The sketch Committee Note emphasizes that cy pres distribution is a matter of party agreement, not court action.

It was observed that even though a cy pre distribution is agreed to by the parties, it becomes part of the court's judgment. It can be appealed. And there is a particular problem if cy pres distribution is the only remedy. Suppose, for example, a defendant's wrong causes a ten-cent injury to each of a million people. Individual distributions to not seem sensible. But finding an alternative use for the $100,000 of "damages" seems to be creating a new remedy not recognized by the underlying substantive law of right and remedy.

Another judge noted that "courts have been doing this, but it's a matter of follow-the-leader." There is not a lot of endorsement for the practice, particularly at the circuit level. Cy pres theory has its origins in trust law. Settlement class judgments ordinarily are not designed to enforce a failed trust. "What is the most thoughtful judicial discussion" that explains the justification for these practices?

The response was that cy pres recoveries have been discussed in a number of California state cases. California recognizes "fluid recovery," as illustrated by the famous case of an order reducing cab fares in Los Angeles — there was likely to be a substantial overlap between the future cab users who benefit from the period of reduced fares and the past cab users who paid the unlawful high fares, but the overlap was not complete. The Eighth Circuit has provided a useful review this year. And cy pres distribution can be made only when the court has found the settlement to be fair, reasonable, and adequate. That determination itself requires an effort to compensate class members — by direct distribution if possible, but if that is not possible in some other way.

A judge noted a recent case in his court involving a defendant who sent out 100,000,000 spam fax messages. The records showed the number of faxes, but then the records were spoliated. There was no record of where the faxes had gone. The liability insurer agreed to settle for $300 for each of the class representatives. But what could be done with the remaining liability, which — with statutory damages — was for a staggering sum? Seven states in addition to California provide for distributing a portion of a cy pres recovery to Legal Services. That still leaves the need to dispose of the rest. Addressing these questions in rule text must rest on the premise that such distributions are proper.

It was agreed that these questions are serious. The ALI pursued them to cut back on cy pres distributions, to make it difficult to bypass class members. Perhaps a rule should say that it is unfair to have all the settlement funds distributed to recipients other than class members.

Discussion concluded on two notes: these questions cannot be resolved in a single afternoon. And although it would be possible to adopt a rule that forbids cy pres distributions, that probably is not a good idea.

Objectors: Objectors play a role that is recognized by Rule 23 and that is an important strand in reconciling class-action practice with the dictates of due process. Well-framed objections can be very valuable to the judge. At the same time, it is widely believed that there are "bad objectors" who

seek only strategic personal gain, not enhancement of values for the class. On this view, some objectors may seek to exploit their ability to delay a payout to the class in order to extract tribute from class counsel that may be to the detriment of class interests. Rule 23(e)(5) was added to reflect the concern with improperly motivated objections by requiring court approval for withdrawal of an objection. This provision appears to have been "somewhat successful."

The Appellate Rules Committee is studying proposals to regulate withdrawal of objections on appeal. The Rule 23 Subcommittee is cooperating in this work.

Alternative sketches are presented at page 273 in the agenda materials. In somewhat different formulations, each requires the parties to file a statement identifying any agreement made in connection with withdrawal of an objection. An alternative approach is illustrated by sketches at pages 274-275 of the agenda materials. The first simply incorporates a reminder of Rule 11 in rule 23(e)(5). The second creates an independent authority to impose sanctions on finding that an objection is insubstantial or not reasonably advanced for the purpose of rejecting or improving the settlement.

No rule can define who is a "good" or a "bad" objector. The idea of these sketches is to alert and arm judges to do something about bad objectors when they can be identified.

Another possibility that has been considered is to exact a "bond" from an objector who appeals. The more expansive versions of the bond would seek to cover not simply the costs of appeal — which may be considerable — but also "delay costs" reflecting the harm resulting from delay in implementing the settlement when the appeal fails.

A "good" objector who participated in the George Washington Roundtable commented extensively on the obstacles that already confront objectors.

The first comment was that sanctions on counsel "are more and more regulation of attorney conduct."

And the first question from an observer was whether discovery is appropriate to support objections. The response was that it is not likely that a rule would be written to provide automatic access to discovery. There is a nexus to opt-out rights. At most such issues might be described in a Committee Note, recognizing that at times discovery may be valuable.

The next question was whether courts now have authority under Rule 11 and 28 U.S.C. § 1927 to impose sanctions on frivolous objections or objections that multiply the proceedings unreasonably and vexatiously. The response was that the second alternative, on page 275, seems to cut free from these sources of authority, creating an independent authority for sanctions. But it remains reasonable to ask whether independent authority really is needed. One departure from Rule 11, for example, is that Rule 11 creates a safe harbor to withdraw an offending filing as a matter of right; the Rule 23 sketch does not include this.

Rule 68 Offers: The sketches in the agenda materials, beginning at page 277, provide alternative approaches to a common problem. Defendants resisting class certification often attempt to moot the representative plaintiff by offering complete individual relief. Often the offers are made under Rule 68. Although acceptance of a Rule 68 offer leads to entry of a judgment, it is difficult to find any principled reason to suppose that a Rule 68 offer has greater potential to moot an individual claim than any other offer, particularly one that may culminate in entry of a judgment. Courts have reacted to this ploy in different ways. The Supreme Court has held that a Rule 68 offer of complete relief

to the individual plaintiff in an opt-in action under the Fair Labor Standards Act moots the action. The opinion, however, simply assumed without deciding that the offer had in fact mooted the representative plaintiff's claim, and further noted that an opt-in FLSA action is different from a Rule 23 class action. Beyond that, courts seem to be increasingly reluctant to allow a defendant to "pick off" any representative plaintiff that appears, and thus forever stymie class certification. Some of the strategies are convoluted. In the Seventh Circuit, for example, a class plaintiff is forced to file a motion for class certification on filing the complaint because only a motion for certification defeats mooting the case by an offer of complete individual relief. But it also is recognized that an attempt to rule on certification at the very beginning of the action would be foolish, so the plaintiff also requests, and the courts understand, that consideration of the certification motion be deferred while the case is developed. This convoluted practice has not commended itself to judges outside the Seventh Circuit.

The first sketch attacks the question head-on. It provides that a tender of relief to a class representative can terminate the action only if the court has denied certification and the court finds that the tender affords complete individual relief. It further provides that a dismissal does not defeat the class representative's standing to appeal the order denying certification.

The second sketch simply adopts a provision that was included in Rule 68 amendments published for comment in 1983 and again in 1984. This provision would direct that Rule 68 does not apply to actions under Rules 23, 23.1, and 23.2. It did not survive withdrawal of the entire set of Rule 68 proposals.

The third sketch begins by reviving a one-time practice that was at first embraced and then abandoned in the 2003 amendments. This practice required court approval to dismiss an action brought as a class action even before class certification. The parties must identify any agreement made in connection with the proposed dismissal. The sketch also provides that after a denial of certification, the plaintiff may settle an individual claim without prejudice to seeking appellate review of the denial of certification.

The first question was whether these proposals reflect needs that arise from limits on the ability to substitute representatives when one is mooted. The first response was that it is always safer to begin with multiple representatives. But it was suggested that the problem might be addressed by a rule permitting addition of new representatives. That approach is often taken when an initial representative plaintiff is found inadequate.

The next observation was that substituting representatives may not solve the problem. The defendant need only repeat the offer to each successive plaintiff. The approach taken in the first sketch is elegant.

Another member observed that courts allow substitution of representatives at the inadequacy stage of the certification decision. But substitution may require formal intervention. That is too late to solve the mootness problem. These issues are worth considering.

The last observation was that the Seventh Circuit work-around seems to be effective. "It's not that big a deal." But the first and second sketches are simple.

Issues Classes: The relationship of Rule 23(c)(4) issues classes to the predominance requirement in Rule 23(b)(3) has been a longstanding source of disagreement. One view is that an issue class can be certified only if common issues predominate in the claims considered as a whole. The other view is that predominance is required only as to the issues certified for class treatment. There are some

signs that the courts may be converging on the view that predominance is required only as to the issues.

The first sketch in the agenda materials, page 281, simply adds a few words to Rule 23(b)(3): the court must find that "questions of law or fact common to the class predominate over any questions affecting only individual class members, subject to Rule 23(c)(4), and * * *." The "subject to Rule 23(c)(4)" phrase may seem somewhat opaque, but the meaning could be elaborated in the Committee Note.

The second sketch, at page 282, would amend Rule 23(f) to allow a petition to appeal from an order deciding an issue certified for class treatment. The rule might depart from the general approach of Rule 23(f), which requires permission only from the court of appeals, by adding a requirement that the district court certify that there is no just reason for delay. This added requirement, modeled on Rule 54(b), might be useful to avoid intrusion on further management of the case. An opportunity for immediate appeal could be helpful before addressing other matters that remain to be resolved.

A judge asked the first question. "Every case I have seen excludes issues of damages. Does this mean that every class is a (c)(4) issues class that does not need to satisfy the predominance requirement"? That question led to a further question: What is an issue class? An action clearly is an issue class if the court certifies a single issue to be resolved on a class basis, and intends not to address any question of individual relief for any class member. The action, for example, could be limited to determining whether an identified product is defective, and perhaps also whether the defect can be a general cause of one or more types of injury. That determination would become the basis for issue preclusion in individual actions if defect, and — if included — general causation were found. Issues of specific causation, comparative responsibility, and individual injury and damages would be left for determination in other actions, often before other courts. But is it an "issue" class if the court intends to administer individual remedies to some or many or all members of the class? We have not thought of an action as an issue class if the court sets the questions of defect and general causation for initial determination, but contemplates creation of a structure for processing individual claims by class members if liability is found as a general matter.

This plaintive question prompted a response that predominance still is required for an issue class. This view was repeated. Discussion concluded at that point.

Notice: The first question of class-action notice is illustrated by a sketch at page 285 of the agenda materials. Whether or not it was wise to read Rule 23(c) to require individualized notice by postal mail in 1974 whenever possible, that view does not look as convincing today. Reality has outstripped the Postal Service. The sketch would add a few words to Rule 23(c)(2)(B), directing individual notice "by electronic or other means to all members who can be identified through reasonable effort." The Committee Note could say that means other than first class mail may suffice.

This proposal was accepted as an easy thing to do.

The Committee did not discuss a question opened in the agenda materials, but not yet much explored by the Subcommittee. It may be time to reopen the question of notice in Rule 23(b)(1) and (2) classes, even though the concern to enable opt-out decisions is not present. It is not clear whether the Subcommittee will recommend that this question be taken up.

Pilot Projects

Judge Campbell opened the discussion of pilot projects by describing the active panel presentation and responses at the January meeting of the Standing Committee. Panel members explored three possible subjects for pilot projects: enhanced initial disclosures, simplified tracks for some cases, and accelerated ("Rocket") dockets.

The Standing Committee would like to encourage this Committee to frame and encourage pilot projects. It likely will be useful to appoint a subcommittee to study possible projects, looking to what has been done in state courts and federal courts, and to recommend possible subjects.

One potential issue must be confronted. Implementation of a pilot project through a local district court rule must come to terms with Rule 83 and the underlying statute, 28 U.S.C. § 2071(a), which direct that local rules must be consistent with the national Enabling Act rules. The agenda materials include the history of a tentative proposal twenty years ago to amend Rule 83 to authorize local rules inconsistent with the national rules, subject to approval by the Judicial Conference and a 5-year time limit. The proposal was abandoned without publication, in part for uncertainty about the fit with § 2071(a).

The Rule 83 question will depend in part on the approach taken to determine consistency, or inconsistency, with the national rules. The current employment protocols employed by 50 district judges are a good illustration. They direct early disclosure of much information that ordinarily has been sought through discovery. But they seem to be consistent with the discovery regime established in Rule 26, recognizing the broad discretion courts have to guide discovery.

Initial Disclosures: Part of the Rule 26(a)(1) history was discussed earlier in this meeting. The rule adopted in 1993 directed disclosure of witnesses with knowledge, and documents, relevant to disputed matters alleged with particularity in the pleadings. It included a provision allowing districts to opt out by local rule; this provision was included under pressure from opponents who disliked the proposal. The rule was revised in 2000 as part of the effort to eliminate the opt-out provision of the 1993 rule, limiting disclosure to witnesses and documents the disclosing party may use. Arizona Rule 26.1 requires much broader disclosure even than the 1993 version of Rule 26(a)(1). It is clearly intended to require disclosure of unfavorable information as well as favorable information. The proposal for adoption was greeted by protests that such disclosures are inconsistent with the adversary system. The Arizona court nonetheless persisted in adoption. This broad disclosure is coupled with restrictions on post-disclosure discovery. Permission is required, for example, to depose nonparty witnesses. Arizona lawyers were surveyed to gather reactions to this rule in 2008 and 2009. In the 2008 survey, 70% of the lawyers with experience in both state and federal courts preferred to litigate in state court. (Nationally, only 43% of lawyers with experience in both state and federal courts prefer their state courts.) The results in the 2009 survey were similar. More than 70% of the lawyers who responded said that initial disclosures help to narrow the issues more quickly. The Arizona experience could be considered in determining whether to launch a pilot project in the federal courts.

An observer from Arizona said that debate about the initial disclosure rule declines year-by-year. "It does require more work up front, but it is, on average, faster and cheaper. Unless a client wants it slow and expensive, we often recommend state court." An action can get to trial in state court in 12, or 16, months. Two years is the maximum. It takes longer in federal court. He further observed that Arizona should be considered as a district to be included in a federal pilot project because the bar, and much of the bench, understand broad initial disclosures.

The next comment observed that a really viable study should include districts where broad initial disclosure "is a complete shock to the system." There may be a problem with a project that

exacts disclosures inconsistent with the limited requirements of Rule 26(a)(1). But it is refreshing to consider a dramatic departure, as compared to the usually incremental changes made in the federal rules. This comment also observed that even in districts that adhered to the 1993 national rule, lawyers often agreed among themselves to opt out.

A member asked whether comparative data on case loads were included in the study of Arizona experience. The answer was that they were not in the study. But Maricopa County has 120 judges. Their dockets show case loads per judge as heavy as the loads in federal court.

A judge observed that a mandatory initial disclosure regime that includes all relevant information would be an integral part of ensuring proportional discovery. The idea is to identify what it is most important to get first. A pilot project would generate this information as a guide to judicial management. The judge could ask: "What more do you need"? This process could be integrated with the Rule 26(f) plan. This is an extraordinarily promising prospect. There will be enormous pushback. Justice Scalia, in 1993, wondered about the consistency of initial disclosure with an adversary system. But the success in Arizona provides a good response.

Accelerated Dockets: This topic was introduced with a suggestion that the speedy disposition rates recently achieved in the Western District of Wisconsin appear to be fading. The Southern District of Florida has achieved quick disposition times for some case. "Costs are proportional to time." Setting a short time for discovery reflects what is generally needed. State-court models exist. The "patent courts" are experimenting with interesting possibilities. The Federal Judicial Center will report this fall on experience with the employment protocols.

These and other practices may help determine whether a pilot project on simplified procedures could be launched. Federal-court tracking systems could be studied at the beginning. State court practices can be consulted.

A member provided details on the array of cases filed in federal court. The four most common categories include prisoner actions, tort claims, civil rights actions (labor claims can be added to this category), and contract actions. Smaller numbers are found for social security cases, consumer credit cases, and intellectual property cases. Some case types lend themselves to early resolution. Early case evaluation works if information is shared. Early mediation also works, although the type of case affects how early it can be used.

One thing that would help would be to have an e-discovery neutral available on the court's staff to help parties work through the difficulties. Many parties do not know what they're doing with e-discovery. This member has worked as an e-discovery master. "Weekly phone calls can save the parties a lot of money." One ploy that works is to begin with a presumption that the parties will share the master's costs equally, unless the master recommends that one party should bear a larger share. That provision, and the fact that they're being watched, dramatically reduces costs and delay. And e-discovery mediation can help.

It also helps when the parties understand the case well enough for early mediation.

And experience as an arbitrator, where discovery is limited to what the arbitrator directs, shows that it is possible to control costs in a fair process.

Another suggestion was that a statute allows summary jury trial. If the parties agree, it can be a real help. The trial can be advisory. It may be limited, for example to 3 hours per party. Summaries of testimony, or live witnesses, may be used. Charts may be used. "Juries love it." After

the jury decides, lawyers can ask the jury why they did what they did. This practice can be a big help in conjunction with a settlement conference.

Another suggestion was that it would help to devise rules to dispose of cases that require the court to review a "record." Social Security cases, IDEA cases, and ERISA fiduciary cases are examples.

Another judge noted that the Northern District of Ohio has a differentiated case management plan. The categories of cases include standard, expedited, complex, mass tort, and administrative. There are ADR options, and summary jury trial. It would be good to study this program to see how it works out over time.

Discussion concluded with the observation that if done well, study of these many alternatives could lead to useful pilot projects.

Judge Sutton concluded the discussion of pilot projects by noting that the Standing Committee is grateful for all the work done on the Duke Rules package and on Rule 37(e). He further noted that Rule 26(a)(1) failed in its initial 1993 form because it was a great change from established habits. It may be worthwhile to restore it, or something much like it, as a pilot project in 10 or 15 districts to see how it might be made to work now.

Judge Sutton concluded the meeting by noting that Judge Campbell's term as Committee Chair will conclude on September 30. Judge Campbell will attend the November meeting, and the Standing Committee meeting in January, for proper recognition of his many contributions to the Rules Committees. "Surely 100% of Arizona lawyers would prefer David Campbell to anyone else." His stewardship of the Committee has been characterized by steadiness, even-handedness, patience, and insight. And he is always cheerful. "Thank you."

Respectfully submitted,

Edward H. Cooper
Reporter