Advisory Committee on Civil Rules
Washington, D.C.
April 18-19, 1996

I. Opening Remarks of Chairman. (Oral report.)

II. Approval of Minutes of November 1995 meeting.

III. Review of Proposed Amendments Published for Public Comment.

A. Proposed Amendments to Rule 9(h), Pleading Special Matters — Admiralty and Maritime Claims.

B. Proposed Amendments to Rule 26(c), Discovery — Protective Orders.

C. Proposed Amendments to Rule 47, Selecting Jurors — Examining Jurors.

D. Proposed Amendments to Rule 48, Number of Jurors — Participation in Verdict.

IV. Consideration of Draft Proposed Amendments to Rule 23 (Class Actions).

A. Comprehensive Redraft of Rule 23.

B. Alternative Factors in Comprehensive Redraft of Rule 23.

1. Eliminating "Necessary" Element in Rule 23(b)(3).

2. Reducing Role of "Probable Success."

3. Eliminating "Public Values" from Rule 23(b)(3).

4. Reducing Notice Complications.

5. Eliminating Settlement Classes.

C. Minimum Redraft of Rule 23.

D. Proposed Amendments to Rule 23(f) — Appellate Rules.

V. Consideration of Standing Committee's Draft Self-Study Plan.

VI. Consideration of Admiralty Rules B, C, and E.

VII. Next Meeting.

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Agenda Item I-II

DRAFT MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

NOVEMBER 9 and 10, 1995

NOTE: THIS DRAFT HAS NOT BEEN REVIEWED BY THE COMMITTEE

The Advisory Committee on Civil Rules met on November 9 and 10, 1995, at The University of Alabama School of Law. The meeting was attended by all members of the Committee: Judge Patrick E. Higginbotham, Chair, and Judge David S. Doty, Justice Christine M. Durham, Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Paul V. Niemeyer, Carol J. Hansen Posegate, Esq., Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq. Edward H. Cooper was present as reporter. Former Committee Chair Chief Judge Sam C. Pointer Jr., and former member John P. Frank, Esq., also attended. Judge Alicemarie H. Stotler attended as Chair of the Standing Committee on Rules of Practice and Procedure; Professor Daniel R. Coquillette attended as Reporter, and Sol Schreiber, Esq. attended as liaison member, of that Committee. Judge Jane A. Restani attended as liaison representative from the Bankruptcy Rules Advisory Committee. Peter G. McCabe and John K. Rabiej, along with Karen Kremer, represented the Administrative Office of the United States Courts. Thomas E. Willging and Robert J. Niemic represented the Federal Judicial Center. Professor Francis E. McGovern attended as an invited speaker on experience with state-court class actions. Observers included Frank Bainbridge, Esq., Sheila Birnbaum Esq., Robert S. Campbell, Jr., Esq. (liaison, American College of Trial Lawyers), Alfred W. Cortese, Jr., Esq., Robert Heim, Esq., Professor Deborah R. Hensler, Robert Klein, Esq., Barry McNeil, Esq. (Chair-elect, ABA Litigation Section), Professor Linda S. Mullenix, Fred Nisko, Esq., Professor Carol M. Rice, Evan Schwab, Esq., Fred S. Souk, Esq., Melvin Spaeth, Esq., and H. Thomas Wells Jr., Esq. (liaison, ABA Litigation Section).

Judge Higginbotham opened the meeting by welcoming the Committee and observers to Tuscaloosa and the Law School.

The Minutes of the April 20, 1995 meeting were approved.

Judge Higginbotham reported on the September meeting of the Judicial Conference of the United States. Shortly before the meeting, the proposals to publish for comment revised jury voir dire provisions in Criminal Rule 24(a) and Civil Rule 47(a) were moved to the discussion calendar. It was proposed that the Judicial Conference direct the Standing Committee that the revisions not be published for comment. This proposal raised concerns on at least two scores. The first concern is that it would be a new and unfortunate precedent to bring the Judicial Conference into the rulemaking process before the ordinary

consideration of proposals that have worked through the full processes of the Advisory Committees and Standing Committee. The second concern is that such interference could make it more difficult to persuade Congress that the Enabling Act process should be respected because it provides an orderly and designedly deliberate process for considering rules changes. After spirited discussion, the Judicial Conference decided not to interfere with the proposed publications. This action seems to reflect a judgment about the need to respect the regular Enabling Act process, not final approval of the merits of the Criminal Rule 24(a) and Civil Rule 47(a) proposals. There seems to have been a strong sense that allowing public comment is particularly important with respect to attorney participation in jury voir dire. The matter is of great importance to the bar, and the bar should know that it has had full opportunity to make its views known.

Brief further discussion was given to the Civil Rule 47(a) proposal. It was noted that the public comment period may propose alternatives that will improve the initial proposal. Jury questionnaires are often suggested, but must be controlled both to protect juror privacy and also to reduce the opportunities for manipulation of psychological profiles or other jury selection devices. New York, which has followed the practice of selecting civil juries outside the presence of a judge, is moving toward a system of greater judicial involvement that nonetheless is likely to leave room for lawyer participation. And thoughtful attention must be directed to the fact that many judges who permit substantial lawyer participation under present Rule 47(a) oppose amendment of the rule to require this practice. If possible, some means must be found to address the underlying concern that judges are better able to control improper uses of voir dire if they have an unconditional right to deny any participation.

The report on pending legislation pointed out that it was decided that the "Contract With America" bills were moving so fast in the House of Representatives that it would not be fruitful to attempt to voice Rules Committee concerns in the House. The Subcommittee chaired by Judge Scirica, including members Doty, Rowe, Vinson, and Wittmann, has met with some success in working with members of the Senate staff. Congress is working toward a conference report on securities legislation, although as of the time of this meeting the Senate had not yet appointed conferees. Some difficulties continue to divide the House and Senate. The chair of the SEC has stated profound reservations about the legislation. It is still too early to guess the prospects for eventual passage. There are important substantive provisions in the bill, and the subcommittee has been at pains to state repeatedly that substantive matters are outside the area of proper Committee concern. When substance and procedure are tied together in the bill, as often happens, this approach has necessarily

constrained the subcommittee's freedom to make suggestions. And there are many procedural provisions, dealing with pleading, discovery, Civil Rule 11 sanctions, jury interrogatories, class actions, and other matters. Some of the troubling procedural provisions have been dropped, such as the proposals for steering committees or guardians ad litem in class actions. Other class action innovations — and there are many — are limited to securities actions, but seem to have reached a stage that is beyond further modification. Pleading requirements have been moved to a relatively "low stakes" table; the most recent version incorporates Second Circuit standards for pleading with particularity. The Rule 11 provisions continue to be a challenge. The current version requires the court to review the complaint, responsive pleadings, and dispositive motions, and make findings whether there has been any violation of Rule 11. Any Rule 11 violation in the complaint that is not de minimis presumptively requires an award of the full attorney fees incurred by the defendant, no matter how small a portion of the fees was incurred by reason of the violation rather than entirely proper portions of the complaint. These Rule 11 provisions have become a surrogate for a more general fee-shifting proposal, and the compromise seems untouchable during this session. If the bill does not pass this session, however, there may be an opportunity for further consideration and improvement of these provisions.

Rule 23

Civil Rule 23 formed the central focus of the meeting. The materials with the discussion draft suggested that four major proposals should be discussed first: (1) The new Rule 23(f) provision for permissive interlocutory appeals; (2) that Rule 23(b)(3) be modified to require that a class action be "necessary" for the fair and efficient adjudication of the controversy; (3) that Rule 23(b)(3) require consideration of the probable success of the class claim on the merits, and of the significance of even probable success; and (4) that Rule 23 be modified — most likely with respect to (b)(3) classes only — to make clear the appropriateness of "settlement" classes. The meeting provided opportunity for full discussion of each of these four proposals, and tentative decisions were reached as to the first three. No time was available to discuss the more detailed changes that also were proposed in the discussion draft. The discussion draft posed two separate issues with respect to these changes. The first issue is whether it is wise to propose a number of significant changes in tandem with a set of major changes. The choices to be made will not be easy. If the Committee finds several aspects of Rule 23 that bear useful improvements, it seems undesirable to defer these matters for a period that is likely to extend several years into the future. On the other hand, consideration of even two or three fundamental changes will continue to require careful attention and

much hard work. If the Standing Committee, members of the bench and bar, Judicial Conference, Supreme Court, and Congress are asked to consider fundamental changes, there may be a risk that other significant changes will not receive the attention required to ensure the best possible revisions. The second issue really is all the other changes. None can be advanced without careful Committee review. If it is decided that they should be considered on the merits with an eye to determining which merit a recommendation for publication, the Committee must review them to support appropriate determinations.

Rule 23(f): Permissive Interlocutory Appeals

Draft Rule 23(f) would provide for permissive interlocutory appeal from a district court order granting or denying class certification. The draft is closely modeled on the language of 28 U.S.C. § 1292(b), in an effort to invoke familiar concepts that will ease application of a new rule. It departs from § 1292(b), however, in important respects. First, it does not require permission to appeal from the district court, nor even an initial request to the district court for permission. Second, it does not incorporate any of the limiting § 1292(b) requirements that have limited use of § 1292(b) in the class certification context — that there be "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Although § 1292(b) has provided a useful opportunity for appeal with respect to various Rule 23 rulings, the draft is intended to make appeals more readily available. The opportunity for more frequent review may be particularly important if other substantial changes are made in Rule 23. Particularly during the early years of any new Rule 23 provisions, the opportunity for appellate guidance by interlocutory appeal can be invaluable.

The limits built into the draft were noted repeatedly throughout the discussion. Application for permission to appeal must be made within 10 days of the order granting or denying certification. District court proceedings are stayed only if a stay is ordered by the district judge or the court of appeals — the stay provision is modeled on § 1292(b) to ensure there is no confusion of meaning. The district-court-first analogy to Appellate Rule 8(a) also was noted repeatedly. The Advisory Committee Note to this provision should observe that ordinarily an application to stay district court proceedings should be made first to the district court. The question was raised whether the rule should provide a presumptive stay of discovery when a court of appeals grants permission to appeal. It was agreed that it is better to adhere to the general provisions of the § 1292(b) model; such problems seem to be worked out well in practice under §

1292(b), and creation of a presumption might distort the stay decision.

The first question addressed to the nature of the permissive appeal was whether there should be an opportunity to appeal as of right, even broader than the former "death-knell" theory that was used by some courts to permit appeal when a denial of class certification seemed to threaten the practical termination of litigation that could not be pursued to vindicate individual claims alone. The discretionary opportunity provided by the draft was thought to be illusory. It was observed that at least in some circuits, certification for appeal under § 1292(b) frequently fails because the court of appeals denies permission to appeal; eliminating the need for district-court certification does not ensure that the court of appeals will grant permission.

The response to the fear that a discretionary system of interlocutory appeal would prove illusory was the fear that a right to appeal would lead to abuse. The Federal Judicial Center study confirms the belief that there are many "routine" class certification decisions. Appeals in such cases are likely to do little more than increase delay and expense. Yet there will be strong temptations to appeal certification decisions; defendants will be particularly tempted to appeal orders that grant certification. Perhaps worse, the right to appeal certification decisions might lead a party to contest a certification that otherwise would be accepted by stipulation. It is anticipated — and the Advisory Committee Note would make clear — that permission to appeal, although discretionary in the court of appeals, will rarely be given.

It was further urged that the draft provides significantly greater protection against improvident certification decisions than § 1292(b) now provides. Removing the power of the district court to defeat any opportunity to appeal is a significant change. A grant or denial of certification can "make or break" the litigation, and the need for review at times will be greatest in situations that are least likely to lead to district-court certification. And the danger of delay is reduced not only by the draft requirement that permission to appeal be sought within 10 days, but also by the prospect that the courts of appeals generally will act quickly, likely within 30 days or so, in deciding whether to grant permission.

An argument was advanced for restoring the requirement of district court permission to appeal, drawing from the observation that a class certification decision may be provisional. When a judge has reached a reasonably firm decision as to certification, appellate review often will be welcome, particularly in cases that present uncertain questions of law. There is little reason to fear

that necessary appeals will be thwarted by district court intransigence. And if the district judge has no voice in the appeal decision, there will be a tendency to defer certification rulings. These arguments were later renewed, with the added suggestion that district-court discretion is particularly important in cases that have generated lengthy records on the certification question. The district court's familiarity with the record will support a better evaluation of the value of appeal. The response was renewed also, this time with the added observations that certification for appeal might be inappropriately denied by a judge bent on pursuing settlement following a grant of class certification designed to encourage settlement, or that certification for appeal might be inappropriately denied by a judge who has denied class certification because of distaste for the underlying claim.

Discussion returned to the fear that the draft rule would encourage too many efforts to appeal; it was suggested that appeals would be attempted in the overwhelming majority of cases. It was rejoined, however, that this prediction rested on experience with the most complex and contentious of class actions. More routine actions are not likely to involve such persistent efforts. The explicit invocation of court of appeals discretion, moreover, is a significant safeguard against feckless attempts to appeal. Although adding "in its discretion" to an openly permissive appeal provision may seem redundant, it is valuable as an explicit reaffirmation of the sweep of appellate discretion. The phrase is lifted bodily from § 1292(b); the Committee Note should state that the scope of appellate discretion is as broad under proposed Rule 23(f) as it is under § 1292(b). Invoking this familiar concept should allay concerns about the risks of improvident and disruptive appeal attempts. It is expected, moreover, that most certification decisions will depend heavily on specific case circumstances. There will be little reason to grant appeal in such cases; the major impetus for appeal will come in cases presenting unsettled questions of law.

Further discussion led to the conclusion that the Committee Note should discuss the possible importance of district court contributions to the decision whether to permit interlocutory appeal. District courts should be encouraged to offer advice on the desirability of appeal at the time of making certification decisions. The advice would not be a condition of appeal, but would be more or less persuasive according to the reasons offered by the district court and the extent to which certification turns on case-specific facts developed at length in the district court. District courts can be quite helplful in "separating the wheat from the chaff" of intended appeals. District court advice may help the parties as well as the court of appeals; a cogent statement of reasons for refusing appeal may often discourage a party who

otherwise would attempt an appeal.

It also was asked whether an appeal provision could reasonably be discussed before deciding whether to propose any other changes in Rule 23. Until the Committee has concluded its deliberations on Rule 23, it will not be possible to know what the Rule will be. The scope of appeal, the nature of the issues that may be advanced, and the frequency or infrequency of "routine" certification decisions, all depend on the nature of the rule itself. It was responded that the Committee may decide to urge only the appeal amendment. But it was further agreed that a decision to propose an appeal provision may appropriately be revisited, at the behest of any Committee member, at the conclusion of the Rule 23 deliberations.

A motion to approve proposed Rule 23(f) passed, 11 for and 1 opposed as to particular (unspecified) features of the draft.

CERTIFICATION "NECESSARY"

The discussion draft proposed that to certify a Rule 23(b)(3) class, a district court must find that certification is "necessary" for the fair and efficient adjudication of the controversy, not merely superior to other available methods:

> **(3)** the court finds * * * that a class action is ~~superior to other available methods~~ necessary for the fair and efficient adjudication of the controversy. * * *

The background of this proposal was described as the great level of interest and concern that have come to surround use of Rule 23 to address mass torts, and particularly dispersed mass torts. The Committee has heard many views on this set of problems through its activities focused on Rule 23. There has been a strong sense that much of the difficulty has been due to the substantive law, a difficulty beyond the reach of this Committee. There also has been much concern that certification of a class can give artifical strength to claims that individually lack any significant merit. The greatest concern focuses on claims that, if valid, would generate substantial individual damage awards. Although many of the claims may be brought as individual actions, the defendants would defeat most. If all are aggregated in a single action, however, even a relatively small risk of losing on the merits must be weighed by the defendants against the crushing liability that would be imposed by a loss on the merits. This calculation may be further affected by a fear that the sheer weight of the responsibility of denying any recovery to all members of a class may increase the prospect that the class will win on an aggregate claim that would be lost far more often if pursued in individual

litigation. The result is a great pressure to settle. The pressure to settle also may be enhanced by the transaction costs of litigating individual claims — if a defendant can purchase "global peace" by settlement, much of the settlement cost may be offset by saving the expense of individual litigations.

On the other side of the equation is the familiar phenomenon of class litigation to enforce claims that are strong on the merits but that would not bear the expense of individual litigation. Consolidation of actions in the same court under Civil Rule 42, and aggregation of actions in different courts under 28 U.S.C. §§ 1404, 1406, and 1407 is not a particularly effective means of addressing this problem, even recognizing that the efficiencies of consolidated proceedings may make it possible to pursue claims that would not bear the risks and expenses of separate adjudication. Class actions in such circumstances do far more than merely achieve efficiency. The proposal is not designed to deter consolidations, but only to limit class certification to settings in which individual litigation is not a realistic alternative.

Changing this criterion of Rule 23(b)(3) certification from superiority to necessity could emphasize the role of class actions in addressing claims that do not bear the costs of individual litigation. For such claims, class certification is necessary. Certification is not necessary for claims that could reasonably be pursued in individual actions. It may be that a single event or set of events will give rise to claims of both types because some victims suffer substantial injury, while many other victims suffer only relatively minor injuries.

Such is the purpose of the proposal. It is limited to (b)(3) classes. The questions the Committee addressed began with the central issues: is the change desirable? What might it mean in practice — is there force to the concern that "necessary" might mean a lower threshold, not a higher threshold? Should the change be broadened to include (b)(1) or (b)(2) classes?

The first response was that the proposal was a mere cosmetic change that is not adequate to address any of the real problems of Rule 23.

The next response was that indeed the change seemed to lower the standard, making it easier to achieve certification. The annotations to the proposal say that the test of necessity is a practical test, not an absolute one; is this something that can safely be left to the Committee Note, or should it somehow be worked into the language of the Rule? Another view of this question was that there is no meaningful difference between superiority and necessity; unless we can find and express a difference, we should not amend the language of the present rule.

In any event, the concept of necessity is ambiguous.

And then the proposal was championed as a good thing. The only way to effect change is to modify the language of the rule. The problems indeed are clustered around (b)(3) and the "freeway" effect it has in generating claims that, but for class certification, would not ever develop into litigation. If it were possible to find the equivalent in formal drafting language, the rule should caution against "willy-nilly" certification. The Note should say this. A clear and convincing preponderance of the factors conducing to certification should be required.

The opposing view conceded that necessity implies a higher standard than superiority, and argued that a higher standard is undesirable. To find that a class action is superior is to find that it is a better means of proceeding. To change the standard is to require that a court deny certification even though a class action would be better than — superior to — the realistically available alternative methods of proceeding. The change may seem to be loading the rule too much in favor of defendants. The perceived problems would be better addressed through the proposed factors that look to the probability and social benefits of success on the merits of the class claim.

Another concern about the necessity standard was expressed in relation to employment discrimination claims. The statutory amendments that have added damages remedies now bring these cases into the ambit of (b)(3) classes. Class certification may be necessary to ensure that all affected individuals recover damages; a rule that emphasizes necessity may lead to certification of a class that will generate many practical problems, and that would not be "superior" to other available methods that often would not be invoked. This result may be a good thing, but we need to think about the problem before deciding on a language change.

The concern about the ambiguous relationship between the superiority and necessity standards led to the suggestion that the rule retain the superiority requirement and add necessity as an additional requirement. This should make it clear that the standard is being ratcheted up. This proposal was in fact adopted after much further discussion.

Attention then moved to the element of this requirement that focuses on the "fair and efficient adjudication of the controversy." It was observed that the meaning of this phrase depends on the "controversy" that it refers to. If the controversy includes claims that grow out of a common fact setting but that would not give rise to individual litigation, the concepts of fairness and efficiency may diverge. A class action may be superior and indeed necessary precisely because there is no viable

alternative means of adjudication. It is more fair if the claim deserves to be enforced. At the same time, class proceedings may be "efficient" only in the sense that the alternatives are so inefficient as to be unavailable. For that matter, certification also may not be "fair" in light of the prospect that an aggregation of worthless small claims may gain leverage that forces settlement to avoid the costs of class litigation and the risk of a mistaken judgment on the merits. This discussion did not lead to any proposal for amending any of the three terms involved.

Another suggestion was that as a matter of drafting, factor (C) should be reframed. "Desirability" somehow duplicates the inquiry into superiority or necessity; it would be better to refer to the consequences of concentrating the litigation in the particular forum. This suggestion was met, however, with the concern that the longstanding language of Rule 23 should be changed only when a change of meaning is intended. Any substitute for desirability must be explained in the Note as a styling change, not a change of meaning, and even then there would be a risk that the Note would be overlooked and some change of meaning read into the change of language.

These concerns provoked the observation that before addressing matters of language, it is most important to determine what policy should be embodied in the rule. Should we maintain present policy, or is it desirable to suggest some change?

One broad policy issue was found in the question whether adoption of a higher standard for (b)(3) class certification would be, or would be perceived to be, a pro-defendant choice. The response was that the change cannot meaningfully be seen in that light. The purpose of this change is not to address the classes that aggregate numerous small claims; if anything is do be done about such classes, it will be through other proposals. Instead, it addresses the classes that include plaintiffs who have substantial individual claims and who could pursue individual litigation. In the last few years, defendants have often sought certification of such classes. The interests of the defendants, often spurred by liability insurers, are to achieve a global settlement that avoids the costs and uncertainties of individual litigation. Making certification more difficult in these cases could at least as easily be seen as a pro-plaintiff change. As an additional complication, the interests of the defendants may overlap with the interests of some members of the plaintiff class because a class adjudication can effect a more orderly and uniform distribution of the assets available to satisfy the claims of all plaintiffs. A carefully structured class disposition can ensure that all persons injured by a common course of conduct share in the judgment, not simply those who got the earlier judgments. The purpose is not so much to favor plaintiffs or defendants as to find

a procedure that most effectively recognizes the interests of all.

The Committee then was admonished that this proposal reflects rulemaking at its worst. The Rules were, in the beginning, relatively simple. People could understand them. They have become complex. The cognoscenti understand them still. But there are 800,000 lawyers who may need to understand them, and it is counterproductive to continue along a course of trivial changes that generate confusion far out of proportion to any incremental benefit that might be achieved.

The policy issues were brought back into the discussion with an illustration of a "single event" mass tort. An airplane crash might generate 150 claims. Each claim could be tried separately. A joint class proceeding may be more efficient, but is not necessary. This is a real situation that causes real difficulty. Individual actions in the federal courts can be consolidated without difficulty, given the array of consolidation devices. The Note should comment on this alternative to certification. This change is important. This argument was met by the contrary view that class certification is suitable for the single-event mass disaster. And in return it was accepted that perhaps in some single-event settings a class action is necessary because consolidation will not accomplish all the appropriate results. Class certification, for example, might help address settings in which individual state-court actions cannot be consolidated with a mass of federal actions.

A different perspective was opened by the observation that the proposed necessity standard seems calculated to underscore a preference for individual litigation where individual litigation is possible. It was answered that this is indeed the purpose, that many lawyers believe there is too much emphasis on moving cases, getting rid of them, even though individual actions would be better. This is the policy that should be addressed before language is chosen.

This policy was then underscored by referring to the decision in Matter of Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995). It was suggested that the result in the Rhone-Poulenc case is right, and that Rule 23(b)(3) should be amended to make it easier to support similar results in future cases. We need to find a way to make it easier to refuse certification. This view was echoed in the statement that the issue is whether Rule 23(b)(3) should be amended to discourage class certification.

The earlier suggestion was renewed by a motion that the superiority language should be retained, and supplemented by adding a requirement of necessity. There would be no change in the "fair and efficient language," which refers to matters that depend

heavily on the context of specific cases. This change may indeed encourage certification of small-claims classes; whether there may be offsetting changes that may discourage certification depends on the additional proposals still to be discussed.

The virtues of this proposal were urged to be twofold. The existing body of doctrine that elaborates the superiority requirement will be retained, providing a familiar first step of analysis. The additional necessity requirement need be addressed only if superiority is found. Necessity then will provide an additional and higher requirement that will require further evaluation of the same factors that bore on the superiority determination.

The objection was made that it seems undesirable to require this two-step process. The proposal seems to be that necessity is a higher standard that always embraces superiority, and always requires something more. The finding of superiority will be necessary in all cases, but never sufficient for certification. Why not focus on necessity alone, explaining it as well as can be, without retaining both requirements?

The motion to retain the superiority requirement and add a necessity requirement passed by vote of 8 to 4. This portion of Rule (b)(3) would read:

> **(3)** the court finds * * * that a class action is superior to other available methods and necessary for the fair and efficient adjudication of the controversy. * * *

State Class Actions

Professor Frances McGovern then addressed the Committee on current experience with class actions in state courts. He spoke from extensive experience with state-court class actions, including experience as a special master charged with facilitating coordination between state courts and the federal court supervising the consolidated federal cases arising out of claims concerning silicone gel breast implants. He has worked extensively with the MTLC committee established by the Conference of Chief Justices.

There has been an explosion in state class actions. Many of them involve claims that are framed as "fraud" claims arising out of the terms of various kinds of insurance and loan transactions. The volume is remarkable. The procedures also are remarkable; state judges achieve much greater uniformity of procedure than federal judges, largely by adhering closely to the recommendations made in the Manual for Complex Litigation. There are some major problems.

Polybutelene pipe cases illustrate one type of state actions. Chlorine attacks the pipe joints, causing them to leak. State law governs, and individual claims ordinarily are too small to meet the amount-in-controversy requirement for diversity jurisdiction. Some individual claims have been tried to judgment. The defendants want to settle. A Texas state judge refused to certify a nationwide class for a $750,000,000 settlement. A federal judge denied jurisdiction of an attempted class action. The result was that class actions were filed in three states. A California judge took on the task of persuading judges from the other state to go to California to work out a settlement. When that did not work, he conducted a settlement conference that came very close to a settlement. The lawyers have been "sent back" to the other state courts to attempt to conclude the settlement of all actions in all states. It may work.

For some time, class actions have provided the "end game" after a number of individual actions have been tried to judgment, establishing a framework of information that facilitates just and reasonable settlement on a class basis. But recently some lawyers are attempting to bypass this process, putting the class action "up front" before there have been many individual adjudications.

State judges increasingly are turning down "sweetheart" settlements that establish res judicata for the defendants in return for deals that benefit the class lawyers more than the class.

State class actions have become very important. And federal Rule 23 is very important to what the state courts do. Most states follow Rule 23, although there are variations in the extent of its adoption.

Deborah Hensler then stated that Rand is trying to put together a project to get a good view on the frequency and diversity of class actions. The methodology would be different than that used by the Federal Judicial Center study, aiming at generating complementary information. A survey of potential plaintiffs would be an important element in the study. A series of case studies, based on data collection from sources outside court files, would be attempted as the basis for a systematic measure of the costs and benefits of class actions for plaintiffs and defendants. This is a very ambitious proposal, which will require substantial independent funding. It may not be possible to mount as ambitious a project as would be desirable. Although it takes a while to make sure that the cases studied are fairly representative, not "eccentric," results could be available in time to inform this Committee's ongoing consideration of Rule 23.

PROBABILITY OF SUCCESS

Over the course of the past year, it has been urged that Rule 23 should incorporate a test, akin to preliminary injunction analysis, that balances the probable outcome on the merits against the burdens imposed by class certification. The discussion draft included this feature in two — perhaps redundant — ways, dealing only with (b)(3) classes:

> **(3)** the court finds * * * that the probability of success on the merits of the claim [by or against members of the class] warrants the burdens of certification, and that a class action is superior * * *. The matters pertinent to the findings include: * * * (E) the probable success on the merits of the class claims, issues, or defenses.

Discussion began by framing the general issues: should any consideration of the merits be required? If so, what should be the means of calibrating the strength of the claims to the certification decision? Should the preliminary injunction analogy be used, or does it suggest an unnecessarily elevated standard of success? How would this approach affect the relationship between the certification decision and other proceedings — would it require substantially increased opportunity for discovery on the merits, delay the certification decision, create difficulty for certification of settlement classes, increase the occasions for interlocutory appeal? Although the provision may seem a boon for defendants, may it generate offsetting problems by elevating the stakes at an early stage of the litigation for fear that a preliminary finding of probable success may increase settlement pressure and even affect a defendant's standing with the financial community? So, in the end, is this an approach that may help plaintiffs in cases that lead to a favorable preliminary appraisal of the merits, and may harm plaintiffs when the preliminary appraisal is unfavorable?

It was suggested that perhaps it would be more appropriate to rely on analogy to temporary restraining order practice rather than preliminary injunction practice. The difficulty with preliminary injunction procedure was thought to be that it may be akin to trying the case before certification. Civil Rule 65, indeed, authorizes the court to combine the preliminary injunction hearing with trial on the merits. A temporary restraining order often issues only after a hearing, but the hearing is expedited and there is little or no discovery. The key is to find an abbreviated procedure, a matter that invokes the procedural distinctions between temporary restraining orders and preliminary injunctions, not any supposed difference in the standards for preliminary relief.

It was observed that with preliminary consideration of the

merits, lawyers inevitably will demand an opportunity for discovery to support well-informed presentations on the merits. And, once discovery is opened up, it will be difficult to limit its scope. It will be difficult to resist this pressure, and it will be difficult to keep the focus of discovery narrow. If the purpose is to separate out claims that gain settlement power by certification despite scant prospect of success at trial on the merits, an abbreviated procedure will not do the job. During the delay, it may happen that some individual claims are tried; that is not necessarily an undesirable thing.

The fear that a probable success requirement would impede certification of classes for the purpose of settlement was stated to be a real problem. It also was noted that defendants often push for certification of a plaintiff class if they believe they have strong cases, and that the probable success requirement could prove adverse to defendants in this way as well.

Concern with the effects on settlement classes was met by the suggestion that a probable success requirement could be viewed from the perspective of settlement. If certification is made to support future efforts to settle, the requirement means only that there is a reasonable prospect that settlement will be achieved, since settlement will count as success on the merits. If certification is made to support a settlement already reached, the measurement of success on the merits becomes one with the proceedings to determine whether to approve the settlement. The defendant wants certification, the plaintiff wants certification, and a probable success element should not be a problem if the rule is properly drafted.

The probable success factor was urged to be a good token of the broader problems of class actions today. Some class actions are very good, as shown by the wide array of opinions gathered by the Committee's efforts to reach out to the bench and bar for advice. Other class actions are simply means by which complaisant plaintiffs' lawyers offer res judicata for sale at bargain rates to intimidated defendants. The Federal Judicial Center study shows that individual recoveries are small in most class actions. Account should be taken both of the prospects of meaningful recovery for anyone, and whether there is enough real good in any recovery to justify the burden of class proceedings. Although the Rhone-Poulenc decision in the Seventh Circuit does not say so expressly, it turns in part on an estimate of the probable merits of the class claim, and also on the costs to the system even if the class claim succeeds. The history of plaintiff failures at trial generated a particular fear that a single class proceeding might reach a wrong result. Even if a right result should be achieved, great difficulties would be encountered in further proceedings to translate the class judgment into individual judgments. Other

cases involving minuscule individual recoveries, administered and distributed at great cost, impose quite different burdens. "Fluid" class recovery in such cases involves elements of social policy that should be beyond the reach of the Rules Enabling Act process.

It was asked whether success on the merits should be measured by the representative parties' claims or by the class claim. The response was that it is the class claim that is important, but that the plaintiffs' individual claims may be strong evidence of the strength of the class claim. The question is how many class members have claims sufficiently similar to the individual representatives' claims to warrant certification.

This discussion led to more pointed suggestions as to the nature of the showing that might be required. Rather than a thorough appraisal of the merits, it was suggested that a "first look" might be sufficient, or that the effort should be only to ensure that the claims are not "bogus."

The first look approach was resisted on the ground that the certification decision is very important. If the merits are to be considered, it should not be done on the basis of half-a-dozen affidavits. If there is to be discretionary consideration of the merits at the certification stage, it should not be so open-ended.

The "bogus" claim approach met the response that few cases involve bogus claims. Most contemporary criticism of Rule 23 arises from dispersed mass-tort cases, and these cases do not involve bogus claims.

These observations returned the discussion to the opening point. The class device should facilitate prosecution of strong claims, but should not be misused to add strength to weak claims. Many experienced lawyers say that, despite the difficulties of making a rigorous empirical demonstration, a significant share of class actions involve coercive use of the class device to force settlement of claims that have little chance of success on the merits but that promise overwhelming liability should the slender prospect of success on the merits mature into reality.

The quest for alternative formulations led to additional suggestions looking to a "significant probability of success," or "sufficient merit to warrant certification." These and other formulas led to the suggestion that before further drafting efforts were made, the Committee should determine the general question whether any consideration of the merits might be appropriate.

A motion to add to the (b)(3) certification some consideration of the probable merits passed by 11 to 1.

Robert Heim, an observer, then told the Committee that although he had been an early proponent of the preliminary injunction probability-of-success analogy, the Committee discussions had persuaded him that this approach might impose an undue burden on plaintiffs. The burden would be particularly troubling if appraisal of the probable outcome were to be made early in the litigation. Defendants too may have cause to fear this approach, particularly as the preliminary appraisal might come to influence such subsequent matters as settlement negotiations, summary judgment, or even attitudes at trial. It would be better simply to adopt a low threshold that gives the court discretion to look at the merits without embarking on an extended inquiry. This result could be accomplished by adopting a new element in the Rule 23(b)(3) calculus, requiring the court to find that the issues presented by the facts and the law are not insubstantial [and have been sufficiently well developed through prior judicial experience].

Immediate response to this suggestion was that perhaps this inquiry should be reduced from an element of the certification decision to a mere place in the list of factors that bear on the elements of certification — the most obvious fit would be with the determination that certification is superior and necessary for the fair and efficient adjudication of the controversy. The question is one of weeding out weak cases, and a simple role as one factor in the certification process will accomplish that task. It was suggested that if this look at the merits should become only a factor, a balancing element should be incorporated, so that a greater prospect of success on the merits would be required when the burdens of certification are greater. Treating the inquiry as a mere factor in the certification determinations was urged to reduce the risk of untoward consequences. Indeed, it was urged that as a mere factor, this inquiry could actually help plaintiffs win certification of classes on strong small claims, reducing the concern that preliminary consideration of the merits may seem an unfairly pro-defendant provision. (And it was responded that perhaps the bilateral impact of this approach is enhanced if it is made an element of certification, not a mere factor.)

Another response was that it is dangerous to require prior judicial experience with the underlying claims. This element seems to reflect concern with dispersed mass torts. There is no reason to insist that there have been earlier litigation of related claims before determining whether to certify claims that arise out of a single transaction — securities fraud actions offer a common example. It was responded that the concern really goes to the newness of the kind of claim. Securities litigation often presents issues of a kind made familiar by much earlier litigation that arises out of distinct events but invokes common principles. So of other kinds of class actions. But some class actions present

issues that are new and unfamiliar; it takes time for the claims to mature through individual adjudication before courts can safely consider class litigation. Premature class certification can create many claims that otherwise "would not be."

The balancing approach reappeared, with the suggestion that a "not insubstantial" test standing alone would not have much effect. Insubstantial claims should be dismissed without regard to attempted class certification. It also was urged that "not insubstantial" has a double-negative ring that is not well-suited to rule drafting. The effort to sort out claims that can proceed as individual claims but not as class claims also seems to intrinsically involve balancing. What is sought is a sufficient prospect of success by the members of the class to justify the incremental costs, delays, risks, and settlement pressures that flow from certification. Why not say this openly, recognizing that the adverse consequences of certification vary from case to case, and allowing only relatively strong claims to support a certification that imposes relatively onerous burdens?

The difficulty of making a cogent appraisal of the likely outcome returned to the discussion. A "determination" of probable merits should not be required, but only a preliminary assessment. But there is a danger that in many cases the assessment will not in fact be preliminary. Any requirement in this dimension will put real pressure on the judge. Findings will be made. Discovery will be had. The determination may be tied to, or sequenced with, summary judgment.

A separate question was raised about the risk that an adverse ruling on the probable success factor might spur a plaintiff to mount a second action. The same representative plaintiff might allow the first action to meander along without certification, but seek certification of the same class in another court with another opportunity to persuade a different judge on the probable success issue. It would be a nice question whether the first determination should preclude relitigation by the same plaintiff, particularly if there is no final judgment in the first action. And the problems would become much more tangled if the same lawyers simply found a different representative plaintiff to maintain a second action. Certification and defeat of the class claim brings some measure of finality. Denial of certification is less likely to do so. These questions were met with the response that if there is a need to make certification more difficult, the need should not be put aside because of the prospect that a plaintiff who once fails to make the required showing may try a second time to make the same required showing.

Comparisons with present practice also were noted. One comparison is the finding in the Federal Judicial Center study that

in a majority of the class actions studied, motions to dismiss or for summary judgment were made before a ruling on certification. Another was that evidentiary hearings now are required on only a small fraction of class certifications, and that the hearings that are had typically run from two hours to perhaps a single day.

Discussion of the probability-of-success factor resumed after an overnight break. It was suggested at the beginning of the morning session that it would be difficult to be achieve a final formula, with confidence, at this meeting. There will be many opportunities for review, aided by comment, before the present discussion draft can be transformed into a new rule. The Committee should seek to do the best it can for the moment, recognizing that the time has not yet come to take a proposal to the Standing Committee with a recommendation for publication and comment. Instead, the draft that emerges from this meeting can be reported to the Standing Committee as an information item at its January meeting, seeking their views as support for further consideration at the April meeting of this Committee. If a proposal for publication can be reached at the April meeting, and is approved by the Standing Committee in early summer, it would go out for public comment at the same time as a proposal presented to the Standing Committee in January.

Turning to the actual approach to be taken, it was observed that the "not insubstantial" claim approach involves a double negative in one sense, but it reflects a common recognition that goes beyond the surface logic of words. Lawyers understand that however precise a line we might imagine between "substantial" and "insubstantial," there is a big difference between requiring that a claim be substantial and requiring that a claim be not insubstantial. Earlier discussion has shown many difficulties with a balancing test. It seems more attractive to adopt a test that allows a first look at the merits, but that often can be met without a need for extensive discovery or formal hearings. The test would be designed to screen out claims so weak on the merits as to gain potential strength only by class certification. Even at that, the certification decision will be a major event, just as it often is now. If the rule requires only a finding that the claims are not insubstantial, it will be far different from requiring that a means be found to weigh different measures of probable success on the merits against different levels of certification-induced burdens, risks, and pressures to settle. There even is a virtue in the negative reference to "not insubstantial," moving away from the dangers of early factfinding.

Initial discussion settled on a draft that incorporates the "not insubstantial" requirement among the findings required for certification of a (b)(3) class, and that adds "on the merits" to make it clear that insubstantiality does not refer to the dollar

amount of individual or aggregate claims. The draft would add this element to (b)(3):

> (3) the court finds * * * that the class claims, issues, or defenses are not insubstantial on the merits, * * *. The matters pertinent to ~~the~~ these findings include * * * (E) the probable success on the merits of the class claims, issues, or defenses * * *.

This approach was contrasted with the balancing approach that dominated much of the earlier discussion. The balancing approach continued to find support, particularly if the rule were to identify explicitly the continuing concern that certification of a class can impose not only great expense but also a coercive pressure to settle in face of a very small probability that a weak claim may result in liability for large damages. This alternative was offered as a proper matter for further discussion at future meetings. Indeed, the Committee may wish to provide an alternative discussion draft in its informational report to the Standing Committee.

This point of uncertainty was the occasion for one of the frequent observations anticipating the later discussion whether the burdens of class proceedings may be so important as to justify refusal to certify claims that are likely to succeed on the merits. It was suggested that although this question is conceptually distinct from the probability-of-success question, it affords an alternative approach to the concern that class proceedings may at times be much ado about too little.

These uncertainties also provoked one of several discussions of the frustration that inheres in a process of surveying many possible changes, large and small, before finally determining what path to take. The Committee has not finally determined whether to propose any changes at all — the only commitment is to make thorough use of the information that has been gathered. If changes are to be proposed, there is no determination whether there will be only a few small changes, a major overhaul of the rule, or a substantial set that includes some important changes and a number of smaller improvements. The frustration, however, is a necessary price to be paid for carefully reviewing each of many possibilities, suspending judgment until all have been considered.

Returning to the probable-success issue, it was moved that the Committee present two alternatives to the Standing Committee for information and advice. One alternative would be the "not insubstantial on the merits" version set out at pages 19 to 20. The second alternative would not for the moment refer expressly to the effect of certification in creating pressure to settle, but

would include an explicit balancing requirement and raise a higher threshold than the "not insubstantial on the merits" version. This alternative would read:

> **(3)** the court finds * * * that the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification * * *. The matters pertinent to ~~the~~ these findings include: * * * (E) the probable success on the merits of the class claims, issues, or defenses * * * .

Retaining both versions for purposes of further discussion will provide the opportunity for further consideration. They are intended to be quite distinct.

The motion to present both alternatives passed 11 to 1.

Benefits and Costs of Class Victory

The next topic was a proposal, drawn from various state law models, that a court have discretion to refuse certification of a (b)(3) class if the benefits gained by success on the merits would not be sufficient to justify the costs of administering the class action and distributing individual recoveries. This proposal is distinct from the probability-of-success question because it can be applied by assuming that the class will prevail on the merits. In pure form, it would be administered by assuming that the class will prevail and asking whether the victory will justify the costs entailed in reaching the merits and implementing the judgment.

The discussion draft shaped this issue by adding a new item to the list of factors to be considered in determining whether a class action is superior and necessary to the fair and efficient adjudication of the controversy:

> **(F)** the significance of the public and private values of the probable relief to individual class members in relation to the complexities of the issues and the burdens of the litigation;

The first observation was that it is logically difficult to fit this drafting form into the list of findings required in the initial paragraph of (b)(3). It clearly does not bear on predominance of common issues, or probable success. It fits, if at all, only with the determination whether a class action is superior to other available methods and necessary for the fair and efficient adjudication of the controversy. This factor is likely to be relevant only when individual claims are too small to justify the cost of nonclass adjudication, so that a class action is necessary

if the controversy is to be adjudicated, and so that it is difficult to deny that a class action is superior to alternatives that will not lead to any adjudication of the controversy. There may be a better drafting solution if this factor is to be adopted.

In support of some such approach, it was urged that this issue is a major matter. Although the Federal Judicial Center study shows median individual recoveries in class actions across a range from $300 to $500, there are many illustrations of far smaller recoveries. The "two dollar" individual recovery is trivial, and is responsible more than anything else for the "bad name" of class actions. The courts are asked to shoulder a considerable burden, to conscientiously administer cases that mean little or nothing to individual class members but enrich class counsel.

Of course the contrary argument will be made that what is important is not the perhaps trivial individual recovery but enforcement of the social policies embodied in the legal rules that support the recovery. The malefactors must not be allowed to retain their ill-gotten gains because they have managed to profit from small wrongs inflicted on many people, and because public enforcement resources are not adequate to the task assumed by the class-action bar. But courts must pay the price of administering this form of justice, and the price is paid at the expense of litigants who present individually important claims that also rest on important social policies. The question whether to devise means to punish all wrongdoers is a question of political and social policy that should be left to other agencies of government. They should find the means to reach a proper level of enforcement, not civil rules adopted through the Rules Enabling Act process.

The median individual recovery figures of the Federal Judicial Center study were again advanced to show that although the typical figures are far below the level needed to support individual litigation, the figures are not trivial. Across the four districts in the study, median individual recoveries ranged from $315 to $528.

It was proposed that all of these concerns might better be addressed by a more thorough revision of factors (D), (E), and (F) in the Rule 23(b) calculus:

> **(D)** the likely difficulties, expenses, and burdens if the controversy is resolved by class adjudication rather than by separate individual actions;
>
> **(E)** the likely benefits to individual class members if the controversy is resolved by class adjudication rather than by separate individual actions; and

(F) the public interest, if any, in having the controversy resolved by class adjudication rather than by separate individual actions

(F) {alternative} whether the predominant motivation for class certification is counsel's interest in fees rather than the benefits sought for class members

It was agreed that if there is to be a factor F, and if it is to have the force suggested, its structure and placement are important. Various committee members had attempted to combine factors (E) and (F) of the draft version, and encountered difficulty. These efforts commonly wound up in the direction of asking whether the probable relief to individual class members is sufficient to justify the costs and burdens of class litigation, or more simply whether the probable relief is worth the effort. One difficulty arises from the meaning of the relatively neutral but open-ended reference in the draft to the "significance" of the public and private values of class relief. Identification of public and private values, and particularly of "public values," involves a wide-open element of discretion that may be too broad.

Turning to the cost and effort dimension, the Committee asked for a review of the attorney fee awards found in the Federal Judicial Center study. The response was that median gross monetary recoveries ranged in the four different courts from $2,000,000 to $5,000,000; attorney fees ranged from 20% to 40% of class recoveries, and the higher percentages ordinarily were associated with smaller gross recoveries.

Attention then focused on the issue that many believed to lie at the core of the F-factor issue. There are significant problems in administering class actions that yield only trivial individual recoveries — the "$2 recovery" became the symbol of this phenomenon. But there is a deterrence value in enforcing existing social policy as captured in current law. The F factor seeks to incorporate this value by focusing on the public value of the probable relief, but may not capture the importance of deterrence and forcing disgorgement of ill-gotten gains. The very elasticity of the public value concept, indeed, virtually ensures that very good judges will reach different results in cases that seem indistinguishable. A focus solely on the insignificance of private relief, however, leaves out the deterrence function.

The need to pursue deterrence through privately instituted class litigation was challenged. Congress can, if it wishes, create a bounty system to encourage private enforcement of public values. Qui tam actions embody precisely such a system. The question is whether Rule 23 should continue to play a comparable role. This function has been absorbed by Rule 23(b)(3) over many

years in which it was adapted to functions that never were anticipated by its authors. There was no imperative command that the rule be adopted. There was none that it be adapted as it has been. It should be possible to reexamine the question whether it must continue to function as an incentive to lawyers who at best can pursue the public interest only by means of the inefficient, costly, and pressure-ridden device of artificially aggregating vast numbers of individually trivial claims. Why not cut back on this outgrowth, leaving it to Congress to devise better means of enforcement in the public interest where better means really are desirable? Even the class action represents litigation with parties. It began life simply as a procedural device to facilitate effective determination of individual claims. It becomes quite a different procedural device — and perhaps more a substantive tool than a procedural device — when it is abused by fee-inspired lawyers in the name of social policy. It is brought on behalf of the constituent members of the class, and it is they who are bound by the judgment. It cannot be brought without defining a class of real people or legal entities. Why not focus solely on the benefits to the class members, as parties? If there is meaningful individual relief, class litigation makes sense. Lawyers who bring such class actions will be rewarded, and the public interest is served. But there are actions in which individual benefits are trivial or nonexistent. Why should class actions be the means of enforcing public values in such settings?

Quite apart from the direct costs of achieving public enforcement by aggregating trivial individual claims, it was observed that this device has contributed to a public sense of cynicism about courts, lawyers, and the law.

A first rejoinder was that the image of the $2 recovery is misleading. There are few such cases. What of a case with 20,000 claimants with $25 individual recoveries: is $500,000 too trivial to ignore? How will a judge decide whether $25, or $200, is important enough — whether the calculation also includes public values, or is limited to private values?

A second part of the response was that whatever may have been intended when the 1966 amendments were adopted, the social-enforcement function has become part of Rule 23. It is, in a real sense, woven into the fabric of social justice. The idea is to deter the conduct, in a manner somewhat analogous to punitive damages. If the costs of administering individual remedies are untoward, the answer may lie in substituted relief in the models often characterized as "fluid" or "cy pres" recovery.

Sheila Birnbaum was then asked to address the committee. She began by noting that many practitioners are exposed to class actions across the full national scene. They are proliferating.

One new field of growing activity involves state-law attacks on the drafting failures of insurance policies, loan forms, and the like, framed as fraud claims but in fact involving highly technical matters. There are no statistics, but actions like this are common. And they enforce no meaningful social policies at all. Anticipating the later discussion, she also addressed the use of settlement classes. They often are proper; disagreement with the result in one or another prominent case should not disguise the importance of settlement as a means of resolving problems that otherwise may be intractable. Choice-of-law problems provide one illustration of the reasons that may support use of a settlement class where a litigation class would not be possible. It is not clear that the Rule 23 draft does enough to support settlement classes.

Further doubts were expressed about allowing courts to turn a certification decision on assessment of the public values to be served by a class victory. Rule 23 is what it has become. It is troubling. But the fact is that public enforcement agencies simply do not have the resources to achieve comprehensive enforcement of all our public laws against all significant violations. Rule 23 enforcement has become a major feature of the enforcement system, and only political judgments can justify substantial alteration. In addressing securities class actions, for example, pending legislation seeks simply to address specific perceived abuses, not to retrench the central role of class actions in vindicating individually small claims for violations that, in the aggregate, have inflicted sufficient total injury to repay the private costs of class-action enforcement. These problems are too much political to be addressed through the Enabling Act process. Congress is the agency to correct them.

These doubts were repeated in a different voice. Discretion needs anchors, it needs guidelines. Members of the Committee have expressed quite different views as to the proper interpretation of the draft (F) factor. It will be very difficult for district judges to administer, and the difficulty will generate costly uncertainty. This approach almost invites the troubling response that class actions are being trimmed to the "just-the-right-size" formula: if the problems are too small, or too large, Rule 23 assistance will be denied. When suit is filed, the parties and lawyers do not agree that it is a "$2" case. If attorney fees are the problem, the Committee should address that problem directly.

Another problem was seen in the feature of the draft that limits consideration of the burdens of certification in (b)(3) classes. Various illustrations offered in the Committee have included (b)(2) classes in which injunctive or declaratory relief seemed to offer trivial benefits to individual members. And in any event, it does not seem practical

separate consideration of the probability of success from the importance of success. As with the approach sketched on page 22, it would be better to restructure factors (D), (E), and (F) together. It also might be better to incorporate a direct reference to cases in which attorney fees seem to be the motivating factor behind the litigation.

The suggested direct focus on attorney-fee motivation spurred the observation that the private attorney general aspect of class actions is not of itself untoward. It is accepted in actions that yield significant benefits to individual class members. The question is whether it should be accepted in actions that do not yield significant individual benefits. Private enforcement can be wise; the question is whether it is desirable absent significant individual benefits. The antitrust laws, for example, encourage private enforcement by treble damages and attorney-fee awards, but provide these encouragements only to people who can prove antitrust injury.

So, it was suggested, the draft F factor may be too general. How might it be narrowed, reducing concerns about open-ended discretion and avoiding even the appearance of trespass on areas of social-political policy? Would it help to seek something simpler than a factor that bears on the also discretionary (b)(3) determination whether a class action is superior and necessary? The questions are first, what is the proper role of the committee in reconsidering the ways in which Rule 23(b)(3) has evolved over three decades of judicial interpretation? Second, what direction should be taken? And, third, what language will best effect the intended changes?

One approach would be to attempt to distinguish between the deterrence that arises from a meaningfully compensatory remedy and the deterrence that arises from the in terrorem function of aggregating trivial claims. Not all deterrence is desirable, particularly if it arises from the disproportionate burdens and risks of pursuing judgment on the merits. Focus on the public interest may legitimately recognize that there may be no public interest in a particular proposed means of enforcement — the rule even could be drafted to focus on "the public interest, if any * * *." This leaves substantive concerns to substantive law, not the mode of relief. This approach, however, does not directly address the difficulty of understanding just what public values are involved in any particular proposed class action. It must be remembered that all of this discussion addresses a situation in which there is a strong claim on the merits but small individual damages. What is the public interest then?

The difficulty of the values concept was finally addressed by a proposal that the factor be redrafted in terms of public interest

and private benefit. On motion, the Committee cast 11 votes, with no dissent, to adopt the following language as a working draft:

> **(F)** whether the public interest in — and the private benefits of — the probable relief to individual class members justify the burdens of the litigation;

The Committee Note to this factor would explain that the burdens of litigation include not only the costs of class litigation and the complexity of the issues, but also the in terrorem effect of certification.

Settlement Classes

Discussion of settlement classes began with the reminder that this topic has come in for renewed attention in conjunction with dispersed mass tort actions. In re General Motors Corp. Pick-up Truck Fuel Tank Litigation, 55 F.3d 768 (3d Cir. 1995) has surveyed the terrain. Two asbestos cases are approaching appellate arguments in the Third and Fifth Circuit. The issues are open for debate and the law is in flux. The first question is whether the Committee should attempt to deal with these issues while the litigation cauldron is boiling. This question does not imply that the Committee should not consider the problem; to the contrary, the Committee already has begun the process, and should make a deliberate decision whether anything useful can yet be done. But it may be the course of wisdom to decide that the time for action is not ripe. The risks of defendant-created plaintiff classes are not new. But the risks are much affected by the way in which the class is structured. An opt-out class is less threatening; consent is very important. An opportunity to opt-out knowing the actual terms of a proposed settlement can be particularly useful to ensure individual fairness. Other questions include the basic question whether it makes sense to certify a class for settlement purposes when the same class would not — and often could not — be certified for litigation, and whether it is proper to permit a class that is first proposed for certification at the same time as a proposed settlement is presented for approval. Settlements that seek to include "futures" claimants who do not yet have enforceable claims present quite different issues. Great savings in transaction costs can be achieved by means of settlement classes. And they may facilitate claims administration structures that achieve a measure of equality in the treatment of different claimants that could not be achieved by any other means.

The questions are large. The drafting chore may not be difficult once the questions are answered. But finding the answers remains difficult. The Committee has elected not to press forward with the draft that would have collapsed the categorical

distinctions between (b)(1), (b)(2), and (b)(3) classes, recognizing the special origins and legitimacy of (b)(1) and (b)(2) classes and the risk of losing this history. Is the tie to litigation equally important to the legitimacy of class certification, or can the real-world importance of settlement be recognized in the text of the Rule? Notice and adequate representation will remain crucial. The opportunity to opt out, perhaps at the time of settlement as well as at the time of certification, may remain equally important.

The gravity of these questions led to the suggestion that perhaps settlement classes should not be treated simply as a factor subsumed in the (b)(3) certification process, but should become a new and separate Rule 23.3. The rejoinder was that any new rule would have to duplicate many provisions of Rule 23; there should be a way to make settlement classes a separate part of Rule 23.

It was urged that the decision whether to act now should not turn on anticipation of the guidance to be provided by pending cases. These cases will be controlled by the current language and structure of Rule 23, and by the specific settlement events in those cases. The first issue is whether the rule should address settlement classes as a separate phenomenon; the mechanics should be deferred until that decision is made. The question is whether it is proper to view the requirements for certification differently when certification is sought solely for purposes of settlement, not for litigation. The Rule or the Note can emphasize the distinctive importance of notice and adequacy of representation in settlement classes.

One ground for resisting settlement classes is the danger of sloppy thinking about the class definition. Another danger is presented by cases in which the settlement is worked out before the request for certification. Two parties negotiate a prepackaged complaint, certification, and settlement, and then present it for approval by a process that lacks any of the safeguards provided by a true adversary proceeding. It is not really clear whether there is an Article III case or controversy in this setting. There is some force to the view that the court is simply being asked to peddle res judicata through the group of plaintiffs' lawyers who made the lowest and most attractive bid to the defendants. How can a court ensure that there was genuine adversariness in negotiating the settlement? And how can it ensure that there was no disqualifying conflict of interests among different people who are lumped together in a single supposed class? There is a great practical value in settlement classes, but also a great strain on the system. How can adequate representation of class members be ensured, and by whom? Perhaps the impending Third and Fifth Circuit decisions will provide helpful guidance.

From a somewhat different perspective, it was urged that there should not be any need to amend Rule 23 to support settlement class certifications. All of the requirements for certification must be met. But the question whether the requirements have been met can be addressed from the perspective of settlement, not the problems of adjudication. The Third Circuit General Motors Pickup decision can be read to reject this view, and to insist that certification is permissible only if the Rule 23 requirements would be met for purposes of litigation. If the opinion is read that way and is followed, then Rule 23 should be amended to restore the meaning that should be found in its present text. The purpose of certifying a settlement class is to provide benefits for class members — present claimants — and to reduce the risks and transaction costs for all parties. The court has an important role to play by administering settlement through Rule 23; without this judicial supervision, defendants in the dispersed mass tort cases may attempt to establish nonjudicial claims-administration procedures that settle individual claims by means that do not inform claimants as well, and that do not protect individual interests as well. Most settlements in these cases occur after there have been individual judgments in individual actions; the terms of settlement are informed by the results of actual adjudications, and the exercise of judicial review is similarly informed.

This defense of settlement classes focused attention on Rule 23(e). It was observed that it is difficult enough to provide effective judicial review of settlements reached in actions certified for class adjudication, in substantial part because the parties cease to be adversaries when they join in seeking approval of a settlement, and suggested that these problems may be exacerbated with settlement classes. The fairness hearing, urged by some as adequate protection, does not do the job. The best lawyers and best judges can work together to fashion a fair settlement, present the alternatives effectively, and accomplish an effective review. But not all can get it right. Once a settlement is proposed, moreover, other class-action lawyers can undertake a campaign to encourage opt-outs, promising to get a better deal.

The case-or-controversy theme returned to the discussion, with the statement that it is essential that there be a bona fide dispute between real parties. There is no authority in the Enabling Act or Constitution to provide for settings that do not involve a valid dispute presented for actual decision. A settlement class divorced from a litigation class is illegitimate. Courts may be doing it, but it should be off-limits.

This view of the "real dispute" issue was met by the observation that many cases come to court this way. At the very least, there are nonclass individual actions pending, ordinarily

many of them. Some of the individual actions may be consolidated by nonclass means. A settlement class is sought because everyone involved wants a global resolution, and for good reason. The proposed settlement reflects many antecedent real disputes. It should be enough that the settlement class meets Rule 23 requirements as applied to settlement, not litigation. And there are objectors — there is always someone who comes forward to challenge the settlement. Some settlement classes involve large claims, some involve small claims. Settlement classes will continue to occur unless the Committee acts to prohibit the use of Rule 23 in dispersed mass torts. The settlement terminates claims that were real cases or controversies; it simply moves them into a class context.

The case-or-controversy discussion led to the question whether a settlement class can be used to expand jurisdiction, reaching people who could not be forced into an adjudicated class. It was suggested that "force" is not proper, nor even an opt-out approach, but that an opt-in class should be proper.

The praises of settlement classes were then sung by reference to the silicone gel breast implant cases. They could not be tried as a class. Choice-of-law problems would be insurmountable. In addition, differences in the facts relevant to different defendants would defeat a single action against all defendants. The critical thing is to get understandable notice to plaintiffs who demonstrate understanding by making informed choices. There are now thousands of individual actions outside the class, and thousands more are being filed every month. Asbestos litigation may provide even more persuasive justifications. There are large numbers of plaintiffs with clearly "real" claims. Manageability is very different for settlement than for litigation. If individuals consent, the settlement class should be appropriate.

Robert Heim observed that it is easy to be distracted by the common concern for the settlement class action that first comes to court as a prepackaged complaint, certification-by-consent, and settlement. The fear of collusion is genuine, and it is fair to worry whether courts can provide effective protection in the process of reviewing the settlement. But defendants who face massive litigation want to resolve the many problems that arise from dispersed actions. It should not be controlling whether the negotiations occur before or after the comprehensive class action is filed. The court can gain help in reviewing the settlement by making sure that effective notice is provided to class members. In addition, there is a whole new group of class-action lawyers who represent objectors, providing the adversary elements that otherwise would be missing. Beyond that, it would be desirable to appoint a guardian ad litem to provide independent representation for the class; if it is congenial to achieve this function by

relying on the "master" label, that should be helpful.

The view was repeated that even prepackaged settlements come to court as the fruit of much earlier litigation.

It also was suggested that more thought should be given to adding to Rule 23(e) more detailed guidance on the process for reviewing and approving proposed settlements. The Manual for Complex Litigation provides guidance now. But perhaps Rule 23(e) should be elaborated along the lines recently developed by Judge Schwarzer.

The focus of the settlement discussion on dispersed mass torts led to the question whether Rule 23 should be used to make it easier to resolve these problems. The easier it is to resolve claims, the more claims there will be, and the more mass-tort class actions.

The prospect that ready access to settlement-class litigation may increase the volume of litigation was discounted by the observation that at least in asbestos litigation, the focus on the detailed manageability of class litigation blinks the reality that the alternative is no more individual than a class action. There are lawyers with hundreds or even thousands of clients, whose relationship with their clients is no more real than the relationship between class lawyers and nonrepresentative class members. And they too are said to be settling cases in batches, by group settlements that focus on a total sum that, as a practical matter, is allocated among clients by the lawyer who represents them.

The settlement-class topic was left unresolved. The Committee is anxious to hear specific proposals that go beyond the tentative beginnings in the discussion draft. The topic will remain on the agenda for the April, 1996 meeting.

Federal Judicial Center Study

The Federal Judicial Center study of class actions was referred to throughout the class-action discussion. Committee members had the nearly-final version of the report that was prepared for this meeting. A brief summary of the report was provided by Thomas Willging, and as to the appeal portion by Robert Niemic. The study, conducted in four districts, examined all actions that involved a class allegation and that were terminated between July 1, 1992 and June 30, 1994. The districts, chosen for believed high levels of class action activity and geographic dispersion, were the Northern District of California, the Northern District of Illinois, the Eastern District of Pennsylvania, and the Southern District of Florida. The total number of cases with class

allegations was 418. The data are representative only for those courts over the study period.

The first summary observation was that the study shows that class actions are commonly necessary means of enforcing the claims that they involve. Among the four districts in the study, the highest individual recovery figure was $5,331, an amount too small to support individual litigation. (By way of contrast, a study of litigation in the 75 largest counties by the National Center for State Courts showed average recoveries of $52,000 in personal injury actions, and $57,000 in fraud actions.)

The next observation was that despite the modest amount of individual recoveries, the aggregate recoveries showed that class litigation is an effective deterrent instrument. After deducting attorney fees, the median net settlements in certified Rule 23(b)(3) class actions ranged from $800,000 to $2,800,000 in the four courts; the median class sizes ranged from 3,000 to 15,000.

The entire study included 13 certified (b)(2) classes with no net monetary distribution. Some had nonmonetary distributions such as rebate coupons that could not be valued by the study. It seems likely that if the court had been able to foresee the results in the cases that did not involve significant injunctive relief, the classes would not have been certified.

It is not possible to use the study to predict what effects would follow from a requirement that the certification decision consider the probable outcome on the merits. The present system strongly discourages any consideration of the merits. But the study does show that through motions to dismiss or for summary judgment, judges commonly do look at the merits before certification. A majority of the cases in all districts had a ruling on dismissal before or at the same time as the certification ruling, and many had summary judgment rulings.

The study found 28 cases, 18% of the total certified classes, that involved simultaneous certification and settlement. A substantial share of the classes were certified for settlement only.

The class actions endured far longer than average litigation in the same courts.

Turning to appeals, 15% to 34% of the study cases had at least one appeal. There was a higher rate of appeal in the cases that were not certified as class actions than in the certified cases. There was a dramatically increased rate of appeal in the cases that went to trial — appeals on trial-related issues were taken in 12 of these 18 cases, a very high rate for civil actions. The appeals

led to affirmance in about 50% of the cases, to reversal and remand in about 15%, and to dismissal of the appeals in the remainder.

Few appeals dealt with class certification issues. The study cases involved one § 1292(a)(1) appeal. The only attempt to win mandamus review involved an attempt to remove the trial judge.

DISCOVERY

Robert Campbell, representing the Federal Rules Committee of the American College of Trial Lawyers, reported on the Committee's informal review of the scope of discovery under Civil Rule 26(b)(1). The Committee studied alternative possibilities in detail. The rule now permits discovery of "any matter * * * relevant to the subject matter involved in the pending action." It also permits discovery of information "reasonably calculated to lead to the discovery of admissible evidence." The committee includes a wide variety of plaintiff- and defendant-lawyers, and they achieved a strong consensus that the expense, time, and difficulties parties encounter in litigation are caught up in Rule 26(b)(1). A distinguished federal judge has estimated that 95% of all discovery is irrelevant and never used. That figure may be a bit high, but it is in the right neighborhood. This is the core of the discovery problem. They urge the Committee to consider both of these sweeping elements of discovery. Their committee was unanimous in making this recommendation, an unusual event.

The Committee agreed to include this topic on the agenda for the April meeting. Deep concerns with discovery were voiced at the Southwestern Legal Foundation conference on procedure attended by many Committee members in March, 1995, and it is appropriate for the Committee to review these problems as part of the continuing duty to study the rules. The Committee should not simply put the topic aside because the same concerns have been expressed for many years without leading to any direct response. Many efforts have been made to cabin the occasional excesses of discovery. If they have not done the job, it must be considered whether the time has come to reconsider the central issues. The purpose of the suggestion is large. The inquiry must not be undertaken lightly.

Standing Committee Self-Study Draft

Professor Coquillette, as Reporter of the Standing Committee, addressed the Committee on the draft self-study report prepared for the Standing Committee. The draft is tentative; it has not yet been approved and does not reflect considered Standing Committee views. The Standing Committee is anxious to have the draft reviewed by members of all of the Advisory Committees. Some of the recommendations are very important to the future of the rulemaking process.

Discussion began with the composition of the Advisory Committees and the Standing Committee. The Standing Committee is important not only to coordinate the several advisory committees, but also to provide deliberate review of their recommendations. The history of the relationships has been one that expands the role of the advisory committee chairs. Some earlier chairs of the Standing Committee did not ask the advisory committee chairs to attend the full Standing Committee meeting. Now it is routine to have the advisory committee chairs attend the full meeting. They have become valuable participants. Their role would be enhanced by making them voting members of the Standing Committee. As a practical matter, the advisory committee chairs now do most of the work that would be entailed by full membership on the Standing Committee, participating actively in discussion of recommendations made by all of the advisory committees. This change can be effected without significant dislocation; the Standing Committee can simply be enlarged to include the advisory committee chairs. There is no need for legislation.

The Committee unanimously adopted a resolution supporting Standing Committee membership for advisory committee chairs.

Other Rules

Admiralty Rule B had been on the agenda for this meeting. The need to integrate Rule B with the 1993 amendments of Rule 4, however, presents challenging questions. Discussion of the necessary changes was put off to the next meeting to allow more thorough preparation.

A proposal that the rules require use of recycled paper and double-sided copying for all papers filed in district courts was held for continuing study.

Two proposals that had been made to the Committee were put aside as outside the Committee's role. One was creation of a privilege against discovery of police internal investigation reports. This proposal was found better suited to the Evidence Rules Advisory Committee. The other proposal was adoption of a requirement that successful defendants recover attorney fees in actions under 42 U.S.C. § 1983 or the Americans with Disabilities Act; if the unsuccessful plaintiff is unable to pay the award, payment by the plaintiff's lawyer should be ordered. This proposal was found to involve matters of substantive law suitable to Congress, not the Rules Enabling Act process.

Several other significant proposals were deferred for future consideration. Although many of them involve potentially useful improvements of the Civil Rules, the Committee does not have sufficient time to devote appropriate attention to every such

proposal when the proposal is first advanced. Perhaps more important than Committee time constraints are the limits on the capacity of the full Enabling Act process. It is not only this Committee, but also the Standing Committee, members of the bench and bar, the Judicial Conference of the United States, the Supreme Court, and Congress that must lavish searching scrutiny on proposed rules. The Committee has proposed a continuing series of important rules changes, and must husband the resources of the process to ensure full evaluation of the most important proposals.

The Copyright Rules present a special problem because it seems that few lawyers have the experience needed to help the Committee determine what (if anything) should be done beyond amending Copyright Rule 1 to reflect that the 1909 Copyright Act has been superseded by the 1976 Copyright Act. Advice is being sought.

Next Meeting

It was tentatively decided that the next Committee meeting would be held on April 18 and 19, 1996.

With thanks to the several observers who participated helpfully in the meeting, and to the Administrative Office staff for its unfailing strong support, the meeting adjourned at 4:40 p.m. on November 10.

Respectfully submitted,

Edward H. Cooper, Reporter

Agenda Item III A

Rule 9(h)

Little public comment has been addressed to the proposed Rule 9(h) amendment. No reason has been provided to reconsider the initial proposal.

The proposal as published, together with the Note, should provide an adequate reminder of the proposed amendment and the underlying reasons.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 9. Pleading Special Matters

* * * * *

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an

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*New matter is underlined; matter to be omitted is lined through.

identifying statement is governed by the principles of Rule 15. ~~The reference in Title 28, U.S.C. § 1292(a)(3), to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of this subdivision (h)~~ A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

COMMITTEE NOTE

Section 1292(a)(3) of the Judicial Code provides for appeal from "[i]nterlocutory decrees of ... district courts ... determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed."

Rule 9(h) was added in 1966 with the unification of civil and admiralty procedure. Civil Rule 73(h) was amended at the same time to provide that the § 1292(a)(3) reference "to admiralty cases shall be construed to mean admiralty and maritime claims within the meaning of Rule 9(h)." This provision was transferred to Rule 9(h) when the Appellate Rules were adopted.

A single case can include both admiralty or maritime claims and nonadmiralty claims or parties. This combination reveals an ambiguity in the statement in present Rule 9(h) that an admiralty "claim" is an admiralty "case." An order "determining the rights and liabilities of the parties" within the meaning of § 1292(a)(3) may resolve only a nonadmiralty claim, or may simultaneously resolve interdependent admiralty and nonadmiralty claims. Can appeal be taken as to the nonadmiralty matter, because it is part of a case that includes an admiralty claim, or is appeal limited to the admiralty claim?

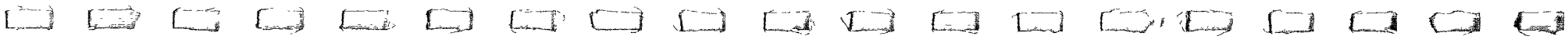
The courts of appeals have not achieved full uniformity in applying the § 1292(a)(3) requirement that an order "determin[e] the rights and liabilities of the parties." It is common to assert that the statute should be construed narrowly, under the general policy that exceptions to the final judgment rule should be construed narrowly. This policy would suggest that the ambiguity should be resolved by limiting the interlocutory appeal right to orders that determine the rights and liabilities of the parties to an admiralty claim.

A broader view is chosen by this amendment for two reasons. The statute applies to admiralty "cases," and may itself provide for appeal from an order that disposes of a nonadmiralty claim that is joined in a single case with an admiralty claim. Although a rule of court may help to clarify and implement a statutory grant of jurisdiction, the line is not always clear between permissible implementation and impermissible withdrawal of jurisdiction. In addition, so long as an order truly disposes of the rights and liabilities

of the parties within the meaning of § 1292(a)(3), it may prove important to permit appeal as to the nonadmiralty claim. Disposition of the nonadmiralty claim, for example, may make it unnecessary to consider the admiralty claim and have the same effect on the case and parties as disposition of the admiralty claim. Or the admiralty and nonadmiralty claims may be interdependent. An illustration is provided by *Roco Carriers, Ltd. v. M/V Nurnberg Express*, 899 F.2d 1292 (2d Cir. 1990). Claims for losses of ocean shipments were made against two defendants, one subject to admiralty jurisdiction and the other not. Summary judgment was granted in favor of the admiralty defendant and against the nonadmiralty defendant. The nonadmiralty defendant's appeal was accepted, with the explanation that the determination of its liability was "integrally linked with the determination of non-liability" of the admiralty defendant, and that "section 1292(a)(3) is not limited to admiralty *claims*; instead, it refers to admiralty *cases*." 899 F.2d at 1297. The advantages of permitting appeal by the nonadmiralty defendant would be particularly clear if the plaintiff had appealed the summary judgment in favor of the admiralty defendant.

It must be emphasized that this amendment does not rest on any particular assumptions as to the meaning of the § 1292(a)(3) provision that limits interlocutory appeal to orders that determine the rights and liabilities of the parties. It simply reflects the conclusion that so long as the case involves an admiralty claim and an order otherwise meets statutory requirements, the opportunity to appeal should not turn on the circumstance that the order does —

or does not — dispose of an admiralty claim. No attempt is made to invoke the authority conferred by 28 U.S.C. § 1292(e) to provide by rule for appeal of an interlocutory decision that is not otherwise provided for by other subsections of § 1292.



Agenda Item III B

Rule 26(c)

The recent history of the proposal to amend Rule 26(c) is described in the attached Reporter's Note, which is taken almost verbatim from the agenda materials for the April, 1995 Advisory Committee meeting. The Advisory Committee recommended, and the Standing Committee approved, publication for comment of the version that the Judicial Conference sent back for further consideration in March, 1995.

The 1995-1996 period for public comment produced a substantial body of comments. A summary of the comments will be provided by the time of the meeting. Two aspects of the proposal drew greatest comment: the provision that recognizes the widespread practice of entering protective orders on stipulation of the parties, and the provision that specifically enumerates reliance on a protective order as one factor to be considered on a motion to dissolve or modify the order.

The concern with stipulated protective orders continues to be the familiar concern that protection should be provided only on a judicial finding of good cause. Attorneys who represent plaintiffs frequently assert that duty to their clients requires them to stipulate to protective orders that unjustifiably interfere with access to information that does not warrant protection. Consent does not show that there is no need for concern. The responding concern is that courts should not – and effectively cannot – force parties to litigate a dispute when there is no dispute. If the parties agree that a protective order is proper, they should no more be forced to proceed by contested motion than they are forced to contest any other discovery issue or other matter. Stipulated orders may serve the interests of the parties and the court in very important ways.

One compromise of the stipulated order question would be to modify the proposed language slightly to make it clear that good cause is required for a stipulated order as well as a contested order. The relevant words would be: "for good cause shown by motion or by stipulation." The requirement that the parties articulate the reasons for protection would help the parties to frame a more precise order, and help the court in deciding whether to accept the stipulation. The articulated reasons also would help in passing on a motion to modify or dissolve the order. Although there is a manifest risk that in most cases the stipulation of good cause would become a mere routine addition made without thought, little harm would be done.

The need to consider reliance in passing on a motion to modify or dissolve a protective order has been defended forcefully in the public comments. One illustration, somewhat simplified, was provided at the Atlanta hearing. The plaintiff, injured by a Style 6 Widget designed by the defendant, demands discovery of all design information bearing on Widget Styles 1 through 10. There is a good chance that should the matter be forced on the court, discovery

would be limited to Style 6, or perhaps Style 6 and one or two others. Rather than litigate the issue, the defendant agrees to provide all the information to the plaintiff subject to a protective order. If reliance on the protective order is not protected, the defendant may be forced to litigate discoverability in a number of costly and delaying ways. To the extent that all discovery is denied as to Widget Models 1 to 5 and 7 to 10, full protection is achieved. The same protection should be held available on motion to modify a protective order — whether entered on stipulation or after contest — that has prompted production of information that the court would not have ordered produced at all absent a protective order.

Although the public comments provide valuable additional information, they do not raise new questions. The doubts expressed in the comments are familiar, and were considered carefully in working out the 1994 draft after the first period of public comment on a slightly different draft published in 1993. The 1994 draft expressed the Committee's accommodation of the same competing interests. The importance of stipulated orders was considered again on remand from the Judicial Conference, and as part of the 1995 decision to publish the 1994 draft for comment.

These issues focus attention again on the continuing question whether there is a need to amend Rule 26(c). The public comments did not provide any new sense that there is a special need for amendment. This project was first undertaken to explore concerns raised by Congressional consideration of protective order legislation, not to address independent Advisory Committee concerns with the operation of Rule 26(c). The Committee has continually viewed the proposed rule as an expression and affirmation of the better — and common, although not universal — present practice. Ongoing comments seem to provide no more than additional anecdotal information about occasional questionable practices. Perhaps there is no need to pursue the proposed amendment further.

Reporter's Note: Rule 26(c)

The Standing Committee adopted the Advisory Committee's recommendation to amend Rule 26(c) and sent it to the Judicial Conference with a recommendation that it be transmitted to the Supreme Court in March, for submission to Congress by the end of April. The Judicial Conference first voted to strike the language in Rule 26(c)(1) that expressly confirmed the practice of stipulated protective orders, and then voted to recommit the proposal to the Advisory Committee. It is not clear at the moment whether this sequence of actions implies a determination that Rule 26(c) should not refer to stipulated protective orders. A more formal statement may be provided. The question for the Committee is what – if anything – should be done to revise Rule 26(c) further. If anything is to be done, a subsidiary question will be whether the eventual proposal should be published for an additional period of public comment. Among the many possible approaches, the following are the most obvious:

Do Nothing

The Rule 26(c) proposal published in October, 1993, emerged from a Committee that was uncertain whether there was any need to revise the rule. The Committee Note published with the proposal referred to the Report of the Federal Courts Study Committee and to articles by Professors Marcus and Miller, all of which concluded that lower courts are doing a good job both in determining the extent to which protection is appropriate and in reconsidering the need for protection when a motion is made to modify or dissolve a protective order. They find no support for the frequent claim that protective orders conceal information necessary to protect the public health and welfare. Congress, however, had taken an increasingly active interest in this question. From the beginning, the Committee proposal has reflected respect for the concerns expressed in Congress. The respect due Congress arises in part from the prospect that Congress may have access to information that does not come to the Committee's attention in the ordinary course of Committee work. Respect also flows from the role of Congress as the source of the Committee's Enabling Act authority and as the final actor when the Supreme Court transmits proposed rules to Congress. The spirit underlying the proposal is that it is good for the Committee to bring the strengths of the Enabling Act process to bear in a cooperative endeavor that implements congressional concerns in the best way possible.

It is not too late to reconsider the question whether there is any real need to amend Rule 26(c). The information provided by public comments on the proposed rule, and the record compiled in legislative hearings last year, can be considered to supplement the information available to the Committee when it drafted the 1993 proposal. If these events did not produce persuasive evidence of the need for revision, it may be proper to defer further action until a stronger case for revision can be made.

Revise the Stipulation Provision

Another possible approach would be to revise the stipulation language that was in the proposal approved by the Standing Committee and recommended to the Judicial Conference. There was no reference to stipulated protective orders in the version of Rule 26(c) that was published in 1993. The reference was added as part and parcel of the elaborations that were made during the lengthy discussion of Rule 26(c) at the October, 1994 meeting of this Committee. The proposed Rule 26(c)(1) read in part: "the court * * * may, for good cause shown or on stipulation of the parties, make any order that justice requires * * *." This reference was added to the text of the rule for a variety of reasons. In part, it was meant to make doubly sure of the proposition stated in the Committee Note published in 1993: "Protective orders entered by agreement of the parties also can serve the important need to facilitate discovery without requiring repeated court rulings." In addition, it was tied to the newly added provision of proposed Rule 26(c)(3)(B)(iv), requiring that on motion to modify or dissolve a protective order the court consider "the reasons for entering the order, and any new information that bears on the order." As observed in the Committee Note to item (iv), all of the information bearing on the need for protection is in one sense new to the court when the original order was entered on stipulation.

Nothing in the proposal would have required a court to enter a protective order merely because the parties stipulated to it. The Rule provides only that the court "may * * * make any order that justice requires." In considering a stipulation the court may consider any justification submitted by the parties and may require additional justification. Many judges routinely require an explanation. If it seems desirable to go forward with Rule 26(c) revisions, this approach could be captured even more clearly in the text of the rule. One possible formulation would be that the court:

> may, for good cause shown *by motion* or ~~on~~ *by* stipulation of the parties, make any order ~~which~~ that justice requires to protect * * *.

Requiring that good cause be shown by a stipulation for a protective order may indeed have an advantage in forcing the parties to think carefully about their needs and the shaping of the proposed order.

Resubmit Without Change

Another alternative is to resubmit the proposal without change. The Committee has concluded, after careful thought but without difficulty, that it would be a costly step backward to do anything to Rule 26(c) that might cast doubt on the power of the parties to stipulate to effective protective orders. The proposal submitted to the Judicial Conference reflected careful deliberation based on thoughtful study of the literature, public comments, the

interests of Congress, and the collective experience of the Committee. Many alternative formulations were considered and eventually blended into the final proposal. Although improvements are welcome at any hour, however late, the justification for any change must be apparent or must be clearly articulated. The justification for change has not yet been made to appear.

An alternative to a straight-ahead resubmission without change would be to publish the proposal for comment. Although the proposal was initially submitted to the Judicial Conference without republication, there might be some advantage in republication with a specific request for comment on the matters that were added to the version published in 1993.

Other Concerns

The importance of party control over discovery procedure was emphasized by two aspects of the 1993 discovery amendments. The more important is Rule 26(f). The proposals published in 1991 would have abrogated the discovery conference provision of former Rule 26(f). The Committee Note published with that proposal observed: "The special 'discovery conference' envisioned by the 1980 amendment has not proved to be an effective device to prevent discovery abuses." The meeting of the parties provided by the 1993 version of Rule 26(f) was resurrected as part of the decision to revise and adhere to the initial disclosure requirements set out in new Rule 26(a). The Committee believed that a meeting of the parties to develop a discovery plan can go a long way toward reducing strategic behavior and misbehavior. The plan developed by the parties is to include proposals concerning: "(3) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed * * *."

This proposal for limitations on discovery and "other limitations" echoes the provisions of Rule 29, which also was amended in 1993. Rule 29 provides in part: "Unless otherwise directed by the court, the parties may by written stipulation * * * (2) modify other procedures governing or limitations placed upon discovery * * *." The Committee Note with the 1993 amendments stated: "This rule is revised to give greater opportunity for litigants to agree upon modifications to the procedures governing discovery or to limitations upon discovery. Counsel are encouraged to agree on less expensive and time-consuming methods to obtain information, as through voluntary exchange of documents, use of interviews in lieu of depositions, etc."

These provisions for party proposals or stipulations imposing "limitations" on discovery lend considerable weight to the routine use of stipulated protective orders. Rule 29, for example, clearly contemplates exchanges of information by means that are completely outside the formal discovery process. The lesser step of stipulating to protective orders that govern discovery and that are subject to initial review and later modification or dissolution by the court should be less troubling to those who seek to increase the opportunities for later access.

Stipulated protective orders are noted in the Manual for Complex Litigation 3d, § 21.432. In addition, it is suggested that as with other discovery matters, a party seeking a protection order must first make a good faith effort to resolve the matter without court action, and that protective orders should be addressed in the proposed discovery plan. The Manual notes that an order entered by consent is subject to modification. Among the issues to be considered when application is made to dissolve or modify any protective order are reliance on the order, and whether "the disclosing party [was] unqualified obligated to produce" the discovery material.

The Federal Judicial Center Study of protective order practice, made available to the Committee in nonfinal form at the October, 1994, meeting, provided — albeit in preliminary form, soon to be made final — a hard, real-world look at actual protective order practice. This information bears directly, in many ways, on the argument that specific court findings should be required to support any protective order that limits or bars disclosure of discovery materials. Protective order activity occurs in about 5% of all cases; the figure would be higher as a percentage of cases in which there is any discovery activity. Stipulated protective orders account for about 25% of the total. Most protective orders result from a motion, but nearly half the motions do not provoke any response. Approximately 40% of the motions were granted in whole or in part; 2 of some 200 stipulated orders were rejected by the court on the record. The protective orders involved a variety of topics, but many involved limits on disclosure, and a significant number required return or destruction of discovered materials. The nature of the suits in which protective orders restricted access to discovery materials varied widely. Civil rights actions involved the greatest number, followed by contract actions. "Other statutes" and "property rights" litigation came next. Personal injury actions accounted for 8% or 9% of the orders restricting access. Provisions for vacating the order, or actual dissolution or modification, occurred in very small percentages of the cases with protective orders.

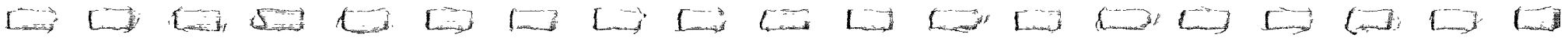
This information suggests that protective orders limit public access to information of genuine public interest only in a small minority of cases. Civil rights actions are likely to involve intensely personal information. Contract and property rights litigation is likely to involve matters that do not affect the world at large. "Other statutes" may involve a wide variety of matters, some of them involving genuine public interests. Personal injury actions often involve unique events.

The final version of the Federal Judicial Center study will make the information more precise, and may reveal some new details. The broad picture, however, seems clear. Protective orders serve a variety of purposes, and are entered in many types of litigation. Here, as with all other discovery matters, it is common to rely on party management of the discovery process.

Return or Destroy Agreements

One question not yet addressed by the Committee is the frequent use of agreements that discovery materials will be destroyed or returned to the party who produced them. These provisions build on the widespread adoption of rules that forestall routine filing of discovery materials. Return or destruction, when performed, provides an effective assurance of confidentiality. At the same time, return or destruction may force costly recreation of the discovery process in related litigation. It may be possible to regulate these agreements; the attached Rule 5(d) draft illustrates one possible approach.

The Rule 5(d) draft responds to one of the suggestions in the comments in response to the 1993 publication of a draft Rule 26(c). It includes an obviously arbitrary five-year retention period; some other period might prove a better compromise. It does not include any provision that the discovery materials must be retained in the same order in which they were produced. Although there would be a real advantage in this requirement, it almost inevitably would require maintaining a separate and duplicate set of files. Since this provision would complement the rules on filing discovery materials, it seems well within the reach of the Enabling Act.



Rule 26. General Provisions Governing Discovery; Duty of Disclosure

* * * * *

(c)(1) Protective Orders. ~~Upon~~ On motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, ~~and for good cause shown,~~ the court ~~in which~~ where the action is pending ~~or~~ — and ~~alternatively~~, on matters relating to a deposition, also the court in the district where the deposition ~~is to~~ will be taken — may, for good cause shown or on stipulation of the parties, make any order ~~which~~ that justice requires to protect a party or person from annoyance, embarrassment,

oppression, or undue burden or expense, including one or more of the following:

(~~1~~A) ~~that~~ precluding the disclosure or discovery ~~not be had~~;

(~~2~~B) ~~that~~ specifying conditions, including time and place, for the disclosure or discovery ~~may be had only on specified terms and conditions, including a designation of time or place~~;

(~~3~~C) ~~that the discovery may be had only by~~ prescribing a discovery method ~~of discovery~~ other than that selected by the party seeking discovery;

(~~4~~D) ~~that~~ excluding certain matters ~~not be inquired into~~, or ~~that~~ limiting the scope of ~~the~~ disclosure or discovery ~~be limited~~

to certain matters;

(~~5~~E) designating the persons who may be present while ~~that~~ the discovery is ~~be~~ conducted ~~with no one present except persons designated by the court~~;

(~~6~~F) ~~that a deposition, after being sealed,~~ directing that a sealed deposition be opened only ~~by order of the~~ upon court order;

(~~7~~G) ordering that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; or

(~~8~~H) directing that the parties simultaneously file specified documents

or information enclosed in sealed envelopes, to be opened as ~~directed by~~ the court directs.

(2) If ~~the~~ a motion for a protective order is wholly or partly denied ~~in whole or in part~~, the court may, on ~~such~~ just terms ~~and conditions as are just~~, order that any party or ~~other~~ person provide or permit discovery or disclosure. ~~The provisions of~~ Rule 37(a)(4) apply~~ies~~ to the award of expenses incurred in relation to the motion.

(3) (A) The court may modify or dissolve a protective order on motion made by a party, a person bound by the order, or a person who has been allowed to intervene to seek modification or dissolution.

(B) In ruling on a motion to dissolve or modify

a protective order, the court must consider, among other matters, the following:

(i) the extent of reliance on the order;

(ii) the public and private interests affected by the order, including any risk to public health or safety;

(iii) the movant's consent to submit to the terms of the order;

(iv) the reasons for entering the order, and any new information that bears on the order; and

(v) the burden that the order imposes on persons seeking information relevant to other

litigation.

COMMITTEE NOTE

Subdivisions (1) and (2) are revised to conform to the style conventions adopted for simplifying the present rules. No change in meaning is intended by these style changes.

Subdivision (1) also is amended to confirm the common practice of entering a protective order on stipulation of the parties. Stipulated orders can provide a valuable means of facilitating discovery without frequent requests for action by the court, particularly in actions that involve intensive discovery. If a stipulated protective order thwarts important interests, relief may be sought by a motion to modify or dissolve the order under subdivision (3). Subdivision (1), as all of Rule 26(c), deals only with discovery protective orders. It does not address any other form of order that limits access to court proceedings or materials submitted to a court.

Subdivision (3) is added to the rule to dispel any doubt whether the power to enter a protective order includes power to modify or vacate the order. The power is made explicit, and includes orders entered by stipulation of the parties as well as orders entered after adversary contest. The power to modify or dissolve should be exercised after careful consideration of the conflicting policies that shape protective orders. Protective orders serve vitally important interests by ensuring that privacy is invaded by discovery

only to the extent required by the needs of litigation. Protective orders entered by agreement of the parties also can serve the important need to facilitate discovery without requiring repeated court rulings. A blanket protective order may encourage the exchange of information that a court would not order produced, or would order produced only under a protective order. Parties who rely on protective orders in these circumstances should not risk automatic disclosure simply because the material was once produced in discovery and someone else might want it.

Modification of a protective order may be sought to increase the level of protection afforded as well as to reduce it. Among the grounds for increasing protection might be violation of the order, enhanced appreciation of the extent to which discovery threatens important interests in privacy, or the need of a nonparty to protect interests that the parties have not adequately protected.

Modification or dissolution of a protective order does not, without more, ensure access to the once-protected information. If discovery responses have been filed with the court, access follows from a change of the protective order that permits access. If discovery responses remain in the possession of the parties, however, the absence of a protective order does not without more require that any party share the information with others.

Despite the important interests served by protective orders, concern has been expressed that protective orders can thwart other interests that also are important. Two interests have drawn special attention. One is the interest

in public access to information that involves matters of public concern. Information about the conduct of government officials is frequently used to illustrate an area of public concern. The most commonly offered example focuses on information about dangerous products or situations that have caused injury and may continue to cause injury until the information is widely disseminated. The other interest involves the efficient conduct of related litigation, protecting adversaries of a common party from the need to engage in costly duplication of discovery efforts.

The first sentence of subparagraph (A) recognizes that a motion to modify or dissolve a protective order may be made by a party, a person bound by the order, or a person allowed to intervene for this purpose. A motion to intervene for this purpose need not meet the technical requirements of Rule 24. It is enough to show that the applicant has a sufficient interest to justify consideration of the motion. These provisions are supported by the practice that has developed through a long line of decisions.

Subparagraph (B) lists some of the matters that must be considered on a motion to dissolve or modify a protective order. The list is not all-inclusive; the factors that may enter the decision are too varied even to be foreseen.

The most important form of reliance on a protective order is the production of information that the court would not have ordered produced without the protective order. Often this reliance will take the form of producing information under a blanket protective order without raising the objection that the information is not subject to

disclosure or discovery. The information may be protected by privilege or work-product doctrine, the outer limits of Rule 26(b)(1), or other rules. Reliance also may take other forms, including the court's own reliance on a protective order less sweeping than an order that flatly prohibits discovery. If the court would not have ordered discovery over proper objection, it should not later defeat protection of information that need not have been produced at all. Reliance also deserves consideration in other settings, but a finding that information is properly discoverable directs attention to the question of the terms — if any — on which protection should continue.

The public and private interests affected by a protective order include all of the myriad interests that weigh both for and against discovery. The question whether to modify or dissolve a protective order is, apart from the question of reliance, much the same as the initial determination whether there is good cause to enter the order. An almost infinite variety of interests must be weighed. The public and private interests in defeating protection may be great or small, as may be the interests in preserving protection. Special attention must be paid to a claim that protection creates a risk to public health or safety. If a protective order actually thwarts publication of information that might help protect against injury to person or property, only the most compelling reasons, if any, could justify protection. Claims of commercial disadvantage should be examined with particular care, and mere commercial embarrassment deserves little concern. On the other hand, it is proper to demand a realistic showing that there is a need for disclosure of protected information.

Often there is full opportunity to publicize a risk without access to protected discovery information. Paradoxically, the cases that pose the most realistic public risk also may be the cases that involve the greatest interests in privacy, such as a yet-to-be-proved claim that a party is infected with a communicable disease.

Consent to submit to the terms of a protective order may provide strong reason to modify the order. Submission to the terms of the order should include submission to the jurisdiction of the court to enforce the order. This factor will often overlap the fifth enumerated factor that considers the interests of persons seeking information relevant to other litigation. Submission to the protective order, however, does not establish an automatic right to modification. It may be better to leave to the court entertaining related litigation the question whether information is discoverable at all, the balance between the needs for discovery and for privacy, and the terms of protection that may reconcile these competing needs. These issues often are highly case-specific, and the court that entered the protective order may not be in a good position to address them.

Submission to the protective order and the court's enforcement jurisdiction also may justify disclosure to a state or federal agency. A public agency that has regulatory or enforcement jurisdiction often can compel production of the protected information by other means. The test of modification, however, does not turn on a determination whether the agency could compel production. Rather than provoke satellite litigation of this question, protection is provided by requiring the agency to submit to the protective

order and the court's enforcement jurisdiction. If there is substantial doubt whether the agency's submission is binding, the court may deny disclosure. One obvious source of doubt would be a freedom of information act that does not clearly exempt information uncovered by this process.

The role of the court in considering the reasons for entering the protective order is affected by the distinction between contested and stipulated orders. If the order was entered on stipulation of the parties, the motion to modify or dissolve requires the court to consider the reasons for protection for the first time. All of the information that bears on the order is new to the court and must be considered. If the order was entered after argument, however, the court may justifiably focus attention on information that was not considered in entering the order initially.

A protective order does not of itself defeat discovery of the protected information by independent discovery demands made in independent litigation on the person who produced the information. The question of protection must be resolved independently in each action. At the same time, it may be more efficient to reap the fruits of discovery already under way or completed without undertaking duplicating discovery. The closer the factual relationships between separate actions or potential actions, the greater the reasons for modifying a protective order to allow disclosure by the most efficient means.

Assessment of the need for disclosure in support of related litigation may require joint action by two courts.

The court that entered the protective order can determine most easily the circumstances that justified the order and the extent of justifiable reliance on the order. The court where related litigation is pending can determine most easily the importance of the information in that litigation, and often can determine most accurately the balance between the interest in disclosure and the interest in nondisclosure or further protection. The rule does not attempt to prescribe procedures for cooperative action.

Special questions arise from the prospect of multiple related actions brought at different times and in different courts. Great inefficiencies can be avoided by establishing means of sharing information. Informal means are frequently found by counsel, and occasional efforts are made at establishing more formal means even outside the framework of consolidated proceedings. There is not yet sufficient experience to support adoption of formal rules establishing — and regulating the terms of access to — litigation support libraries, document depositories, depositions taken once for many actions, or similar devices. To the extent that consolidation devices may not prove equal to the task, however, these questions will deserve attention in the future.

Rule 26(c)(3) applies only to the dissolution or modification of protective orders entered by the court under subdivision (c)(1). It does not govern orders that control access to material submitted to the court by motion, at a hearing, at trial, or otherwise. It does not address private agreements entered into by litigants that are not submitted to the court for its approval. Nor does Rule 26(c)(3) apply to

motions seeking to vacate or modify final judgments that occasionally contain restrictions on the disclosure of specified information. Rules 59 and 60 govern such motions.

Agenda Item III C

Rule 47(a)

Attorney participation in jury voir dire examination has provoked a near avalanche of comment. A summary will be provided by the time of the meeting.

There were few surprises in the public comments, although many interesting anecdotes were provided. Federal judges are almost unanimously opposed to the proposal, although a small number supported it. Perhaps the most forceful argument was advanced by many judges who now regularly permit direct attorney participation in voir-dire examination. The system works well now, they say, because of the unconditional right to terminate attorney examination at any time, or to deny any right to begin the process in litigation involving a lawyer who has misbehaved in the past. No matter how earnestly the Advisory Committee may seek to expand on the discretionary power to impose reasonable limits and to terminate examination, creation of a right to participate will undermine effective judicial control. Some of the objecting judges have had experience with attorney participation as state court judges, and a very few have abandoned it after experimentation in federal court. The fears that lawyers will seek to use voir dire as a means of selecting a partial jury, not an impartial jury, are the fears that have been considered throughout the process of considering this proposal.

If comments from federal judges continued in the vein that had been well opened by the time the Committee recommended publication of the proposal, comments from practicing lawyers pulsed in the arteries that were predicted. Judges simply are not in a position to elicit all important information from prospective jurors. Lawyers, who are more familiar with the litigation than the judge, can in very brief periods of questioning elicit crucial information needed to support challenges for cause and peremptory challenges. Judges can readily control any impulse toward excessive advocacy. There are no significant problems in courts that now permit attorney participation. There will be no significant problems in courts that, forced by an amended rule, come to permit attorney participation for the first time.

These concerns have been considered by the Committee. They deserve careful continuing consideration. The first and vital question is whether so many federal judges, with such great collective experience, are simply starting at shadows. There is a deep difference of perception between bench and bar on these issues. It may be that the wise approach is to pursue other means of educating judges in the perceptions of the bar and the advantages of permitting direct attorney participation in voir dire.

Drafting questions remain if the amendment is to be pursued further, now or in the future. The Advisory Committee has not considered the specific drafting issues presented by the published proposal. The proposal was redrafted at the July, 1995 meeting of

the Standing Committee to eliminate drafting differences between proposed Criminal Rule 24(a) and Civil Rule 47(a). The attached notes suggest a revised draft. The revised draft has been submitted to the Criminal Rules Advisory Committee, which meets the week after this Committee.

Rule 47. Selecting ~~Selection of~~ Jurors

(a) ~~Examination of~~ Examining Jurors.

(1) The court ~~may~~ shall ~~permit the parties or their attorneys to conduct the examination of~~ examine prospective jurors ~~or may itself conduct the examination~~.

(2) The court shall also permit the parties to orally examine the prospective jurors. The court may in its discretion:

(A) impose reasonable limits of time, manner, and subject matter on examination by the parties, and

(B) terminate examination by a person who violates those limits, or for other good cause.

NOTE

(1) "Voir dire" was added as part of the compromise drafting process. It requires a lot of additional and unnecessary words. "Voir dire" has not been in Criminal Rule 24 or Civil Rule 47 for so long that I do not think we need it now.

(2) "But" is not needed to introduce the second sentence if we go to the numbered paragraphs format.

(3) The reason I went to the numbered paragraphs was to solve the problems that arise from the present position of "as the court determines in its discretion." This drafting occurred at the very last minute of discussion in the standing committee, when Joe Spaniol persuaded Bryan Garner to invoke the rule of the immediate antecedent. It leaves two problems. First, some readers may ignore the immediate antecedent and conclude that the court has discretion to deny oral examination by the parties. Second, there is no express statement that the court's discretion extends to termination of examination by a party. I think both problems are resolved by this structure.

Rule 47. Selecting ~~Selection of~~ Jurors

(a) **~~Examination of~~ Examining Jurors.** The court ~~may~~ shall ~~permit the parties or their attorneys to~~ conduct the voir dire examination of prospective jurors ~~or may itself conduct the examination~~. But the court shall also permit the parties to orally examine the prospective jurors to supplement the court's examination within reasonable limits of time, manner, and subject matter, as the court determines in its discretion. The court may terminate examination by a person who violates those limits, or for other good cause. ~~In the latter event, the court shall permit the parties or their attorneys to supplement the examination~~

~~by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.~~

* * * * *

COMMITTEE NOTE

Rule 47(a) in its original and present form permits the court to exclude the parties from direct examination of prospective jurors. Although a recent survey shows that a majority of district judges permit party participation, the power to exclude is often exercised. See *Shapard & Johnson, Survey Concerning Voir Dire* (Federal Judicial Center 1994). Courts that exclude the parties from direct examination express two concerns. One is that direct participation by the parties extends the time required to select a jury. The second is that counsel frequently seek to use voir dire not as a means of securing an impartial jury but as the first stage of adversary strategy, attempting to establish rapport with prospective jurors and influence their views of the case.

The concerns that led many courts to undertake all direct examination of prospective jurors have earned deference by long tradition and widespread adherence. At the same time, the number of federal judges that permit party participation has grown considerably in recent years.

The Federal Judicial Center survey shows that the total time devoted to jury selection is virtually the same regardless of the choice made in allocating responsibility between court and counsel. It also shows that judges who permit party participation have found little difficulty in controlling potential misuses of voir dire. This experience demonstrates that the problems that have been perceived in some state-court systems of party participation can be avoided by making clear the discretionary power of the district court to control the behavior of the party or counsel. The ability to enable party participation at low cost is of itself strong reason to permit party participation. The parties are thoroughly familiar with the case by the start of trial. They are in the best position to know the juror information that bears on challenges for cause and peremptory challenges, and to elicit it by jury questioning. In addition, the opportunity to participate provides an appearance and reassurance of fairness that has value in itself.

The strong direct case for permitting party participation is further supported by the emergence of constitutional limits that circumscribe the use of peremptory challenges in both civil and criminal cases. The controlling decisions begin with *Batson v. Kentucky*, 476 U.S. 79 (1986) and continue through *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419 (1994). *See also Purkett v. Elem*, 115 S.Ct. 1769 (1995). Prospective jurors "have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination." *J.E.B.*, 114 S.Ct. at 1428. These limits enhance the importance of searching

voir dire examination to preserve the value of peremptory challenges and buttress the role of challenges for cause. When a peremptory challenge against a member of a protected group is attacked, it can be difficult to distinguish between group stereotypes and intuitive reactions to individual members of the group as individuals. A stereotype-free explanation can be advanced with more force as the level of direct information provided by voir dire increases. As peremptory challenges become less peremptory, moreover, it is increasingly important to ensure that voir dire examination be as effective as possible in supporting challenges for cause.

Fair opportunities to exercise peremptory and for-cause challenges in this new setting require the assurance that the parties can supplement the court's examination of prospective jurors by direct questioning. The importance of party participation in voir dire has been stressed by trial lawyers for many years. They believe that just as discovery and other aspects of pretrial preparation and trial, voir dire is better accomplished through the adversary process. The lawyers know the case better than the judge can, and are better able to frame questions that will support challenges for cause or informed use of peremptory challenges. Many also believe that prospective jurors are intimidated by judges, and are more likely to admit potential bias or prejudgment under questioning by the parties.

Party examination need not mean prolonged voir dire, nor subtle or brazen efforts to argue the case before trial. The court can undertake the initial examination of prospective jurors, restricting the parties to supplemental

questioning controlled by direct time limits. Effective control can be exercised by the court in setting reasonable limits on the manner and subject-matter of the examination. Lawyers will not be allowed to advance arguments in the guise of questions, to seek committed responses to hypothetical descriptions of the case, to assert propositions of law, to intimidate or ingratiate, or otherwise to turn the opportunity to seek information about prospective jurors into improper adversary strategies. The district court has ample power to control the time, manner, and subject matter of party examination. The process of determining the limits continues throughout the course of each party's examination, and includes the power to terminate further examination by a person that has misused or abused the right of examination. Among other grounds, termination may be warranted not only by conduct that may impair the trial jury's impartiality but also by questioning that is repetitious, confusing, or prolonged, or that threatens inappropriate invasion of the prospective jurors' privacy. The determination to set limits or to terminate examination is confided to the broad discretion of the district court. Only a clear abuse of this discretion — usually in conjunction with a clearly inadequate examination by the court — could justify reversal of an otherwise proper jury verdict.

The voir dire process can be further enhanced by use of jury questionnaires to elicit routine information before voir dire begins. Questionnaires can save much time, and may improve in many ways the development of important information about prospective jurors. Potential jurors are protected against the embarrassment of public examination.

A prospective juror may be more willing to reveal potentially embarrassing information in responding to a questionnaire than in answering a question in open court. Written answers to a questionnaire also may avoid the risk that answers given in the presence of other prospective jurors may contaminate a large group.

Questionnaires are not required by Rule 47(a), but should be seriously considered. At the same time, it is important to guard against the temptation to extend questionnaires beyond the limits needed to support challenges for cause and fair use of peremptory challenges. Just as voir dire examination, questionnaires can be used in an attempt to select a favorable jury, not an impartial one. Prospective jurors must be protected against unwarranted invasions of privacy; the duty of jury service does not support casual inquiry into such matters as religious preferences, political views, or reading, recreational, and television habits. Indeed the list of topics that might be of interest to a party bent on manipulating the selection of a favorable jury through the use of sophisticated social-science profiles and personality evaluations is virtually endless. Selection of an impartial jury requires suppression of such inquiries, not encouragement. The court's guide must be the needs of impartiality, not party advantage.

Agenda Item III D

Rule 48

Public comments on the twelve-person jury proposal have provided no surprises. Opposing comments have not pointed to intrinsic disadvantages of twelve-member juries, apart from occasional reference to the fear that twelve jurors are more likely than six to deliberate to impasse. This fear is not borne out by statistical evidence or the balance of anecdotal evidence. Opposition rests more on collateral concerns that twelve-person juries will take more time, from selection through final verdict; increase costs; add further impositions on citizens reluctant to serve; and create difficulties with courtroom architecture.

Support for twelve-person juries reflects the considerations that led the Advisory Committee to recommend the amendment. Twelve-person juries give more of everything we want from a jury. It is incontestable that a twelve-person jury increases dramatically the prospects that any given jury will include representatives of minority groups. The other deliberating advantages of twelve-person juries are supported by such scant empirical evidence as exists and by a growing body of persuasive social science.

The chief remaining task may be that of framing a succinct statement that supplements the Committee Note as a means of introducing this proposal to the remaining steps in the Enabling Act process.

Rule 48. Number of Jurors — Participation in Verdict

The court shall seat a jury of ~~not fewer than six and not more than~~ twelve members. ~~and a~~All jurors shall participate in the verdict unless excused from service ~~by the court pursuant to~~ under Rule 47(c). Unless the parties ~~otherwise~~ stipulate otherwise, (1) the verdict shall be unanimous, and (2) no verdict ~~shall~~ may be taken from a jury ~~reduced in size to~~ of fewer than six members.

COMMITTEE NOTE

Rule 48 was amended in 1991 to reflect the conclusion that it had been "rendered obsolete by the adoption in many districts of local rules establishing six as the standard size for a civil jury." Six-person jury local rules were upheld by the Supreme Court in *Colgrove v.*

Battin, 413 U.S. 149 (1973). The Court concluded that the Seventh Amendment permits six-person juries, and that the local rules were not inconsistent with Rule 48 as it then stood.

Rule 48 is now amended to restore the core of the twelve- member body that has constituted the definition of a civil jury for centuries. Local rules setting smaller jury sizes are invalid because inconsistent with Rule 48.

The rulings that the Seventh Amendment permits six-member juries, and that former Rule 48 permitted local rules establishing six-member juries, do not speak to the question whether six-member juries are desirable. Much has been learned since 1973 about the advantages of twelve-member juries. Twelve-member juries substantially increase the representative quality of most juries, greatly improving the probability that most juries will include members of minority groups. The sociological and psychological dynamics of jury deliberation also are strongly influenced by jury size. Members of a twelve-person jury are less easily dominated by an aggressive juror, better able to recall the evidence, more likely to rise above the biases and prejudices of individual members, and enriched by a broader base of community experience. The wisdom enshrined in the twelve-member tradition is increasingly demonstrated by contemporary social science.

Although the core of the twelve-member jury is restored, the other effects of the 1991 amendments remain unchanged. Alternate jurors are not provided. The jury includes twelve members at the beginning of trial, but may

be reduced to fewer members if some are excused under Rule 47(c). A jury may be reduced to fewer than six members, however, only if the parties stipulate to a lower number before the verdict is returned.

Careful management of jury arrays can help reduce the incremental costs associated with the return to twelve-member juries.

Sylistic changes have been made.

Agenda Item IV

RULE 23: Reporter's Note on The Issues

Several draft versions of Rule 23 follow this introductory note. The most important are the first and last. First is the March, 1996 edition of the comprehensive changes that have evolved over the past several years. Last is a "minimum changes" version that makes very few changes. This version incorporates the repeatedly confirmed provision for permissive interlocutory appeals, and diluted versions of three (b)(3) items adopted in November. These three include the finding that a (b)(3) class is "necessary," here reduced to consideration of the "need" for certification as one factor in the certification process; the need for a preliminary showing on the merits, here reduced to consideration in appraising the importance of "probable relief" to individual class members; and the need to balance the expected costs and benefits of certification, here revised to delete direct consideration of the public interest. The minimum changes version deletes any reference to settlement classes.

A draft Committee Note is attached to the comprehensive rule draft. It attempts to capture the essence of the Committee's views on matters that have been discussed by the Committee, recognizing that further discussion is likely to require significant changes. The draft Note also discusses the many features of the draft rule that have not been explored by the Committee. These portions of the Note are designed to provide a foundation for consideration of any of these features that may come to engage Committee attention.

Several other versions lie between the comprehensive version and the minimum changes versions. Each incorporates a single significant change in the comprehensive version. Each is introduced by a note that identifies the change. The note should provide sufficient guidance; if the text of the rule is consulted at all, it should be to see the context of the modified language or the deletion.

The best course is to begin discussion with the major topics that were explored in depth at the November meeting. The results of the November deliberations are included in the comprehensive draft, including the alternative versions for subdivision (b)(3) item (iii). The draft Committee Note reflects the November deliberations.

Substantially identical versions of the draft rule and draft Note were presented to the Standing Committee in January as an information item. Reactions of Standing Committee members, and continuing reactions from the bar, have provided grounds for further review of the major proposed changes that emerged from the November meeting. Some of these changes are marked in the comprehensive draft. Others are set out in the versions that follow the comprehensive draft.

As in November, the draft continues to include many changes that are less important than the changes summarized above. Most of

these changes have carried forward from the draft that was prepared and tentatively approved by the Committee during Judge Pointer's term as chair. Many of the changes have carried forward without change. They have not yet been reconsidered as part of the comprehensive review of Rule 23, however, and it does not seem appropriate to recommend any of them for publication without fresh consideration. One important reason for further consideration springs from the many changes that have been made in the earlier draft. The earlier draft incorporated a new subdivision (a)(5) that required a finding of superiority for any class action, and dissolved the walls that separate (b)(1), (b)(2), and (b)(3) classes. It also proposed significant changes in opt-out practice. The trial court was given discretion to permit class members to opt out of a (b)(1) or (b)(2) class, and also was given discretion to deny any opportunity to opt out of a (b)(3) class. These changes provided one of the reasons for the substantial changes that were proposed for the subdivision (c) notice provisions. Another important reason for further consideration springs from the extensive advice that has been gathered by Committee meetings, conferences and symposia, letters from members of the bar and organized bar groups, and the Federal Judicial Center study.

These proposed changes are supported by explanatory statements in the draft Committee Note. The Note is made up from whole cloth, for want of any Committee discussion. The purpose of the draft is to illuminate the changes for present discussion, not to preempt discussion.

Before evaluating the merits of any of these other proposed amendments, it is appropriate to determine whether the time has come to propose this many changes in Rule 23. The major changes carried forward from the November meeting will command close scrutiny in all the remaining stages of the Enabling Act process. It is important that they be appraised carefully and in depth. Simultaneous pursuit of many changes creates a risk of dividing attention and weakening the consideration devoted to any one change, however significant.

Any ordering of the other proposed changes must be quite rough. Importance is only one element of priority, and indeed may be two-edged. Changes of greater importance require greater knowledge and greater confidence. Minor changes, on the other hand, may not be worth the fuss. The following list includes more important matters in the first group, gradually shading off into matters of less importance.

Subdivision (c) presents two significant questions.

Draft subdivision (c)(1) eliminates the present requirement that a certification ruling be made "[a]s soon as practicable after the commencement of an action brought as a class action." The FJC study suggests that this requirement is observed only in a very general way, as if a determination must be made "when" practicable.

Of itself, this suggests that there may not be much reason for change. But some concern was expressed in the Standing Committee discussion about undue pressure to make a speedy determination. And some elements of the proposed changes may support elimination of the requirement. Elimination would be strongly supported by adoption of a requirement that the merits be considered in passing on a (b)(3) certification question. It would be supported, though without as much force, by adoption of the proposed (d)(1) provision confirming the practice of precertification rulings on motions to dismiss or for summary judgment.

Subdivision (c) also changes the provisions for notice. In one way or another, the drafts have from the beginning made two changes in notice. An explicit requirement of notice in (b)(1) and (b)(2) actions has been added. The requirement of notifying every identifiable member of a huge small-claims class has been softened. Civil Rights plaintiffs have been afraid that an explicit notice requirement for (b)(2) classes will be used to hamstring important litigation. There has been less comment, but the changes for small-claims (b)(3) classes are likely to be welcomed by plaintiffs and feared by defendants. Many academics have thought that improvement of the notice provisions is long overdue. The decision whether to respond to these concerns may depend in part on the cogency of the draft provisions. If the draft is not at least substantially sound, it may be difficult to make sufficient improvements to warrant further consideration.

The new opt-in class provided by subdivision (b)(4) also raises important questions. If changes are adopted to discourage use of (b)(3) opt-out classes for claims that can readily support individual litigation, it may be useful to provide a new form of permissive joinder. An opt-in class would resemble present class actions only by providing a familiar framework for delegating substantial elements of control to common counsel, supervised to some extent by representative class members. As compared to more traditional class actions, the terms of inviting joinder could dissolve such difficult questions as choice of law or even the means for determining individual injury and damages. The most likely fears are that the availability of an opt-in class may further reduce the inclination to face difficult (b)(3) certification choices. Opt-in classes do not promise an effective means of achieving "global peace" by settlement on a comprehensive basis.

The desire to protect the opportunity to litigate substantial individual claims on an individual basis also suggests the draft (b)(5) provision that requires separate (b)(3) certification and the opportunity to opt out if individual damages claims are added to a (b)(2) class. In some ways, indeed, it makes sense to package together the proposed emphasis on the "need" for (b)(3) class litigation, the alternative of opt-in classes for those who prefer aggregation on some partial basis, and the right to opt-out of any class determination of damages.

There is one omission in the draft that deserves renewed comment. Whatever is made of the oblique reference to settlement classes in draft (b)(3) factor (H), we never have generated a draft to enumerate the concerns that might be addressed in reviewing a proposed settlement for subdivision (e) approval. Initial efforts were abandoned as not promising. Perhaps more should be done in this direction.

Other proposed changes are less central. They can be put aside with no more regret than may be occasioned by reflecting on the capacity of the Enabling Act process to consider multiple changes at one time. The repeated emphasis on the opportunity to frame issues classes was in part designed to give modest encouragement to mass-tort aggregation. The "fiduciary duty" material in (a)(4) has met much doubt, because it is so general. The (d)(1) provision for precertification determination of motions to dismiss or for summary judgment was designed to overrule 4th and 7th Circuit decisions. The FJC study shows that at least N.D.Ill. has blithely ignored the 7th Circuit rule, and a recent 7th Circuit decision seems to permit precertification rulings after all. The (e)(1) provision requiring court approval of any dismissal, compromise, or deletion of class issues before a certification determination seems a good idea, but it may not be necessary. The (e)(3) provision for magistrate-judge or special-master consideration of settlement proposals is adventurous at best; it has been carried forward to preserve the high-water mark of a proposal that may never have been intended to go so far.

If the Committee is to go beyond the matters considered in November, in short, the most significant changes are those that delete the "as soon as practicable" requirement; modify notice requirements; establish opt-in classes; and provide a right to opt out of damages determinations incident to a (b)(2) class. Most of these changes are closely related to an increased emphasis on the desirability of individual litigation to resolve individually substantial damages claims. None of these changes may merit adoption, but they seem to head the list of items next in order of priority.

Agenda Item IV A

Rule 23. Class Actions (February, 1996 draft)

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all ~~only~~ if ~~—~~ with respect to the claims, defenses, or issues certified for class action treatment ~~—~~

(1) the ~~class is~~ members are so numerous that joinder of all members is impracticable~~,~~;

(2) there are questions of law or fact common to the class~~,~~;

(3) ~~the claims or defenses of the representative parties are typical of the claims or defenses~~ the representative parties' positions typify those of the class~~,~~; and

(4) the representative parties and their attorneys will fairly and adequately discharge the fiduciary duty to protect the interests of ~~the~~ all persons while members of the class until relieved by the court from that fiduciary duty.

(b) ~~Class Actions Maintainable~~ When Class Actions May be Certified. An action may be ~~maintained~~ certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class ~~which~~ that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class ~~which~~ that would as a practical matter be dispositive of the interests of the other members

not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate~~ final injunctive or declaratory relief ~~or corresponding declaratory relief~~ may be appropriate with respect to the class as a whole; or

(3) the court finds (i) that the questions of law or fact common to the certified class ~~members of the class~~ predominate over ~~any~~ individual questions ~~affecting only individual members~~ included in the class action, (ii) that a class action is superior to other available methods and necessary for the fair and efficient ~~adjudication~~ disposition of the controversy, and — if such a finding is requested by a party opposing certification of a class — (iii) that {the class claims, issues, or defenses are not insubstantial on the merits} [alternative:] {the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification}. The matters pertinent to ~~the~~ these findings include:

(A) the need for class certification to accomplish effective enforcement of individual claims;

(B) the ~~interest of members of the class in individually controlling the prosecution or defense of~~ practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;

(C) the extent, ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of~~

~~the class~~;

(D) the desirability ~~or undesirability~~ of concentrating the litigation ~~of the claims~~ in the particular forum;

(E) the likely difficulties ~~likely to be encountered in the management of~~ in managing a class action that will be avoided or significantly reduced if the controversy is adjudicated by other available means;

(F) the probable success on the merits of the class claims, issues, or defenses;

(G) whether the public interest in — and the private benefits of — the probable relief to individual class members justify the burdens of the litigation; and

(H) the opportunity to settle on a class basis claims that could not be litigated on a class basis or could not be litigated by [or against?] a class as comprehensive as the settlement class; or

(4) the court finds that permissive joinder should be accomplished by allowing putative members to elect to be included in a class. The matters pertinent to this finding will ordinarily include:

(A) the nature of the controversy and the relief sought;

(B) the extent and nature of the members' injuries or liability;

(C) potential conflicts of interest among members;

(D) the interest of the party opposing the class in securing a final and consistent resolution of the

matters in controversy; and

(E) the inefficiency or impracticality of separate actions to resolve the controversy; or

(5) the court finds that a class certified under subdivision (b)(2) should be joined with claims for individual damages that are certified as a class action under subdivision (b)(3) or (b)(4).

(c) Determination by Order Whether Class Action to Be ~~Maintained~~ Certified; Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses.

(1) ~~As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.~~ When persons sue or are sued as representatives of a class, the court shall determine by order whether and with respect to what claims, defenses, or issues the action ~~should~~ will be certified as a class action.

(A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how [putative] members (i) may elect to be excluded from the class, and (ii) if the class is certified only for settlement, may elect to be excluded from any settlement approved by the court under subdivision (e). When a class is certified under subdivision (b)(4), the order must state when, how, and under what conditions [putative] members may elect to be included in the class; the conditions of inclusion may include a requirement that class

members bear a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be [is] conditional, and may be altered or amended before ~~the decision on the merits~~ final judgment.

(2) **(A)** When ordering certification of a class action under this rule, the court shall direct that appropriate notice be given to the class. The notice must concisely and clearly describe the nature of the action, the claims, issues, or defenses with respect to which the class has been certified, the right to elect to be excluded from a class certified under subdivision (b)(3), the right to elect to be included in a class certified under subdivision (b)(4), and the potential consequences of class membership. [The court may order a defendant to advance part or all of the expense of notifying a plaintiff class if, under subdivision (b)(3)(E), the court finds a strong probability that the class will win on the merits.]

(i) In any class action certified under subdivision (b)(1) or (2), the court shall direct a means of notice calculated to reach a sufficient number of class members to provide effective opportunity for challenges to the class certification or representation and for supervision of class representatives and class counsel by other class members.

(ii) In any class action ~~maintained~~ certified under subdivision (b)(3), the court shall direct to ~~the~~ members of the class the best notice practicable under the circumstances, including

individual notice to all members who can be identified through reasonable effort[, but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the generally small value of individual members' claims.] The notice shall advise each member that ~~(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C)~~ any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(iii) In any class action certified under subdivision (b)(4), the court shall direct a means of notice calculated to accomplish the purposes of certification.

(3) Whether or not favorable to the class.

(A) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(1) or ~~(b)~~ (2)~~, whether or not favorable to the class,~~ shall include and describe those whom the court finds to be members of the class~~.~~;

(B) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(3)~~, whether or not favorable to the class,~~ shall include and specify or describe those to whom the notice provided in subdivision (c)(2)(A)(ii) was directed, and who have not requested exclusion, and whom the court finds to be members of the class~~.~~; and

(C) The judgment in an action certified as a class action under subdivision (b)(4) shall include all those who elected to be included in the class and who were not earlier dismissed from the class.

(4) ~~When appropriate (A)~~ An action may be ~~brought or maintained~~ certified as a class action —

(A) with respect to particular claims, defenses, or issues; or

(B) ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly~~ by or against multiple classes or subclasses, which need not satisfy the requirement of subdivision (a)(1).

(d) Orders in Conduct of Class Actions. ~~In the conduct of actions to which this rule applies, the court may make appropriate orders:~~

(1) Before determining whether to certify a class the court may decide a motion made by any party under Rules 12 or 56 if the court concludes that decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay.

(2) As a class action progresses, the court may make orders that:

(A) ~~(1)~~ determin~~e~~ing the course of proceedings or prescrib~~e~~ing measures to prevent undue repetition or complication in ~~the~~ presenting~~ation of~~ evidence or argument;

(B) ~~(2)~~ requir~~e~~ing, ~~for the protection of~~ to protect the members of the class or otherwise for the fair

conduct of the action, ~~that~~ notice ~~be directed~~ to some or all ~~of the~~ members of:

(i) refusal to certify a class;

(ii) any step in the action; ~~, or of~~

(iii) the proposed extent of the judgment; ~~,~~ or ~~of~~

(iv) the members' opportunity ~~of the members~~ to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, ~~or~~ to otherwise come into the action, or to be excluded from or included in the class;

(C) ~~(3)~~ impose~~ing~~ conditions on the representative parties, class members, or ~~on~~ intervenors;

(D) ~~(4)~~ require~~ing~~ that the pleadings be amended to eliminate ~~therefrom~~ allegations ~~as to~~ about representation of absent persons, and that the action proceed accordingly;

(E) ~~(5)~~ deal~~ing~~ with similar procedural matters.

(3) ~~The orders~~ An order under subdivision (d)(2) may be combined with an order under Rule 16~~,~~ and may be altered or amended ~~as may be desirable from time to time~~.

(e) Dismissal ~~or~~ and Compromise.

(1) Before a certification determination is made under subdivision (c)(1) in an action in which persons sue [or are sued] as representatives of a class, court approval is required for any dismissal, compromise, or amendment to delete class issues.

(2) An ~~class~~ action certified as a class action shall not be

dismissed or compromised without the approval of the court, and notice of ~~the~~ a proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(3) A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent investigation and report to the court on the fairness of the proposed dismissal or compromise. The expenses of the investigation and report and the fees of a person specially appointed shall be paid by the parties as directed by the court.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying a request for class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

DRAFT ADVISORY COMMITTEE NOTE

March, 1996

Class action practice has flourished and matured under Rule 23 as it was amended in 1966. Subdivision (b)(1) continues to provide a familiar anchor that secures the earlier and once-central roles of class actions. Subdivision (b)(2) has cemented the role of class actions in enforcing a wide array of civil rights claims, and subdivision (b)(3) classes have become one of the central means of protecting public interests through enforcement of large numbers of small claims that would not support individual litigation. The experience of more than three decades has shown the wisdom of those who crafted the 1966 rule, in matters both foreseen and unforeseen. Inevitably, this experience also has shown ways in which Rule 23 can be improved. These amendments will effect modest expansions in the availability of class actions in some settings, and modest restrictions in others. A new "opt-in" class category is created by subdivision (b)(4). Settlement problems are addressed, both by confirming the propriety of "settlement classes" and by strengthening the procedures for reviewing proposed settlements. Changes are made in a number of ancillary procedures, including the notice requirements. Many of these changes will bear on the use of class actions as one of the tools available to accomplish aggregation of tort claims. The Advisory Committee debated extensively the question whether more adventurous changes should be made to address the problems of managing mass tort litigation, particularly the problems that arise when a common course of conduct causes injuries that are dispersed in time and space. At the end, the Committee concluded that it is too early to anticipate the lessons that will be learned from the continuing and rapid development of practice in this area.

Stylistic changes also have been made.

At the request of the Advisory Committee, the Federal Judicial Center undertook an empirical study designed to illuminate the general use of class actions not only in settings that capture general attention but also in more routine settings. The study is published as T.E. Willging, L.L. Hooper, and R.J. Niemic, *An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules (1996)*. The study provided much useful information that has helped shape these amendments.

Subdivision (a). Subdivision (a) is amended to emphasize the opportunity to certify a class that addresses only specific claims, defenses, or issues, an opportunity that exists under the current rule. The change, in conjunction with parallel changes in subdivision (b)(3) and elsewhere in the rule, may make it easier to address mass tort problems through the class action device. One or two common issues may be certified for common disposition, leaving individual questions for individual litigation or for aggregation

on some other basis — including aggregation by certification of different, and probably smaller, classes.

Paragraph (4) is amended to emphasize the fiduciary responsibilities of counsel and representative parties. The new language is intended only to provide a forceful reminder to court, counsel, and representative parties that attorneys who undertake to represent a class owe duties of professional responsibility to the entire class and all members of the class. It does not answer any specific question.

Subdivision (b). Subdivision (b)(2) is amended to make it clear that a defendant class may be certified in an action for injunctive or declaratory relief against the class. Several courts have resolved the ambiguity in the 1966 language by permitting certification of defendant classes. Defendant classes can be useful, but particular care must be taken to ensure that the defendants chosen to represent the class do not have significant conflicts of interest with other class members and actually provide adequate representation. Care also must be taken to ensure that the responsibilities of adequately representing a class do not unfairly increase the expense and other burdens placed on the class representatives, and do not coerce or impede settlement by class representatives as individual parties rather than as class representatives.

Subdivision (b)(3) has been amended in several respects. Some of the changes are designed to redefine the role of class adjudication in ways that sharpen the distinction between the aggregation of individual claims that would support individual adjudication and the aggregation of individual claims that would not support individual adjudication. Current attempts to adapt Rule 23 to address the problems that arise from torts that injure many people are reflected in part in some of these changes, but these attempts have not matured to a point that would support comprehensive rulemaking. When Rule 23 was substantially revised in 1966, the Advisory Committee Note stated: "A `mass accident'resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits seprately tried." Although it is clear that developing experience has superseded that suggestion, the lessons of experience are not yet so clear as to support detailed mass tort provisions either in Rule 23 or a new but related rule.

The probability that a claim would support individual litigation depends both on the probability of any recovery and the probable size of such recovery as might be won. One of the most

important roles of certification under subdivision (b)(3) has been to facilitate the enforcement of valid claims for small amounts. The median recovery figures reported by the Federal Judicial Center study all were far below the level that would be required to support individual litigation, unless perhaps in a small claims court. This vital core, however, may branch into more troubling settings. The mass tort cases frequently sweep into a class many members whose individual claims would easily support individual litigation, controlled by the class member. Individual class members may be seriously harmed by the loss of control. Class certification may be desired by defendants more than most plaintiff class members in such cases, and denial of certification or careful definition of the class may be essential to protect many plaintiffs. As one example, a defective product may have inflicted small property value losses on millions of consumers, reflecting a small risk of serious injury, and also have caused serious personal injuries to a relatively small number of consumers. Class certification may be appropriate as to the property damage claims, but not as to the personal injury claims.

In another direction, class certification may be sought as to individual claims that would not support individual litigation because of a dim prospect of prevailing on the merits. Certification in such a case may impose undue pressure on the defendant to settle. Settlement pressure arises in part from the expense of defending class litigation. More important, settlement pressure reflects the fact that often there is at least a small risk of losing against a very weak claim. A claim that might prevail in one of every ten or twenty individual actions gathers compelling force — a substantial settlement value — when the small probability of defeat is multiplied by the amount of liability to the entire class.

Individual litigation may play quite a different role with respect to class certification. Exploration of mass tort questions time and again led experienced lawyers to offer the advice that it is better to defer class litigation until there has been substantial experience with actual trials and decisions in individual actions. The need to wait until a class of claims has become "mature" seems to apply peculiarly to claims that at least involve highly uncertain facts that may come to be better understood over time. New and developing law may make the fact uncertainty even more daunting. A claim that a widely used medical device has caused serious side effects, for example, may not be fully understood for many years after the first injuries are claimed. Pre-maturity class certification runs the risk of mistaken decision, whether for or against the class. This risk may be translated into settlement terms that reflect the uncertainty by exacting far too much from the defendant or according far too little to the plaintiffs.

Item numbers have been added to emphasize the individual importance of each of the three requirements enumerated in the first paragraph of subdivision (b)(3).

Item (i) has been amended to reflect the other changes that emphasize the availability of issues classes. The predominance of law or fact questions common to the class is measured only in relation to individual questions that also are to be resolved in the class action. Individual questions that are left for resolution outside the class action are not included in measuring predominance. One frequently discussed example is provided by certification of issues of design defect and general causation as the only matters to be resolved on a class basis, leaving individual issues of comparative fault, specific causation, and damages for resolution in other proceedings.

Item (ii) in the findings required for class certification has been amended by adding the requirement that a (b)(3) class be necessary for the fair and efficient [adjudication] of the controversy. The requirement that a class be superior to other available methods is retained, and the superiority finding — made under the familiar factors developed by current law, as well as the new factors (E), (F), and (G)(H) — will be the first step in making the finding that a class action is necessary. It is no longer sufficient, however, to find that a class action is in some sense superior to other methods of [adjudicating] "the controversy." It also must be found that class certification is necessary. Necessity is meant to be a practical concept. In adding the necessity requirement, it also is intended to encourage careful reconsideration of the superiority finding without running the drafting risks entailed in finding some new word to substitute for "superior." Both necessity and superiority are together intended to force careful reappraisal of the fairness of class adjudication as well as efficiency concerns. Certification ordinarily should not be used to force into a single class action plaintiffs who would be better served by pursuing individual actions. A class action is not necessary for them, even if it would be more efficient in the sense that it consumes fewer litigating resources and more fair in the sense that it achieves more uniform treatment of all claimants. Nor should certification be granted when a weak claim on the merits has practical value, despite individually significant damages claims, only because certification generates great pressure to settle. In such circumstances, certification may be "necessary" if there is to be any [adjudication] of the claims, but it is neither superior nor necessary to the fair and efficient [adjudication] of the claims. Class certification, on the other hand, is both superior and necessary for the fair and efficient [adjudication] of numerous individual claims that are strong on the merits but small in amount.

Superiority and necessity take on still another dimension when

there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. Even though many individual plaintiffs would be better served by racing to secure and enforce the earlier judgments that exhaust the available assets, fairness may require aggregation in a way that marshals the assets for equitable distribution. Bankruptcy proceedings may prove a superior alternative, but the certification decision must make a conscious choice about the best method of addressing the apparent problem.

Item (iii) has been added to the findings required for class certification, and is supplemented by the addition of new factor (E) (F) to the list of factors considered in making the findings required for certification. It addresses the concern that class certification may create an artificial and coercive settlement value by aggregating weak claims. It also recognizes the prospect that certification is likely to increase the stakes substantially, and thereby increase the costs of the litigation. These concerns justify preliminary consideration of the probable merits of the class claims, issues, or defenses at the certification stage if requested by a party opposing certification. If the parties prefer to address the certification determination without reference to the merits, however, the court should not impose on them the potential burdens and consequences entailed by even a preliminary consideration of the merits.

{*Version 1*} Taken to its full extent, these concerns might lead to a requirement that the court balance the probable outcome on the merits against the cost and burdens of class litigation, including the prospect that settlement may be forced by the small risk of a large class recovery. A balancing test was rejected, however, because of its ancillary consequences. It would be difficult to resist demands for discovery to assist in demonstrating the probable outcome. The certification hearing and determination, already events of major significance, could easily become overpowering events in the course of the litigation. Findings as to probable outcome would affect settlement terms, and could easily affect the strategic posture of the case for purposes of summary judgment and even trial. Probable success findings could have collateral effects as well, affecting a party's standing in the financial community or inflicting other harms. And a probable success balancing approach must inevitably add considerable delay to the certification process.

The "first look" approach adopted by item (iii) is calculated to avoid the costs associated with balancing the probable outcome and costs of class litigation. The court is required only to find that the class claims, issues, or defenses "are not insubstantial on the merits." This phrase is chosen in the belief that there is a wide — although curious — gap between the higher possible

requirement that the claims be substantial and the chosen requirement that they be not insubstantial. The finding is addressed to the strength of the claims "on the merits," not to the dollar amount or other values that may be involved. The purpose is to weed out claims that can be shown to be weak by a curtailed procedure that does not require lengthy discovery or other prolonged proceedings. Often this determination will be supported by precertification motions to dismiss or for summary judgment. Even when it is not possible to resolve the class claims, issues, or defenses on motion, it may be possible to conclude that the claims, issues, or defenses are too weak to justify the costs of certification.

{*Version 2*} These risks can be justified only by a preliminary finding that the prospect of class success is sufficient to justify them. The prospect of success need not be a probability of 0.50 or more. What is required is that the probability be sufficient in relation to the predictable costs and burdens, including settlement pressures, entailed by certification. The finding is not an actual determination of the merits, and pains must be taken to control the procedures used to support the finding. Some measure of controlled discovery may be permitted, but the procedure should be as expeditious and inexpensive as possible. At times it may be wise to integrate the certification procedure with proceedings on precertification motions to dismiss or for summary judgment. A realistic view must be taken of the burdens of certification — bloated abstract assertions about the crippling costs of class litigation or the coercive settlement effects of certification deserve little weight. At the end of the process, a balance must be struck between the apparent strength of the class position on the merits and the adverse consequences of class certification. This balance will always be case-specific, and must depend in large measure on the discretion of the district judge.

The prospect-of-success finding is readily made if certification is sought only for purposes of pursuing settlement, not litigation. If certification of a settlement class is appropriate under the standards discussed [with factor (G)(H) and subdivision (e)] below, the prospect of success relates to the likelihood of reaching a settlement that will be approved by the court, and the burdens of certification are merely the burdens of negotiations that the parties can abandon when they wish.

Care must be taken to ensure that subsequent proceedings are not distorted by the preliminary finding on the prospect of success. If a sufficient prospect is found to justify certification, subsequent pretrial and trial proceedings should be resolved without reference to the initial finding. The same caution must be observed in subsequent proceedings on individual claims if certification is denied.

{{These paragraphs follow either Version 1 or Version 2.}}

It may happen that different parties appear, seeking to represent the same class or overlapping classes. Or it may happen that parties appear to request certification of a class for purposes of a settlement that has been partly worked out, but not yet completed. These and still other situations will complicate the task of integrating the preliminary appraisal of the merits with the other proceedings required to determine the class-certification question. No single solution commends itself. These complications must be worked out according to the circumstances of each case.

One court's refusal to certify for want of a sufficient prospect of class success is not binding by way of res judicata if another would-be representative appears to seek class certification in the same court or some other court. The refusal to recognize a class defeats preclusion through the theories that bind class members. Even participation of the same lawyers ordinarily is not sufficient to extend preclusion to a new party. The first determination is nonetheless entitled to substantial respect, and a significantly stronger showing may properly be required to escape the precedential effect of the initial refusal to certify.

[Alternative that would reflect substitution of new factor (A) in the matters pertinent to finding superiority for the proposed item (ii) requirement that a class action be "necessary" for the fair and efficient disposition of the controversy.] The list of factors that bear on the finding whether a class action is superior to other available methods for the fair and efficient [disposition] of the controversy has been amended in several ways.

Factor (A) is added to focus on the question whether class certification is needed to accomplish effective enforcement of individual claims. The need for class certification is a practical concept. This factor is intended to underscore the importance of individual fairness as well as overall fairness and efficiency. Certification is needed for the fair and efficient [adjudication] of numerous individual claims that are strong on the merits but small in amount. Such classes provide the traditional and abiding justification for (b)(3) certification. Certification ordinarily should not be used, on the other hand, to force into a single class action plaintiffs who would be better served by pursuing individual actions. A class action is not needed for them, even if it would be more efficient in the sense that it consumes fewer litigating resources, and also more fair to the extent that it may achieve more uniform treatment of all claimants. Nor should certification be granted when a weak claim on the merits has practical value, whether or not there are individually significant damages claims, only because certification generates great pressure to settle. In such circumstances, certification may be needed if there is to be

any [adjudication] of the claims, but it is neither superior nor needed for the fair and efficient [adjudication] of the claims.

The need for class certification takes on still another dimension when there is a significant risk that the insurance and assets of the defendants may not be sufficient to fully satisfy all claims growing out of a common course of events. Even though many individual plaintiffs would be better served by racing to secure and enforce the earlier judgments that exhaust the available assets, fairness may require aggregation in a way that marshals the assets for equitable distribution. This need may justify certification under subdivision (b)(3), or in appropriate cases may justify certification under subdivision (b)(1). Bankruptcy proceedings may prove a superior alternative. The decision whether a (b)(3) class is needed must rest on a conscious choice about the best method of addressing the apparent problem.

Yet another problem, presented by some recent class-action settlements, arises from efforts to resolve future claims that have not yet matured to the point that would permit present individual enforcement. A toxic agent, for example, may have touched a broad universe of persons. Some have developed present injuries, most never will develop any injury, and many will develop injuries at some indefinite time in the future. Class action settlements, much more than adjudications, can be structured in ways that provide for processing individual claims as actual injuries develop in the future. Class disposition may be the only possible means of resolving these "futures" claims. These situations present issues that cannot now be resolved by rule. Classes have been certified on a "limited fund" theory under subdivision (b)(1), limiting any question of exclusion from the class to the settlement terms approved by the court. Subdivision (b)(3) also may present an opportunity for certification, presenting difficult questions as to the means for protecting the right to opt out of the class. It is difficult to provide effective notice to future claimants, and particularly difficult as to those who may not even know that they have been exposed to the common class risk. It also is difficult to make an intelligent decision whether to opt out when the prospect and nature of any future injury are uncertain. Yet any realistic prospect of settlement is likely to be destroyed if the opportunity to request exclusion is extended to include a reasonable period after each future claimant becomes aware of actual injury and of the class settlement and judgment. These problems can be addressed explicitly only in light of the lessons to be learned from developing experience.

Factor (B), formerly factor (A), is amended to emphasize the ability of individual class members to pursue their claims through means other than the proposed class. Often the alternative means will be individual litigation, fully controlled by the litigant. The alternative separate actions, however, also may involve

aggregation on some other basis, including certification of a differently defined class that is not individually controlled by all parties.

Factor (C), formerly factor (B), has been amended in several respects. Other litigation can be considered so long as it is "related" and involves class members; there is no need to determine whether the other litigation somehow concerns the same controversy. The focus on other litigation "already commenced" is deleted, permitting consideration of litigation without regard to the time of filing in relation to the time of filing the class action. The more important change authorizes consideration of the "maturity" of related litigation. In one dimension, maturity can reflect the need to avoid interfering with the progress of related litigation already well advanced toward trial and judgment. When multiple claims arise out of dispersed events, however, maturity also reflects the need to support class adjudication by experience gained in completed litigation of several individual claims. If the results of individual litigation begin to converge, class adjudication may seem appropriate. Class adjudication may continue to be inappropriate, however, if individual litigation continues to yield inconsistent results, or if individual litigation demonstrates that knowledge has not yet advanced far enough to support confident decision on a class basis.

Factor (E), formerly factor (D), has been amended to set the difficulties of managing a class action in perspective. If other means of adjudication would create greater difficulties than class adjudication for the judicial system as a whole — including state as well as federal courts — certification should not be defeated by the difficulties of managing a class action.

Factor (E) (F) has been added to subdivision (b)(3) to complement the addition of new item (ii) and the addition of the necessity element to item (iii) and the addition of new factor (A). The role of the probable success of the class claims, issues, or defenses is discussed with those items.

Factor (F) (G) has been added to subdivision (b)(3) to effect a retrenchment in the use of class actions to aggregate trivial individual claims. It bears on the item (iii) requirement that a class action be superior to other available methods and necessary needed within the meaning of factor (A) for the fair and efficient [adjudication] of the controversy. It permits the court to deny class certification if the public interest in — and the private benefits of — probable class relief do not justify the burdens of class litigation. This factor is distinct from the evaluation of the probable outcome on the merits called for by item (ii) and factor (E) (F). At the extreme, it would permit denial of certification even on the assumption that the class position would certainly prevail on the merits.

Administration of factor (F) (G) requires care and sensitivity. Subdivision (b)(3) class actions have become an important private means for supplementing public enforcement of the law. Legislation often provides explicit incentives for enforcement by private attorneys-general (including qui tam provisions), attorney-fee recovery, minimum statutory penalties, and treble damages. Class actions that aggregate many small individual claims and award "common-fund" attorney fees serve the same function. Class recoveries serve the important functions of depriving wrongdoers of the fruits of their wrongs and deterring other potential wrongdoers. There is little reason to believe that the Committee that proposed the 1966 amendments anticipated anything like the enforcement role that Rule 23 has assumed, but there is equally little reason to be concerned about that belief. What counts is the value of the enforcement device that courts, aided by active class-action lawyers, have forged out of Rule 23(b)(3). In most settings, the value of this device is clear.

The value of class-action enforcement of public values, however, is not always clear. It cannot be forgotten that Rule 23 does not authorize actions to enforce the public interest on behalf of the public interest. Rule 23 depends on identification of a class of real persons or legal entities, some of whom must appear as actual representative parties. Rule 23 does not explicitly authorize substituted relief that flows to the public at large, or to court- or party-selected champions of the public interest. Adoption of a provision for "fluid" or "cy pres" class recovery would severely test the limits of the Rules Enabling Act, particularly if used to enforce statutory rights that do not provide for such relief. The persisting justification of a class action is the controversy between class members and their adversaries, and the final judgment is entered for or against the class. It is class members who reap the benefits of victory, and are bound by the res judicata effects of victory or defeat. If there is no prospect of meaningful class relief, an action nominally framed as a class action becomes in fact a naked action for public enforcement maintained by the class attorneys without statutory authorization and with no support in the original purpose of class litigation. Courts pay the price of administering these class actions. And the burden on the courts is displaced onto other litigants who present individually important claims that also enforce important public policies. Class adversaries also pay the price of class enforcement efforts. The cost of defending class litigation through to victory on the merits can be enormous. This cost, coupled with even a small risk of losing on the merits, can generate great pressure to settle on terms that do little or nothing to vindicate whatever public interest may underlie the substantive principles invoked by the class.

The prospect of significant benefit to class members combines

with the public values of enforcing legal norms to justify the costs, burdens, and coercive effects of class actions that otherwise satisfy Rule 23 requirements. If probable individual relief is so slight as to be essentially trivial or meaningless, however, the core justification of class enforcement fails. Only public values can justify class certification. Public values do not always provide sufficient justification. An assessment of public values can properly include reconsideration of the probable outcome on the merits made for purposes of item (ii) and factor (E). If the prospect of success on the merits is slight and the value of any individual recovery is insignificant, certification can be denied with little difficulty. But even a strong prospect of success on the merits may not be sufficient to justify certification. It is no disrespect to the vital social policies embodied in much modern regulatory legislation to recognize that the effort to control highly complex private behavior can outlaw much behavior that involves merely trivial or technical violations. Some "wrongdoing" represents nothing worse than a wrong guess about the uncertain requirements of ambiguous law, yielding "gains" that could have been won by slightly different conduct of no greater social value. Disgorgement and deterrence in such circumstances may be unfair, and indeed may thwart important public interests by discouraging desirable behavior in areas of legal indeterminacy.

Factor (G) (H) is added to resolve some, but by no means all, of the questions that have grown up around the use of "settlement classes." Factor (G) (H) bears only on (b)(3) classes. Among the many questions that it does not touch is the question whether it is appropriate to rely on subdivision (b)(1) to certify a mandatory non-opt-out class when present and prospective tort claims are likely to exceed the "limited fund" of a defendant's assets and insurance coverage. This possible use of subdivision (b)(1) presents difficult issues that cannot yet be resolved by a new rule provision. Subdivisions (c)(1)(A)(2) and (e) also bear on settlement classes.

A settlement class may be described as any class that is certified only for purposes of settling the claims of class members on a class-wide basis, not for litigation of their claims. The certification may be made before settlement efforts have even begun, as settlement efforts proceed, or after a proposed settlement has been reached.

Factor (G) (H) makes it clear that a class may be certified for purposes of settlement even though the court would not certify the same class, or might not certify any class, for litigation. At the same time, a (b)(3) settlement class continues to be controlled by the prerequisites of subdivision (a) and all of the requirements of subdivision (b)(3). The only difference from certification for litigation purposes is that application of these Rule 23 requirements is affected by the differences between settlement and

litigation. Choice-of-law difficulties, for example, may force certification of many subclasses, or even defeat any class certification, if claims are to be litigated. 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 litigation 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. Important and even vitally 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) obligation to review and approve a class settlement commonly must surmount the informational difficulties that arise when the major adversaries join forces as proponents of their settlement agreement. Objectors frequently appear to reduce these difficulties, but 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, particularly if the action appears to have been 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. Subdivision (c)(1)(A)(ii) requires that if the class was certified only for settlement, class members be allowed to opt out of any settlement after the terms of the settlement are approved by the court. Parties who fear the impact of such opt-outs on a settlement intended to achieve total peace may respond by refusing to settle, or by crafting the settlement so that one or more parties may withdraw from the settlement after the opt-out period. The opportunity to opt out of the settlement creates special problems when the class includes "futures" claimants who do not yet know of the injuries that will one day bring them into the class. As to such claimants, the right to opt out created by subdivision (c)(1)(A)(ii) must be held open until the injury has matured and for a reasonable period after actual notice of the class settlement.

The right to opt out of a settlement class is meaningless unless there is actual notice. Actual notice in turn means more than exposure to some official pronouncement, even if it is directly addressed to an individual class member by name. The notice must be actually received and also must be cast in a form that conveys meaningful information to a person of ordinary understanding. A class member is bound by the judgment in a

settlement-class action only after receiving actual notice and a reasonable opportunity to opt out of the judgment.

Although notice and the right to opt out provide the central means of protecting settlement class members, the court must take particular care in applying some of Rule 23's requirements. Definition of the class 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 no 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.

When a (b)(3) settlement class seems premature, the same goals may be served in part by forming an opt-in settlement class under subdivision (b)(4). An opt-in class will bind only those whose actual participation guarantees actual notice and voluntary choice. The major difference, indeed, is that the opt-in class provides clear assurance of the same goals sought by requiring actual notice and a right to opt out of a (b)(3) settlement-class judgment. Other virtues of opt-in classes are discussed separately with subdivision (b)(4).

Subdivision (b)(4) creates a new power to certify an opt-in class. The opt-in class is identified as a means of permissive joinder. Joinder under Rule 23 may prove attractive for a variety of reasons. Certification of an opt-in class may provide a ready means of focusing joinder that avoids the difficulties of more diffuse aggregation devices. Reliance on the familiar incidents of Rule 23 can provide a framework for managing the action that need not be reinvented with each new attempt to join many parties.

Opt-in classes may be a particularly attractive means for joining goups of defendants. There is less need to worry about adequate representation of class members who have opted in, and there are far more effective means of reducing the burdens imposed on the representative defendants.

Opt-in classes also may provide an attractive means of addressing dispersed mass torts. The class can be defined to resolve problems that could not be readily resolved without the consent that is established by opting in and accepting the definition. The law chosen to govern the dispute can be stated, terms for compensating counsel announced, procedures established for resolving individual questions in the class action or by other means, and so on. Questions of power over absent parties, analogous to personal jurisdiction questions, are avoided. Claims disposition procedures can be established that facilitate settlement. Perhaps most important, an opt-in class provides a

means more effective than the now familiar opt-out class to sort out those who prefer to pursue their claims in individual litigation. Subdivision (b)(4) thus complements subdivision (b)(3), providing an alternative means of addressing dispersed mass torts. Although a court should always consider the alternative of certification under (b)(3) in determining whether to certify a class under (b)(4), certification under (b)(4) is proper even in circumstances that also would support certification under (b)(3). The same is true as to certification under subdivision (b)(2), although there are not likely to be many circumstances that support an opt-in class for injunctive or declaratory relief. If certification is proper under subdivision (b)(1), on the other hand, reliance should be placed on (b)(1), not (b)(4).

The matters specified in factors (A) through (E) bear on the choice between certifying an opt-in class, certifying an opt-out or mandatory class, and allowing the underlying disputes to be resolved outside Rule 23.

Factors (A) and (B), looking to the nature of the controversy, the relief sought, and the extent and nature of the members' injuries or liability, emphasize closely related considerations. A common course of conduct, for example, may inflict minor injury on many victims and severe injury on a few. An opt-out class makes sense for those who suffered minor injury; an opt-in class, managed in conjunction with the opt-out class, may best protect the interests of those who suffered severe injury. As another example, an opt-in class may make more sense than an opt-out class when damages are demanded against a defendant class.

Factor (C) is a reminder that potential conflicts of interest among class members can cut both ways. An opt-in class may withstand somewhat greater potential conflicts than classes certified under other subdivisions because the members all have elected to join the action. This factor may push toward reliance on an opt-in class rather than attempts to combine subclasses of apparently congruent interest into a single class action. Substantial conflicts, however, may make the class unwieldy or unworkable.

Factor (D) emphasizes the need to consider the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy. In compelling circumstances, this interest justifies certification of a (b)(1)(A) class. It also may bear on certification of a (b)(2) class. In less compelling circumstances, it may justify certification of an opt-out class under (b)(3), including a settlement class. Resort to a (b)(4) opt-in class should be had only after canvassing the suitability of certification under these other subdivisions.

Factor (E), looking to the inefficiency or impracticality of resolving the controversy by separate actions, looks in part to the

interests of our several judicial systems in bringing together closely related disputes. These interests are served by an opt-in class, however, only to the extent that individual litigants voluntarily take advantage of the invitation to join together. A (b)(4) class is a new permissive-joinder device that takes advantage of developed class-action procedures, not a means of serving judicial interests in efficiency by expanding mandatory joinder rules.

Paragraph 5 addresses class actions that seek to combine individual damages recoveries with class-based declaratory or injunctive relief. It requires that damages claims be certified under (b)(3) or (b)(4). Individual damages claims should be included in a mandatory class only if certification is appropriate under (b)(1). Proper certification under (b)(2) for declaratory or injunctive relief does not ensure the appropriateness of class treatment for damages claims. That question must be addressed separately.

Subdivision (c). The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is deleted. The notice provisions are substantially revised. Notice now is explicitly required in (b)(1) and (b)(2) classes; notice in (b)(3) classes need not be directed to all identifiable members of the class if the cost is excessive in relation to the generally small value of individual claims; and notice in (b)(4) class is designed to accomplish the purpose of inviting joinder. Other changes are made as well.

The Federal Judicial Center study showed many cases in which it was doubtful whether determination of the class-action question was made as soon as practicable after commencement of the action. This result occurred even in districts with local rules requiring determination within a specified period. The appearance may suggest only that practicability itself is a pragmatic concept, permitting consideration of all the factors that may support deferral of the certification decision. If the rule is applied to require determination "when" practicable, it does no harm. The requirement is deleted, however, to support implementation of other changes in Rule 23. Significant preliminary preparation may be required in a (b)(3) action, for example, to appraise probable success on the merits and to determine whether the public interest and private benefits justify the burdens of class litigation. These and similar inquiries should not be made under pressure of an early certification requirement. [Consideration of a precertification motion to dismiss or for summary judgment under subdivision (d)(1), for example, readily justifies posponement of the certification decision.] If related litigation is approaching maturity, indeed, there may be positive reasons for deferring the class determination pending developments in the related litigation.

Subdivision (c)(1)(A) requires that the order certifying a (b)(3) class, not the notice alone, state when and how class members can opt out. It does not address the questions that may arise when settlement occurs after expiration of the initial period for requesting exclusion, or when the class includes members who, because not yet injured at the time of certification or settlement, do not become aware of their membership in the class until the action has been settled. The court has power to condition approval of a settlement on adoption of terms that permit class members to opt out of the settlement. This power should be exercised with restraint, however, because the parties must be allowed to decline the condition and the prospect of extensive exclusions may easily defeat any settlement.

The order certifying a (b)(4) opt-in class may state conditions that must be accepted by those who opt to join the class. The conditions may control not only procedures for managing the action but also such matters as the law chosen to govern decision. The power to require contribution by class members to litigation expenses is noted separately to empahsize this feature of opt-in classes, a matter that may be particularly important when a defendant class is certified under (b)(4).

Subparagraph (B) permits alteration or amendment of an order granting or denying class certification at any time before final judgment. This change avoids any possible ambiguity in the earlier reference to "the decision on the merits." Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. The definition of a final judgment should have the same flexibility that it has in defining appeability, particularly in protracted institutional reform litigation. Proceedings to enforce a complex decree may generate several occasions for final judgment appeals, and likewise may demonstrate the need to adjust the class definition.

Subdivision (c)(2) amends the requirements for notice of a determination to certify a class action. In all cases, the order must be both concise and clear. Clarity should have pride of place, but it must be remembered that many class members will not bother to read even a clear notice that is too long. The requirements of concision and clarity can be adjusted to reflect the probable sophistication of class members, but in most cases the notice should be cast in terms that an ordinary person can understand. Description of the right to elect exclusion from a (b)(3) class should include the (c)(1)(A) right to elect exclusion from any settlement in an action certified only for purposes of settlement.

The provisions that require consideration of the merits in determining whether to certify a (b)(3) class may show a strong

probability that a plaintiff class will win on the merits. In such circumstances, subdivision (c)(2)(A) authorizes the court to order that a defendant advance part or all of the expense of notifying the class.

Item (i) adopts a functional notice requirement for (b)(1) and (b)(2) class actions. Notice should be directed to all identifiable members of the class in circumstances that support individual notice without substantial burden. If a party addresses regular communications to class members for other purposes, for example, it may be easy to include the class notice with a routine mailing. If substantial burdens would be imposed by an effort to reach all class members, however, the means of notice can be adjusted so long as notice is calculated to reach a sufficient number of class members to ensure the opportunity to protect class interests in the questions of certification and adequate representation. The notice requirement is less exacting than the notice requirement for (b)(3) actions because there is no right to opt out of a (b)(1) or (b)(2) class. If a (b)(3) class is certified in conjunction with a (b)(2) action according to the requirements of subdivision (b)(5), the notice requirements for a (b)(3) action must be satisfied as to the (b)(3) class.

Item (ii) continues the provisions for notice in a (b)(3) class action. The provisions for notice of the right to be excluded and of the potential consequences of class membership are shifted to the body of subparagraph (A). A new provision is added, allowing notice to be limited to a sampling of class members if the cost of notice to all members is excessive in relation to the generally small value of individual claims. The sample should be designed to ensure adequate opportunity for supervision of class representatives and class counsel.

Item (iii) provides a flexible notice system for (b)(4) classes. Notice should be adapted to the purpose of inviting participation, and in some circumstances may be addressed to lawyers conducting related litigation. Although the court need not worry about the effects of the judgment on nonparties, it should direct a reasonable effort to make the opportunity to participate practically available.

Subdivision (c)(3) includes a new subparagraph (C) that specifies the effect of the judgment in an opt-in class certified under new subdivision (b)(4).

Subdivision (c)(4) is amended to provide that the "numerosity" requirement of subdivision (a)(1) need not be satisfied as to each of multiple classes or subclasses. The court is free to choose between the advantages of small subclasses and the advantages of requiring individual joinder of a small number of people who have distinctive interests.

Subdivision (d). Only modest changes, generally stylistic, are made in subdivision (d).

Paragraph (1) is new. It confirms the general practice found by the Federal Judicial Center: courts frequently rule on motions under Rules 12 and 56 before determining whether to certify a class. Some courts have feared that this practice might violate the former requirement that a class determination be made as soon as practicable after the action is filed. Elimination of that requirement should banish any doubt, but this paragraph is added to remind courts and parties of this helpful practice.

Paragraph (2) is adjusted to include notice of matters affecting opt-in classes, and to confirm the potentially useful practice of providing notice of refusal to certify a class.

Subdivision (e). Paragraphs (1) and (3) are new.

Paragraph (1) requires court approval of any dismissal, compromise, or deletion of class issues attempted before a class certification determination is made in an action brought as a class action. This provision is designed to protect the interests of nonrepresentative class members who may have relied on the pending action and the proposed representation.

Paragraph (3) establishes an opportunity to acquire independent information about the wisdom of a proposed class-action settlement. The parties who support the settlement cannot always be relied upon to provide adequate information about the reasons for rejecting the settlement. Information may be provided through objections by class members, but objectors often have found it difficult to acquire sufficient information, and the burdens of framing comprehensive and persuasive objections may be insurmountable. {A magistrate judge or person specially appointed by the court to make an independent investigation and report may be better able to acquire the necessary information and — with expenses paid by the parties — better able to bear the burdens of acquiring and using the information.} [The opportunity provided by this paragraph should, however, be exercised with restraint. In most cases it is better that the trial judge assume the responsibility for directing the parties to provide sufficient information to evaluate a proposed settlement. Direction by the judge will ensure that the judge receives the information needed by the judge, and that the judge bears the front-line responsibility for evaluating the settlement in light of this information.] Appointments under this paragraph are not made under Rule 53 and are not subject to its constraints.

(f). This permissive interlocutory appeal provision is adopted under the power conferred by 28 U.S.C. § 1292(e). Appeal from an order granting or denying class certification is permitted in the sole discretion of the court of appeals. No other type of

Rule 23 order is covered by this provision. It is designed on the model of § 1292(b), relying in many ways on the jurisprudence that has developed around § 1292(b) to reduce the potential costs of interlocutory appeals. The procedures that apply to the request for court of appeals permission to appeal under § 1292(b) should apply to a request for permsision to appeal under Rule 23(f). At the same time, subdivision (f) departs from § 1292(b) in two significant ways. It does not require that the district court certify the certification ruling for appeal, although the district court often can assist the parties and court of appeals by offering advice on the desirability of appeal. And it does not include the potentially limiting requirements of § 1292(b) that the district court order "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." These differences warrant modest differences in the procedure for seeking permission to appeal from the court of appeals. Appellate Rule 5.1 has been modified to provide the appropriate procedure.

Only a modest expansion of the opportunity for permissive interlocutory appeal is intended. Permission to appeal should be granted with great restraint. The Federal Judicial Center study supports the view that many suits with class action allegations present familiar and almost routine issues that are no more worthy of immediate appeal than many other interlocutory rulings. Yet several concerns justify some expansion of present opportunities to appeal. An order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation. [The prior draft added that if a plaintiff class is certified after judgment for the representative plaintiffs, the result may be "one-way" intervention. That does not seem much of a concern to me — if indeed there is a valid claim on the merits, why should we be concerned that the late-certified class members have not had to take a sporting chance on losing their valid claims?] An order granting certification, on the other hand, may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

The expansion of appeal opportunities effected by subdivision (f) is indeed modest. Court of appeals discretion is as broad as under § 1292(b). Permission to appeal may be granted or denied on the basis of any consideration that the court of appeals finds persuasive. Permission is most likely to be granted when the certification decision turns on a novel or unsettled question of

law. Such questions are most likely to arise during the early years of experience with new class-action provisions as they may be adopted into Rule 23 or enacted by legislation. Permission almost always will be denied when the certification decision turns on case-specific matters of fact and district court discretion.

The district court, having worked through the certification decision, often will be able to provide cogent advice on the factors that bear on the decision whether to permit appeal. This advice can be particularly valuable if the certification decision is tentative. Even as to a firm certification decision, a statement of reasons bearing on the probable benefits and costs of immediate appeal can help focus the court of appeals decision, and may persuade the disappointed party that an attempt to appeal would be fruitless.

The 10-day period for seeking permission to appeal is designed to reduce the risk that attempted appeals will disrupt continuing proceedings. It is expected that the courts of appeals will act quickly in making the preliminary determination whether to permit appeal. Permission to appeal does not stay trial court proceedings. A stay should be sought first from the trial court. If the trial court refuses a stay, its action and any explanation of its views should weigh heavily with the court of appeals.

Agenda Item IV B #1

Draft Rule Without "Necessary" Element in (b)(3)

This version deletes the new (b)(3) requirement that a court find that class certification is necessary for the fair and efficient adjudication of the controversy.

It retains the proposed new "factor (A)." This factor is intended to serve much the same function as the requirement that certification be necessary, without the confusion that the first drafting has engendered. The purpose is to discourage certification of classes that include members whose claims would support meaningful individual litigation. The alternative versions of the Committee Note suggest that it is easier to explain this purpose as a "need" factor.

Rule 23. Class Actions ("Necessary" Deleted)

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all ~~only~~ if ~~—~~ with respect to the claims, defenses, or issues certified for class action treatment ~~—~~

(1) the ~~class is~~ members are so numerous that joinder of all members is impracticable~~,~~;

(2) there are questions of law or fact common to the class~~,~~;

(3) ~~the claims or defenses of the representative parties are typical of the claims or defenses~~ the representative parties' positions typify those of the class~~,~~; and

(4) the representative parties and their attorneys will fairly and adequately discharge the fiduciary duty to protect the interests of ~~the~~ all persons while members of the class until relieved by the court from that fiduciary duty.

(b) ~~Class Actions Maintainable~~ When Class Actions May be Certified. An action may be ~~maintained~~ certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class ~~which~~ that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class ~~which~~ that would as a practical matter be dispositive of the interests of the other members

not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate~~ final injunctive or declaratory relief ~~or corresponding declaratory relief~~ may be appropriate with respect to the class as a whole; or

(3) the court finds (i) that the questions of law or fact common to the certified class ~~members of the class~~ predominate over ~~any~~ individual questions ~~affecting only individual members~~ included in the class action, (ii) that a class action is superior to other available methods for the fair and efficient ~~adjudication~~ disposition of the controversy, and — if such a finding is requested by a party opposing certification of a class — (iii) that {the class claims, issues, or defenses are not insubstantial on the merits} [alternative:] {the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification}. The matters pertinent to ~~the~~ these findings include:

(A) the need for class certification to accomplish effective enforcement of individual claims;

(B) the ~~interest of members of the class in individually controlling the prosecution or defense of~~ practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;

(C) the extent, ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of~~

~~the class~~;

(D) the desirability ~~or undesirability~~ of concentrating the litigation ~~of the claims~~ in the particular forum;

(E) the likely difficulties ~~likely to be encountered in the management of~~ in managing a class action that will be avoided or significantly reduced if the controversy is adjudicated by other available means;

(F) the probable success on the merits of the class claims, issues, or defenses;

(G) whether the public interest in — and the private benefits of — the probable relief to individual class members justify the burdens of the litigation; and

(H) the opportunity to settle on a class basis claims that could not be litigated on a class basis or could not be litigated by [or against?] a class as comprehensive as the settlement class; or

(4) the court finds that permissive joinder should be accomplished by allowing putative members to elect to be included in a class. The matters pertinent to this finding will ordinarily include:

(A) the nature of the controversy and the relief sought;

(B) the extent and nature of the members' injuries or liability;

(C) potential conflicts of interest among members;

(D) the interest of the party opposing the class in securing a final and consistent resolution of the

matters in controversy; and

(E) the inefficiency or impracticality of separate actions to resolve the controversy; or

(5) the court finds that a class certified under subdivision (b)(2) should be joined with claims for individual damages that are certified as a class action under subdivision (b)(3) or (b)(4).

(c) Determination by Order Whether Class Action to Be ~~Maintained~~ Certified; Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses.

(1) ~~As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.~~ When persons sue or are sued as representatives of a class, the court shall determine by order whether and with respect to what claims, defenses, or issues the action ~~should~~ will be certified as a class action.

(A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how [putative] members (i) may elect to be excluded from the class, and (ii) if the class is certified only for settlement, may elect to be excluded from any settlement approved by the court under subdivision (e). When a class is certified under subdivision (b)(4), the order must state when, how, and under what conditions [putative] members may elect to be included in the class; the conditions of inclusion may include a requirement that class

members bear a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be [is] conditional, and may be altered or amended before ~~the decision on the merits~~ final judgment.

(2) **(A)** When ordering certification of a class action under this rule, the court shall direct that appropriate notice be given to the class. The notice must concisely and clearly describe the nature of the action, the claims, issues, or defenses with respect to which the class has been certified, the right to elect to be excluded from a class certified under subdivision (b)(3), the right to elect to be included in a class certified under subdivision (b)(4), and the potential consequences of class membership. [The court may order a defendant to advance part or all of the expense of notifying a plaintiff class if, under subdivision (b)(3)(E), the court finds a strong probability that the class will win on the merits.]

(i) In any class action certified under subdivision (b)(1) or (2), the court shall direct a means of notice calculated to reach a sufficient number of class members to provide effective opportunity for challenges to the class certification or representation and for supervision of class representatives and class counsel by other class members.

(ii) In any class action ~~maintained~~ certified under subdivision (b)(3), the court shall direct to ~~the~~ members of the class the best notice practicable under the circumstances, including

individual notice to all members who can be identified through reasonable effort[, but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the generally small value of individual members' claims.] The notice shall advise each member that ~~(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C)~~ any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(iii) In any class action certified under subdivision (b)(4), the court shall direct a means of notice calculated to accomplish the purposes of certification.

(3) Whether or not favorable to the class,

(A) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(1) or ~~(b)~~ (2)~~, whether or not favorable to the class,~~ shall include and describe those whom the court finds to be members of the class~~.~~;

(B) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(3)~~, whether or not favorable to the class,~~ shall include and specify or describe those to whom the notice provided in subdivision (c)(2)(A)(ii) was directed, and who have not requested exclusion, and whom the court finds to be members of the class~~.~~; and

(C) The judgment in an action certified as a class action under subdivision (b)(4) shall include all those who elected to be included in the class and who were not earlier dismissed from the class.

(4) ~~When appropriate (A)~~ An action may be ~~brought or maintained~~ certified as a class action —

(A) with respect to particular claims, defenses, or issues; or

(B) ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly~~ by or against multiple classes or subclasses, which need not satisfy the requirement of subdivision (a)(1).

(d) Orders in Conduct of Class Actions. ~~In the conduct of actions to which this rule applies, the court may make appropriate orders:~~

(1) Before determining whether to certify a class the court may decide a motion made by any party under Rules 12 or 56 if the court concludes that decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay.

(2) As a class action progresses, the court may make orders that:

(A) ~~(1)~~ determine~~ing~~ the course of proceedings or prescribe~~ing~~ measures to prevent undue repetition or complication in ~~the~~ present~~ingation of~~ evidence or argument;

(B) ~~(2)~~ require~~ing~~, ~~for the protection of~~ to protect the members of the class or otherwise for the fair

conduct of the action, ~~that~~ notice ~~be directed~~ to some or all ~~of the~~ members of:

(i) refusal to certify a class;

(ii) any step in the action; ~~, or of~~

(iii) the proposed extent of the judgment; ~~,~~ or ~~of~~

(iv) the members' opportunity ~~of the members~~ to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, ~~or~~ to otherwise come into the action, or to be excluded from or included in the class;

(C) ~~(3)~~ impose~~ing~~ conditions on the representative parties, class members, or ~~on~~ intervenors;

(D) ~~(4)~~ require~~ing~~ that the pleadings be amended to eliminate ~~therefrom~~ allegations ~~as to~~ about representation of absent persons, and that the action proceed accordingly;

(E) ~~(5)~~ deal~~ing~~ with similar procedural matters.

(3) ~~The orders~~ An order under subdivision (d)(2) may be combined with an order under Rule 16~~,~~ and may be altered or amended ~~as may be desirable from time to time~~.

(e) Dismissal ~~or~~ and Compromise.

(1) Before a certification determination is made under subdivision (c)(1) in an action in which persons sue [or are sued] as representatives of a class, court approval is required for any dismissal, compromise, or amendment to delete class issues.

(2) An ~~class~~ action certified as a class action shall not be

dismissed or compromised without the approval of the court, and notice of ~~the~~ a proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(3) A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent investigation and report to the court on the fairness of the proposed dismissal or compromise. The expenses of the investigation and report and the fees of a person specially appointed shall be paid by the parties as directed by the court.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying ~~a request for~~ class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Agenda Item IV B # 2

Draft Reducing Role of Probable Success

The November draft of (b)(3) included two alternative versions of a requirement that – if requested by the party opposing the class – the court make findings as to the probable success on the merits of the class claims, issues, or defenses. Although this element was intended to make it more difficult to maintain class actions, it has caused anguish among defendants. A preliminary inquiry into the merits is feared on several grounds.

The most easily demonstrated concern is that a preliminary inquiry into the merits will prolong the class certification process and add great cost. Certification proponents will make persuasive demands to be allowed preliminary discovery on the merits, and these demands will be difficult to resist.

A second concern is that no matter how modest the finding is, any preliminary reference to the merits will cast a heavy pall on subsequent proceedings. The pressure to settle, already increased drastically by certification, will be augmented exponentially. Consideration of disputed pretrial matters, including not only summary judgment but the scope and terms of discovery, will be affected.

A third concern is that any judicial imprimatur on the class claim will exacerbate the collateral effects of the litigation. The effects may be as concrete as stock-market values or as ephemeral as public relations concerns, but they are real and often vitally important.

These concerns are reflected in this draft in several ways. The finding on the merits embodied by item (iii) in the November (b)(3) draft is eliminated. Factor (F), referring to probable success on the merits, is redlined, indicating possible deletion.

If these deletions are made, it remains possible to provide for some preliminary consideration of the merits in ways designed to reduce the costs of the consideration. One way would be to require particularized pleading of all elements of all class claims, as proposed by Sheila L. Birnbaum. Another would be to address these issues in the portion of the Note addressed to consideration of the balance between the probable individual relief and the costs and burdens of class litigation.

A revised Note, attached to what now is Factor (G), might read something like this:

In an appropriate case, assessment of the probable relief to individual class members can go beyond consideration of the relief likely to be awarded should the class win a complete victory. The probability of class success also can be considered if there are strong reasons to doubt success. It is appropriate to consider the probability of success only if the appraisal can be made without extended proceedings and without prejudicing subsequent

proceedings. This factor should not become the occasion for extensive discovery that otherwise would not be justified at this stage of the litigation. Neither should reliance this factor be expressed in terms that threaten to increase the influence that a certification decision inevitably has on other pretrial proceedings, trial, or settlement.

Rule 23. Class Actions (Probable Success Reduced)

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all ~~only~~ if — with respect to the claims, defenses, or issues certified for class action treatment —

(1) the ~~class is~~ members are so numerous that joinder of all members is impracticable~~,~~;

(2) there are questions of law or fact common to the class~~,~~;

(3) ~~the claims or defenses of the representative parties are typical of the claims or defenses~~ the representative parties' positions typify those of the class~~,~~; and

(4) the representative parties and their attorneys will fairly and adequately discharge the fiduciary duty to protect the interests of ~~the~~ all persons while members of the class until relieved by the court from that fiduciary duty.

(b) ~~Class Actions Maintainable~~ When Class Actions May be Certified. An action may be ~~maintained~~ certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class ~~which~~ that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class ~~which~~ that would as a practical matter be dispositive of the interests of the other members

not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate~~ final injunctive or declaratory relief ~~or corresponding declaratory relief~~ may be appropriate with respect to the class as a whole; or

(3) the court finds (i) that the questions of law or fact common to the certified class ~~members of the class~~ predominate over ~~any~~ individual questions ~~affecting only individual members~~ included in the class action, and (ii) that a class action is superior to other available methods ~~and necessary~~ for the fair and efficient ~~adjudication~~ disposition of the controversy. The matters pertinent to ~~the~~ these findings include:

(A) the need for class certification to accomplish effective enforcement of individual claims;

(B) the ~~interest of members of the class in individually controlling the prosecution or defense of~~ practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;

(C) the extent, ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of the class~~;

(D) the desirability ~~or undesirability~~ of concentrating the litigation ~~of the claims~~ in the particular forum;

(E) the likely difficulties ~~likely to be encountered in the management of~~ in managing a class action that will be avoided or significantly reduced if the controversy is adjudicated by other available means;

~~(F) the probable success on the merits of the class claims, issues, or defenses;~~

(G) whether the public interest in — and the private benefits of — the probable relief to individual class members justify the burdens of class litigation; and

(H) the opportunity to settle on a class basis claims that could not be litigated on a class basis or could not be litigated by [or against?] a class as comprehensive as the settlement class; or

(4) the court finds that permissive joinder should be accomplished by allowing putative members to elect to be included in a class. The matters pertinent to this finding will ordinarily include:

(A) the nature of the controversy and the relief sought;

(B) the extent and nature of the members' injuries or liability;

(C) potential conflicts of interest among members;

(D) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and

(E) the inefficiency or impracticality of separate actions to resolve the controversy; or

(5) the court finds that a class certified under subdivision

(b)(2) should be joined with claims for individual damages that are certified as a class action under subdivision (b)(3) or (b)(4).

(c) Determination by Order Whether Class Action to Be ~~Maintained~~ Certified; Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses.

(1) ~~As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.~~ When persons sue or are sued as representatives of a class, the court shall determine by order whether and with respect to what claims, defenses, or issues the action ~~should~~ will be certified as a class action.

(A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how [putative] members (i) may elect to be excluded from the class, and (ii) if the class is certified only for settlement, may elect to be excluded from any settlement approved by the court under subdivision (e). When a class is certified under subdivision (b)(4), the order must state when, how, and under what conditions [putative] members may elect to be included in the class; the conditions of inclusion may include a requirement that class members bear a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be [is] conditional, and may be altered or amended before

~~the decision on the merits~~ final judgment.

(2) **(A)** When ordering certification of a class action under this rule, the court shall direct that appropriate notice be given to the class. The notice must concisely and clearly describe the nature of the action, the claims, issues, or defenses with respect to which the class has been certified, the right to elect to be excluded from a class certified under subdivision (b)(3), the right to elect to be included in a class certified under subdivision (b)(4), and the potential consequences of class membership. [The court may order a defendant to advance part or all of the expense of notifying a plaintiff class if, under subdivision (b)(3)(E), the court finds a strong probability that the class will win on the merits.]

(i) In any class action certified under subdivision (b)(1) or (2), the court shall direct a means of notice calculated to reach a sufficient number of class members to provide effective opportunity for challenges to the class certification or representation and for supervision of class representatives and class counsel by other class members.

(ii) In any class action ~~maintained~~ certified under subdivision (b)(3), the court shall direct to ~~the~~ members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort[, but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the

generally small value of individual members' claims.] The notice shall advise each member that ~~(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C)~~ any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(iii) In any class action certified under subdivision (b)(4), the court shall direct a means of notice calculated to accomplish the purposes of certification.

(3) Whether or not favorable to the class,

(A) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(1) or ~~(b)~~ (2)~~, whether or not favorable to the class,~~ shall include and describe those whom the court finds to be members of the class~~.~~;

(B) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(3)~~, whether or not favorable to the class,~~ shall include and specify or describe those to whom the notice provided in subdivision (c)(2)(A)(ii) was directed, and who have not requested exclusion, and whom the court finds to be members of the class~~.~~; and

(C) The judgment in an action certified as a class action under subdivision (b)(4) shall include all those who elected to be included in the class and who were not earlier dismissed from the class.

(4) ~~When appropriate (A)~~ An action may be ~~brought or maintained~~ certified as a class action —

(A) with respect to particular claims, defenses, or issues; or

(B) ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly~~ by or against multiple classes or subclasses, which need not satisfy the requirement of subdivision (a)(1).

(d) Orders in Conduct of Class Actions. ~~In the conduct of actions to which this rule applies, the court may make appropriate orders:~~

(1) Before determining whether to certify a class the court may decide a motion made by any party under Rules 12 or 56 if the court concludes that decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay.

(2) As a class action progresses, the court may make orders that:

(A) ~~(1)~~ determine~~ing~~ the course of proceedings or prescribe~~ing~~ measures to prevent undue repetition or complication in ~~the~~ presenting~~ation of~~ evidence or argument;

(B) ~~(2)~~ require~~ing~~, ~~for the protection of~~ to protect the members of the class or otherwise for the fair conduct of the action, ~~that~~ notice ~~be directed~~ to some or all ~~of the~~ members of:

(i) refusal to certify a class;

(ii) any step in the action; ~~, or of~~

(iii) the proposed extent of the judgment; ~~,~~ or ~~of~~

(iv) the members' opportunity ~~of the members~~ to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, ~~or~~ to otherwise come into the action, or to be excluded from or included in the class;

(C) ~~(3)~~ impose~~ing~~ conditions on the representative parties, class members, or ~~on~~ intervenors;

(D) ~~(4)~~ require~~ing~~ that the pleadings be amended to eliminate ~~therefrom~~ allegations ~~as to~~ about representation of absent persons, and that the action proceed accordingly;

(E) ~~(5)~~ deal~~ing~~ with similar procedural matters.

(3) ~~The orders~~ An order under subdivision (d)(2) may be combined with an order under Rule 16~~,~~ and may be altered or amended ~~as may be desirable from time to time~~.

(e) Dismissal ~~or~~ and Compromise.

(1) Before a certification determination is made under subdivision (c)(1) in an action in which persons sue [or are sued] as representatives of a class, court approval is required for any dismissal, compromise, or amendment to delete class issues.

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

(3) A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent investigation and report to the court on the fairness of the proposed dismissal or compromise. The expenses of the investigation and report and the fees of a person specially appointed shall be paid by the parties as directed by the court.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying a request for class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Agenda Item IV B #3

Draft Rule Deleting Public Values from (b)(3)

This version deletes consideration of the public interest from the "just ain't worth it" calculation of subdivision (b)(3) Factor (G).

The concerns that bear on this question were explored at the November meeting.

The arguments for considering public interest are straightforward. Rule 23(b)(3) has become an important means of enforcing the policies that underlie much contemporary social legislation. Public enforcement agencies frequently lack the resources necessary to achieve desirable levels of enforcement. Without class actions, wrongdoers can profit from their violations. Small injuries may be inflicted on thousands or even millions of people, who individually have no effective means of redress. If a court is to be authorized to consider the perhaps trivial nature of the individual recovery that may be effected by a class victory on the merits, it also must be authorized to consider the public interests that may require enforcement notwithstanding the lack of any meaningful private benefit.

The countervailing arguments are equally straightforward. The first set of arguments, detailed in the draft Committee Note, emphasizes the view that adversary litigation is a legitimate means of administering social policy only when justified by explicit statute or by the need to redress private injury. We do not recognize citizen standing to compel lawful behavior by renegade public officials – indeed, Article III forbids it. We should not establish a roving Rule 23 commission that authorizes class counsel to enforce the law against private wrongdoers. The second set of arguments rests on the difficulty of measuring the relative importance of the public values enshrined in different laws. On this view, it is not appropriate for Article III judges to presume to discriminate among the policies that animate various provisions of the Constitution, statutes, administrative regulations, and decisional law. The most that judges should undertake is to determine whether the costs and burdens of class litigation are justified by the objective cash value and subjective intrinsic value of the relief available to actual class members.

Rule 23. Class Actions (Draft deleting "public interest")

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all ~~only~~ if — with respect to the claims, defenses, or issues certified for class action treatment —

(1) the ~~class is~~ members are so numerous that joinder of all members is impracticable~~,~~;

(2) there are questions of law or fact common to the class~~,~~;

(3) ~~the claims or defenses of the representative parties are typical of the claims or defenses~~ the representative parties' positions typify those of the class~~,~~; and

(4) the representative parties and their attorneys will fairly and adequately discharge the fiduciary duty to protect the interests of ~~the~~ all persons while members of the class until relieved by the court from that fiduciary duty.

(b) ~~Class Actions Maintainable~~ When Class Actions May be Certified. An action may be ~~maintained~~ certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class ~~which~~ that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class ~~which~~ that would as a practical matter be dispositive of the interests of the other members

not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate~~ final injunctive or declaratory relief ~~or corresponding declaratory relief~~ may be appropriate with respect to the class as a whole; or

(3) the court finds (i) that the questions of law or fact common to the certified class ~~members of the class~~ predominate over ~~any~~ individual questions ~~affecting only individual members~~ included in the class action, (ii) that a class action is superior to other available methods ~~and necessary~~ for the fair and efficient ~~adjudication~~ disposition of the controversy, and — if such a finding is requested by a party opposing certification of a class — (iii) that {the class claims, issues, or defenses are not insubstantial on the merits} [alternative:] {the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification}. The matters pertinent to ~~the~~ these findings include:

(A) the need for class certification to accomplish effective enforcement of individual claims;

(B) the ~~interest of members of the class in individually controlling the prosecution or defense of~~ practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;

(C) the extent, ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of~~

~~the class~~;

(D) the desirability ~~or undesirability~~ of concentrating the litigation ~~of the claims~~ in the particular forum;

(E) the likely difficulties ~~likely to be encountered in the management of~~ in managing a class action that will be avoided or significantly reduced if the controversy is adjudicated by other available means;

(F) the probable success on the merits of the class claims, issues, or defenses;

(G) whether the probable relief to individual class members justifies the costs and burdens of class litigation; and

(H) the opportunity to settle on a class basis claims that could not be litigated on a class basis or could not be litigated by [or against?] a class as comprehensive as the settlement class; or

(4) the court finds that permissive joinder should be accomplished by allowing putative members to elect to be included in a class. The matters pertinent to this finding will ordinarily include:

(A) the nature of the controversy and the relief sought;

(B) the extent and nature of the members' injuries or liability;

(C) potential conflicts of interest among members;

(D) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and

(E) the inefficiency or impracticality of separate actions to resolve the controversy; or

(5) the court finds that a class certified under subdivision (b)(2) should be joined with claims for individual damages that are certified as a class action under subdivision (b)(3) or (b)(4).

(c) Determination by Order Whether Class Action to Be ~~Maintained~~ Certified; Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses.

(1) ~~As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.~~ When persons sue or are sued as representatives of a class, the court shall determine by order whether and with respect to what claims, defenses, or issues the action ~~should~~ will be certified as a class action.

(A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how [putative] members (i) may elect to be excluded from the class, and (ii) if the class is certified only for settlement, may elect to be excluded from any settlement approved by the court under subdivision (e). When a class is certified under subdivision (b)(4), the order must state when, how, and under what conditions [putative] members may elect to be included in the class; the conditions of inclusion may include a requirement that class members bear a fair share of litigation expenses

incurred by the representative parties.

(B) An order under this subdivision may be [is] conditional, and may be altered or amended before ~~the decision on the merits~~ final judgment.

(2) **(A)** When ordering certification of a class action under this rule, the court shall direct that appropriate notice be given to the class. The notice must concisely and clearly describe the nature of the action, the claims, issues, or defenses with respect to which the class has been certified, the right to elect to be excluded from a class certified under subdivision (b)(3), the right to elect to be included in a class certified under subdivision (b)(4), and the potential consequences of class membership. [The court may order a defendant to advance part or all of the expense of notifying a plaintiff class if, under subdivision (b)(3)(E), the court finds a strong probability that the class will win on the merits.]

(i) In any class action certified under subdivision (b)(1) or (2), the court shall direct a means of notice calculated to reach a sufficient number of class members to provide effective opportunity for challenges to the class certification or representation and for supervision of class representatives and class counsel by other class members.

(ii) In any class action ~~maintained~~ certified under subdivision (b)(3), the court shall direct to ~~the~~ members of the class the best notice practicable under the circumstances, including individual notice to all members who can be

identified through reasonable effort[, but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the generally small value of individual members' claims.] The notice shall advise each member that ~~(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C)~~ any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(iii) In any class action certified under subdivision (b)(4), the court shall direct a means of notice calculated to accomplish the purposes of certification.

(3) Whether or not favorable to the class,

(A) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(1) or ~~(b)~~ (2)~~, whether or not favorable to the class,~~ shall include and describe those whom the court finds to be members of the class~~.~~;

(B) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(3)~~, whether or not favorable to the class,~~ shall include and specify or describe those to whom the notice provided in subdivision (c)(2)(A)(ii) was directed, and who have not requested exclusion, and whom the court finds to be members of the class~~.~~; and

(C) The judgment in an action certified as a class

action under subdivision (b)(4) shall include all those who elected to be included in the class and who were not earlier dismissed from the class.

(4) ~~When appropriate (A)~~ An action may be ~~brought or maintained~~ certified as a class action —

(A) with respect to particular claims, defenses, or issues; or

(B) ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly~~ by or against multiple classes or subclasses, which need not satisfy the requirement of subdivision (a)(1).

(d) Orders in Conduct of Class Actions. ~~In the conduct of actions to which this rule applies, the court may make appropriate orders:~~

(1) Before determining whether to certify a class the court may decide a motion made by any party under Rules 12 or 56 if the court concludes that decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay.

(2) As a class action progresses, the court may make orders that:

(A) ~~(1)~~ determine~~ing~~ the course of proceedings or prescribe~~ing~~ measures to prevent undue repetition or complication in ~~the~~ present~~ingation of~~ evidence or argument;

(B) ~~(2)~~ require~~ing~~, ~~for the protection of~~ to protect the members of the class or otherwise for the fair conduct of the action, ~~that~~ notice ~~be directed~~ to

some or all ~~of the~~ members of:

(i) refusal to certify a class;

(ii) any step in the action; ~~, or of~~

(iii) the proposed extent of the judgment; ~~,~~ or ~~of~~

(iv) the members' opportunity ~~of the members~~ to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, ~~or~~ to otherwise come into the action, or to be excluded from or included in the class;

(C) ~~(3)~~ impose~~ing~~ conditions on the representative parties, class members, or ~~on~~ intervenors;

(D) ~~(4)~~ require~~ing~~ that the pleadings be amended to eliminate ~~therefrom~~ allegations ~~as to~~ about representation of absent persons, and that the action proceed accordingly;

(E) ~~(5)~~ deal~~ing~~ with similar procedural matters.

(3) ~~The orders~~ An order under subdivision (d)(2) may be combined with an order under Rule 16~~,~~ and may be altered or amended ~~as may be desirable from time to time~~.

(e) Dismissal ~~or~~ and Compromise.

(1) Before a certification determination is made under subdivision (c)(1) in an action in which persons sue [or are sued] as representatives of a class, court approval is required for any dismissal, compromise, or amendment to delete class issues.

(2) An ~~class~~ action certified as a class action shall not be dismissed or compromised without the approval of the

court, and notice of ~~the~~ a proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(3) A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent investigation and report to the court on the fairness of the proposed dismissal or compromise. The expenses of the investigation and report and the fees of a person specially appointed shall be paid by the parties as directed by the court.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying a request for class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Agenda Item IV B #4

Draft Reducing Notice Complications

This draft makes two changes in the notice provisions of subdivision (c).

(c)(1)(A) is changed by deleting the draft requirement that class members be allowed to opt out of any settlement if the class is certified only for purposes of settlement. This requirement would have little effect, and could create some mischief, if the terms of a proposed settlement are known when the class is first certified and notice is given. It would be more important, and could prove more dangerous to the settlement process, if the terms of a proposed settlement are first announced after expiration of the initial opt-out period. Extension of the opportunity to opt out also could aggravate the pressures that surround the determination whether a settlement class can be certified under subdivision (b)(1) on a "limited funds" theory. A court might still choose to condition approval of settlement on recognition of a second right to opt out, a matter discussed in one of the alternative forms of the draft Note on subdivision (e).

(c)(2)(A) is changed by deleting the provision that would allow the court to order a defendant to advance part or all of the expense of notifying a plaintiff class if it finds a strong probability that the class will win on the merits. This deletion reflects the prospect that the Committee will decide to diminish the role played by predictions on the merits in deciding on (b)(3) certification. Even if the stronger form of item (iii) is retained in (b)(3), however, this expense-of-notice provision may generate more controversy than it is worth.

Rule 23. Class Actions (Draft Reducing Notice Needs)

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all ~~only~~ if ~~—~~ with respect to the claims, defenses, or issues certified for class action treatment ~~—~~

(1) the ~~class is~~ members are so numerous that joinder of all members is impracticable~~,~~;

(2) there are questions of law or fact common to the class~~,~~;

(3) ~~the claims or defenses of the representative parties are typical of the claims or defenses~~ the representative parties' positions typify those of the class~~,~~; and

(4) the representative parties and their attorneys will fairly and adequately discharge the fiduciary duty to protect the interests of ~~the~~ all persons while members of the class until relieved by the court from that fiduciary duty.

(b) ~~Class Actions Maintainable~~ When Class Actions May be Certified. An action may be ~~maintained~~ certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class ~~which~~ that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class ~~which~~ that would as a practical matter be dispositive of the interests of the other members

not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate~~ final injunctive or declaratory relief ~~or corresponding declaratory relief~~ may be appropriate with respect to the class as a whole; or

(3) the court finds (i) that the questions of law or fact common to the certified class ~~members of the class~~ predominate over ~~any~~ individual questions ~~affecting only individual members~~ included in the class action, (ii) that a class action is superior to other available methods and necessary for the fair and efficient ~~adjudication~~ disposition of the controversy, and — if such a finding is requested by a party opposing certification of a class — (iii) that {the class claims, issues, or defenses are not insubstantial on the merits} [alternative:] {the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification}. The matters pertinent to ~~the~~ these findings include:

(A) the need for class certification to accomplish effective enforcement of individual claims;

(B) the ~~interest of members of the class in individually controlling the prosecution or defense of~~ practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;

(C) the extent, ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of~~

~~the class~~;

(D) the desirability ~~or undesirability~~ of concentrating the litigation ~~of the claims~~ in the particular forum;

(E) the likely difficulties ~~likely to be encountered in the management of~~ in managing a class action that will be avoided or significantly reduced if the controversy is adjudicated by other available means;

(F) the probable success on the merits of the class claims, issues, or defenses;

(G) whether the public interest in — and the private benefits of — the probable relief to individual class members justify the burdens of the litigation; and

(H) the opportunity to settle on a class basis claims that could not be litigated on a class basis or could not be litigated by [or against?] a class as comprehensive as the settlement class; or

(4) the court finds that permissive joinder should be accomplished by allowing putative members to elect to be included in a class. The matters pertinent to this finding will ordinarily include:

(A) the nature of the controversy and the relief sought;

(B) the extent and nature of the members' injuries or liability;

(C) potential conflicts of interest among members;

(D) the interest of the party opposing the class in securing a final and consistent resolution of the

matters in controversy; and

(E) the inefficiency or impracticality of separate actions to resolve the controversy; or

(5) the court finds that a class certified under subdivision (b)(2) should be joined with claims for individual damages that are certified as a class action under subdivision (b)(3) or (b)(4).

(c) Determination by Order Whether Class Action to Be ~~Maintained~~ Certified; Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses.

(1) ~~As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.~~ When persons sue or are sued as representatives of a class, the court shall determine by order whether and with respect to what claims, defenses, or issues the action ~~should~~ will be certified as a class action.

(A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how [putative] members may elect to be excluded from the class. When a class is certified under subdivision (b)(4), the order must state when, how, and under what conditions [putative] members may elect to be included in the class; the conditions of inclusion may include a requirement that class members bear a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be [is] conditional, and may be altered or amended before ~~the decision on the merits~~ final judgment.

(2) (A) When ordering certification of a class action under this rule, the court shall direct that appropriate notice be given to the class. The notice must concisely and clearly describe the nature of the action, the claims, issues, or defenses with respect to which the class has been certified, the right to elect to be excluded from a class certified under subdivision (b)(3), the right to elect to be included in a class certified under subdivision (b)(4), and the potential consequences of class membership.

(i) In any class action certified under subdivision (b)(1) or (2), the court shall direct a means of notice calculated to reach a sufficient number of class members to provide effective opportunity for challenges to the class certification or representation and for supervision of class representatives and class counsel by other class members.

(ii) In any class action ~~maintained~~ certified under subdivision (b)(3), the court shall direct to ~~the~~ members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort[, but individual notice may be limited to a sampling of class members if the cost of individual notice is excessive in relation to the generally small value of individual members' claims.] The notice shall advise each member

that ~~(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C)~~ any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(iii) In any class action certified under subdivision (b)(4), the court shall direct a means of notice calculated to accomplish the purposes of certification.

(3) Whether or not favorable to the class,

(A) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(1) or ~~(b)~~ (2)~~, whether or not favorable to the class,~~ shall include and describe those whom the court finds to be members of the class~~.~~;

(B) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(3)~~, whether or not favorable to the class,~~ shall include and specify or describe those to whom the notice provided in subdivision (c)(2)(A)(ii) was directed, and who have not requested exclusion, and whom the court finds to be members of the class~~.~~; and

(C) The judgment in an action certified as a class action under subdivision (b)(4) shall include all those who elected to be included in the class and who were not earlier dismissed from the class.

(4) ~~When appropriate (A)~~ An action may be ~~brought or maintained~~ certified as a class action =

(A) with respect to particular claims, defenses, or issues; or

(B) ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly~~ by or against multiple classes or subclasses, which need not satisfy the requirement of subdivision (a)(1).

(d) **Orders in Conduct of Class Actions.** ~~In the conduct of actions to which this rule applies, the court may make appropriate orders:~~

(1) Before determining whether to certify a class the court may decide a motion made by any party under Rules 12 or 56 if the court concludes that decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay.

(2) As a class action progresses, the court may make orders that:

(A) ~~(1)~~ determine~~ing~~ the course of proceedings or prescribe~~ing~~ measures to prevent undue repetition or complication in ~~the~~ present~~ingation of~~ evidence or argument;

(B) ~~(2)~~ require~~ing~~, ~~for the protection of~~ to protect the members of the class or otherwise for the fair conduct of the action, ~~that~~ notice ~~be directed~~ to some or all ~~of the~~ members of:

(i) refusal to certify a class;

(ii) any step in the action; ~~, or of~~

(iii) the proposed extent of the judgment; ~~,~~ or ~~of~~

(iv) the members' opportunity ~~of the members~~ to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, ~~or~~ to otherwise come into the action, or to be excluded from or included in the class;

(C) ~~(3)~~ impose~~ing~~ conditions on the representative parties, class members, or ~~on~~ intervenors;

(D) ~~(4)~~ require~~ing~~ that the pleadings be amended to eliminate ~~therefrom~~ allegations ~~as to~~ about representation of absent persons, and that the action proceed accordingly;

(E) ~~(5)~~ deal~~ing~~ with similar procedural matters.

(3) ~~The orders~~ An order under subdivision (d)(2) may be combined with an order under Rule 16~~,~~ and may be altered or amended ~~as may be desirable from time to time~~.

(e) Dismissal ~~or~~ and Compromise.

(1) Before a certification determination is made under subdivision (c)(1) in an action in which persons sue [or are sued] as representatives of a class, court approval is required for any dismissal, compromise, or amendment to delete class issues.

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

(3) A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent

investigation and report to the court on the fairness of the proposed dismissal or compromise. The expenses of the investigation and report and the fees of a person specially appointed shall be paid by the parties as directed by the court.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying a request for class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Agenda Item: IV B #5

Draft Rule Without Settlement Classes

This version deletes the new (b)(3) Factor (H) that obliquely recognized the legitimacy of settlement classes.

Deletion of the factor need not foreclose any reference to settlement classes in the Committee Note. The current draft Note discusses settlement classes at several points. Some portions of these discussions could be preserved. The simplest form would state that no attempt is made to regulate settlement class practice, and perhaps explain that it seems too early to attempt to capture the lessons of developing practice in explicit rule provisions.

Rule 23. Class Actions (Draft without settlement classes)

(a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all ~~only~~ if — with respect to the claims, defenses, or issues certified for class action treatment —

(1) the ~~class is~~ members are so numerous that joinder of all members is impracticable~~,~~;

(2) there are questions of law or fact common to the class~~,~~;

(3) ~~the claims or defenses of the representative parties are typical of the claims or defenses~~ the representative parties' positions typify those of the class~~,~~; and

(4) the representative parties and their attorneys will fairly and adequately discharge the fiduciary duty to protect the interests of ~~the~~ all persons while members of the class until relieved by the court from that fiduciary duty.

(b) ~~Class Actions Maintainable~~ When Class Actions May be Certified. An action may be ~~maintained~~ certified as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class ~~which~~ that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class ~~which~~ that would as a practical matter be dispositive of the interests of the other members

not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) ~~the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate~~ final injunctive or declaratory relief ~~or corresponding declaratory relief~~ may be appropriate with respect to the class as a whole; or

(3) the court finds (i) that the questions of law or fact common to the certified class ~~members of the class~~ predominate over ~~any~~ individual questions ~~affecting only individual members~~ included in the class action, (ii) that a class action is superior to other available methods and necessary for the fair and efficient ~~adjudication~~ disposition of the controversy, and — if such a finding is requested by a party opposing certification of a class — (iii) that {the class claims, issues, or defenses are not insubstantial on the merits} [alternative:] {the prospect of success on the merits of the class claims, issues, or defenses is sufficient to justify the costs and burdens imposed by certification}. The matters pertinent to ~~the~~ these findings include:

(A) the need for class certification to accomplish effective enforcement of individual claims;

(B) the ~~interest of members of the class in individually controlling the prosecution or defense of~~ practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending separate actions;

(C) the extent, ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of~~

~~the class~~;

(D) the desirability ~~or undesirability~~ of concentrating the litigation ~~of the claims~~ in the particular forum;

(E) the likely difficulties ~~likely to be encountered in the management of~~ in managing a class action that will be avoided or significantly reduced if the controversy is adjudicated by other available means;

(F) the probable success on the merits of the class claims, issues, or defenses;

(G) whether the public interest in — and the private benefits of — the probable relief to individual class members justify the burdens of the litigation; or

(4) the court finds that permissive joinder should be accomplished by allowing putative members to elect to be included in a class. The matters pertinent to this finding will ordinarily include:

(A) the nature of the controversy and the relief sought;

(B) the extent and nature of the members' injuries or liability;

(C) potential conflicts of interest among members;

(D) the interest of the party opposing the class in securing a final and consistent resolution of the matters in controversy; and

(E) the inefficiency or impracticality of separate actions to resolve the controversy; or

(5) the court finds that a class certified under subdivision (b)(2) should be joined with claims for individual damages that are certified as a class action under subdivision (b)(3) or (b)(4).

(c) Determination by Order Whether Class Action to Be ~~Maintained~~ Certified; Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses.

(1) ~~As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.~~ When persons sue or are sued as representatives of a class, the court shall determine by order whether and with respect to what claims, defenses, or issues the action ~~should~~ will be certified as a class action.

(A) An order certifying a class action must describe the class. When a class is certified under subdivision (b)(3), the order must state when and how [putative] members (i) may elect to be excluded from the class, and (ii) if the class is certified only for settlement, may elect to be excluded from any settlement approved by the court under subdivision (e). When a class is certified under subdivision (b)(4), the order must state when, how, and under what conditions [putative] members may elect to be included in the class; the conditions of inclusion may include a requirement that class members bear a fair share of litigation expenses incurred by the representative parties.

(B) An order under this subdivision may be [is]

conditional, and may be altered or amended before ~~the decision on the merits~~ final judgment.

(2) (A) When ordering certification of a class action under this rule, the court shall direct that appropriate notice be given to the class. The notice must concisely and clearly describe the nature of the action, the claims, issues, or defenses with respect to which the class has been certified, the right to elect to be excluded from a class certified under subdivision (b)(3), the right to elect to be included in a class certified under subdivision (b)(4), and the potential consequences of class membership. [The court may order a defendant to advance part or all of the expense of notifying a plaintiff class if, under subdivision (b)(3)(E), the court finds a strong probability that the class will win on the merits.]

(i) In any class action certified under subdivision (b)(1) or (2), the court shall direct a means of notice calculated to reach a sufficient number of class members to provide effective opportunity for challenges to the class certification or representation and for supervision of class representatives and class counsel by other class members.

(ii) In any class action ~~maintained~~ certified under subdivision (b)(3), the court shall direct to ~~the~~ members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort[, but individual notice may be limited to a sampling of class members if the cost of individual

notice is excessive in relation to the generally small value of individual members' claims.] The notice shall advise each member that ~~(A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C)~~ any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(iii) In any class action certified under subdivision (b)(4), the court shall direct a means of notice calculated to accomplish the purposes of certification.

(3) Whether or not favorable to the class,

(A) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(1) or ~~(b)~~ (2)~~, whether or not favorable to the class,~~ shall include and describe those whom the court finds to be members of the class~~.~~;

(B) The judgment in an action ~~maintained~~ certified as a class action under subdivision (b)(3)~~, whether or not favorable to the class,~~ shall include and specify or describe those to whom the notice provided in subdivision (c)(2)(A)(ii) was directed, and who have not requested exclusion, and whom the court finds to be members of the class~~.~~; and

(C) The judgment in an action certified as a class action under subdivision (b)(4) shall include all those who elected to be included in the class and who were not earlier dismissed from the class.

(4) ~~When appropriate (A)~~ An action may be ~~brought or maintained~~ certified as a class action —

(A) with respect to particular claims, defenses, or issues; or

(B) ~~a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly~~ by or against multiple classes or subclasses, which need not satisfy the requirement of subdivision (a)(1).

(d) Orders in Conduct of Class Actions. ~~In the conduct of actions to which this rule applies, the court may make appropriate orders:~~

(1) Before determining whether to certify a class the court may decide a motion made by any party under Rules 12 or 56 if the court concludes that decision will promote the fair and efficient adjudication of the controversy and will not cause undue delay.

(2) As a class action progresses, the court may make orders that:

(A) ~~(1)~~ determine~~ing~~ the course of proceedings or prescribe~~ing~~ measures to prevent undue repetition or complication in ~~the~~ presenting~~ation of~~ evidence or argument;

(B) ~~(2)~~ require~~ing~~, ~~for the protection of~~ to protect the members of the class or otherwise for the fair conduct of the action, ~~that~~ notice ~~be directed~~ to some or all ~~of the~~ members of:

(i) refusal to certify a class;

(ii) any step in the action; ~~, or of~~

(iii) the proposed extent of the judgment; ~~,~~ or ~~of~~

(iv) the members' opportunity ~~of the members~~ to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, ~~or~~ to otherwise come into the action, or to be excluded from or included in the class;

(C) ~~(3)~~ impose~~ing~~ conditions on the representative parties, class members, or ~~on~~ intervenors;

(D) ~~(4)~~ require~~ing~~ that the pleadings be amended to eliminate ~~therefrom~~ allegations ~~as to~~ about representation of absent persons, and that the action proceed accordingly;

(E) ~~(5)~~ deal~~ing~~ with similar procedural matters.

(3) ~~The orders~~ An order under subdivision (d)(2) may be combined with an order under Rule 16~~,~~ and may be altered or amended ~~as may be desirable from time to time~~.

(e) Dismissal ~~or~~ and Compromise.

(1) Before a certification determination is made under subdivision (c)(1) in an action in which persons sue [or are sued] as representatives of a class, court approval is required for any dismissal, compromise, or amendment to delete class issues.

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

(3) A proposal to dismiss or compromise an action certified as a class action may be referred to a magistrate judge or a person specially appointed for an independent investigation and report to the court on the fairness of the proposed dismissal or compromise. The expenses of the investigation and report and the fees of a person specially appointed shall be paid by the parties as directed by the court.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying a request for class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Agenda Item IIC

Rule 23: Minimum Changes Draft

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(B) **Class Actions Maintanable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the need for class certification to accomplish effective enforcement of individual claims;

(AB) the ~~interest of members of the class in individually controlling the prosecution or defense of~~ practical ability of individual class members to pursue their claims without class certification and their interests in maintaining or defending

separate actions;

(BC) the extent, ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of the class~~;

(CD) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(DE) the difficulties likely to be encountered in the management of a class action; and

(F) whether the probable relief to individual class members justifies the costs and burdens of class litigation.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:

(A) the court will exclude the member from the class if the member so requests by a specified date;

(B) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate:

(A) an action may be brought or maintained as a class action with respect to particular issues, or

(B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) **Orders in Conduct of Actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the matter proceed accordingly;

(5) dealing with similar procedural matters.

The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

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

(f) **Appeals.** A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

Agenda Item IV D

Rule 23(f) – Appellate Rules

For Information

Attached is a copy of a letter to Professor Carol Ann Mooney, Reporter for the Appellate Rules Advisory Committee, suggesting a starting point for adoption of an Appellate Rule to complement proposed Civil Rule 23(f).

Although the Appellate Rules Advisory Committee has primary responsibility for proposing means to implement the proposal for interlocutory appeals from certification orders, the Civil Rules Advisory Committee has devoted much time to this question and has heard reactions from many sources. It may be useful to consider these questions and offer improved advice to the Appellate Rules Committee.

January 15, 1996

Professor Carol Ann Mooney
University of Notre Dame Law School
Notre Dame, Indiana 46556

Re: Appellate Rules Accommodation of Draft Civil Rule 23(f)

Dear Carol:

This is my first contribution to the question you raised at the Standing Committee meeting last week. You are quite right that some provision should be made in the Appellate Rules if the Civil Rules Advisory Committee comes to recommend publication of the current draft Civil Rule 23(f), providing for discretionary review of orders granting or denying class certification. I want to be as much help as I can be in explaining the Rule 23(f) proposal to the Appellate Rules Committee.

The easy part is the enclosures. I have printed together the present draft Rule 23(f) and the draft Committee Note, making a more convenient package for your Committee to consider. [I may advise the Civil Rules Committee to consider deleting "a request for" from draft Rule 23(f), so that it would read "an order * * * granting or denying class action certification under this rule * * *. That would not affect your work.] I also have printed off the relevant portion of the draft Civil Rules Commitee minutes for last November. Although the permissive appeal proposal has been before the Committee for some time — and indeed at least once provoked discussion in the Standing Committee about the allocation of responsibility between the Civil and Appellate Rules Committees in this area — the November minutes give a good summary of the Civil Rules Committee's reasoning.

The more difficult part is finding whether I have anything useful to say about the best means of fitting this proposal in with the structure of the Appellate Rules. Although the model is a simplified version of § 1292(b), Appellate Rule 5 is not a good fit because it has so many provisions that relate to features of § 1292(b) that are omitted from proposed Rule 23(f). Appellate Rule 5.1, relating to permissive appeals following appeal to a district court from a magistrate judge's judgment, is a better fit. My initial guess is that almost all of subdivisions (b), (c), and (d) could be applied to Rule 23(f) appeals; the most likely exception would be the time for response provided in Rule 5.1(b)(2). The trick is to fit Rule 23(f) into Rule 5.1(a).

My understanding is that a new first sentence has been created for the restyled Rule 5.1(a)(1). Since I do not have it before me, let me offer a first pass at adding Rule 23(f) to Rule

5.1(a), in the simplest of all possible terms:

(a) Petition for Leave to Appeal.

(1) A party may seek an appeal under Federal Rule of Civil Procedure 23(f) from an order granting or denying class action certification, or from a district-court judgment entered after an appeal [under § 636(c)(4)] * * * by filing a petition for leave to appeal. Such an appeal ~~to a court of appeals~~ is a matter not of right but of sound judicial discretion.

(2) The petition must be filed with the circuit clerk, with proof of service on all parties to the district-court action,
(A) within ten days after entry of the order granting or denying class action certification, [if appeal is sought under Civil Rule 23(f),] or
(B) within the time provided by Rule 4(a) for filing a notice of appeal, if appeal is sought under § 636(c)(4).
~~with proof of service on all parties to the district court action.~~

(I redlined "to a court of appeals" under subdivision (1) to raise the question whether this phrase is necessary.)

The provisions of subdivision (b)(1) would be written somewhat differently if there were a stand-alone rule for Rule 23(f) appeals, but I think they provide a suitable generic system that covers both Rule 23(f) and judgments-on-review-of-magistrate-judge-judgments.

It may be desirable to shorten the time for response to a class-action certification appeal; the 7 days provided by Rule 5(b)(2) for § 1292(b) appeals seems appropriate. If that seems right, it should be easy enough to adapt Rule 5.1(b)(2).

This letter is designed only to serve as a reminder of the chore. When I can be of more help, please let me know.

Sincerely,

Edward H. Cooper

EHC/lm
encls.
c: Hon. Patrick E. Higginbotham

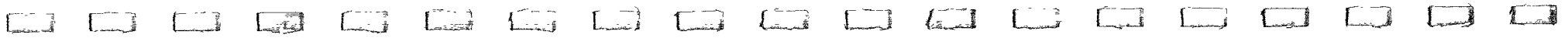
Agenda Item V

Standing Committee Draft Self-Study

As compared to the draft Standing Committee Self-Study that was in the Advisory Committee materials for the meeting in November, 1995, the attached draft includes several changes. It is worth reading again.

The Standing Committee continues to hope for advice on this draft Self-Study. Several of the issues that may deserve comment are described in the attached January 23 letter to Professor Coquillette, the Reporter for the Standing Committee. This statement of issues is intended to prompt additional inquiry, not to close off discussion.

The role of the Self-Study remains uncertain. It may be designed to raise issues that will carry forward in the Standing Committee's deliberations on a sustaining basis. It may be designed for more immediate "adoption" in some form. The importance of searching evaluation and comment now depends on the intended use.



THE UNIVERSITY OF MICHIGAN
LAW SCHOOL
HUTCHINS HALL
ANN ARBOR, MICHIGAN 48109-1215

January 23, 1996

Professor Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, Massachusetts 02159

Re: Standing Committee Self-Study

Dear Dan:

This letter is a revised and updated version of my November 27 letter commenting on the draft Self-Study Report from the Standing Committee's Subcommittee on Long Range Planning. As you will recall, I undertook the chore of preparing the November 27 letter after the Civil Rules Advisory Committee was unable to make time at its November meeting for careful review of an earlier draft. I would like to hope that the Civil Rules Committee may be able to make time to consider the December draft at its April meeting, but the agenda is if anything more crowded than the November agenda. So I am once again taking it on myself to provide a set of reactions. Judge Higginbotham has reviewed both the November 27 letter and this letter, and approves most of my suggestions. Perhaps there will be enough time on the Civil Rules Committee agenda in April to test our expectation that most members of the Committee also would join in these views.

Almost all of my comments will be framed around the specific numbered recommendations. For the most part I will pass by the many items that seem right, without burdening you with a chorus of amens. But I will begin with one item that seems at least right, and perhaps too restrained.

Recommendation 3 is that the chairs of the advisory committees should serve five-year terms. The period is picked on the assumption that the chair will be chosen from among experienced members of the committee. The chair, however, may not have any prior experience on the committee. In such circumstances, a six-year term as chair would be appropriate, perhaps divided into initial and renewal terms of three years each. Five years is all too brief, given the pace of the Enabling Act process, and is even more inadequate with a new chair. By way of illustration, the Civil Rules Advisory Committee had generated a detailed draft for revising Civil Rule 23, the class action rule, when I was first appointed a member of the Committee in October, 1991. If everything goes as quickly as possibly can be from here on out, a draft may be ready for publication in September, 1996. In between, the Committee has lavished great attention on the draft, reaching out to seek advice from many quarters. Again, if everything should continue to move as rapidly as possible, it would be September of

1997 before the Judicial Conference could consider a final recommendation for revision. Judge Sam Pointer was the chair at the beginning. Judge Patrick Higginbotham now is chair. There will be other rules that demand as much attention. It is daunting to contemplate the prospect that some of them will force three chairs – or perhaps even more – to develop an intimate familiarity with the committee's development of the rule, revisions by the Standing Committee, and above all the wisdom contributed by public comment.

Evaluative Norms: Discussion pp. 11-12, 13: Beginning at the bottom of page 11, the study says: "[A] lack of consensus about the wisdom of problematic proposed rules will normally suffice to block the adoption of such rules. Consensus should not be too strong a norm, however, because it favors the status quo." This statement is troubling. Many rules proposals engender controversy, much of it arising from differences in experience, perceptions, and values. Those who seek to advance the Civil Rule 1 purposes of seeking the just, speedy, and inexpensive determination of litigation may – and frequently do – disagree vehemently. Such disagreement, arising from disinterested efforts to improve our system of procedure, is an important reason for proceeding with caution. But it cannot stymie needed reforms. Controversy also may arise from narrower sources, concerned more with specific advantage to one group or another than with improved procedure. Such disagreement can provide a strong signal that a proposal is indeed on the right track. Some help in this direction is found on page 13 in the discussion of Recommendation 1, where it is recognized that "[r]ulemaking ought not follow public opinion * * * ." More should be said, however, to avoid the danger that opponents of change will seize on overstatements about the need for consensus as a tool to oppose important reforms.

For different reasons, I also am worried about the passage from the bottom of page 11 to the top of page 12. The expectation for consensus, it says, "should render the rulemaking process sufficiently inert to resist utopian reform by policymakers who are so detached from the arena of litigation to which the rules are directed that they are indifferent to the practical impact of the rule changes upon those most affected by them." My only worry is that some readers might find in this passage an implication that it deals with a real danger. I now have enough direct experience with the Civil Rules Advisory Committee, and more attenuated experience with the Standing Committee, to know that no implication could be farther from the reality. The policymakers are deeply embroiled in the arena of litigation, and are concerned above all else with the practical effect of the rules. I have seen enough of the work of the several other advisory committees to be confident that the same is true of them.

The first full paragraph on page 12 states: "Geographical uniformity is more important than trans-substantive application of the federal rules." This statement may be reasonable, but why borrow trouble by saying it? The examples of departures from

trans-substantive application are derivative actions and the bankruptcy rules; neither example illuminates much of anything. The next statement is that "geographical disuniformity, even when expressly permitted by local opt-out provisions inserted into the national rules, operates insidiously and often covertly to impair the norms of both efficiency and fairness." This is a remarkable statement. It stands in sharp contrast to the statement on page 17 that the belief that uniform rules would facilitate a national practice "should be investigated rather than treated as a shibboleth." The picture is further clouded by Recommendation 10, p. 19, that "[t]here ought to be a strong but rebuttable presumption against local options in the national rules." The RAND study of experience with Civil Justice Reform Act Expense and Delay Reduction Plans likely will provide useful insights into these matters. It seems premature to anticipate the results, or to decide how conclusive they may be. The concern that substantial differences in local practice may encourage forum-shopping, voiced in the next paragraph, is understandable. There are many factors that bear on choice of forum, however, and it seems difficult to attribute a vital role to the effects of local rules.

Recommendation 1: The recommendation that "[a]ppointments to the advisory committees should reflect the personal and professional diversity in the federal bench and bar" is wise in intent. It also would be wise to note, in one way or another, that these are relatively small committees. (The suggestion that perhaps they should be smaller seems questionable. Even when all members of the Civil Rules Advisory Committee are able to attend a meeting, they have worked very effectively as a group. The need to achieve a variety of backgrounds and practice experiences counsels against size reductions.) The opportunities for diversity are necessarily constrained. More important, there is a risk that open pursuit of diversity may persuade some committee members that they have been appointed to "represent" one point of view or another. This danger is increased by the suggestion in the discussion that the Chief Justice should consider seeking suggestions from the American Bar Association and similar other organizations. Seeking advice in very informal and casual ways is helpful, and no doubt is done now. But it will not do to give the ABA, let alone half-a-dozen organizations, the impression that there is an organizational seat. No committee member should have the slightest sense of obligation to represent the positions of the ABA or any other organization. Independent judgment, in the light of all information before the Committee, is essential. This sentence should be deleted from the discussion.

Recommendation 4: The recommendation that Advisory Committee reporters should undertake two new chores may be too ambitious. Committee members are very busy people -- their very busy-ness, and the experience derived from it, is what makes them so valuable as committee members. To ask them to absorb regular circulations of law journal articles, social-science publications, and other pertinent articles, is to ask them to do more than academics find

feasible. The same is true of "continuing education," "in-house seminars." It is work enough to address the most prominent literature that bears on current agenda items. As a recent example, a thick book of the most prominent articles on lawyer participation in jury voir dire was responsible for changing the views of many Civil Rules Advisory Committee members; the prospect that they could have spared as much attention to this topic if they were beset with even a narrow selection of the vast academic outpourings on all procedure topics is not promising. In the vein of seminars, the Committee has organized panel presentations on Civil Rule 23, encouraged members of the bar to attend and participate in Committee meetings, and organized — or joined in — a series of symposia for the bench and bar. These efforts, focused directly on a specific and very important Rule, have been enormously valuable. The value, however, derives from the specific focus on a particular project. This recommendation might be improved by providing a more specific focus that ties ventures into the literature and seminars to specific committee work.

Recommendation 5: Reliance on electronic technologies surely will become ever more important in the work of the several committees. It would be helpful, however, to address questions of access. The early stages of committee consideration of any topic are tentative. Widespread public access to very preliminary discussions could chill discussion, and at the same time fix public reactions that are difficult to adjust when a tentative approach is changed. I do not know what the limits should be, but some caution should be noted.

Recommendation 6: Again, the recommendation itself seems sensible. Of course Advisory Committees should rely on available empirical data, and should develop mechanisms for gathering and evaluating data. The Civil Rules Committee has regularly sought help from the Federal Judicial Center, and has learned a great deal from the Center's studies. Recent examples include studies of discovery protective orders, attorney voir-dire practices, offer-of-judgment experience, and class actions. The discussion, however, may invite difficulty. Many of the most difficult questions that confront the rulemaking process do not lend themselves readily to rigorous empirical work. This is particularly true when it comes time to predict the consequences of proposed rules changes. The process cannot be limited to changes that are supported by clear empirical evaluation of present experience and the prospective impact of amended rules. One back-burner item on the Civil Rules Committee agenda may provide an illustration. Civil Rule 15(a) allows a plaintiff to amend a complaint once as a matter of course before a responsive pleading is served. An answer cuts off the right, but not a motion to dismiss. The questions whether this distinction makes sense, and what changes might make better sense of the right to amend, are not likely to yield to any but the most ambitious empirical work. It is hard to believe that the Committee cannot justify consideration of this question unless it can mount a project that measures and compares the effects of four or five

variations across significant samples of carefully matched comparable cases.

Recommendation 7: The Civil Rules Advisory Committee recognizes the importance of participating in the evaluation of lessons to be learned from experience under the Civil Justice Reform Act of 1990. Perhaps the first challenge will be see whether there is any occasion for assisting the Committee on Court Administration and Case Management as it confronts a schedule that, at least as matters stand now, requires formulation of a report in an impossibly short period of time. However that may be, careful evaluation of the RAND study cannot be undertaken casually. It may be that instead of a single "written report generalizing from the experience with the 1990 Act," a series of reports will prove more helpful.

Recommendation 8: This recommendation addresses "the effects of creating local options in the national rules." The discussion, however, is narrower, focusing on the local option provisions built into the 1993 discovery amendments. By far the most controversial of these provisions is the opt-out provision built into the Rule 26(a) disclosure rules. This provision was adopted with the expectation that different districts would do different things, and that the disclosure procedure could be improved by studying the local differences. The recommendation seems to call also for a related study of the effects that local differences generate apart from the quality of local procedures. That topic will be more diffuse, and may be one that should be coordinated with the Local Rules project. The discussion states that the study should investigate, not passively accept, the "belief of the Standing Committee that uniform rules would facilitate a national practice." This statement does not blend well with Recommendation 10, which states "a strong but rebuttable presumption against local options in the national rules." However open the inquiry is to be, it must be recognized that it will prove difficult, and that the quite special context offered by the disclosure rules cannot do duty as the sole example that will test the virtues and vices of local options.

Recommendation 9: The discussion raises the question whether the Chairs of the Advisory Committees should be made voting members of the Standing Committee. My own experience with Standing Committee meetings is limited, but it suggests that the Advisory Committee chairs often have made valuable contributions to Standing Committee deliberations on topics advanced by other committees. Recognition of this role by voting membership would be useful, particularly since it can be accomplished without reducing the number of other members or changing the present dynamics of deliberation. Otherwise, the comments on Recommendation 1 carry over to Recommendation 9 as well.

Recommendation 10: In discussing the Evaluative Norms and Recommendation 8, I suggested that there is an apparent difference between Recommendations 8 and 10 in addressing the values of local

options.

Recommendation 11: The drafting relationships between the Standing Committee and the several Advisory Committees are so complex that this brief discussion may not be sufficient. The suggestion that "concerns about style and grammar" should be addressed before the Standing Committee meets is admirable, although it should be made clear that each Advisory Committee chair must remain free to refuse to "rectify" a draft absent direction from the Standing Committee. It does help to recognize that the line that separates style and grammar from meaning often is uncertain. More important, care should be taken with the suggestion that proposals ought to be returned "to the Advisory Committee" to consider "substantial changes for either style or substance," as admirable as it seems. There may be occasions when a six-month delay in the process is costly. More important, there may be occasions when parallel proposals from separate advisory committees reflect careful consideration of the alternatives and inconsistent outcomes. Little may be accomplished by asking each committee to revisit positions already taken with mutual knowledge of the other committee's views. The process of hurried accommodation at the Standing Committee meeting may not always be desirable, but at times the cure must be more careful consideration in the Standing Committee rather than remand to the separate Advisory Committees. These problems may be aggravated if a rigid cycle is adopted for amendments, so that remand to an Advisory Committee requires a lengthy delay in completing the Enabling Act process.

As a separate matter, thought must be given to the process of adapting Committee Notes to the process of revision at higher levels of the process. Whether the notes are labeled as Advisory Committee Notes or simply Committee Notes — a matter of changing style — it has often happened in the past that a note written for one version of a rule is published as the only explanation of a quite different version that has emerged at later stages of the process.

Recommendation 13: The liaison members from the Standing Committee have been valuable participants in the Civil Rules Advisory Committee process. I would be hard-put to find any specific recommendation for improvement.

Recommendation 14: The fate of the "restyled" rules is a difficult topic. My current understanding is that global restyling of entire sets of rules is to be suspended while the revised Appellate Rules are published for comment. Let me offer two suggestions. The first is that different fates may be appropriate for different sets of rules; trusting that the effort to restyle the Appellate Rules will prove a smashing success, I am not confident that success in that endeavor will demonstrate that success with the Civil Rules is equally within reach. The second is that despite the recent set-back with the substitution of "must" for "shall" in the Supreme Court, we should continue to consider the prospect of gradual introduction of restyled rules. Most of the Civil Rules come on

for attention sooner or later. Incorporation of style revisions may be better accomplished in this setting. This approach has the special advantage that it facilitates changes in meaning. Experience with the styling project so far has revealed many ambiguities that cannot be cured without choosing a meaning and thereby, as like as not, changing the meaning. These problems can be digested on a small scale. Confronting the bench and bar with the need to comment on a complete set of restyled rules, even over a period far longer than the usual six months, is quite a different matter.

Recommendation 15: I have nothing to contribute on the actual recommendation to abolish the Subcommittee on Long Range Planning. But the discussion suggests that "Advisory Committees study comprehensive packages of procedural reforms proposed by scholars, committees, and bar groups." At least for the Civil Rules Advisory Committee, this seems wishful thinking. Our closest brush with this prospect came in the first stages of developing an agenda for the conference last March sponsored by SMU and the Southwestern Legal Foundation. You will recall that the idea of fomenting a comprehensive reconsideration of the Civil Rules proved far too grand to manage. The time may be upon us to begin to reconsider the most basic postulates of the adversary system of civil justice. The Committee cannot become usefully involved until a much better beginning is provided, and likely cannot become usefully involved until several much better beginnings have been provided. The Committee agenda is quite full as it is. So is the capacity of the full Enabling Act process. Many relatively minor amendments have had to be postponed. Major projects likewise have been postponed – to mention only one, a comprehensive revision of Civil Rule 53 to address the common pretrial and post-judgment use of masters has been put on hold for the indefinite future. There is no need to wonder whether bold attempts to remake the system would be premature, fruitless, or dangerous; the Committee has not the resources to undertake the task.

Part D: The Supreme Court: Although there is no recommendation, it is observed that consideration of proposed rules by both the Judicial Conference and the Supreme Court "consumes much time for little purpose." If the Court must receive recommended rules at – or close to – the beginning of its Term, I am not sure that much time is lost in the overall march of the process. If it is meant only to suggest that little is contributed by Judicial Conference consideration, I am not sure that the suggestion is well-founded. I have great respect for the process by which advisory committees generate, and the Standing Committee reviews, proposed rules amendments. I have had profound doubts about the wisdom of one or another recent actions of the Judicial Conference in reviewing specific rule proposals. Nonetheless, were I the Supreme Court, I would welcome review by an intermediate body that is not directly caught up in the hurly-burly of the committee process. This detached inspection may help make the Court comfortable about its continuing role. Absent better reason for dissatisfaction, we

might seek to avoid this implicit suggestion.

Recommendation 16: The question of a biennial cycle has been considered at intervals. There are substantial difficulties with the proposal. A direct difficulty is faced with some frequency: rules changes are considered to aid Congress, or to adapt to new legislation. Postponing such projects can lead to unnecessary complications in the relationships between Congress and the Enabling Act process, or unnecessary delays in adapting formal practice to new statutory requirements. A related difficulty is posed by the suggestion that a single publication cycle be adopted for all of the rules together — it is difficult enough to engage the attention of the bar in present circumstances, and the process depends heavily on informed comment from as many voices as possible. Some lawyers, and particularly bar committees, may have much to contribute by way of comments on different sets of rules. Dividing their attention with a single massive package once every two years could limit the value of their comments. An additional difficulty arises from the suggested schedule described at page 25 and note 65. It envisions a clustering of Advisory Committee meetings in late April, creating potential staffing problems for the Rules Committee Support Office. It also seems to entail Advisory Committee meetings sometime between the end of April and the end of July, if the Standing Committee is to meet again in the fall. Summer is a difficult time to win full attendance of committee members. The alternative of a single meeting in April, with twice the agenda, is quite unattractive; even two meetings a year are a bare minimum, with time to reflect but not too much delay in between. There also could be substantial difficulties with the conjunction between the two-year cycle and remands by the Standing Committee — remand to an Advisory Committee on the eve of the biennial publication date could push a proposal back for a full two years. Other practical difficulties are likely to emerge as well. If all this work is presented in periodic large bundles to the Judicial Conference, the opportunity for reflective consideration by the Conference will be substantially reduced. The responsibility placed on the representative of the Standing Committee to assist the Judicial Conference will be substantially augmented. And if significant regularity is maintained, there is a risk that proposals presented at unusual times will be greeted with skepticism. This idea has not been adopted, and should not be.

Best regards,

EHC/lm

Edward H. Cooper

xc: John K. Rabiej

A Self-Study of Federal Judicial Rulemaking

A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States

December 1995

Introduction

At the June 1993 meeting, the Standing Committee directed the Subcommittee on Long Range Planning to undertake a thorough study of the federal judicial rulemaking procedures, including: (1) a description of existing procedures; (2) a summary of criticisms and concerns; (3) an assessment of how existing procedures might be improved; and (4) appropriate proposed recommendations.

The self-study was deferred in anticipation of the January 1994 executive session and related discussion. At that meeting, the Standing Committee decided to solicit public comments. Appendix A to this Report contains a summary of the comments received. In addition, the Subcommittee canvassed the secondary literature. Appendix B to this Report is an annotated bibliography. An interim report was circulated in anticipation of the June 1994 meeting of the Standing Committee. The interim report raised several issues for preliminary discussion at that meeting and solicited further written comments from those in attendance. Drafts were circulated to the Standing Committee in January and July of 1995. After receiving comments from the Advisory Committees, the Subcommittee lays before the Standing Committee this final report, for consideration at the January 1996 meeting.

The following sections organize this Self-Study Report on the federal judicial rulemaking procedures: a **History** of the origins of modern rulemaking; a description of **Current Procedures**; a discussion of **Evaluative Norms**; the **Issues and Recommendations** for reforms; and a brief **Conclusion**.

History[1]

Modern federal judicial rulemaking dates from 1958. A few paragraphs of history inform our understanding of current practice.

The Judiciary Act of 1789 first authorized federal courts to fashion necessary rules of practice.[2] A lesser known statute enacted a few days later provided that in actions at law the federal procedure should be the same as in the state courts.[3] This created a system that seems odd to us today: a distinctly national procedure for equity and admiralty, coupled with a static procedure, conforming to the procedure in each state as of September 1789, for actions at law. Procedure for actions at law in federal courts was frozen, while state courts altered their procedures. The system became more odd, or at least more uneven, in 1828, when a statute required federal courts in subsequently admitted states to conform to 1828 state procedures. The same statute provided that all federal courts were to follow 1828 state procedures, with some discretion, in proceedings for writs of execution and other enforcement procedures.[4] This unsatisfactory system prevented the federal courts from following state procedural reform such as the New York Code of 1848, which merged law and equity and simplified pleading.[5]

The next legislative change came in 1872 when Congress required all actions at law to follow the corresponding state forum's rules and procedures.[6] Under the Conformity Act there were as many different sets of federal rules and procedures as there were states.[7]

This Report is not the place to retell the history of the Federal Rules of Civil Procedure, a story "told in large part in terms of dedicated individuals who worked and campaigned to bring them into existence."[8] What bears emphasis is that until 1938, that is, for the Nation's first 150 years, things were very different from what they are today.

Before 1938, the federal courts followed state procedural law, state substantive statutes, and federal substantive common law, even in diversity cases. Of course, the substantive common law of the forum state was recognized to be controlling in the famous 1938 Supreme Court diversity

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1 This portion of this Report is adapted from Thomas E. Baker, An Introduction to Federal Court Rulemaking Procedure, 22 Tex. Tech L. Rev. 323, 324-28 (1991). For a more detailed history, see Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015, 1035–95 (1982). See also Peter G. McCabe, Renewal of the Federal Rulemaking Process, 44 Am. U. L. Rev. 1655 (1995), which provides a comprehensive statement of current practices and a summary of their history.

2 Act of Sept. 24, 1789, ch. 20, §17, 1 Stat. 73, 83.

3 Act of Sept. 29, 1789, ch. 21, §2, 1 Stat. 93.

4 Act of May 19, 1828, ch. 68, 4 Stat. 278.

5 Charles E. Clark, The Challenge of a New Federal Judicial Procedure, 20 Cornell L.Q. 443, 499-50 (1935).

6 Act of June 1, 1872, ch. 255, 17 Stat. 197.

7 "[T]he procedural law continued to operate in an atmosphere of uncertainty and confusion, aggravated by the growing tendency of federal courts to develop their own rules of procedure under the licensing words of the 1872 Act that conformity was to be 'as near as may be.' " Charles Alan Wright & Arthur R. Miller, 4 Federal Practice and Procedure §1002 at 14 (2d ed. 1987).

8 Id. §1004 at 21.

decision of *Erie Railroad Co. v. Tompkins*,[9] overruling *Swift v. Tyson*, which had stood since 1842.[10] And in the same year, after more than two decades of effort, national rules of procedure were adopted by the Supreme Court, which embraced the work of an ad hoc Advisory Committee it had appointed under the Rules Enabling Act of 1934.[11] Thus 1938 marked an inversion in diversity cases: henceforth there would be federal procedural law and state substantive law. Those 1938 rules—recognizable today despite numerous amendments—established a nationally-uniform set of federal procedures, abolished the distinction between law and equity, created one form of action, provided for liberal joinder of claims and parties, and authorized extensive discovery.

The Supreme Court's ad hoc Advisory Committee comprised distinguished lawyers and law professors. While the ad hoc Committee members have been lionized for their accomplishment of drafting the rules, their more subtle but equally lasting achievement was to establish the basic traditions of federal procedural reform.[12] Two features of that experience have characterized federal judicial rulemaking ever since. First, the ad hoc Committee took care to elicit the thinking and the experience of the bench and bar by widely distributing drafts and soliciting comments, evincing willingness to reconsider and redraft its recommendations. Second, "the work of the Committee was viewed as intellectual, rather than a mere exercise in counting noses."[13] The ad hoc Committee recommended to the Supreme Court what it considered the best rules rather than rules that might be supported most widely or might appease special interests. Although the rulemaking process has been revised over the years since, these traditions have endured.

This positive experience located rulemaking responsibility inside the judicial branch, but the modern rulemaking process continues to evolve. A year after the new rules went into effect, the Supreme Court called on the ad hoc Advisory Committee to submit amendments, which the Court accepted and sent to Congress, and which became effective in 1941.[14] The next year, the Supreme Court designated the ad hoc Committee as a continuing Advisory Committee, which thereafter periodically submitted rules amendments through the 1940s and early 1950s.[15] But rumblings of dissatisfaction were heard, attributable in part to a perception that the Supreme Court merely rubber-stamped the recommendations from the Advisory Committee. Several of the Justices agreed with that criticism, dissenting from orders to complain that the proposals were not actually the work of the Court.[16] Other observers had misgivings about the tenure and

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9 304 U.S. 64 (1938).

10 44 U.S. (16 Pet.) 11 (1842).

11 Act of June 19, 1934, ch. 651, §§1-2, 48 Stat. 1064; Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1935).

12 Wright & Miller, supra note 7, §1005.

13 Ibid.

14 Order Requesting Amendments from the Advisory Committee, 308 U.S. 642 (1939).

15 Continuance of Advisory Committee, 314 U.S. 720 (1941); Charles E. Clark, "Clarifying" Amendments to the Federal Rules?, 14 Ohio St. L. J. 241 (1953).

16 E.g., Order Amending the Rules of Civil Procedure, 329 U.S. 843 (1946) (noting Justice Frankfurter's reliance on the judgment of the Advisory Committee); Order Amending the Rules of Civil Procedure, 308 U.S. 643 (1939) (noting Justice Black's disapproval); Order Adopting the Rules of Procedure for the District Courts of the United States, 302 U.S. 783 (1937) (noting Justice Brandeis' disapproval).

influence of the members of the Advisory Committee, who served until resignation or death. In 1955 the Advisory Committee submitted an extensive report to the Supreme Court with numerous proposed amendments. The Court neither acted on the Report nor explained its inaction. Instead, the Justices ordered the Committee "discharged with thanks" and revoked its authority as a continuing body.[17]

The resulting void in rulemaking led the American Bar Association, the Judicial Conference, and other groups to express concern.[18] At the time, there was no small controversy over whether the Court should designate a new committee and how the members might be selected. A consensus emerged that some ongoing rulemaking process was desirable, but that the process had to be reformed. The replacement rulemaking procedures were designed by Chief Justice Earl Warren, Justice Tom C. Clark, and Chief Judge John J. Parker of the Fourth Circuit, during their cruise to attend the 1957 American Bar Association Convention. Justice Clark recalled: "On our daily walks around the deck of the Queen Mary, we thrashed out the problem thoroughly, finally agreeing that the Chief Justice, as the Chair of the Judicial Conference, should appoint the committees which would give them the tag of 'Chief Justice Committees.' "[19] This "Queen Mary Compromise" led to a statutory amendment by which Congress assigned responsibility to the Judicial Conference for advising the Supreme Court regarding changes in the various sets of federal rules—admiralty, appellate, bankruptcy, civil and criminal—which only the Court had formal statutory authority to amend.[20] The rulemaking process today follows the basic 1958 design.[21] Only two developments in rulemaking since then are sufficiently noteworthy to deserve brief mention in this history.

First, there was a showdown over the Federal Rules of Evidence. An Advisory Committee on Rules of Evidence was created in 1965. Following standard rulemaking procedures, after extensive study, the Advisory Committee promulgated a set of proposed rules in 1972. Those proposed rules were highly controversial, especially the rules dealing with evidentiary privileges. Congress postponed the rules of evidence pending further legislation. Then Congress made substantial revisions before enacting rules of evidence into law, effective in 1975.[22] The legislative veto provision attached to all rules of evidence has since been discarded, but the applicable statute still provides that any revision of the rules governing evidentiary privileges shall have no force unless approved by Congress.[23] The Chief Justice reestablished an Advisory Committee on the

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17 Order Discharging the Advisory Committee, 352 U.S. 803 (1956).

18 The Rule-Making Function and the Judicial Conference of the United States, 44 A.B.A. J. 42 (1958) (panel discussion).

19 Tom C. Clark, Foreword to Wright & Miller, supra note 7, at ix.

20 Act of July 11, 1958, Pub. L. No. 93-12, 72 Stat. 356; Panel Discussion, The Rule-Making Function of the Judicial Conference of the United States, 44 A.B.A.J. 42 (1958).

21 The Justices continue to express their individual concerns about the Supreme Court's appropriate role in judicial rulemaking. Statement of Justice White, 113 S.Ct. 575 (Apr. 22, 1993); Dissenting Statement of Justice Scalia, joined by Justices Thomas and Souter, 113 S.Ct. 581 (Apr. 22, 1993); Order Amending the Rules of Civil Procedure, 374 U.S. 861 (1963) (opposing statements of Justices Black and Douglas).

22 Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926; Edward W. Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Rev. 908 (1978).

23 28 U.S.C. §2074(b).

Rules of Evidence in 1993, after a 20-year hiatus. This committee has embarked on a comprehensive review of the subject, but has decided not to reopen the privileges question.

Second, Congress amended the Rules Enabling Act in 1988 to require the rules committees to hold open meetings, maintain public minutes, and afford wider notice of proposals and longer periods for public commentary on proposed rules.[24] Rulemaking today is more accessible to interested parties than ever before. It is also slower, and the exchange is not an unmixed blessing. In the wake of the 1988 changes, only Congress can change rules with dispatch. This means that any group with a perceived pressing need seeks its forum in the legislature rather than the judiciary, and today Congress regularly demonstrates its interest in federal rules matters by holding committee hearings and amending the rules themselves.

Current Procedures[25]

Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence, subject to an expressly reserved legislative power to reject, modify, or defer any judicially-made rules. This statutory authorization is found in the Rules Enabling Act.[26] Pursuant to this statutory authorization and responsibility, the judicial branch has developed an elaborate committee structure with attendant rulemaking procedures. The *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* describe the current procedures for judicial rulemaking.[27] These rulemaking procedures were adopted by the Judicial Conference of the United States. They govern the operations of the Standing Committee and the various Advisory Committees in drafting and recommending new rules or amendments to the present sets of federal rules of practice and procedure.

The Judicial Conference of the United States consists of the Chief Justice of the United States, the chief judges of the 13 United States courts of appeals, the Chief Judge of the Court of International Trade, and 12 district judges chosen for a term of 3 years by the judges of each circuit. The Judicial Conference meets twice every year to consider administrative problems and policy issues affecting the federal judiciary and to make recommendations to Congress concerning legislation affecting the federal judicial system.[28] It also acts through an Executive Committee on some matters.

By statute, the Judicial Conference is charged with carrying on a "continuous study of the operation and effect of the general rules of practice and procedure."[29] The Conference is empowered to recommend changes and additions in the federal rules "from time to time" to the

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24 Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (codified at 28 U.S.C. §2073(c)).

25 This portion of this Report is adapted from Baker, supra note 1, at 328-31, and Administrative Office of the U.S. Courts, The Federal Rules of Practice and Procedure—A Summary for Bench and Bar (Oct. 1993) (hereinafter A Summary for Bench and Bar).

26 28 U.S.C. §§2071-2077.

27 Announcement, 54 Fed. Reg. 13,752 (Apr. 5, 1989) (publishing Procedures adopted by the Judicial Conference of the United States on Mar. 14, 1989).

28 28 U.S.C. §331.

29 Ibid.

Supreme Court, in order to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."[30]

To perform these responsibilities of study and drafting, the Judicial Conference has created the Committee on Rules of Practice, Procedure, and Evidence (Standing Committee)[31] and various Advisory Committees (currently one each on Appellate Rules, Bankruptcy Rules, Civil Rules, Criminal Rules and Evidence Rules). All appointments are made by the Chief Justice of the United States, for a three-year, once-renewable term. Members are federal and state judges, practicing attorneys, and scholars. On recommendation of the Advisory Committee's chair, the Chief Justice appoints a reporter, usually from the academy, to serve the committee as an expert advisor. The reporter coordinates the committee's agenda and drafts the rules amendments and the explanatory committee notes.

The Standing Committee coordinates the rulemaking responsibilities of the Judicial Conference. The Standing Committee reviews the recommendations of the various Advisory Committees and makes recommendations to the Judicial Conference for proposed rules changes "as may be necessary to maintain consistency and otherwise promote the interest of justice."[32] The Secretary to the Standing Committee, currently the Assistant Director for Judges Programs of the Administrative Office of the U.S. Courts, coordinates the operational aspects of the entire rulemaking process and maintains the official records of the rules committees. The Rules Committee Support Office of the Administrative Office provides day-to-day administrative and legal support for the Secretary and the various committees.[33] The Federal Judicial Center provides staff assistance, particularly with respect to research.[34]

Rulemaking procedures are elaborate:

> The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes. The rulemaking process is time-consuming and involves a minimum of seven stages of formal comment and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted.[35]

By delegation from the Judicial Conference, each Advisory Committee is charged to carry out a "continuous study of the operation and effect of the general rules of practice and procedure"

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30 Ibid.

31 28 U.S.C. §2073(b). The convention has been to refer to this Committee as the "Standing Committee on Rules of Practice and Procedure" or simply the "Standing Committee."

32 8 U.S.C. §2073(b).

33 "Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, suggestions and comments submitted by the public, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are available from the Rules Committee Support Office." A Summary for Bench and Bar, supra note 25.

34 See 28 U.S.C. §620(b)(1), (4). See also Experimentation in the Law: Report of the Federal Judicial Center Advisory Committee on Experimentation in the Law (1981).

35 A Summary for Bench and Bar, supra note 25.

in its particular field.[36] An Advisory Committee considers suggestions and recommendations received from any source, new statutes and judicial decisions affecting the rules, and other relevant legal commentary. "Proposed changes in the rules are suggested by judges, clerks of court, lawyers, professors, government agencies, or other individuals and organizations."[37] Copies or summations of all written recommendations and suggestions that are received are first acknowledged in writing and then forwarded to each member. The Advisory Committees meet at the call of the chair. Each meeting is preceded by notice of the time and place, including publication in the *Federal Register*, and meetings are open to the public.[38] Upon considering a suggestion for a rules change, the Advisory Committee has several options, including: (1) accepting the suggestion, either completely or with modifications or limitations; (2) deferring action on the suggestion or seeking additional information regarding its operation and impact; (3) rejecting the suggestion because it does not have merit or would be inconsistent with other rules or a statute; or (4) rejecting the suggestion because, while it may have some merit, it is not really necessary or sufficiently important to warrant a formal amendment.[39]

The Reporter to the Advisory Committee, under the direction of the Advisory Committee or its Chair, prepares the initial drafts of rules changes and "Committee Notes" explaining their purpose or intent. The Advisory Committee then meets to consider and revise these drafts and submits them, along with an Advisory Committee Report which includes any minority or separate views, to the Standing Committee. The reporters of all the Advisory Committees are encouraged to work together, with the reporter to the Standing Committee, to promote clarity and consistency among the various sets of federal rules; the Standing Committee has created a Style Subcommittee, with its own Consultant, that works with the Advisory Committees to help achieve clear and consistent drafts of proposed amendments.

Once the Standing Committee approves the drafts for publication, the proposed rules changes are printed and circulated to the bench and bar, and to the public generally. Every effort is made to publish the proposed rules widely. More than 10,000 persons and organizations are on the mailing list, including: federal judges and other federal court officials; United States Attorneys; other federal government agencies and officials; state chief justices; state attorneys general; law schools; bar associations; and interested lawyers, individuals and organizations who request to be included on the distribution list.[40] A notice is published in the *Federal Register* and the proposed rules changes also are reproduced with explanatory committee notes and supporting documents in the West Publishing Company's advance sheets of *Supreme Court Reporter*, *Federal Reporter*, and *Federal Supplement*.[41] As a matter of routine, copies are provided to other legal publishing firms. Anyone who requests a copy of any particular set of proposed changes may obtain one.

The comment period runs six months from the *Federal Register* notice date. The Advisory Committee usually conducts public hearings on proposed rule changes, again preceded by

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36 See 28 U.S.C. §2073(b).

37 A Summary for Bench and Bar, supra note 25.

38 Notice of Public Meeting, 59 Fed. Reg. 59,793 (Nov. 18, 1994).

39 A Summary for Bench and Bar, supra note 25.

40 A Summary for Bench and Bar, supra note 25.

41 E.g., 115 S.Ct. No. 1, at cxvi (Nov. 1, 1994).

widely-published notice. The hearings typically are held in several geographically diverse cities to allow for regional comment. Transcripts of the hearings are generally available. The six-month time period may be abbreviated, and the public hearing cut out, only if the Standing Committee or its Chair determines that the administration of justice requires that the process be expedited.

At the conclusion of the comment period, the reporter prepares a summary of the written comments received and the testimony presented at public hearing for the Advisory Committee, which may make additional changes in the proposed rules. If there are substantial new changes, there may be an additional period for public notice and comment. The Advisory Committee then submits the proposed rule changes and Committee Notes to the Standing Committee. Each submission is accompanied by a separate report of the comments received which explains any changes made subsequent to the original publication. The report also includes the minority views of Advisory Committee members who chose to have their separate views recorded.

The Standing Committee coordinates the work of the several Advisory Committees, individually and jointly. Although on occasion the Standing Committee suggests actual proposals to be studied, its chief function is to review the proposed rules changes recommended by the Advisory Committees. Meetings of the Standing Committee are open to the public and are preceded by public notice in the *Federal Register*.[42] Minutes of all meetings are maintained as public records and made available to interested parties.

The Chair and Reporter of each Advisory Committee attend the meetings of the Standing Committee to present the proposed rules changes and Committee Notes. The Standing Committee may accept, reject, or modify a proposal. If a Standing Committee modification effects a substantial change, the proposal may be returned to the Advisory Committee with appropriate instructions, including the possibility of a second publication for another period of public comment and public hearings. The Standing Committee transmits the proposed rule changes and Committee Notes approved by it, together with the Advisory Committee report, to the Judicial Conference. The Standing Committee's report to the Judicial Conference includes its recommendations and explanations of any changes it has made, along with the minority views of any members who wish to record separate statements.

The Judicial Conference, in turn, transmits those recommendations it approves to the Supreme Court of the United States. Formally, the Supreme Court retains the ultimate responsibility for the adoption of changes in the rules, accomplished by an Order of the Court.[43] The Supreme Court has at times played an active part, refusing to adopt rules proposed to it and making changes in the text of rules.[44] In practice, however, the Advisory Committees and the Standing Committee are the main engines for procedural reform in the federal courts. Under the enabling statutes,[45] amendments to the rules may be reported by the Chief Justice to the

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42 Notice of Meeting, 55 Fed. Reg. 25,384 (1990).

43 Order Amending the Federal Rules of Civil Procedure (Apr. 22, 1993), H.R. Doc. 103-74, 103d Cong., 1st Sess., reprinted at 113 S.Ct. 478 (1993).

44 The Supreme Court actually made changes in the original adoption of the civil and criminal rules. Wright & Miller, supra note 7, §§2 n.8 & 1004 n.18. Charles E. Clark, The Role of the Supreme Court in Federal Rulemaking, 46 J. Am. Jud. Soc. 250 (1963). And the Court continues to do so. Order, 129 F.R.D. 559 (May 1, 1990); Order of April 27, 1995 (not yet reported).

45 28 U.S.C. §§2071-77.

Congress at or after the beginning of a regular session of Congress but not later than May 1st. The amendments become effective no earlier than December 1 of the year of transmittal, if Congress takes no action.[46]

Since 1958 this rulemaking procedure has been followed regularly.[47] Spirited debates have been generated, from time to time, over particular proposals and sets of amendments. Some of these controversies have been resolved within the Third Branch. In recent years, these rulemaking procedures have been followed with the result that particular proposals have been rejected at each level of consideration—at the Advisory Committees, at the Standing Committee, at the Judicial Conference, and at the Supreme Court—often with attendant public debate and occasionally with high controversy. Debate likewise has attended proposals that have been approved. For example, the thorough changes to the civil discovery provisions in 1993 drew a separate statement from one member of the Supreme Court and a dissenting statement from three others.

Other controversies have played out in the Congress. For example, the 1993 amendments were the subject of hearings in both the Senate and the House of Representatives. A bill to rescind some of the discovery rules changes in that package passed the House but did not reach the floor of the Senate. Most recently, Congress included three new rules of evidence in the Violent Crime Control and Law Enforcement Act of 1994.[48] But over the years judges and the judiciary regularly have been heard to urge that Congress should feel obliged to exercise greater self-restraint in this regard and defer to the Rules Enabling Act process.

Evaluative Norms[49]

It is worth a few pages to consider rulemaking procedures from a normative vantage, to ask what are the explicit and implicit norms that overlay the entire enterprise of federal judicial rulemaking, beyond the more familiar first level of abstraction that would consider the policy underlying some specific rule change. This vantage includes rulemaking norms as they are currently understood as well as how they might be "reimagined." If rulemaking procedures are a meta-procedure, in the sense they are the procedures followed to promulgate new court procedures, then this segment of this Report, for what it is worth, might be described as a meta-meta-procedure. To describe it this way is to admit that this part has the smell of the lamp about it.

Inadequacies. Some argue that the existing norms to be found in the federal rules are not adequate and do not contemplate all that must be taken into account in a meaningful assessment

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46 But see Act of March 30, 1973, Pub. L. 93-12, 87 Stat. 9 (providing that the proposed Rules of Evidence should have no effect until expressly approved by Act of Congress).

47 Order Amending the Rules of Civil Procedure, 480 U.S. 955 (1987); Order Amending the Rules of Civil Procedure, 471 U.S. 1155 (1985); Order Amending the Rules of Civil Procedure, 461 U.S. 1097 (1983).

48 Pub. L. No. 103-322, 108 Stat. 1796; H.R. Rep. No. 103-711, 103d Cong., 2nd Sess. (1994). On unanimous recommendation of the Advisory Committee on Evidence and of the Standing Committee, the Judicial Conference informed Congress that in its view this exercise was imprudent and had produced seriously flawed language. The Judicial Conference proposed an alternative text more in accord with the norms and drafting style of the other rules. See *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases* (Feb. 1995). Congress took no action, and the new rules went into force on July 9, 1995, as originally enacted.

49 This part of this Report is adapted, with permission, from a letter from Professor Oakley to the Chair of the Subcommittee. John B. Oakley, An Open Letter on Reforming the Process of Revising the Federal Rules, 55 Mont. L. Rev. 435 (1994).

of rulemaking as a process. Rule 1's goal for the federal civil rules is the "just, speedy, and inexpensive determination of every action." Although the three specified norms of justice, speed, and economy in civil litigation are rooted in common sense, they beg some of the most important questions that face rulemakers.

In a world in which time is money, speed and economy are two sides of the same figurative coin—and the sides are indistinguishable. Standing alone, they would argue for deciding every case by the quickest (and therefore cheapest) means possible—such as the flip of a more conventional coin on which the head does not mirror the tail. Of course a "heads or tails" system of resolving civil disputes would be intolerable, because it would be unjust. But the norm of justice lends itself more easily to condemnation of offered measures, rather than to a constructive way to sort proffered reforms, because it conceals at least two competing conceptions of what justice requires.

On the one hand, justice has something to do with fairness to individuals. Civil cases ought to reach the "right" result—the outcome that would follow if every relevant fact were known with absolute accuracy, if all uncertainty in meaning or application were wrung out of every relevant proposition of law, and if society itself could by some extraordinary plebiscite resolve whether the application of the general law to the unique circumstances of a particular case should be tempered by overriding concerns of the situational equity.

On the other hand, justice also has something to do with concerns of equality and aggregate social efficiency. If we were to allocate all of our resources to attaining the Nth degree of accuracy and absolute equity in our determinations of legal liability in a particular case, there would be far less, if any, resources left to adjudicate other deserving cases, let alone to accomplish all of the other functions government performs besides deciding civil disputes. Moreover, if equity were given a standing veto over pre-existing legal rules as applied to the actual facts of any given case, we would subvert the system of reliance on protected expectations that permits a society to function amid a welter of conflicting interests without every such conflict becoming a contested dispute brought into court.

The fact that Rule 1 speaks of a just determination in *every* case, not only the one before a judge at any given moment, is more a reminder of the inevitable tension between concerns of fairness and efficiency than a criterion for resolving that tension. It should therefore be no surprise that the history of federal civil procedure under the Federal Rules has featured a continuous but seldom explicitly elaborated struggle between what might be labeled the "primacy of fairness" versus the "primacy of efficiency." The "primacy of fairness" argues for subordination of procedural rules in favor of reaching the merits of the parties' dispute under the substantive law, and conditioning the finality of determination on liberal opportunities for amendment of pleadings, reconsideration by the trial court, and appellate review. The "primacy of efficiency" argues for rigorous enforcement of procedural rules to narrow the range of the parties' dispute and to expedite decision, and limiting the opportunity for, and scope of, appellate review.

Alternatives. What alternative or additional norms might be imagined for federal judicial rulemaking, beyond the norms that might be considered for the particular rules and procedures themselves? Federal rules of procedure should be adopted, construed, and administered to promote five related norms: efficiency, fairness, simplicity, consensus, and uniformity.

The application of the norm of efficiency to the rulemaking process requires an assessment of how costly it is to initiate consideration of a rule change and for that proposal to proceed to

implementation by the federal courts. That assessment is itself rather complicated, requiring, for instance, consideration of the social cost of the rulemaking process in terms of how much more time the rulemakers would have spent adjudicating cases, representing clients, or teaching students and conducting research, had they not been involved in the rulemaking process.

The assessment of the efficiency of the rulemaking process is further complicated by being interactive with assessment of the efficiency of the actual rules the rulemaking process produces. A conservative and time-consuming process of rulemaking may be less costly than fast-track rulemaking that taxes the litigation system with a constant need for retraining and a high rate of error attributable to unfamiliarity with as-yet unconstrued new rules, unless it can be shown that the long-run efficiency gains of new rules are consistently high. The inefficiency of frequently changing the rules might argue either for keeping the rulemaking process inefficient and thus resistant to proposals for change, or for adopting some form of staging process by which rule changes are limited, absent exceptional circumstances, to a prescribed schedule of once every so many years. Moreover, since the Judicial Conference does not have monopoly power in rulemaking, the relative efficiency of either an inert or a volatile judicial rulemaking process will be determined, in part, by the efficiency or inefficiency of the rules likely to be produced by direct Congressional action, or by Congressional delegation of local rulemaking power to individual district courts, should centralized rulemaking by the Judicial Conference committee structure be deemed unduly torpid.

As applied to the rulemaking process, the norm of fairness calls not only for receptivity to proposals for change by those not directly vested with rulemaking power, but also for access to the process of implementing a proposed rule change by those whose interests are most likely to be affected by any proposed change. How seriously is public comment encouraged and facilitated, and is this a pro forma gesture or is there evidence that adverse public comment makes a difference in the progression of a proposal into a rule change? As applied to the rules that the process produces, the norm of fairness requires evaluation of whether changes in the rules promote or retard the likelihood that individual cases will come to the right result, whether by adjudication or pro tanto by settlement, in relation to the efficiency gains or losses that result from such changes. Is the rulemaking system biased in favor of ratcheting up efficiency at the expense of fairness, or vice versa?

The norm of simplicity, specified in 28 U.S.C. §331, serves the related interests of both efficiency and fairness. Unduly complex rules of procedure not only increase the cost of training, compliance, and enforcement, but also increase the likelihood of mistaken and hence unfair application. Any rulemaking process that regularly produces unduly complex rules of procedure or unduly complicates existing simple rules threatens the systemic goals of efficiency and fairness.

As applied to the rulemaking process, the norm of consensus overlaps, but does not duplicate, the norm of fairness. The norm of consensus demands, first, that the rulemaking process be sufficiently open to public input to be fairly representative of, or at least sensitive to, the interests of those who will be most affected by the rules it produces. But this norm demands more than mere notice and the opportunity to be heard. There must be some sharing of, or at least constraint upon, the power to make new rules, so that a lack of consensus about the wisdom of problematic proposed rules will normally suffice to block the adoption of such rules. Consensus should not be too strong a norm, however, because it favors the status quo. At the same time, the expectation for consensus should render the rulemaking process sufficiently inert to resist utopian reform by policymakers who are so detached from the arena of litigation to which the rules are

directed that they are indifferent to the practical impact of rule changes upon those most affected by them.

The norm of uniformity is fundamental to the rulemaking process first set in place by the 1934 Rules Enabling Act. The Act was intended to promote a system of federal procedure that was not only trans-substantive but, with minor local variations, uniform in application in all federal district courts. Geographical uniformity is more important than trans-substantive application of the federal rules. Deviations from trans-substantive uniformity can, where necessary and appropriate, be expressly specified within the rules. Current examples are the special rules for class actions brought derivatively by shareholders, and the entire set of discrete rules of procedure for bankruptcy cases. But geographical disuniformity, even when expressly permitted by local opt-out provisions inserted into the national rules, operates insidiously and often covertly to impair the norms of both efficiency and fairness.

The norm of uniformity demands that the procedure for litigating actions in federal courts remain essentially similar nationwide. If each district court's rules of civil procedure are allowed to become sufficiently distinct that venue may affect outcome and that a special aptitude in local procedure becomes essential to competent representation in that court, forum-shopping would be encouraged. Moreover, litigants must either risk the unfairness of inadvertent mistake in conforming to localized rules of procedure or incur inefficient costs of insuring against the idiosyncrasies of local practice by ad hoc procedural research or the prophylactic retention of local counsel.

Issues and Recommendations

In this section of this Report, we turn to issues, analyses, and recommendations.[50] We take up issues related to the five entities in rulemaking: Advisory Committees; Standing Committee; Judicial Conference; Supreme Court; and Congress. The report concludes with a discussion of the time line of rulemaking.

A. Advisory Committees

Memberships: Criticisms have been leveled at the composition of the various rules committees. First, there have been allegations of an under-representation of the bar, particularly active practitioners, and of other identifiable interest groups within the bar, such as public interest lawyers. The often implied but sometimes explicit objection is that the Advisory Committees are dominated by federal judges. Second, there have been allegations of a lack of diversity of members. The argument is that the Advisory Committees ought to mirror the diversity of the federal bar, which includes more women and minorities than are currently found on the federal bench.

These are considerations for the attention of the appointing authority, the Chief Justice. In recent years, the Advisory Committees have been enlarged to include more non-judges. Whether they (and the Standing Committee) have already become too large for sustained exchanges and careful discussion is an interesting question; drafting by large committees is rarely successful. We doubt that they should be larger; perhaps they should be smaller. At all events, the rules committees are committees of the Judicial Conference of the United States, the policy-making entity of

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50 Professor Carl Tobias assisted in the compilation of issues for consideration in this part of this Report.

the Third Branch. They are not "bar" committees. "Representativeness"—seats on the Advisory Committee for major identifiable factions of the bar—is incompatible with the tradition of federal rulemaking based on a disinterested expertise, as opposed to interest-group politics. Rulemaking ought not follow public opinion or the ratio of specialties at the bar.

Federal judges ought to remain a majority of the members of the Advisory Committees. They have the knowledge and time to act in the best interest of the public those courts serve. They are of course lawyers too, with experience on both sides of the bench. The ability to compare these two experiences makes judges especially appropriate rulemakers. This is not to say that the appointing power ought to be exercised without regard to the concerns we have mentioned. It is enough to suggest that these considerations be given appropriate attention and that efforts be made to identify well-qualified candidates with diverse personal and professional experiences. Some recognition may appropriately be given to enduring divisions in the practice of law. For example, the Advisory Committee on the Criminal Rules includes a representative of the Department of Justice and a Federal Public Defender. Analogously, the Civil Justice Reform Act of 1990 required that advisory groups be "balanced and include attorneys and other persons who are representative of major categories of litigants" in each district.[51]

To help achieve these goals, the Chief Justice now solicits advice widely from within the federal judiciary and the Administrative Office of the U.S. Courts. The Chief Justice could consider seeking suggestions from the American Bar Association and similar other organizations as well.[52]

[1] Recommendation to the Chief Justice: Appointments to the Advisory Committees should reflect the personal and professional diversity in the federal bench and bar.

Length of terms: Members' terms on the Advisory Committee should be long enough to maintain continuity and to allow a member to see a proposal through to adoption, but not so long as to create inflexibility and to render rulemaking an "insider's game." The current practice is to appoint members for an initial three-year term followed by a second three-year term. On balance, this seems a reasonable normal term of years for members, but the Chief Justice should retain his existing discretion to make exceptions when appropriate to help committees follow through with extended rulemaking projects.

Members must master a potentially bewildering number of proposals within a complex process. The Chair, Reporter, and veteran members of the Advisory Committee can be of great assistance. The rotation on and off of the Advisory Committee affords new members a break-in period. This by-product is reason to maintain the staggered terms. Still, more formal assistance might be appropriate. This might take the form of an orientation meeting scheduled the day before the regular meeting of the Advisory Committee, attended by the new members, the Chair, and the Reporter, and perhaps others. Additionally, the Standing Committee and the Advisory

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51 28 U.S.C. §478(b).

52 See also Long Range Plan for the Federal Courts (May 1995) Recommendation 30, Implementation Strategy 30c: "In developing rules, the Judicial Conference and the individual courts should seek significant participation by the interested public and representatives of the bar, including members of the federal and state benches."

Committees should continue to invite members whose terms have expired to attend the meeting after their term ends, in order to promote continuity.

[2] Recommendation to the Advisory Committees: Chairs and Reporters of the Advisory Committees should schedule orientation meetings with new members.

Somewhat different considerations obtain for Chairs. Rulemaking projects take three years from beginning to end. A Chair with a three-year term therefore can see a project through only if it commences at the outset of his or her tenure. A leader ought to be granted some time to think through proposals, to make them, and still have time to see them through. Reporters now serve indefinitely. Making a non-member of the committee the only enduring voice is questionable. A Chair, too, ought to provide continuity within the Advisory Committee and the Standing Committee. It is not uncommon for the Chairs to represent the judicial branch before the Congress. The practice of elevating an experienced member to the Chair is appropriate. If a Chair is designated at the end of one three-year term, a term of five years as Chair would be appropriate, increasing total service to eight years. This duration is not out of line in a life time-tenured institution. The shorter terms of members preserve sufficient opportunity for widespread involvement in rulemaking.

[3] Recommendation to the Chief Justice: The term for Chairs of the Advisory Committees should be five years.

Resources and support: Members of the Advisory Committees need sufficient resources and support for their part-time but nonetheless important duties. The permanent staff from the Administrative Office provides necessary logistical support for attending meetings and related duties. The Reporters provide important expertise and drafting assistance. Members exchange information about new developments as a matter of routine. Liaison members of the Standing Committee also contribute to the smooth operation of the committee system. The paper-flow through the Advisory Committees is substantial. The relevant literature in each of these areas of the law is growing rapidly.

Because committee members are part-time rulemakers it might be useful to provide them with some regular entrée to the secondary literature, including law journals and social-science publications that have some bearing on their responsibilities. The Reporters are the most logical bibliographers.

Various Advisory Committees have planned in-house seminars, presentations by panels of experts in their field, to bring members up-to-date on recent developments. These "continuing education" events should be continued.

[4] Recommendation to the Advisory Committees: Each Advisory Committee ought to consider adding to the Reporter's duties two tasks: first, regularly circulating law journal articles, social-science publications, and other pertinent articles; second, arranging and organizing in-house seminars.

Outreach and intake: One frequently heard criticism of federal rulemaking is that it is a closed process dominated by insiders and elites. The twin complaints are that some worthy proposals go begging for lack of a sponsor and some equally unworthy proposals are pushed through the process by members with an agenda. In fact, anyone can suggest a rules amendment; the Committees' meetings are open to the public, periods for public comment and public hearings

are routine steps; proposed rules changes are widely published and distributed;[53] and the official records of the various rulemaking entities are public documents. Unless a flood of comments prevents it, the Advisory Committee (through its Secretary) acknowledges correspondence and later advises every correspondent of the action taken on his or her proposal. But even inaccurate perceptions have a way of overtaking reality, and they cannot go unchallenged. The Administrative Office's brochure entitled *The Federal Rules of Practice and Procedure—A Summary for Bench and Bar* is a good example of the ongoing effort to correct misconceptions about federal rulemaking. In August 1994 the Chair of the Standing Committee wrote the presidents of all state bar associations, requesting them to designate persons to receive drafts and make comments; so far 42 of the state bars have done this. Advisory Committees have established some independent points of contact.

To promote both the appearance and reality of openness, greater uses of technology should be explored. The extensive mailing list for requests for comments on proposed rules changes usually generates only a few dozen responses. Not infrequently, public hearings scheduled for proposals are canceled for lack of interest.

There are alternate ways to reach interested persons. For example, the public hearing before the April 1994 meeting of the Advisory Committee on the Criminal Rules was broadcast on C-SPAN. Other things might be tried. Public hearings might be conducted relying on closed-circuit television. Proposed rules changes, traditionally distributed in print media, can be made available on the Internet at low cost. Most universities and agencies of the federal government already have access to the Internet—although most federal judges do not. Law firms are increasingly likely to be connected to the Internet. The most recent set of proposed amendments published for comment has been made available via the Administrative Office's home page.[54] Persons should be permitted to lodge their comments online for collection and transmittal to the Advisory Committee. The Advisory Committees and the Standing Committee could communicate by e-mail and other electronic means. Distribution of documents by fax can be discontinued and replaced by distribution of attachments to e-mail messages.

[5] Recommendation to the Administrative Office: Electronic technologies should be used to promote rapid dissemination of proposals, receipt of comments, and the work of the rules committees.

The need for research: It is frequently asserted, most often by academic critics,[55] that federal rulemaking today is too dependent on anecdotal information rather than empirical research. Rules changes more often than not depend on the legal research of the Reporters combined with the informed judgment of the members of the rules committees. To make this argument is not

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53 The full mailing list contains more than 10,000 names. Most addressees receive them ex officio, but there is also a revolving list that eventually will number 2,500 scholars and members of the bar. Any recipient on the revolving list who does not respond over the course of three years will be replaced with a new name.

54 At http://www.uscourts.gov. The Federal Judicial Center also has a home page, at http://www.fjc.gov, with its own publications and links to other legal sites on the Internet. The Cornell Legal Information Institute has made the rules themselves, and many other legal texts, available at http://www.law.cornell.edu. Other sites are blooming. For example, Villanova maintains what it calls "The Home Page for the Federal Courts on the Internet" at http://www.law.vill.edu/Fed-Ct/fedcourt.html.

55 Baker, supra note 1, at 334-35. See particularly Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brooklyn L. Rev. 841 (1993).

necessarily to find fault with the model of disinterested experts as rulemakers. Nor does the argument deny the not-infrequent, well-documented instances when rulemakers have relied on empirical research.[56] Yet not enough has been done to incorporate empirical research into rulemaking on a regular basis. The major difficulties: research is expensive, it takes a long time, and the results are of doubtful utility when they come from survey research or from demonstration projects. Controlled experiments are rare indeed, and sophisticated econometric analysis of variation (the subject of the next section) is difficult to conduct.

We cannot expect members of the rules committees to be experts in empirical research techniques, although a few have been. We can expect the Reporters to be well-versed in the literature related to their expertise, including interdisciplinary writings and studies in other disciplines that have some bearing. Indeed, this ought to be a criterion for appointment of Reporters. It might also be prudent for the Reporters to recruit colleagues in other disciplines whose expertise complements their own, as a kind of informal group of advisors. Additionally, the Administrative Office and the Federal Judicial Center may be called on to gather, digest, and synthesize empirical work of other institutions. The Advisory Committees should notify these institutions about what data ought to be collected. The Federal Judicial Center, in particular, should engage in original rules-related empirical research to determine how procedures are working. Likewise, the Center is adept at field studies and pilot programs—although, as we have observed, data from such projects is problematic, if only because of selection effects in litigation. (Litigants settle when they agree on a probable outcome; samples of litigated cases then may reflect the degree of uncertainty rather than the anticipated operation of the system. Moreover, the amounts paid in settlement, which may be the best indicators of anticipated performance, are rarely available to researchers.) Advisory Committees must take advantage of available data. Finally, a program might be developed for commissioning independent studies to be performed by outside experts under contract with the Advisory Committee.

In sum: the Standing Committee ought to be able to expect that the Advisory Committees will rely to the maximum possible extent on empirical data as a basis for proposing rules changes.

[6] Recommendation to all the Advisory Committees: Each Advisory Committee should ground its proposals on available data and develop mechanisms for gathering and evaluating data that are not otherwise available, and should use these data to decide whether changes in existing rules should be proposed.

An empirical research project of national scope is taking place under the auspices of the Civil Justice Reform Act of 1990.[57] Indeed, some have suggested that the program of district-by-district plans for case management has effectively created a second track of federal rulemaking that threatens the policy goals of national uniformity and political neutrality behind the Rules Enabling Act process. The pilot programs and district plans present an unparalleled opportunity for empirical research into the effectiveness of reforms, within districts and comparing districts with other districts. The Judicial Conference delegated primary responsibility for oversight and evaluation under the Act to the Committee on Court Administration and Case Management. But, as members of the Standing Committee will recall, the Standing Committee has established

56 Baker, supra note 1, at 335.

57 Pub. L. No. 101-650, 104 Stat. 5089 (1990).

a liaison with that Committee. Congress has extended the deadline for reporting to December 31, 1996.[58]

The Advisory Committee on the Civil Rules has the most direct interest in the evaluation of the delay and cost reduction plans. That Advisory Committee will be obliged to conduct its own assessment of the final report to Congress with the expectation that some local innovations in practice and procedure will deserve to be incorporated into the Federal Rules of Civil Procedure—and that less successful innovations will be abandoned, if necessary by being forbidden in the national rules. (We return below to the subject of uniformity.) The final report of the RAND study will provide the Advisory Committee with data for assessing future proposals for rules changes. In the long run, the Advisory Committees and the Standing Committee ought to be expected to learn to better utilize empirical research during the evaluation and reporting cycle. To this end, the Standing Committee should request that the Advisory Committee on Civil Rules provide a written report generalizing from the experience with the 1990 Act.

[7] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should report on and make suggestions about how data gathered from the experience under the Civil Justice Reform Act of 1990 might effectively be used in rulemaking.

Finally, the Standing Committee ought to go about gathering information about the experiences with the phenomenon of local options in the national rules. As part of the 1993 amendments to the Federal Rules of Civil Procedure, districts were afforded the discretion to opt-in or opt-out of various discovery rules changes. The resulting patchwork provides the equivalent of field experiments in the effectiveness of the optioned rules changes. The Federal Judicial Center has begun to collect data on the experience with opting in and out. The Standing Committee should recommend that the Advisory Committee on Civil Rules, in conjunction with the Federal Judicial Center and scholars, seek to evaluate and compare the experiences between districts that opted-in and those that opted-out. This study ought to assess the particular measures involved and offer guidance to the Standing Committee on the future appropriateness of writing local options into the national rules. There should be no bias in this inquiry: although it has long been a belief of the Standing Committee that uniform rules would facilitate a national practice, this belief should be investigated rather than treated as a shibboleth.

[8] Recommendation to the Advisory Committee on the Civil Rules: The Advisory Committee should assess the effects of creating local options in the national rules.

B. Standing Committee

Membership: The discussion about the composition of membership on the Advisory Committees will not be rehearsed here. Much of it applies to the Standing Committee.

It has been suggested that the Standing Committee should be reconstituted to consist only of an independent chair plus the chairs of the various Advisory Committees—or perhaps to have overlapping membership with the Advisory Committees, comprising the Chair plus one or two members of each Advisory Committee. Such a change would reduce the effectiveness of the Standing Committee as an independent voice (and a check), but it would increase continuity and

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58 Pub. L. No. 103-420, 103rd Cong., 2nd Sess. (Oct. 25, 1994).

ensure that each member is more thoroughly versed in the subject. The Chief Justice should consider each side of this balance in selecting the composition of the Standing Committee. One middle position between constituting the Standing Committee wholly from members of the Advisory Committees would be to make the Chairs full members of the Standing Committee, giving them *de jure* the roles that many have assumed *de facto* in recent years. We make no concrete suggestion here but again commend this possibility to the consideration of the Chief Justice.

The criticism that the committees do not "represent" the bar resonates more for the Advisory Committees, which have principal drafting responsibility, than for the Standing Committee. Therefore, we do not suggest enlarging the membership of the Standing Committee to include more attorneys. Nevertheless, it is proper to take into account goals of diversity in membership.

[9] Recommendation to the Chief Justice: Appointments to the Standing Committees should reflect the personal and professional diversity in the federal bench and bar.

Assuring uniformity. The Rules Enabling Act process is supposed to achieve and maintain a uniform national system of federal practice and procedure. National uniformity has been undermined by three factors. First, the ADR movement has created a menu of "nouveaux procedures"[59] that present choices of different resolution procedures for different kinds of disputes. Second, the Civil Justice Reform Act of 1990 balkanized rulemaking authority. Third, the Standing Committee has followed something of a reverse King James Version of rulemaking that "taketh away" and then "giveth": the Standing Committee's Local Rules Project has harmonized local rules with the national rules, but in recent rules amendments, e.g., Fed. R. Civ. P. 26(a), the Standing Committee has authorized district courts to strike off on their own paths, even to reject the national rule. But the new Fed. R. Civ. P. 83, effective on December 1, 1995, insists that local rules be consistent with, and not duplicate, national rules. To promote uniformity in other areas, the Standing Committee has circulated to all district courts a report of the Local Rules Project on criminal rules, and the Reporter has prepared a careful study that will serve as the basis of initiatives looking toward more uniform rules of ethics.

To identify these three developments is not to pass judgment on them, although the worry often heard is that the federal courts are reverting to the pre-1938 era of local procedure. It would not be appropriate for our Subcommittee to recommend a once-and-for-all solution—though we have already suggested taking a good hard look at the consequences. The Judicial Conference's own Long Range Planning Committee was unable to suggest a concrete solution.[60] Our exercise in taking the long-range view would not be complete if we did not at least draw attention to a worry expressed by many on the bench and in the bar. The worry is that the national rules and rulemaking are well on their way to becoming merely the lounge act and not the main room attraction in federal practice and procedure.

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59 Baker, supra note 1, at 334.

60 Proposed Long Range Plan for the Federal Courts (Mar. 1995) Recommendation 30, Implementation Strategy 30b: "The national rules should strive for greater uniformity of practice and procedure, but individual courts should be permitted limited flexibility to account for differing local circumstances and to experiment with innovative procedures."

[10] Recommendation to the Standing Committee: The Standing Committee ought to keep the goal of national uniformity prominent in its expectations and decisionmaking. The Local Rules Project initiatives should be understood as a part of the continuing duty of the Standing Committee. There ought to be a strong but rebuttable presumption against local options in the national rules.

Redrafting proposals. The main task of drafting proposed rules belongs to the Advisory Committees. The Advisory Committees possess the requisite expertise and serve as the focal point for suggestions and public commentary on the present and proposed rules. Rulemaking procedures and tradition, however, recognize that the Standing Committee may revise drafts of proposed rules submitted by the Advisory Committees, before or after the public comment period. Those procedures and traditions likewise anticipate that the Standing Committee will exercise self-restraint. Members of the Standing Committee should communicate concerns about style and grammar to the Chairs and Reporters of the Advisory Committees before the meeting of the Standing Committee begins, to permit these matters to be rectified off the floor (it is easier to draft in small, peaceful groups) and presented to the Standing Committee in writing to facilitate careful reflection. Meetings of the Standing Committee then can focus on substance. We recognize, of course, that style and substance may be inseparable. If in the judgment of the Standing Committee a proposal requires substantial changes for either style or substance, the draft ought to be returned to the Advisory Committee. This division of the rulemaking labor obliges the Standing Committee to be aware of its function and respectful of the role of the Advisory Committees.

[11] Recommendation to the Standing Committee: The Standing Committee and its members must be mindful that the primary responsibility for drafting rules changes is assigned to the Advisory Committees. Members of the Standing Committee should facilitate careful changes in language. If in the judgment of the Standing Committee a proposal requires substantial changes, the Standing Committee should return the measure to the Advisory Committee for further consideration.

Reporter. The Reporter to the Standing Committee has duties different from the those of the Reporters to the Advisory Committees. The former serves as a drafter, but the limited drafting function of the Standing Committee likewise limits this responsibility of its Reporter. The Reporter facilitates communication between the Advisory Committees and the Standing Committee, especially between regular meetings of the Standing Committee, by attending the meetings of the Advisory Committees and by communicating with their Reporters. The Reporter advises the Chair, assists the Administrative Office rules committee staff, and cooperates with the Federal Judicial Center. The Reporter monitors Congressional activities that are related to rulemaking and rules proposals. The Reporter keeps the Standing Committee abreast of commentary and literature related to the rules and rulemaking. The Reporter performs outreach efforts such as appearing before bar groups to familiarize the profession and the public with the rulemaking process and particular proposals. The Reporter serves as a director for special projects, such as the Local Rules Project. The Reporter serves as an advisor to the Standing Committee, as for example with the pending challenge to the Ninth Circuit Rules jointly filed by several states' attorneys general. The Reporter, as the "scholar-in-residence" of the Standing Committee, pursues long range proposals for rulemaking.

If these duties continue to increase and become more time-consuming, the Standing Committee may eventually decide to appoint an Associate Reporter to assist the Reporter. The

sense of the Subcommittee is that things have not yet reached that point. If the Standing Committee accepts the recommendation below to allow the Subcommittee on Long Range Planning to lapse as well as other recommendations made here that would add to the duties of the Reporter, then an Associate Reporter might be needed sooner rather than later. Therefore, our recommendation is open-ended.

[12] Recommendation to the Standing Committee: The Standing Committee should take cognizance of the growing demands being placed on its Reporter and eventually should consider whether to appoint an Associate Reporter.

Liaison members. Liaison members from the Standing Committee attend and have the privilege of the floor at meetings of the Advisory Committees. This innovation ought to be continued with some attention to developing a more definite role for the liaison members.

[13] Recommendation to the Chair: The practice of appointing liaison members from the Standing Committee to the various Advisory Committees should be continued.

Subcommittee on Style. Judge Robert E. Keeton, the immediate past Chair of the Standing Committee, established a Subcommittee on Style and charged it with undertaking a restyling of the various sets of federal rules. That Subcommittee appointed a Consultant who has written a manual on rules drafting. The Subcommittee regularly has contributed to the efforts of the Advisory Committees and the Standing Committee to achieve greater consistency and clarity in the language of the federal rules.

The objective of this effort—uniform, readable, rules consistent with modern legal usage—is important not only to users of the rules but also to drafters, for clarity promotes understanding. The work of the Subcommittee, and particularly the Consultant's drafting manual, will be advantageous to the Standing Committee (and other legal drafters) in the years to come. But it remains an open question whether the plan to rewrite the body of existing rules will succeed. The principal question is whether it is possible to revise the rules without too many accidental change in meaning. A stated goal of preserving meaning invites readers to use the old rules to interpret the new ones, which may complicate interpretation for some time. (This has occurred with the 1948 amendments to Title 28 of the United States Code.) Discovery of ambiguities also leads to discovery of unwelcome substance; yet definitions of "unwelcome" differ, and the ensuing debate about substance may frustrate agreement on style changes.

The Supreme Court also has shown some unease with this process, which until the completion of the project produces differences in style across rules; the "restyled" rules use terminology in a different way from the older rules. When sending a package to Congress on April 27, 1995, the Supreme Court changed "must" to "shall" to preserve consistent usage. The Court may prefer an all-at-once project, of the kind now under way, but thoroughgoing restyling will be a long time coming for several sets of rules. The Advisory Committee on Appellate Rules has completed its initial review of a complete rewrite; the other advisory committees are mid-way in the process or have not yet begun it.

The Long Range Planning Subcommittee believes that the objects of the project are desirable, and that it should be continued. Better drafting for rules newly proposed, or revised for other reasons, should be pursued assiduously. Costs and benefits of revising whole sets of rules at once are more closely balanced: the gains are greater, but so too the costs. Experience with the

Appellate Rules will permit the Standing Committee to decide how to proceed with the other sets of rules.

[14] Recommendation to the Standing Committee: The Standing Committee should continue to improve the style of new and amended rules, and should use its experience to decide whether to revise each set of federal rules fully.

Subcommittee on Long Range Planning. The immediate past Chair of the Standing Committee established a Subcommittee for Long Range Planning. Since then, the Subcommittee has planned to find a role, without substantial long range success. The rulemaking process *is* a form of long-range planning, which suggests that there is no need for a separate long-range planning organ. The Subcommittee has filed reports with the Standing Committee about long range proposals already in the rulemaking pipeline and recommended the introduction of other such proposals. It has recommended that Advisory Committees study comprehensive packages of procedural reforms proposed by scholars, committees, and bar groups. (In the three years since the Standing Committee adopted this recommendation, no Advisory Committee has reported back to the Standing Committee on any of these proposals.) The Subcommittee has attempted to monitor the work of the Judicial Conference's Committee on Long Range Planning. It performed this self-study of rulemaking procedures.

The term of one member of the Subcommittee as a member of the Standing Committee expired before the preparation of this Report; his vacancy on the Subcommittee has not been filled. The term of Professor Baker, the original chair of the Subsommittee, expired at the end of September 1995. He too has not been replaced, but he has continued to participate in the preparation of this final version of the Report. The Subcommittee enthusiastically recommends that with the completion of this Report the Standing Committee disband the Subcommittee on Long Range Planning. (Similarly, in June 1995 the Chief Justice discharged the Judicial Conference's own Committee on Long Range Planning.) Another option is to assign long range planning in rulemaking to the reportorial function, perhaps on the occasion of creating the position of Associate Reporter, as is anticipated in a previous recommendation.

[15] Recommendation to the Chair of the Standing Committee: The Subcommittee on Long Range Planning should be abolished. Issues regarding long range planning in the rules process should be reassigned to the Reporter.

C. Judicial Conference

The Judicial Conference performs a function somewhere between the Standing Committee's and the Supreme Court's. For the most part, the Judicial Conference evaluates proposals on the basis of the paper record compiled by the Advisory Committees and the Standing Committee, and it gives thumbs up or thumbs down (the latter rarely) without making changes. We do not make any recommendations concerning the way the Judicial Conference deals with proposals from the Standing Committee—except for the obvious implication that a change in the role of the Supreme Court (discussed below) would alter the role of the Judicial Conference, and vice versa. The Judicial Conference is the largest body that participates in the process and hence is the least suited to technical drafting. It also has the least time for rulemaking; its agendas are crowded with other subjects, and rules are discussed briefly when they are discussed at all. This increases the chance of misunderstanding, which leads to error. As we mention below, therefore, if the Supreme Court retains its current role, it may be appropriate to remove the Judicial Conference as a separate step in the process.

D. Supreme Court

The main issue regarding the Supreme Court's participation in judicial rulemaking is whether the High Court should continue its role in the statutory scheme. Congress has designated the Supreme Court as the entity with power to promulgate rules for the federal courts, subject to the possibility of legislation during the seven months between proposal and effective date.

Historically, the Court's role has been justified on two levels. First, the Supreme Court, as the highest federal court, exercises supervisory powers over the lower federal courts. Second, the prestige of the Court lends authority to the rules.

Commentators and individual Justices have questioned these justifications and argued that the Court's role is, in the pejorative, to serve as a "rubber stamp." Others on and off the Court have answered that the historic rationales still apply. They draw attention to the occasions when the Supreme Court has disapproved or altered draft rules and to the dissenting statements from some of the Justices regarding particular rules. There is the further, but inevitable, complication that the Supreme Court frequently is called on to interpret the rules and to decide whether they are valid under the Rules Enabling Act and the Constitution.

Justice White's statement regarding the 1993 package of amendments summed up his 31 years of experience in judicial rulemaking.[61] He concluded that the Supreme Court's "promulgation" of rules functionally amounts to a certification to the Congress that the Rules Enabling Act procedures are operating properly and that the particular proposals before the Court are the products of a careful rulemaking process. The transmittal letters from the Chief Justice since then have made the same point.

Given the considerations on both sides, we leave to the Justices themselves the question whether there should be any change in their role—and, correspondingly, whether, if it is best to maintain the Court's current role, it would be appropriate to reduce the role of the Judicial Conference. Having *both* of these bodies pass on rules that have already been fully ventilated consumes much time for little purpose.

There is one other possible change worth mentioning. A few years ago, the British Embassy sent a diplomatic note to the Court concerning the implications of a proposal for service in foreign countries . The measure was returned to the Judicial Conference for further consideration. After the concerns of the foreign governments were addressed, the proposal went forward. In the aftermath of that round of rulemaking, the Justices informed the Standing Committee that they wanted to be alerted to any controversy or objections to particular proposals, as part of the written record forwarded with the rules packages. The Supreme Court may appropriately conclude that return of rules packages—rather than the revision of the proposals and promulgation of rules that the Advisory Committees and Standing Committee have not reviewed—is the best approach when the proposals it receives seem problematic to the Justices.

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61 Statement of Justice White, 113 S.Ct. at 575 (Apr. 22, 1993).

E. Congress

The separation of powers that is part of the structure of the Constitution is not designed for efficiency. By creating federal courts and defining their jurisdiction, Congress keeps the promise of the Preamble to "establish justice." Rulemaking is a power that is legislative in nature to the extent that rules affect the interests of litigants and regulate the conduct of officers of the Third Branch (including attorneys), but is nevertheless delegated partly to the Third Branch. The line drawn in the statutory authorization allows rules dealing with "practice and procedure" but prohibits rules that "abridge, enlarge or modify any substantive rights."[62] On the judicial side, this distinction requires careful discernment.

Congress has the power to adopt rules and procedures for the federal courts.[63] "May" does not imply "should." The wisdom behind the Rules Enabling Act procedures is deep. The Third Branch has the expertise to write rules of practice and procedure. Respect for the independence of the coordinate judicial branch, and the overarching values that independence protects, also counsels moderation in legislative promulgation or amendment of rules. Similarly with respect to legislation regulating the rulemaking process. In his year-end report for 1994, the Chief Justice wrote: "I believe that this [Rules Enabling Act] system has worked well, and that Congress should not seek to regulate the composition of the Rules Committees any more than it already has." The Judicial Conference has reached the same conclusion. See also Recommendation 1 above. And the Judicial Conference's Committee on Long Range Planning shares this understanding. See *Proposed Long Range Plan for the Federal Courts* (Mar. 1995) Recommendation 30, Implementation Strategy 30a ("Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.").

The Judicial Conference has the responsibility to represent before Congress the interests of the federal courts and the citizens they serve. The Standing Committee has the responsibility to aid the Judicial Conference in performing this role. The Standing Committee should continue to monitor legislative activity and serve as a resource to the Judicial Conference to remind Congress of the values behind the Rules Enabling Act. Existing links between the Advisory Committees (and the AO) and Members of Congress and committee staffs should be maintained and, if possible, reinforced. It may be necessary to remind Congress, too, that the 1988 legislation increasing the time needed to amend a rule affects the relation between legislative and judicial branches in the way we discussed above.

F. The Rulemaking Calendar

The rulemaking cycle: Three changes in the rulemaking environment have occurred at roughly the same time. (1) The period between initial proposal and ultimate rule was extended in 1988 by increased opportunities for comment and an increased length of report-and-wait periods, so that it is now difficult to see a proposal through in fewer than three years. (2) The national rulemaking process had become more frenetic, with multiple packages pending simultaneously. Instead of five or more years between amendment cycles (the old norm), it is now common to see multiple amendments to the same rule in different phases: one pending before Congress, another pending before the Judicial Conference, a third out for public comment, and a fourth under con-

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62 28 U.S.C. §2072 (a) & (b).

63 U.S. Const. art. III, §1.

sideration by an Advisory Committee. (3) Meanwhile local rulemaking has burgeoned, in part, but only in part, at the instance of Congress (the Civil Justice Reform Act of 1990).

On one thing most people agree: *all* of these developments are unfortunate. It takes too long to amend a rule or create a new one, and delay not only perpetuates whatever problem occasioned the call for amendment but also invites Congress and local courts to step in. The former undermines the Rules Enabling Act process (and discards the benefits of expertise); the latter undermines national uniformity. If the Supreme Court cannot respond quickly to a problem, legislation or local rules must be the answer. That amendments to the Rules Enabling Act are themselves responsible for the extended rulemaking cycle—so that Congress is the source of the delay it bemoans—offers no succor to those who seek swift changes. At the same time, few people can be found to support the existence of multiple changes to the same rule. Professor Wright, an observer and long-time participant in the rulemaking process, has condemned the process of overlapping amendments in no uncertain terms.[64] His *cri de coeur* is one among many strong and fundamentally correct indictments. It also illustrates the intractable nature of the problem—for it is precisely the change in the length of the cycle that has made overlaps inevitable!

When rules could be amended after a year or so of effort, and when the Chairs of the Advisory Committees and Standing Committee had indefinite terms, it was easy to have discrete and well-separated packages of rules. The heads of the committees could plan a coherent program, confident that they could see it through, and that if new information called for prompt change, they could accomplish it by adding it to an existing package. No more. The increased length and formality of the rulemaking process makes it difficult for a bright idea or alteration required by legislation to "catch up" with an existing package. Meanwhile the members of the committees serve shorter terms, so that fresh blood brings fresh suggestions every year and the Chairs, to have any effect before their three-year terms expire, must act with dispatch. No wonder we see a drawn-out process in which amending cycles overlap while local rules sprout like weeds. And it is almost impossible to imagine a cure while the duration from proposal to effectiveness is longer than the terms of Chairs.

What is worse, a cure that entailed enforced separation of rules packages—say, a maximum of one package per three-year term of a Chair—would have large costs of its own. Would the package have to start life at the outset of the Chair's time? Too soon; the Chair needs time to settle in, do some deep thinking, review the data, collect the thoughts of the committee, and so on. Then would the package start late in the Chair's term? Too late; its architect would leave before shepherding the package through and accommodating the many demands for amendments that occur in the process. Meanwhile new things come up—new statutes, decisions that interpret a rule to create a trap for the unwary (the source of the overlapping proposals concerning Fed. R. App. P. 3 and 4 that Professor Wright bemoaned)—and the cost of tidiness may be that litigants forfeit their rights. Put to a choice between simplifying the life of judges and authors, and preserving the rights of litigants, the rules committees sensibly choose the latter. That seals the fate of proposals to simplify and separate amendment packages without any escape hatch. Once we allow the escape hatch, however, messiness is inevitable.

Several recommendations above aim at relieving the stresses that have led to the current problems. We have suggested longer terms for Chairs and slower turnover of committees. We

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64 Charles Alan Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev. Litigation 1 (1994).

have ruminated about the possibility of abbreviating the rulemaking process by skipping one or another of the participants (either the Judicial Conference or the Supreme Court). What we now take up is the possibility of setting norms for our own work—norms rather than rules, for the reasons we have explained, but norms that if implemented will relieve some points of stress.

Let us establish biennial cycles as the norm. Rules would be issued for comment every other year—not every year, or every six months, as is possible now. Advisory Committees could be encouraged to make recommendations to the Standing Committee every year (to ease the problem of congestion for both the Advisory Committees and the Standing Committee), but proposals would be consolidated for biennial publication. All Advisory Committees could be on the same schedule, so unless some emergency intervened the bar could anticipate that, say, proposals would be sent out for public comment only in even-numbered years. Chairs with longer tenure could plan for these cycles, and it would be easier for late-occurring ideas to "catch up" without the need for separate publication.

A change in the publication cycle could be accompanied, to advantage, by a change in the Standing Committee's schedule. The summer meeting of the Standing Committee has been set by working backward from the May 1 deadline for promulgating rules and transmitting them to Congress (with a December 1 effective date). The Supreme Court can promulgate the rules by May 1 only if it receives a recommendation of the Judicial Conference the preceding fall (a recommendation at the Conference's spring meeting would leave the Court too little time). The Conference can make the necessary recommendation only if the Standing Committee acts by July, which leaves time to write and circulate the final recommendations. The summer meeting is therefore an enduring feature of the rulemaking landscape, so long as the Judicial Conference and the Court play their current roles and the statutory schedule is unchanged.

Not so the winter meeting—and not so the content of meetings. If all recommendations to the Judicial Conference are consolidated for action at the summer meeting, the second meeting of the year can be reserved for the discussion of drafts the Advisory Committees want to publish for comment. A meeting of the Standing Committee in the fall, rather than the winter, would create sufficient time to have a full comment period, a meeting of the Advisory Committee the next spring, and consideration of the final proposals at the ensuing summer meeting of the Standing Committee. This change could shave six months to a year off the rulemaking schedule, making a biennial cycle more attractive.[65]

As we have stressed, it will be essential to allow exceptions for true exigencies, as well as for off-year republication of proposals that deserve further comment. These should be few, however, as a longer cycle will permit more concentrated thought.

---

[65] The following schedule would work. In spring or summer of Year One, the Advisory Committee makes a recommendation for publication. The Standing Committee would consider the recommendation at a meeting between September 15 and 30. Publication at the beginning of November (giving the AO a month for preparation) would produce a comment period closing at the end of April in Year Two. Advisory Committees would meet toward the end of April, in conjunction with any oral hearings, to consider comments and make recommendations for a meeting of the Standing Committee to be held at the end of June of beginning of July. The Standing Committee would transmit any approved drafts to the Judicial Conference for consideration in the fall of Year Two. If the Conference and Supreme Court approved, the rule would take effect on December 1 of Year Three, a total time of approximately 2½ years from initial proposal to effectiveness.

[16] Recommendation to the Standing Committee: The Standing Committee should establish a biennial cycle as the norm in rulemaking, should limit its summer meeting to the consideration of proposals to the Judicial Conference, and should hold a fall meeting for the consideration of recommendations that drafts by sent out for public comment.

Conclusion

The Subcommittee believes that the current rulemaking process is fundamentally sound, but improvement is both possible and desirable. Practices and procedures of the federal courts are admired and emulated by the state court systems and by the court systems of other countries. The procedure that has evolved for maintaining that system of rules deserves substantial credit for this. Nevertheless, we offer these constructive criticisms and recommendations.

Our hope for this Self-Study Report is that it will assist the Standing Committee to consider and then recommend adjustments in the federal judicial rulemaking mechanism.

Respectfully submitted,

Thomas E. Baker
Alvin R. Allison Professor
Texas Tech University School of Law

Frank H. Easterbrook
Circuit Judge
Court of Appeals for the Seventh Circuit

Agenda Item VI

Admiralty Rules B, C, E

The attached materials embody proposed amendments to Admiralty Rules B, C, and E. For the most part, the changes are technical. The project began with the unexplained failure in 1991 to adopt amendments to Rule B to parallel the 1991 changes in Rule C. It moved on to consider the failure to amend Rule B(2) to conform to the 1993 changes in the service-of-process provisions in Civil Rule 4. Other topics have been added, most notably a Department of Justice proposal to add a new Rule C(6)(a) to deal with statutory forfeiture proceedings.

The technical nature of the amendments is a source of both reassurance and uncertainty. The proposals have been prepared by expert admiralty practitioners, who surely are skilled in the technical aspects of admiralty practice. Their expert knowledge makes it tempting to rely on their judgment. The temptation must be resisted. Careful study must be devoted to these proposals, even if the result is to adopt them wholesale. The drafting too must be studied, knowing that style improvements should be made but wary of the risk that style improvements may inadvertently change meaning.

Rule C(6)(b) affords a simple illustration of the kinds of questions that must be asked. The present rule begins by addressing "the claimant of property." The proposed rule addresses "any person who asserts a right of possession or an equity ownership interest in property," who shall file "an appearance and statement identifying their [sic] interest * * *." The draft seems to assume that the only persons who could have been claimants were those who asserted "a right of possession or equity ownership interest." The admiralty concepts indeed may embrace all possible claims within the notions of "right of possession" or "equity ownership," but the Committee must know the meaning of these terms in appraising the proposal. And of course "their" should be "the." The same phrases appear in new Rule C(6)(a), which addresses an action in rem to enforce a forfeiture for violation of a federal statute. If there is a special admiralty meaning for "equity ownership," there is no apparent reason for using the same term in dealing with statutory forfeiture proceedings. Is a materialman's lien, for example, either a right of possession or an "equity" ownership?

These materials have arrived on the eve of assembling the April agenda. The April agenda is crowded as it stands. Before beginning the task of redrafting, it is important that the Committee give preliminary consideration to these materials to provide a collective sense of the issues that must be addressed.

The materials are set out, with interspersed copies of some of the relevant correspondence, in this order: (1) the proposed full text of the amended portions of Rules B, C, and E; (2) a February 6 letter from Mark Kasanin to the Reporter, conveying the January 31 letter from Robert Zapf to Mark Kasanin, and an October 3 letter of the Reporter to Mark Kasanin; (3) an overstrike-and-redline version that shows some, but not all, of the proposed changes; and (4) proposed Committee Notes.

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March 5, 1996

Federal Rules Advisory Committee
Amendments to Rules B, C and E

Our File: 00029

Mark O. Kasanin, Esq.
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Dear Mark:

The enclosed versions of portions of Rules B, C and E were prepared after consultation with and on the advice of members of the Practice and Procedure Committee of the United States Maritime Law Association and representatives of the Department of Justice. They are hereby recommended by the MLA for adoption by the Federal Rules Advisory Committee.

By copy of this letter to Philip A. Berns, Esq., we are forwarding these versions to him with the request that he obtain final DOJ approval and communicate same to the Committee.

I wish to thank all of the Committee members and especially Phil Berns and Professor Sharpe for their guidance and participation in this effort.

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With best regards,

Very truly yours,

Robert J. Zapf
Chair
Practice and Procedure Committee

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RULE B. Attachment and Garnishment: Special Provisions

(1) *When Available; Complaint, Affidavit, Judicial Authorization, and Process.* With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or the plaintiff's attorney that, to the affiant's knowledge, or to the best of the affiant's information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue process of attachment and garnishment and the plaintiff shall have the burden at a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. If the property is a vessel or tangible property on board a vessel, the process or any supplemental process shall be delivered to the marshal for service. If the property is other tangible or intangible property, the process shall be delivered by the clerk to a person or organization authorized to serve it who may be a marshal, a person or organization contracted

with by the United States, a person specially appointed by the court for the that purpose, or if the action is brought by the United States, any officer or employee of the United States. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(n), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

(2) **Notice to Defendant.** No judgment by default shall be entered except upon proof, which may be by affidavit, * * * (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4 (c), (e), (f), (g), or (h), ...

RULE C

(2) Complaint. In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and in admiralty and maritime proceedings, it shall state that the property is within the district or will be during the pendency of the action. In forfeiture proceedings, if the property is located outside of the district, the complaint shall state the statutory basis for the court's exercise of jurisdiction over the property. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) **Judicial Authorization and Process.**

* * *

If the property is a vessel or tangible property on board a vessel, the warrant or any supplemental process shall be delivered to the marshal for service. ...

* * *

If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that

exigent circumstances existed. ...

* * *

(4) **Notice**. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after the execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which any claim against the property seized, appearance, or answer is required to be filed as provided by subdivision (6)(a) or (b) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch.250, § 30, as amended.

* * *

(6) Responsive Pleading; Interrogatories.

(a) *Civil Forfeitures*. In any action in rem to enforce a forfeiture for violation of a Federal statute, any person who asserts a right of possession or an equity ownership interest in the property or a claim against the property that is the subject of the action must file an appearance and statement identifying their interest or a claim against the property within 20 days after the receipt of actual notice of the execution of the process or the final publication of such notice as provided in subsection (4),

whichever is earlier, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the appearance and statement of interest or claim against the property. Any such appearance and statement of interest or claim against the property shall be verified on oath or solemn affirmation. If the appearance and statement of interest or claim against the property is made on behalf of an agent, bailee, or attorney for the appearing party or claimant, it shall state that the agent, bailee, or attorney is duly authorized to file the appearance and statement of interest or claim against the property. At the time of answering the appearing party or claimant must also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

(b) *Maritime Arrests and Other Proceedings.* Any person who asserts a right of possession or an equity ownership interest in property that is the subject of an action in rem shall file an appearance and statement identifing their interest within 10 days after process has been executed or within 10 days after the last date of publication as provided by subdivision (4) of this rule, whichever is earlier, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the appearance and statement of interest . The appearance and statement of interest shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which said party demands its restitution or the

right to defend the action. If the appearance and statement of interest is made on behalf of the appearing party by an agent, bailee, or attorney for the appearing party, it shall state that the agent, bailee, or attorney is duly authorized to file the appearance and statement of interest. At the time of answering the appearing party shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

* * *

RULE E

(3) Process

(a) *Territorial Limits of Effective Service.* In admiralty and maritime proceedings, process in rem, or of maritime attachment and garnishment shall be served only within the district. This provision shall not apply in forfeiture cases governed by 28 U.S.C. § 1355 or any other statute providing for service of process outside of the district.

* * *

(7) **Security on Counterclaim.** Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant, claimant, or any person making an appearance pursuant to Rule C(6)(a) or (b) in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause show, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E(7) as if it had given such security

if a private person so situated would have been required to give it.

* * *

(9) * * *

(b) *Interlocutory Sales.* If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate, or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant, claimant or any person making an appearance pursuant to Rule C(6)(a) or (b), order delivery of the property to such moving party, upon the giving of security in accordance with these rules.

(10) Preservation of Property. Whenever property is attached or arrested pursuant to the provisions of Rule E(4) (b) that permit the marshal or other person having the warrant to execute the process without taking actual possession of the property, and the owner or occupant of the property is thereby permitted to remain in possession, the court, on the motion of any party or on its own

motion, shall enter any order necessary to preserve the value of the property, its contents, and any income derived therefrom, and to prevent the destruction, removal or diminution in value of such property, contents and income.

McCUTCHEN
McCUTCHEN, DOYLE, BROWN & ENERSEN, LLP

February 6, 1996

Edward H. Cooper, Esq.
Associate Dean
The University of Michigan Law School
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Federal Rules Advisory Committee
Possible Amendments to Rules B, C and E

Dear Ed:

As requested by my letter of November 14, 1995 to Bob Zapf, Chairman of the MLA Committee on Practice and Procedure, I have now received a response dated January 31, 1996 (copy enclosed).

As you will see, this includes "red-lined" versions of Rule B(1) and B(2), Rule C(3), C(4) and C(6) and Rule E(7) and E(9). (The "red-lined" versions are actually "grey-lined".) These versions are recommended by the MLA for changes to Rules B, C and E.

There is also a detailed response from Bob to your letter of October 3, 1995 to me.

You will note the footnote on page 2, to the effect that the MLA does not take any formal position with respect to the proposed wording of a new Rule C(6)(a), submitted by the Justice Department in connection with civil forfeitures (this proposed C(6)(a) was not included). I have contacted Frank Hunger's office to ask if the lawyer involved with the proposed forfeiture provision would contact Bob Zapf directly to see if anything can be worked out on the DOJ-proposed Rule C(6)(a) to avoid confusion concerning the varying use of the words "claim" and "claimant." As you will see, the MLA has gotten rid of the "claim" language and has substituted "appearance" therefor in Rule C(6)(b) for maritime arrests for one asserting a possessory interest. On the maritime side, this leaves the word "claim" only for one filing under Rule F in a limitation of liability proceeding as a claim on the fund.

I am hopeful that something will be worked out between the MLA and DOJ with respect to this Rule C(6)(a) which we can forward to you so that all of these proposals can be on our April agenda. It has been decided by the Department of Justice that Phil Berns, who is with

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DOJ in San Francisco, and who is very familiar with all of this will be the DOJ lawyer to try to work this out with Bob Zapf.

With best regards.

Very truly yours,

Mark O. Kasanin

Direct: (415) 393-2144
mkasanin@mdbe.com

cc: John K. Rabiej, Esq. (w/enclosure)
Philip A. Berns, Esq. (w/o enclosure)
Hon. Patrick E. Higginbotham (w/enclosure)
Robert J. Zapf, Esq. (w/o enclosure)

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January 31, 1996

Federal Rules Advisory Committee
Possible Amendments to Rules B, C and E

Our File: 00029

Mark O. Kasanin, Esq.
McCutchen, Doyle, Brown & Enersen
Three Embarcadero Center, Floor 25
San Francisco, California 94111

Dear Mark:

At the 1995 Fall Meeting of the Maritime Law Association (the "MLA") the following resolution was adopted:

> The Association hereby authorizes the Chair of the Practice and Procedure Committee, in consultation with and on the advice of members of that committee, to confer with representatives of the Department of Justice and the Advisory Committee to the Judicial Conference, and to adopt as a recommendation of the Maritime Law Association of the United States such non-substantive, technical amendments to the wording of Rules B, C and E as necessary to ensure conformity among the admiralty rules and the Federal Rules of Civil Procedure consistent with changes previously authorized by the Association.

As the Chair of the Practice and Procedure Committee, I have consulted with and received the advice of members of the

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Committee, and enclose herewith redlined versions of Rule B(1) and B(2); Rule C(3), C(4) and C(6) and Rule E(7) and E(9). These versions are hereby recommended by the MLA for changes to Rules B, C and E.[1]

You have referred us to the letter dated October 3, 1995 from Professor Edward H. Cooper of the University of Michigan Law School and his proposed changes to Rule B. The MLA has the following views and recommendations concerning Professor Cooper's proposals:

1. We do not agree with Professor Cooper's proposal to add the words "summons and" in line 14 of his draft Rule B. Under existing practice, the court does not authorize issuance of the summons, but only issuance of the process of attachment and garnishment. There is no need to have the court approve issuance of the summons, which is addressed to the defendant in personam,

[1] It should be noted that the MLA does not take any formal position with respect to the proposed wording of a new Rule C (6)(a) submitted by the U.S. Department of Justice in connection with civil forfeitures. The MLA previously recommended changes to Rules B, C and E in an attempt to eliminate confusion concerning the varying use of the words "claim" and "claimant" in the Admiralty Rules to refer to those persons who affirmatively assert a right of recovery against a vessel or other property, and also to refer to a party who asserts a property interest in the vessel or property seized and the right to defend claims against the vessel or property. The proposed wording for Rule C (6)(a) put forth by the Department of Justice continues to use the words "claim" and "claimant".

while there is a need for the court to authorize issuance of the process of maritime attachment and garnishment, which is addressed to a non-party garnishee. The clerk, as a matter of course, issues the summons. Hence, in the MLA recommended draft of Rule B, that wording is deleted. The same phrase is also deleted from the MLA recommended wording for Rule C(3).

2. We agree with the change in line 34 of Professor Cooper's draft Rule B, correcting the reference to Rule 4(e). The new reference is to Rule 4(n).

3. We agree with Professor Cooper that the Marshal should serve process of attachment and garnishment if the property to be seized is a vessel or tangible property on board a vessel. We also believe that the Marshal should serve supplemental process addressed to a vessel or tangible property on board a vessel. Accordingly, while we accept Professor Cooper's shift of the supplemental process provision from lines 15 - 17, to lines 31 - 33 of his draft, we have amended the text of his line 24 by inserting after the word "process" the words "or any supplemental process". Also, the text of line 23 of his draft has been corrected by adding the word "a" between "is" and "vessel".

These changes have been carried out in the enclosed MLA recommended wording for Rule B(1).

4. We do not agree with all of Professor Cooper's proposed amendments to Rule B(2). Rule B(2) deals with default situations in the context of a case where process of maritime attachment and garnishment has been issued. We do not agree that there should be any reference in Rule B(2) to a waiver of service in quasi in rem jurisdiction cases. New Rule 4(b) pertains to a defendant's waiver of service after he has been notified of the suit and a copy of the Summons and Complaint delivered to him. Clearly, this would not be the situation in Rule B attachment cases, where the attachment can be avoided by the appointment of an agent for service of process in the jurisdiction. As attachments are not only for the purposes of obtaining jurisdiction but also for obtaining security, it is inconceivable that a plaintiff would seek a defendant's waiver of service of process under new Rule 4(b) before seeking a maritime attachment. Thus, we have deleted the words "or that service has been waived under Rule 4(b)" appearing in lines 42 and 43 of Professor Cooper's draft.

We agree with Professor Cooper that the current reference to old Rule 4(d) should be to new Rule 4(e), and we agree with the inclusion in Professor Cooper's draft of a reference to new Rule 4(e). We also agree with the inclusion in Professor Cooper's draft of references to new Rule 4(f), (g) and (h).

We do not agree that the amended Rule B should contain a reference to new Rule 4(i), (j), or (k). The first two of these provisions deal with service on the United States or upon foreign, state, or local governments. Although existing Rule B refers to old Rule (4d) which, in turn, did refer to methods of service upon the United States and upon states, there are sovereign immunity obstacles to service of process of maritime attachment and garnishment on property of the United States or of a state. The issue is more complicated with respect to foreign states, which contractually may have waived sovereign immunity. The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602, et seq. deals with this issue. Because there is no reference to foreign states in the existing Rule B, we do not believe there should be a reference to foreign states under the proposed amended Rule B. Similarly, because there is no reference to the territorial limits of effective service in the existing Rule B, we do not include a reference to such limits in the proposed amended Rule B, and hence the reference to new Rule 4(k) is deleted. Such a reference could cause confusion concerning the effectiveness of process of maritime attachment and garnishment, which can only reach property within the district. The reference to new Rule 4(k) may cause confusion as it refers to service outside the judicial district.

The enclosed redlined version of Rule B takes into account these suggested changes.

We also enclose a redlined version of Rules C and E, showing the changes recommended by the MLA. As noted in the footnote above, the MLA does not have any comments on proposed Department of Justice Rule C(6)(a).

If you have any questions concerning the above or the enclosed drafts, please do not hesitate to contact the undersigned.

Respectfully submitted,

Robert J. Zapf
Chair Practice and Procedure
Committee
U.S. Maritime Law Association

RJZ:amc

Enclosure

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(with enclosures)

Rule B. Attachment and Garnishment: Special Provisions

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or the plaintiff's attorney that, to the affiant's knowledge, or to the best of the affiant's information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing summons and process of attachment and garnishment shall issue. ~~Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court.~~ If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden at a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. If the property is vessel or ~~a vessel and~~ tangible property on board a vessel, the process shall be delivered to the marshal for service. If the property is other tangible or intangible property, the process shall be delivered by the clerk to a person or organization authorized to serve it who may be a marshal, a person or organization contracted with by the United States, a person specially appointed by the court for that purpose, or, if the action is brought by the United States, any officer or employee of the United States. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(en), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the

defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

(2) Notice to Defendant. No judgment by default shall be entered except upon proof, which may be by affidavit, * * * (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4 (~~d~~e), (f), (g), (h), ~~or~~ (i), (j), or (k), or that service has been waived under Rule 4(d), or * * *.

Committee Note

Supplemental Rule B(1) is amended in two ways.

The service provisions of Supplemental Rule C(3) are expressly incorporated, providing alternatives to service by a marshal if the property to be seized is not a vessel or tangible property on board a vessel. The reference to former Rule 4(e) is changed to Rule 4(n) to reflect the restructuring of Rule 4 in 1993.

Rule B(2) is amended to reflect the 1993 amendments of Rule 4.

Admiralty Rule B

Admiralty Rule C, governing in rem actions, was amended in 1991 to reduce the need to rely on a marshal to effect service. Under subdivision (3), a marshal is required to serve a warrant of arrest only if the property to be seized is "a vessel or a vessel and tangible property on board the vessel." Rule B, governing attachment in support of an in personam action, was not expressly amended. The working assumption of the admiralty bar is that a marshal continues to be required under Rule B in circumstances that would not require a marshal under Rule C. It has been proposed that this portion of Rule B should be amended to conform with Rule C.

It was decided at the April, 1995 meeting that a proposal to revise Rule B should be considered at the November meeting. A tentative draft is attached.

The other attachments reflect something of the mysteries that underlie the process that led to the 1991 amendments. It seems safe to conclude that there was no special reason for distinguishing Rule B from Rule C. Indeed, there is a plausible argument that the Committee thought that it had brought the two rules into alignment by a rather circuitous route through Rule E. Even if that is so, it affords no reason to reject an amendment that clearly accomplishes the same result.

This draft also reflects the well-taken suggestion that Rule B should reflect the renumbering of Civil Rule 4 subdivisions. The 1993 Rule 4 amendments are sufficiently complex to make this task a bit difficult.

The choices made in preparing this draft are reflected in the October 3 letter to Mark Kasanin. If he has an opportunity to suggest improvements in advance of the November meeting, they will be circulated separately.

RULE B. Attachment and Garnishment: Special Provisions

(1) *When Available; Complaint, Affidavit, Judicial Authorization, and Process.* With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or the plaintiff's attorney that, to the affiant's knowledge, or to the best of the affiant's information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. ~~Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court.~~ If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue ~~a summons and~~ process of attachment and garnishment and the plaintiff shall have the burden at a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. ~~If the property is a vessel or a vessel and~~ tangible property on board a vessel, the process or any ~~supplemental process~~ shall be delivered to the marshal for service. ~~If the property is other tangible or intangible property, the~~

process shall be delivered by the clerk to a person or organization authorized to serve it who may be a marshall, a person or organization contracted with by the United States, a person specially appointed by the court for the that purpose, or if the action is brought by the United States, any officer or employee of the United States. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(~~en~~), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

(2) **Notice to Defendant.** No judgment by default shall be entered except upon proof, which may be by affidavit, * * * (b) that the complaint, summons, and process of attachment or garnishment have been served on the defendant in a manner authorized by Rule 4 (~~de~~), (f), (g), or (h), ~~or (i)~~ or (c) ....

Amended Proposal

RULE C

(3) *Judicial Authorization and Process.*

* * *

If the property is a vessel or ~~a vessel and~~ tangible property on board ~~the~~ a vessel, the warrant or any supplemental process shall be delivered to the marshal for service. ...

* * *

If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a ~~summons and~~ warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. ...

(4) **Notice.** No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after the execution of process, the plaintiff shall promptly or with such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which ~~any claim, appearance, or the~~ answer is required to be filed as provided by subdivision (6)(a) or (b) of this rule. This rule does not affect the requirements of notice in actions to foreclose a

preferred ship mortgage pursuant to the Act of June 5, 1920, ch.250, § 30, as amended.

(6) ~~Claim and Answer~~ Responsive Pleading; Interrogatories

(a) [DOJ Proposal Re. Civil Forfeitures]

(b) *Maritime Arrests and Other Proceedings.* Any person who asserts a right of possession or an equity ownership interest in property ~~The claimant of property~~ that is the subject of an action in rem shall file ~~a claim~~ an appearance and statement identifing their interest within 10 days after process has been executed or within 10 days after the last date of publication as provided by subdivision (4) of this rule, whichever is earlier, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the appearance ~~claim~~. The appearance ~~claim~~ shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which ~~the claimant~~ said party demands its restitution ~~and~~ or the right to defend the action. If the appearance ~~claim~~ is made on behalf of ~~the person entitled to possession~~ the appearing party or an agent, bailee, or attorney for the appearing party, it shall state that the agent, bailee, or attorney is duly authorized to make the ~~claim~~ appearance. At the time of answering the ~~claimant~~ appearing party shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.

RULE E

(7) **Security on Counterclaim.** Whenever there is asserted a counterclaim arising out of the same transaction or occurrence with respect to which the action was originally filed, and the defendant, ~~or~~ claimant, or any person making an appearance pursuant to Rule C(6)(a) or (b) in the original action has given security to respond in damages, any plaintiff for whose benefit such security has been given shall give security in the usual amount and form to respond in damages to the claims set forth in such counterclaim, unless the court, for cause show, shall otherwise direct; and proceedings on the original claim shall be stayed until such security is given, unless the court otherwise directs. When the United States or a corporate instrumentality thereof as defendant is relieved by law of the requirement of giving security to respond in damages it shall nevertheless be treated for the purposes of this subdivision E(7) as if it had given such security if a private person so situated would have been required to give it.

(9) * * *

(b) *Interlocutory Sales.* If property that has been attached or arrested is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action, or if the expense of keeping the property is excessive or disproportionate,

or if there is unreasonable delay in securing the release of property, the court, on application of any party or of the marshal, or other person or organization having the warrant, may order the property or any portion thereof to be sold; and the proceeds, or so much thereof as shall be adequate to satisfy any judgment, may be ordered brought into court to abide the event of the action; or the court may, upon motion of the defendant, ~~or~~ claimant or any person making an appearance pursuant to Rule C(6)(a) or (b), order delivery of the property to ~~the defendant or claimant~~ such moving party, upon the giving of security in accordance with these rules.

Proposed Committee Notes

Rule B

Admiralty Rule C, governing in rem actions, was amended in 1991 to reduce the need to rely on a marshal to effect service. Under subdivision (3), a marshal is required to serve a warrant of arrest only if the property to be seized is "a vessel or a vessel and tangible property on board the vessel." Rule B, governing attachment in support of an in personam action, was not correspondingly amended. This portion of Rule B has been amended to conform to the analogous provision of Rule C.

Rule B has also been amended to reflect the renumbering of Civil Rule 4 subdivisions accomplished in the 1993 amendments to the Civil Rules of Procedure.

Rules C(2) and E(3)

Historically, courts had in rem jurisdiction only over property located within the judicial district. Since 1986, however, Congress, in forfeiture and criminal matters, has enacted a number of jurisdictional and venue statutes permitting the courts to exercise authority over property located in other districts under certain circumstances. See 28 U.S.C. § 1355(b) (authorizing forfeiture over property in other districts where act giving rise to the forfeiture occurred in district where the court is located); 18 U.S.C. § 981(h) (creating expanded venue and jurisdiction over property located elsewhere that is related to a criminal prosecution pending in the district); 28 U.S.C. § 1355(d) (authorizing nationwide service of process in forfeiture cases).

Many other statutes and rules, however, still contain language reflecting the old "within-the-district" requirements. These technical amendments bring those provisions up to date in accordance with the new venue and jurisdictional statutes. Indeed, several courts have already held that nationwide service of process provisions in forfeiture proceedings necessarily override Rule E(3)(a). See United States v. Parcel I, Beginning at a Stake, 731 F. Supp. 1348, 1352 (S.D. Ill. 1990); United States v. Premises Known as Lots 50 & 51, 681 F. Supp. 309, 313 (E.D.N.C. 1988). The amendment is therefore intended merely

to remove any ambiguity resulting from Congress's previous omission in conforming Rule E and the other amended provisions to § 1355(d) as they apply to forfeiture cases. The rule in admiralty cases remains the same.

Rule C(3)

A technical amendment is suggested to this rule to clarify that the marshal is to be used to serve process involving a vessel or tangible property aboard a vessel, whether that process is the initial process or supplemental process. In addition, the rule is amended to clarify that a summons may be issued whether or not exigent circumstances exist.

Rule C(4):

Rule C(4) has been amended to require that publication notice specify the time within which a claim, appearance or answer must be filed in forfeiture or maritime arrest or attachment matters. The previous Rule C(4) required publication notice only of the time for filing an answer, but not of the shorter time for filing a claim. As both a claim and an answer were required by Rule C(6), it is believed desirable to provide notice of the time within which a claim, appearance or answer be filed. See United States v. $38,570 in U.S. Currency, 950 F.2d 1108, 1114 (5th Cir. 1992); United States v. Various Parcels of Real Property, 650 F. Supp. 62, 64 n. 2 (N.D. Ind. 1986).

Rule C(6):

Rule C(6) has been amended to separate the provisions relating to forfeiture and maritime arrests. This Admiralty Rule will apply in civil forfeiture cases and maritime arrest matters notwithstanding the provisions in the 1993 Amendments to Rule 4.1 of the Federal Rules of Civil Procedure.

Rule C(6) has also been amended to provide that the time period within which a claim, appearance or answer must be filed will not begin to run until notice of the execution of process has been given. The previous Rule C(6) required filing within ten days of service of the warrant on the seized property, an event of which the person asserting a right to possession or an equity interest in the property may not have been aware. Under the revised rule, the period for filing the pleading will not commence until either receipt of actual notice of the proceedings or the last date of publication, which ever first occurs. See United States v. $38,570 in U.S. Currency, 950 F.2d 1108, 1114 (5th Cir. 1992); United States v. Various Parcels of Real Property, 650 F. Supp. 62, 64 n. 2 (N.D. Ind. 1986).

Rule C(6)(a) expands the time limit for filing a claim in a forfeiture proceeding. It provides for the starting of the time period for filing a claim in forfeiture matters from the date of the receipt of actual notice of the arrest, or the last date of

publication of the arrest pursuant to Rule C(4), whichever is earlier, and to extend the time from 10 days to 20 days.

Rule C(6)(b) also clarifies and emphasizes that only a person asserting a right to possession or an equity ownership interest in the res shall file an appearance and answer. As with the original rule, a person claiming a security interest, e.g., a mortgagee, or other maritime lien claimant, must still intervene separately pursuant to the provisions of Rule 24 of the Federal Rules of Civil Procedure or pursuant to Local Admiralty Rules. Additionally, this amendment does not limit or change the right to file a restricted appearance under Supplemental Rule E(8), that admiralty right being preserved.

Rule E(3):

This rule has been modified to clarify that in maritime cases, in rem or attachment process may only be served within the district.

Rules E(7) and E(9):

Rules E(7) and E(9) are amended to conform to the change to Rule C(6).

Rule E(10):

Rule E(4)(b) of the Supplemental Rules for Certain Admiralty and Maritime Claims governs the service of warrants in in rem matters, attachment matters, and in most civil forfeiture cases. The Rule provides that certain tangible property, including real property, may be arrested or attached without taking physical possession of the property and displacing the owners or occupants. Commonly in such cases, the marshal or other person executing the warrant posts the warrant in a conspicuous place and leaves a copy of the forfeiture complaint with the person in possession or his agent. In forfeiture cases the Government may also file a lis pendens to apprise all interested persons of the pendency of the forfeiture action. See United States v. James Daniel Good Real Property, 114 S. Ct. 492 (1993); United States v. Twp. 17 R 4, 970 F.2d 984 (1st Cir. 1992).

Particularly in forfeiture matters this procedure is preferable in many cases to the actual physical possession of the property because it permits the owners or occupants of the property to remain in possession of the property during the pendency of the forfeiture action. Arresting or attaching parties are sometimes reluctant to follow this procedure, however, because of legitimate concerns about the destruction or removal of the property or its contents by the persons in possession. The amendment is intended to address these concerns and thereby to encourage the use of the least intrusive means of arresting or attaching property by explicitly authorizing and

directing the courts to issue any order necessary to prevent such diminution in the value of the property, including the value of the contents of the premises and any income, such as rents, generated by the property.

Summary of Testimony

Public Hearings: Civil Rules 9(h), 26(c), 47(a), 48

December 15, 1995, Oakland, California

January 26, 1996, Atlanta, Georgia

February 9, 1996, New Orleans, Louisiana

NOTE

These summaries seek to capture the flavor and central points of the testimony of each witness. Of necessity, many details are abbreviated or omitted. As to any one witness, the summary is in some ways unsatisfactory. Across the range of the three hearings, however, the main themes of the oral testimony should be captured here.

Rule 9(h)

George J. Koelzer, Esq. December 15: Tr at 107: "Proposed Rule 9(h) * * * is one I suppose everybody endorses."

Rule 26(c)

Kevin J. Dunne, Esq., December 15: Tr. pp. 5 to 17: Supports the amendments. Experience is defending products cases, including many pharmaceutical cases. There are three alternatives: private agreements governing discovery; stipulated protective orders; and the "maximum pain" approach of disputing every dispute. Ordinarily plaintiffs attorneys agree to stipulated orders because that is the best means of representing their clients. Stipulated orders save time and expense for all parties, and may save vast expense in complex cases. Public safety seldom is threatened – most product cases are filed after public disclosure of the risk. Most often, courts enter the orders in "rubber stamp" fashion, but some change is possible. The proposed language leaves the court free to reject the stipulation. There is little press interest in most cases: "I represented defendants in DES, Dalkon Shield, Breast Implant. I have negotiated stipulated protective orders for 27 years. Not once has the press ever tried to get any of those documents."

Peter Hinton, Esq., December 15: Tr. 29 to 49: Although plaintiff attorneys often stipulate to protective orders, they do not do it "gladly" as Mr. Dunne suggests. The proposed changes are desirable because there may be an increased concern for public safety. Of course as plaintiff in a sexual harassment suit, I would gladly stipulate to an order that protected her privacy.

Frank C. Jones, Esq., January 26: Tr 22 to 31: for Product Liability Advisory Council. The provision for stipulated orders is good. I had a case with some 5,000,000 pages of discovery documents. Under a stipulated protective order, discovery went well; there was no need to burden the court with repeated disputes. If anything, lawyers overproduce under these orders. Once a challenge is made, the burden of showing good cause for protection remains on the party resisting discovery. The consideration of reliance when modification or dissolution is sought is proper. The alternative is always having to burden the court with requests for protection.

Dierdre M. Shelton, Esq., January 26: Tr 31 to 36: "The style changes are excellent. It makes the Rule much easier to read." The stipulation provision does not change anything. The court can still reject the stipulation, and insist on showing good cause; it is difficult to understand how some comments have failed to understand this point. In practice, if the parties are agreed on a protective order, the judge really does not have the information required to draft an order. And when the parties are unable to agree, judges "hate it. And we don't get good rulings because they don't want to deal with it."

Cornish F. Hitchcock, Esq., January 26: Tr 36 to 74: Asks that the proposal be discarded. If it is retained, the references to stipulations and reliance should be stricken; at the end, he concludes that simply removing these items would not require a new round of public comment. He has often represented journalists,

scholars, researchers, and other third parties challenging protective orders. The case law now generally allows third-party applications for relief from protective orders. The key point is that "good cause" can mean different things at different points in the progress of an action. During the initial discovery stages, it can be good cause for a protective order that the order facilitates discovery; if the parties are happy to exchange information under a protective order, there is no case or controversy in front of the judge and no basis for denying good cause. There is no need for a hearing at that stage. Protective orders can be justified "on the grounds that it is temporary, that it is pretrial, because once you get to trial, that's when all the information comes out. * * * Now, the problem in 90 percent of all civil cases is you never get to trial." "We recognzie stipulations still exist and think that the practice could continue." But there is no need for explicit recognition of this practice in the rule. The problem arises later in the litigation when a third party comes in to challenge the order. At that point it should be clear that the party seeking continue protection has the burden of demonstrating good cause for protecting the specific information sought. At that point – and it may be after settlement – "efficient case management may not be good cause any more." The reliance factor should not have any independent force; what counts is good cause for protection at the time access is demanded. The stipulation provision "would change the presumption of openness." Reliance "is a very subjective standard. It's not one that's really amenable to proof one way or the other." What counts is showing a specific justification for continued protection; a show-cause order and response, with the burden on the party seeking protection, is an effective procedure at that point. The reliance argument "will inevitably be made. * * * It cannot be used as a touchstone in and of itself unless it is grounded in a claim of objective harm because there will be a harm following disclosure of a sort that courts don't like to happen."

Michael A. Pope, Esq., January 26: Tr 74 to 80: President, Lawyers for Civil Justice. "The rule has worked fairly effectively up to now, but I certainly see the changes as a proper clarification * * *." "A stipulation provision is a very clear one, and one that certainly is the practice around the country * * *." Privacy is one of the central concerns. Under agreed orders, the parties avoid the costs of fighting discovery, and may produce material that "may not have had to be produced, but it is done by agreement." "Where there is a question, we go ahead and do it because we're relying on the fact that it's only for the purpose of this litigation and will be returned to us at the end." And if the system becomes less predictable – if reliance is not protected – clients will not be as cooperative about producing information. we lawyers "don't control everything." It would be a great disservice to delete reliance from the published proposal; courts would be left puzzling just what is meant.

Kenneth Sherk, Esq., January 26: Tr 80 to 86: The Federal Rules of

Civil Procedure Committee of the American College of Trial Lawyers supports the proposal, and earlier wrote at length on the "reasons why stipulated protective orders ought very definitely to be in the rule."

J. Richard Caldwell, Jr., Esq.: January 26: If the stipulation language were deleted now, lawyers would surely argue that the Committee intended to reject stipulated orders. Of course the argument could be met, but it is better to retain the provision. Stipulations work; in my practice, they outnumber contested orders ten to one. Reliance must be protected. One illustration suffices. In litigation involving Widget Model A-5, there may be a demand for production of design drawings, test results, and the like for models A-1 through A-4, and models A-6 through A-20. My client says they all are so different that these materials are not relevant. But it is less costly simply to produce the materials if we can stipulate to a protective order "with some fair degree of confidence that all of this other material and these other widgets are not going to be admissible in any event." If we had resisted discovery, probably we would not have had to produce the material at all. "That's legitimate reliance." And reliance may be the only argument available to defeat modification when someone else comes in and demands access. It would be better not to allow consideration of public injury on a motion to modify or dissolve, but as a package the (c)(3) factors are "very admirable."

John A. Chandler, Esq., January 26: Tr 93 to 100: Strongly favors stipulated protective orders. Accounting firms commonly have client papers, that were given to the firms with an expectation of confidentiality. "Stipulated protective orders in a system such as that [in which there is no federal accountant-client privilege] makes it easier for a protective order I think is essential."

James Gilbert, Esq., February 9: Tr 15 to 25: For Association of Trial Lawyers of America. The proposal "will give an unfair litigation advantage to a broad category of defendants" — "hundreds, if not thousands, of product manufacturers." Consumers come to product litigation with a need for critical information about design, development, testing, marketing, and the rest, all of it in the possession of the defendant. The defendant hopes to maintain its informational advantage, and seizes on the first legitimate discovery request as the occasion to force agreement to a protective order. The plaintiff is forced to acquiesce; his concern is getting a wheelchair, 24-hour care, or whatever, not advancing fair and efficient litigation by others. "The sole objective of the industry is not to keep this away from their competitors, but to isolate the plaintiff." The issue is about litigation advantage, not privacy; manufacturers have asserted confidentiality as to such public documents as federal safety standards, excerpts from the Federal Register, complaints in public files, filings with the National Safety Administration, and technical papers obtainable in any engineering library in the country. Stipulations should be approved by the court only if an

attorney certifies that the information has been reviewed and is indeed private; severe sanctions should be imposed for certification of nonconfidential material. It would be better to delete the reference to stipulations, retaining the good cause requirement of the present rules. As to reliance, it should not be made an explicit rule factor with respect to modification or dissolution, although there may be circumstances in which a court can properly consider reliance, particularly if the court considered all the appropriate factors and entered an adjudicated protective order at the beginning. The easier it is to win a protective order by stipulation, the easier it should be to win modification or dissolution.

Leslie A. Brueckner, Esq., February 9: Tr 25 to 43: On behalf of Trial Lawyers for Public Justice. The stipulation language should be deleted. This goes beyond existing practice – although many judges enter stipulated order, many judges do not. Some hold that the court is required to make an independent good cause determination even though the parties have agreed. These courts also emphasize the special danger presented by stipulated orders "because none of the parties is advocating for openness in that situation." These orders, moreover, commonly provide for automatic sealing of any discovery materials filed with the court; the court should be required to make an independent determination that the more stringent standards for sealing court records have been met, at least with respect to materials filed in support of a motion. It is enough that the court find that there is good cause for secrecy with respect to categories of information; it is not required that every piece of information be publicly revealed so that the court can determine whether it should not have had to be revealed, nor that the court must examine every document in chambers. As Mr. Gilbert testified earlier today, "what is necessary is that the aprty seeking secrecy affirmatively aver to the court and is subject to the requirement in the order that anything designated confidential is truly within one of the categories that is considered appropriately secret under Rule 26(c)." The First Amendment, indeed, stands in the way of eliminating the good cause requirement by stipulation; Seattle Times finds the First Amendment is satisfied by protective orders entered for good cause. And "reliance" ought not be a factor on motions to dissolve or modify. The question is whether information continues to deserve secrecy; reliance is not in and of itself reason to maintain secrecy. "[N]o party could reasonably rely on a stipulated protective order," but as drafted the rule seems to protect reliance even on stipulated orders. That goes beyond existing law. It will create a trap, and make it very difficult to unseal protective orders.

Hon. Virgina M. Morgan, February 9: Tr 43 to 49: President, Federal Magistrate Judges Association. The proposal addresses well "the issues of privacy, of moving the litigation foward, of protecting the interests of all the parties." Stipulated orders are

appropriate. Commonly the identify categories of documents, and designate those that will be only for the attorney, those that can be shared with the client or house counsel, those that can be shared with experts, and so on. Most of the cases are not product cases. They frequently involve civil rights, or patent or copyright litigation. Reliance is the purpose of entering the order. At times lawyers resist the protective order because they want to share the fruits of discovery with another lawyer who has a different client but a similar claim. That should be addressed up front, recognizing that the purpose of litigation commonly is to provide redress to the plaintiff. It is not a Freedom of Information Act.

Linda C. Lightfoot, Editor, The Advocate, February 9: Tr 80 to 88: Appears for the American Society of Newspaper Editors. The good cause standard should not be diluted by permitting stipulated protective orders. Indeed, the good cause standard should be strengthened, creating "a presumption of openness to be overcome only by a showing of specific serious and substantial interest that clearly outweighs the public interest in disclosure." Civil litigation often is the business of the public, not the parties and attornies alone. Stipulated orders guarantee secrecy "in the very cases that arouns the most public curiosity and are the most latent with public interest implications." In the Baton Rouge area there are chemical spills and accidental emissions that are of interest to the public; a lawyer owes primary allegiance to the client, and it is the role of the news media and other public interest groups to serve the broader public interest. Secrecy orders impose a form of prior restraint on parties who may want to share information with the public. Even if confidentiality orders facilitate settlement, the interest in achieving settlement should not outweigh the public interest.

Victoria Bassetti, Esq., February 9: Tr 88 to 98: A member of the Senate Judiciary Committee staff, speaking for Senator Kohl. The Judiciary Committee has held hearings on bills designed to protect the public health and safety against protective orders, and has deferred action to allow action by the Judicial Conference. "[W]e are saddened to learn that rather than actually confronting the problems that the Judiciary Committee had identified the Conference seems to be backing away from and holding back the requirements of Rule 26(c)." The factors for modification or dissolution, apart from a quibble about reliance, are a step in the right direction; they could easily be incorporated into the initial effort to enter a protective order. The express provision for stipulated orders is a step backward, even though a judge can demand a showing of good cause for a stipulated order under present practice and under the proposed rule. Notwithstanding a proposed stipulation, "the judge is capable of, say, looking at the facts of the case and exercising his or her own independent judgment * * *." The stipulation provision will encourage parties to rely on stipulations. It need not be more difficult to get relief from an order entered after a

finding of good cause than from a stipulated order – in either case, an intervenor must show new considerations to justify relief. The requirement of good cause – and, we would add, a requirement that the judge find that there are no public health or safety interests affected by the order – can be met without holding a hearing, and without requiring the judge to sort through all of the documents covered by the order. The type of case can provide much guidance. "I find it doubtful that in the course of a civil rights litigation the judge or any of the parties are going to stumble across a smoking bun that indicates the Ford Pinto case." In a product liability case, on the other hand, inquiry should be made whether there is good cause to justify closing off access to information that involves the public health or safety. "[O]ne protective order entered in one case can implicate thousands of liveds and thousands of people's health and safety." The inquiry might "cost very little." The judge can ask the parties to indicate which protected documents are simply proprietary sales economic information. It is proper to rely on the parties. "You have to be able to rely on the parties to stipulate and sfit through documents. To rely upon them a little bit more doesnbt strike me as that big a burden," particularly since they will be subject to contempt sanctions if they make misrepresentations about public health and safety implications.

Al Cortese, Esq., February 9: Tr 98 to 109: For the National Chamber Litigation Center. "If there's any reason for promulgating this rule, I think basically it is to put an end to the nonissue of court secrecy." The proposal merely codifies existing practice; if there is to be any change in the proposal, it should be to make it even more clear that it simply confirms present practice. There is no common-law or constitutional right of access to discovery materials. To the contrary, "the real constitutional protections are to protect the information that is required to be disclosed in litigation." The property right in information that must be disclosed only because someone has brought a lawsuit cannot be extinguished; a presumption of access "would be unconstitutional because of the right of due process." The stipulation language does not eliminate the good cause requirement. Stipulations enable discovery to go forward, allowing the parties to sort through millions of pages of documents that in large part are totally irrelevant, without the need in advance of discovery to review all the material, created a confidentiality log, and dispute everything. Under a stipulated protective order, the parties can limit any disputes to specific items. The specific provisions for modification protect any asserted public interest. Reliance is a necessary factor on a petition to modify. It is not possible to say in the abstract whether it would be desirable to take a different approach that simultaneously narrowed the overall scope of discovery and made it more difficult to secure protective orders, but it is clear that no matter what the scope of discovery, protective orders still will be necessary.

W. Reece Bader, Esq., December 15: Tr, 17 to 30: A former member of Civil Rules Advisory Committee and Standing Committee. A similar Rule 47 amendment was proposed in 1984. We were too concerned with lawyer conduct and Rule 68 then; I should have pushed for the amendment then. I support it now. Where active lawyer voir dire is regularly utilized, in general lawyers have not sought to use it to ingratiate themselves or indoctrinate jurors. The trial bar is responsible. Judges can control efforts to misuse the process, and the proposed rule ensures that power. A lawyer knows the case better than the judge, and can spend more time thinking about voir dire questions appropriate to the case. It is important to have as much information as possible to support peremptory and for-cause challenges. I have been involved in only one Batson-type situation; the opportunity to ask questions myself would have been valuable. The adversary process can work to negate attempts to gain advantage. The amount of time spent on voir dire need not unnecessarily delay the process; much can be done in a relatively short time. It is proper to require that some types of questions be directed to the panel as a whole. If a questionnaire has been used, voir dire questions can be narrowed accordingly. Having the judge pose questions requested by counsel does not work as well; in 30% to 40% of my cases this has an adverse impact. It may be urged that the right to participate is particularly important in capital cases, but that simply reflects the fact that participation makes the process work better. The same values are gained in other cases.

Peter Hinton, Esq., December 15: Tr 29 to 49: I have tried more than 150 jury cases to verdict. In every case I wanted a role in voir dire. Judges cannot put jurors in the same place as counsel can. Judges are more intimidating, and jurors are not as inclined to give honest answers to an authority figure. Sue Jones did a doctoral dissertation that demonstrates this difference. Lawyers – at least good lawyers – no longer "try to do the kind of mind-bending snow job that was de rigueur 30 years ago." Instead they ask open-ended questions "and try to do the most difficult thing an attorney has ever tried to do, which is listen to the answer." They are interested in orderly and effective voir dire. Courts can control any effort at abuse; California, after great study, has reconfirmed the practice of lawyer voir dire, and state judges exercise effective control. Code of Civil Procedure § 222.5 defines improper questions as those that attempt to precondition or indoctrinate the jury, or that ask jurors about the applicable law. One sanction judges use is to require a lawyer who has gone too far submit all questions in writing to the court before asking them of the jury. Lawyers, moreover, do not really "select" a jury; they can only "deselect" the most obviously biased members of the panel. The need for deselection is increased by the increasingly firm views many people hold on subjects involved in litigation, views that may be entrenched by public debate that has been called jury

tampering on a national scale. Arbitrary time limits cannot be defined, and California practice forbids them; the time required need not be great, and whatever is required is worth it. Questionnaires are encouraged, and reduce the time needed for voir dire. They also encourage honest answers to questions that might be embarrassing, particularly if assurance is given that follow-up questions will not be dealt with in front of the group.

Hon. Michael R. Hogan: December 15: Tr 49 to 63: Every judge in D. Ore. allows some attorney voir dire. My own practice is to receive proposed questions a week before trial, sort through them, meet again before trial, and then begin the voir dire. Then I ask the lawyers for follow-up questions and ask them. Then I invite the lawyers to ask questions themselves; usually they are satisfied and do not follow up. This works well. "If I do a good job, then I don't really have to exercise any controls." I encounter few efforts to take advantage of the process. When an effort is made, it can be controlled. But to make it a right is to invite appellate review, and appellate judges removed from the scene of trial may impose untoward restrictions. Attorneys want to seat favorable juries, not impartial juries.

Dr. Judy Rothschild: December 15: Tr 63 to 87: Dr. Rothschild is a research sociologist with the National Jury Project West, and also works as a trial consultant. She is a visiting scholar at the University of California, Berkeley, in the Institute of the Study of Social Change, where she is studying jury decisionmaking in complex cases. Lawyer participation in voir dire is important. (1) Jurors are terribly intimidated by the courtroom. They bring many television-derived misconceptions to their task. (2) Social science research shows that people seek to protray themselves in socially desirable ways, and are quite sensitive to verbal and nonverbal clues indicating the desired "correct" answer to questions. A wide range of factors affect the candor of answers to questions. (3) One important factor is the fundamental difference of status between judge and juror, a difference enhanced by the symbols and practice of the courtroom. A screening process goes on in responding to judge-put questions. When a judge asks whether panel members can be fair, "it's pretty clear that therre's one right answer to that question. * * * It's far easier * * * for that question to be answered more honestly and candidly and comfortably when the question is not propounded from an authority figure sitting up high." Attorneys are literally on the same level in the courtoom, and this encourages candor.The judges who are good at voir dire are those who aware of the obstacles they face because of their status. (4) The need to speak publicly also exacerbates the problem. "People tend to avoid embarrassing themselves, and one way to do that is by providing minimal responses." "People's responses tend in the direction of conformity. One doesn't want to seek out attention" in the trial setting. Questionnaires have real advantages, including privacy, in eliciting information. (5) Jurors do come to the courtroom with real biases and disagreements

with the law. In criminal cases, for examples, many jurors believe that a person brought to trial is probably guilty, that defendants should be required to prove their innocence, and that defendants should be required to testify. (6) Global questioning of a panel is less effective because "people have a reluctance to raise their hands. * * * [I]t's easier to avoid answering a question. The best voir dire is that in which jurors do most of the talking. (7) Some lawyers are not good at voir dire, even hate it.

James Farragher Campbell, Esq., Dec. 15: Tr 88 to 97: Appeared on behalf of the National Association for Defense Lawyers, California Attorneys for Criminal Justice, and the Executive Committee of the Litigation Section of the [California] State Bar. Testified only as to Criminal Rule 24. Attorney voir dire is important to discover bias and prejudice in prospective jurors, and has become more important because of limits on stereotyped use of peremptory challenges. It need not pit lawyers against judges, nor result in attorneys taking over the courtroom. The power of control built into the proposed rule is adequate. The vision of silver-tongued orators using voir dire to try the case is out-of-date. Lawyers now are interested in using voir dire to search out bias. Reasonable time limits can be set, although it is not possible to adopt a single period of time that is appropriate for all cases. Judges should be reassured on these points by the experience of the many judges who now permit attorney participation. Yes, to Judge Wilson: attorney voir dire works in practice, and the time has come to stop worrying whether it will work in theory. The opportunity to participate is important to give the appearance of fairness as well as the reality.

George J. Koelzer, Esq., December 15: Tr 98 to 113: Was asked to testify by the ABA Litigation Section. Supports attorney voir dire. In more than 30 years of trial experience has tried jury cases in many state and federal courts, working with all the different modes of voir dire. Over that time, judges have taken over more of the voir dire – perhaps in part because the general level of trial bar skills has declined. But judge-conducted voir dier "is not acceptable in the adversary system." Judges are interested in ferreting out matters that would support for-cause challenges, but not matters that will inform peremptory challenges. Peremptory challenges are "inherent" in the Seventh Amendment right to jury trial. Batson has made the selection process more complicated. There is no realistic recourse in appellate review; the prospect of reversal for inadequate voir dire inquiry is too remote to be of real value. And any competent federal judge will deal quickly and effectively with any abuse by counsel. There have been problems with inadequate judge-conducted voir dire in personal experience, commonly involving refusal to ask suggested questions, and usually involving "a younger, less experienced judge without a lot of courtroom experience."

Robert Aitken, Esq., December 15: Tr 113 to 125: Lawyer voir dire facilitates selection of a fair and unbiased jury, and increases

lawyer comfort with the jury. It does not work as well to have an intermediary – the judge – ask the questions. Any competent judge can control any prospect of lawyer abuse. There are some questions that counsel would prefer to have addressed by the court – for example in a case against a mental hospital, whether any prospective juror had had mental problems. General preliminary questions also are appropriate for court inquiry.

Christine Sherry, Esq., December 15: Tr. 125 to 133: Was asked to testify by the chair-elect of the ABA Litigation Section. Has begun inquiries among lawyers in N.D.Cal. about varying practices and experiences. This testimony is preliminary. Lawyers who have been able to conduct their own voir dire have found it very helpful. Preliminary questionnaires encourage people to provide information that might not come out on oral examination, and can be followed up to great effect. A number of lawyers have reported that 20 to 25 minutes of follow-up questioning can produce great benefits.

Robert B. Pringle, Esq., December 15: Tr. 133 to 142: Current chair, Intellectual Property Litigation Committee, ABA Litigation Section: Experience with voir dire is mostly with extensive lawyer participation in California state courts and limited participation in N.D.Cal. Lawyers do it better. I know more about the evidence and witnesses. My clients generally are able to afford extensive jury studies, and in some cases I have done several mock juries before trial. I and my adversaries have studied prospective jury behavior, deliberations and reactions to the evidence. We come to court equipped to assess jury bias. To deny the opportunity for thorough voir dire is to cut off the most effective means of inquiry. Lawyer abuse need not be feared; a competent judge will control voir dire.

Elia Weinbach, Esq., December 15: Tr 142 to 151: The amendment is desirable. I have had experience where "the judge's handling of the voir dire was ineffective and where we had problem juries simply because the judge was more interested in proceeding expeditiously * * *." "Most federal judges with whom I've dealt in the voir dire process really go through the process solely for the purpose of getting through the process * * *." It should be recognized that so many people avoid jury service that juries are not representative, and will not be – professionals, small business people, and the like do not serve. This makes it more important to preserve peremptory challenges.

Louise A. La Mothe, Esq., December 15: Tr 153 to 168: California state judges allow attorney participation. C.D.Cal. judges generally do not, and their "questions have a tendency to be perfunctory and pretty superficial. * * * [T]he judge does not have the same interest in getting out the information as the lawyers do. And I think that the judge obviously is looking for the most obvious types of bias, but frankly it doesn't always come out." A number of judges, as a matter of speed, want to impanel the first

six in the box. Lawyers can do it better because they know the case better. "Not every client can afford extensive jury research"; it can cost fifteen to twenty-five thousand dollars, or more, including trials to mock juries. Abuse by lawyers does occur, and judges may prefer to do voir dire themselves because it is easier than controlling the lawyers. But it is better for the judge to ride herd on the lawyers than to cut them off. They can and do control lawyers in California state courts.

Professor Charles Weisselberg, December 15: Tr 168 to 185: Attorney voir dire is essential to support challenges for cause and to enable use of peremptory challenges not based on group stereotypes. Denial of participation is not suited to the Batson era – challenges based on individual characteristics require knowing more about jurors than is revealed by judge-conducted voir dire. My experience in C.D.Cal. is like that of Ms. La Mothe: voir dire is "fairly routinized." Judges tend to ask close-ended questions. No juror is going to respond to a question: "You can be fair, can't you"? Nor to questions asking them to raise their hands if they would have trouble following instructions, or would not afford a presumption of innocence. In two cases I was allowed about 15 minutes for voir dire, and discovered that it was possible to learn a lot in 15 minutes – even though the regular local practice meant that I had not had much experience with direct voir dire. The goal will be to select jurors who need further questions, not detailed inquiry of all. I have not had the experience, asked about by Judge Dowd, that civil plaintiffs and criminal defendants seek to "dumb down" juries. As a federal public defender I had the benefit of selecting juries with the aid of a full-time psychologist on our staff; we lawyers learned to be more sophisticated with her help. Judges will set limits, and as they become known there will be fewer attempts to argue the case on voir dire. These efforts may spur additional appeals in the beginning, but these problems should disappear as practice becomes firmly established.

Hon. Duross Fitzpatrick, January 26: Tr. 3 to 15, 21 to 22: Having practiced in Georgia state courts, took lawyer voir dire to the federal bench. Lawyers file their written questions before voir dire, and serve each other. Usually there are no objections; if there are objections, they can be ironed out in a few minutes. Reasonable follow-up questions are allowed. Voir dire never lasts longer than about an hour. If a lawyer comes in from out of town and engages in grueling voir dire, the local lawyer may well announce that there are no questions, the jury will do the right thing, "and it almost always works." Lawyers learn not to wear out a jury with foolish questions. Perhaps peremptory challenges will be abolished one dya, "but as long as we have them, I think lawyers ought to have an opportunity to ask the questions." We have a 3- or 4-page questionnaire that is used in every case, civil and criminal. Lawyers love it. We are revising it now to eliminate questions that are "kind of silly," such as what magazines jurors read, and questions that are unnecessary invasions of privacy. We

treat the answers as confidential, and require lawyers to certify that they will destroy the questionnaires.

John T. Marshall, Esq., January 26: Tr. 15 to 21: In N.D.Ga., questions are outlined in the pretrial order and the judge asks them. Lawyers are permitted follow-up. I would prefer, as the lawyer, to go first. Juror answers to the judge are wooden, tainted by the formality with which the first question is put. It is better for a lawyer to open a conversation "because most jurors are very, very intimidated by the judge." Georgia state courts let lawyers do the voir dire. There attempts to abuse the system. One abuse is an attempt to ask jurors to prejudge the case; judges promptly prevent that. Totally irrelevant or impermissible questions also are stopped short. Voir dire is not extended to the two- or three-day ordeal that people fear. Jury questionnaires are very helpful. They get away from perfunctory questions. And they make it possible to avoid "the land mine," the question and answer that taint the entire panel. They also allow a juror to say things about the difficulty of jury service that may not be said in voir dire.

Frank C. Jones, Esq., January 26: Tr 22 to 31: for Product Liability Advisory Council. "I have never seen a serious problem with lawyer-conducted voir dire where the judge is clearly in control of the courtroom." And I have had very few experiences in which the judge did fail to control. There is a need for lawyer participation to establish a dialogue, to find out whether jurors are proper for the case. And as peremptory challenges are increasingly limited, it becomes more important to enable intelligent challenges for cause.

Michael A. Pope, Esq., January 26: Tr 76 to 80:"There are some judges who don't have that much experience at trying cases and, therefore, they don't do that good a job at voir dire, it's as simple as that. * * * [T]o open up the door and allow the process where the lawyers can actually talk to the jurors is really important * * *."

Kenneth Sherk, Esq., January 26: Tr 80 to 86: The Federal Rules of Civil Procedure Committee of the American College of Trial Lawyers (a Committee of some 230 members) is unanimously in favor of the proposal. It is more limited and restricted than the Committee would prefer. Long experience with lawyer voir dire has not shown any problem of abuse in Arizona state courts. With Batson and related restrictions on the use of peremptory cahllenges, lawyer participation is all the more important. The Advisory Committee Note sets out the reasons for the amendment. Lawyers and judges cooperate in every phase of the case, and there is no reason why cooperation cannot extend into the voir dire process with the lawyer being allowed to ask some questions. The many judges who now do a good job on voir dire will find that lawyers' supplemental questions will not be extensive at all.

J. Richard Caldwell, Jr., Esq., January 26: Tr 86 to 93: The

proposal is good. Questionnaires "can be extremely useful in many, many ways. Either avoiding the dynamite question, saving time." As compared to the judge, the lawyer can initiate a conversation. And, standing close to the prospective jurors, can detect little quivers or hesitations that suggest the need for follow-up questions. The amendment makes it clear that this is limited voir dire, and that the court remains in control.

John A. Chandler, Esq., January 26: Tr 93 to 100: Georgia statutes give lawyers a broad voir dire right. Most federal courts in Georgia permit follow-up questions by lawyers. We have a lot of experience. It seems to work well, to be very helpful. The lawyer gets a better feeling for the jury by asking questions and listening to the answers. Their better understanding of the jury may lead to more mid-trial settlements. Some judges ask questions well; some do not. Judges are concerned to keep the case moving. Lawyers pace the questions better; they wait for the answers, and listen to the answers.

Stephen M. Dorvee, Esq., January 26: Tr 100 to 105: Judge-conducted voir dire "is somewhat inadequate." The judge does not know the case as well as trial counsel. The problem of overreaching counsel is not significant. "As long as a judge can control his courtroom, then he can control voir dire." In the working of the adversarial process, each side usually strikes the jurors the other side most wants and the result is a fair, balanced jury. It is not so important that the lawyer be the one to initiate the conversation as that there be a conversation. A lawyer needs to evaluate the juror's reaction to the lawyer – at the most direct level, to learn whether the juror can understand the lawyer. There may not be much time, but even 15 minutes of examination is enough to get a feel for the jury.

Hon. Hayden W. Head, February 9: Tr 3 to 15: The judges of S.D. Tex. are unanimously opposed to proposed Rule 47(a). A poll of the 94 judges in the 5th circuit District Judges Association garnered 73 responses; 63 oppose the proposal, and 10 support it. It is the judge's responsibility to select an impartial jury, and the adequacy of voir dire is not easily reviewed on appeal. An attorney seeks a partial jury, not an impartial jury. There are no more than a few, if any, district judges who fail to do adequate voir dire examinastions; the cure is in part appellate review, as a recent Fifth Circuit decision shows, and in part education through judge workshops. No matter what discretionary authority seems to be written into the proposal, "the whole ability to control changes. * * * [W]hat will develop is a practice of the most generous or tentative district judge, as affirmed by the most generous panel in the United States." The idea that the adversary system will balance out, with each side preventing the other side from winning a favorable jury, does not work out. Some lawyers are better at jury selection than others. It takes the balance of a judge "to control the flow of the jury selection."

Hon. Virginia M. Morgan, February 9: Tr 43 to 49: President, Federal Magistrate Judges Association. Joins the opposition to attorney voir dire. There are special problems with pro se litigants, both in prisoner cases, employment cases, and others. Is the judge to help the pro se litigant, departing from a position of neutrality? Appoint counsel from the pro bono panel? What should be done in districts that handle pro se prisoner cases with video-conferencing? Will there be new issues for appeal?

Robert Glass, Esq., February 9: Tr 49 to 56: for the National Association of Criminal Defense Lawyers. Spoke only to Criminal Rule 24. "With a little training [of lawyers], the attorney-conducted voir dire is enormously productive. It airs views." "[M]ost judges are afraid of the lawyer-conducted voir dire because it can get out of hand. Well, that's true, but the judges, under the amended rule, would have the power to control the lawyers." An obnoxious lawyer is shut down in the same way as an obnoxious lawyer is shut down on cross-examination. A brief period of time can be set; there is no reason to let it get out of control. Involving attorneys as a matter of right "will force judges to rethink and to be reeducated on how to do it. It is easy once you learn. It doesn't take much time to learn." In criminal cases there is no significant problem with pro se defendants; perhaps there should be a special rule in civil cases, but that is not the subject of this testimony.

Hon. John F. Keenan, February 9: Tr 56 to 64: For all the judges, S.D.N.Y. The judgest of S.D.N.Y. include many who practiced in New York state courts, and some who were judges there. Their experience with attorney participation in voir dire is extensive. We unanimously oppose the proposed amendment. "The state experience has not been a pleasant one, nor has it been a successful one." The time it takes to select a jury is mind-boggling. "New York City does not have a particularly collegial bar." Requiring lawyer participation would reduce judge control, and do so at the beginning of trial, setting the tone and mood for the whole trial. The attempt to authorize reasonable limits will open a new array of satellite litigation, and spawn a new publication market for voir dire manuals. Appellate courts would set the limits of discretion. The knowledge lawyers have of their cases can be utlized through questions they suggest to the judge.

Hon. John M. Roper, February 9: Tr 64 to 80: Appearing for the Economy Subcommittee, Budget Committee, Judicial Conference. All testimony is directed toward budget implications, not policy. Estimates of the cost of lawyer voir dire are based on estimates of the increased time needed to sit a jury. If indeed judges find it difficult to control the time spent by lawyers, costs will increase more than otherwise. To be sure, time can be saved by jury questionnaires – my own experience has been favorable – but it is difficult to know how much time. Nor do we know how much time must be devoted to voir dire by pro se litigants. The costs will escalate still further if this is coupled with 12-person juries.

Of course these estimates to not account for the time that may be saved when, for example, improved voir dire excludes a juror who would have forced a mistrial later. And, more important, the cost estimates that have been made so far are based on fully distributed costs, not the relevant measure of marginal costs incurred by adding lawyer voir dire. There are likely to be additional costs as well, arising form the need to train panel attorneys and federal defenders. Lawyers also will need to be compensated for the time spent to prepare for voir dire – at least in criminal cases, that can be a direct expense. Our main request is that there be more careful study of costs before embarking on a procedure that may have a significant impact on already-strained judicial budgets.

Al Cortese, Esq., February 9: Tr 98 to 109: The National Chamber Litigation Center supports the proposal.

Peter Hinton, Esq., December 15: Tr. 29 to 49: The 12-person jury proposal "is an analytically motivated trip to injustice" unless it is coupled with provision for a nonunanimous verdict. Any increase in the risk of hung juries tips the playing field in favor of corporate defendants, because individual plaintiffs cannot afford retrials. Attorney voir dire will help offset this risk, but not enough. And by increasing the number of jurors, "you have significantly increased the potential for an aberrant jury." "If you had a nine-person majority and adequate peremptories, I would be all for this."

Hon. Michael R. Hogan, December 15: Tr 49 to 63: 6-person juries work. It is increasingly difficult to get citizens to serve as jurors. Many courtrooms are built with 7- or 8-person jury boxes, including our magistrate judge courtrooms. Although with trials by consent before magistrate judges 6-person juries could be made part of the consent process, this might reduce our ability to rely on magistrate judge trials – and we have relied on magistrate judges extensively and successfully.

Dr. Judy Rothschild, December 15: Tr 63 to 87: (Dr. Rothschild's background is described with her Rule 47(a) comments.) There are stray marks favorable to 12-person juries, but most of the testimony focuses on the suggestion that if jury size is increased, the number of peremptory challenges should be increased accordingly.

George J. Koelzer, Esq., December 15: Tr 98 to 113: Has never had an experience, going well back into the days when 12-person juries were used in civil cases as well as criminal, in which the inability to agree on a verdict could be ascribed to the size of the jury. Law and centuries of experience show that a jury of 12 works quite well. It brings more experience and common sense to the task, and is more representative.

Robert Aitken, Esq., December 15: Tr 113 to 125: The shrinkage of the jury is obvious. The number 12 was settled long ago, and worked for centuries. If we can shrink to 6, why not 1?

Robert B. Pringle, Esq., December 15: Tr 133 to 142: Has practiced both on the defense side and – increasingly, particularly in intellectual property cases – on the plaintiff side. Began with the view that a large jury favors the defense, but now prefers it for all sides. A larger jury gives a fair cross-section of the community. It helps in technical cases to have an engineer or two on the panel; there is a risk they will dominate a 6-person jury, but less concern with a jury of 12. I do believe that juries are capable of assessing technical issues, indeed at least as capable as judges. They bring common sense, whatever the level of formal education. There is no need to add alternates.

Elia Weinbach, Esq., December 15: Tr 142 to 151: There is a risk

the 12-person juries will result in more hung juries; the federal judges who have made this observation to me were, to be sure, appointed after 1978 (so have no experience with 12-person civil juries).

Louise A. La Mothe, Esq., December 15: Tr 153 to 168: While I was a member of the California State Judicial Council we had a study done by the National Center for State courts on moving from 12- to 8-person juries. The initial results caused the Council to lose any interest in the change. 12-person juries are more representative, a matter of great importance in our increasingly diverse society. And the influence of any single juror is reduced. The perception of fairness is enhanced.

Professor Charles Weisselberg, December 15: Tr 168 to 185: The return to 12-person juries is good. But it would be better to provide for alternates, to increase the prospect that there will be 12 jurors left to deliberate at the end of a long and complex trial. A fair trial is more important than the disappointment of alternates who are excused without deliberating at the end of trial.

Hon. Duross Fitzpatrick, January 26: Tr 3 to 15: Always uses 12-person juries. They give a good cross-section. The parties accept the results better than might be with smaller juries. I regularly chat with the jurors after the verdict. They understand the instructions. Judge Arnold has made irrefutable points in favor of 12-person juries. Majority verdicts are not a good idea; "a hung jury is not always a bad idea." Fallout from the O.J. case has put people in a panic about jury trial; "I don't think we need to be changing the jury system because of one case that's tried in California."

John T. Marshall, Esq., January 26: Tr 15 to 21: Lawyers select a jury much differently when it is six, because of concern that a single juror can dominate in a way that is not likely with a jury of 12. I have had two experiences with both sides agreed that a 6-person jury came out opposite from whast we expected.

Frank C. Jones, Esq., January 26: Tr. 22 to 31: There is a very different dynamic with 12-person juries. One or two strong persons can influence the outcome with 6-person juries, but this is much more difficult with 12. And a 12-person jury is more likely to be truly representative of the community.

Michael A. Pope, Esq., January 26: Tr. 74 to 80: In Illinois we have always had 12-person juries. "There is something about it that seems to work. * * * And it does seem to bring out the best in people * * *. And hung juries "are extremely rare."

Kenneth Sherk, Esq., January 26: Tr 80 to 86: Chair, Federal Rules of Civil Procedure Committee, American College of Trial Lawyers. We endorse the 12-person jury "if for no other reason than for the representativeness factor, just get a better cross-section."

J. Richard Caldwell, Jr., Esq., January 26: Favors the proposal. Magistrate judges try civil cases in M.D.Fla. They can use an empty courtroom with a 12-member jury box, or add a few chairs to their own courtroom. "They work perfectly well with a twelve-member jury."

John A. Chandler, Esq., January 26: Tr 93 to 100: The rationale in the Advisory Committee Note supports the proposal, "to provide more diversity and to avoid the odd verdict. * * * You get more aberrant decisions with six-person juries * * *. I think predictability helps lawyers and helps clients assess cases." There are anecdotes suggesting that plaintiffs' lawyers tend to choose the 6-person jury state court in Fulton county, rather than the 12-person jury superior court, because "they believe that they are more likely to get a result that's outside of the box with a six-person jury."

Stephen M. Dorvee, Esq., January 26: Tr 100 to 105: A 12-person jury does bring a wide diversity of viewpoints. But it also "sees everything, hears everything, despite what some of my brethren thinks, understand[s] everything. I'm not sure that's the case with a six-person jury. * * * You want a greater collective memory." They have a much more thorough view of the case.

Hon. Hayden W. Head, February 9: All but 2 of the judges of S.D. Tex. oppose the return to 12-person juries. Their views are largely based on cost, and the belief that they have seen adequate and fair verdicts returned by smaller juries. A poll of the 5th Circuit District Judges Association got 73 responses from 94 members. 63 oppose the proposal, while 10 support it. Again, the feeling is that the proposal increases costs without real benefit.

Hon. Virginia M. Morgan, February 9: Tr 43 to 49. President, Federal Magistrate Judges Association. There are concerns about costs.

Hon. John F. Keenan, February 9: Tr 56 to 64: For all the judges, S.D.N.Y. "There is no data or reliable information to support the concept that 12-member juries achieve better results than 6, 8 or 10-person juries." We use 8-member juries; to do that, we have a venire panel of 22. If we go to 12-member juries, the panel must increase to 33 to offset increased losses. "This would increase our annual expenses for jurors by 50 percent on the civil side, an expenditures which we view as totally unnecessary." In New York we have great diversity, and our jury panels reflect that diversity now. The value of jurors as emissaries for the judicial system is well severed by smaller juries.

Hon. John M. Roper, February 9: Tr. 64 to 80: Appearing for the Economy Subcommittee, Budget Committee of the Judicial Conference. This testimony is directed only to cost implications, not to the wisdom of the proposal as a matter of procedure. (The chair of the Budget Committee has vigorously supported a return to 12-person juries as a matter of policy.) The cost of returning to 12-person juries could go as high as $12,000,000. The more jurors you

select, the greater the pool, the greater the number of challenges for cause, the greater the number of people who simply do not show up, the greater the need to send marshals out to round up people, and so on. There are also courtroom costs, both with respect to retrofitting existing magistrate judge courtrooms with larger jury boxes and with respect to new court construction plans that contemplated shared use of courtrooms in ways that permit construction of some courtrooms for smaller juries, and others for 12-person juries. Although parties can be told that they can have a magistrate-judge trial only if they consent to a smaller jury, this may reduce the frequency of consents to magistrate-judge trials. Some defense firms believe there is a greater prospect of a hung jury with 12, and are willing to pay for it, whether or not the perception is accurate.

Al Cortese, Esq., February 9: Tr 98 to 109: The National Chamber Litigation Center supports the proposal.

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE*

Rule 23: Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not

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*New matter is underlined; matter to be omitted is lined through.

parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the practical ability of individual class members to pursue their claims without class certification;

(~~A~~B) ~~the interest of members of the class in individually controlling the prosecution or defense of~~ class members' interests in maintaining or defending separate actions;

(~~B~~C) the extent, ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of the class~~;

(~~C~~D) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(~~D~~E) the difficulties likely to be encountered in the management of a class action; and

(F) whether the probable relief to individual class members justifies the costs and burdens of class litigation; or

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

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) When ~~As soon as~~ practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that:

(A) the court will exclude the member from the class if the member so requests by a specified date;

(B) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or

(b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate:

(A) an action may be brought or maintained as a class action with respect to particular issues, or

(B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the matter proceed accordingly;

(5) dealing with similar procedural matters.

The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

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

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

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

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy; provided, however, that if certification is requested by the parties to a proposed settlement for settlement purposes only, the settlement may be considered in making these findings of predominance and superiority. The matters pertinent to the findings include:

(A) the practical ability of individual class members to pursue their claims without class certification;

(~~A~~B) class members' interests in maintaining or defending separate actions;

(~~B~~C) the extent, ~~and~~ nature, and maturity of any related litigation ~~concerning the controversy already commenced by or against~~ involving class members ~~of the class~~;

(~~C~~D) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(~~D~~E) the difficulties likely to be encountered in the management of a class action; and

(F) whether the probable relief to individual class members justifies the costs and burdens of class litigation.

(G) if certification is requested by the parties to a proposed settlement for settlement purposes only, the settlement may be considered in making these findings of predominance and superiority.

Protective Order Activity in Three Federal Judicial Districts
Report to the Advisory Committee on Civil Rules

Elizabeth C. Wiggins, Melissa J. Pecherski, and George Cort
Federal Judicial Center
April 1996

Introduction and Methods

This report summarizes work underway at the Federal Judicial Center concerning protective orders, confidential settlement agreements, and other sealed court records. The general purpose of our work is to provide the information necessary to evaluate the efficacy of Fed. R. Civ. P. 26(c) and to address the potential need for additional provisions in the rules relating to sealed court records and sealed settlement agreements.

This report focuses on the use of protective orders in three federal district courts. Our research approach entailed identifying cases that involved protective order activity in the three courts and then transcribing information from the docket sheets and case files of a sample of those cases.

Civil cases filed in 1990-1992 in the District of Columbia and those filed in 1991-92 in the Eastern District of Michigan and the Eastern District of Pennsylvania were included in the study. We identified cases involving protective order activity by electronically searching the computerized databases of civil case dockets for event and relief codes associated with this type of activity. We then obtained more detailed information about a random sample of cases that involved protective order activity from each district by recording information from docket sheets and case files.[1]

In this report, we present information about the following issues:

- the incidence of protective order activity;
- the extent to which protective order activity is initiated by stipulated agreement versus motion;
- the extent to which motions for protective orders are contested;
- the extent to which motions for protective orders are granted;
- the stated objectives of protective orders;

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[1]For the District of Columbia, we searched the electronic database during the fall of 1993 and collected the information from the docket sheets and case files during the spring and summer of 1994. In the Eastern District of Pennsylvania and the Eastern District of Michigan, we searched the electronic databases during the summer of 1994 and collected the information from the docket sheets and case files during that summer and fall.

- the types of cases in which protective orders are granted, including the nature of suit and the types of parties involved;
- the types of cases in which access to discovered material is restricted;
- the frequency with which protective orders are modified or dissolved; and
- the disposition of cases in which protective orders are granted.

Findings

The remainder of this report sets forth our findings. Each general finding is numbered and set forth in bold, followed by a fuller explanation and/or data tables.

1. In the Eastern District of Michigan and the Eastern District of Pennsylvania, protective order activity occurred in approximately 5% of civil cases filed in 1991 and 1992. In the District of Columbia, the incidence of protective order activity was higher; it occurred in approximately 10.0,% 9.8%, and 8.1% of the civil cases filed in 1990, 1991, and 1992, respectively.

Table 1 shows for each district the number of civil cases filed during the time period studied and the number of those cases in which protective order activity had occurred at the time we electronically searched the dockets. Because some of the cases filed during the study period were still pending at the time of our electronic search, the percentages shown in the third row likely underestimate the actual amount of protective order activity that will ultimately occur and should be interpreted as lower bounds. Table 2 on the next page shows the number of cases in each district that we examined in more detail, and the number of motions, stipulated agreements, and "sua sponte" protective orders occurring in those cases. By "sua sponte," we mean that the protective order was entered by a judge in the absence of a docketed motion or stipulated agreement. Most of the cases (between 69% and 74% across districts) involved only one motion for protective order, one stipulated agreement, or one "sua sponte" order, although some cases involved up to ten separate motions, agreements, or "sua sponte" orders.

Unless otherwise noted, the remainder of the findings that we present in this report are based on the cases that were examined in more detail.

Table 1
Comparison of Total Caseload with Protective Order Activity

	District of Columbia			Eastern Michigan		Eastern Pennsylvania	
	1990	1991	1992	1991	1992	1991	1992
Number of civil filings	3026	2958	2761	6317	6752	8317	8048
Number of cases involving protective order activity as of the time we examined the dockets	304	289	225	297	340	442	382
Percentage of cases reflecting protective order activity as of the time we examined the dockets	10.0%	9.8%	8.1%	4.7%	5.0%	5.3%	4.7%

Table 2
Description of Samples Examined in More Detail

	District of Columbia	Eastern Michigan	Eastern Pennsylvania
Number of cases examined in more detail	204	195	202
Number of motions, stipulated agreements, "sua sponte" orders in those cases	317	293	317

Note: By "sua sponte," we mean that the protective order was entered by a judge in the absence of a docketed motion or stipulated agreement.

2. Protective order activity was most commonly initiated by motion rather than by stipulated agreement. About half of the motions were opposed. In two districts, hearings were held on few of the motions; in the third district, hearings were held on over half of the motions, often in conjunction with hearings on other motions in the cases.

As shown in Table 3, most of the protective order activity in each district began with a motion by the plaintiff, defendant, another party, or non-party, although a significant amount of activity began with a stipulated agreement between opposing parties. Responses in opposition to about half of the motions were filed (see Table 4). About half of these responses were met with a reply in the District of Columbia and fewer than half of these responses were met with a reply in the other two districts, as shown in Table 5.

In the District of Columbia and the Eastern District of Pennsylvania, hearings were held on few of the motions. In the Eastern District of Michigan, however, hearings were held on over half of the motions (see Table 6). These hearings were often combined with hearings on other motions in the cases.

Table 3
Origin of Protective Order Activity

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Motion by plaintiff	55	17%	63	22%	57	18%
Motion by defendant	184	58%	122	42%	153	48%
Motion by other party or non-party	12	4%	13	4%	25	8%
Stipulated agreement between opposing parties	53	17%	77	26%	77	24%
Judge's order in the absence of a docketed motion or stipulated agreement	13	4%	18	6%	5	2%
TOTAL NUMBER OF SEPARATE PROTECTIVE ORDER ACTIVITIES	317		293		317	

Table 4
Number of Motions to Which a Response was Filed

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
No response filed	78	31%	84	42%	111	47%
Response in opposition filed	143	57%	91	46%	107	46%
Response in concurrence filed	4	2%	1	<1%	3	1%
Response seeking an amendment to the motion	1	<1%	0	0%	0	0%
Response filed, but unknown if in opposition or concurrence	24	10%	21	11%	10	4%
Unable to ascertain whether a response was filed	1	<1%	1	<1%	4	2%
TOTAL NUMBER OF MOTIONS FOR PROTECTIVE ORDER	251		198		235	

Table 5
Number of Responses to which a Reply was Filed

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
No reply filed	92	53%	81	72%	100	83%
Reply filed	74	43%	30	27%	20	17%
Unable to ascertain whether a reply was filed	6	3%	2	2%	0	0%
TOTAL NUMBER OF RESPONSES	172		113		120	

Table 6
Number of Motions for which a Hearing was Held

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Hearing held	27	11%	117	59%	5	2%
No hearing held	216	86%	76	38%	224	95%
Unable to determine if a hearing held	8	3%	5	3%	6	3%
TOTAL NUMBER OF MOTIONS FOR PROTECTIVE ORDER	251		198		235	

3. Approximately 40% of the motions for a protective order were granted either in whole or in part (see Table 7). Only two stipulated agreements were rejected by the court on the record.

Table 7
Disposition of motions for protective orders

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
1. Motion granted in whole	77	32%	53	27%	54	23%
2. Motion granted in part	24	10%	25	13%	29	12%
3. Motion denied (includes some motions denied as moot)	69	29%	58	30%	105	45%
4. Motion not ruled on although case closed (i.e., motion is moot)	70	29%	27	14%	40	17%
5. Motion withdrawn	2	1%	32	16%	6	3%
6. Motion pending	5		3		1	
7. Unknown	4		0		0	
NUMBER OF MOTIONS THAT WERE RESOLVED (categories 1, 2, 3, and 4 above)	240		195		234	

Note: Category 3: Motion Denied includes some motions that were denied as moot. We estimate that the reason for between 20 and 35% of the denials was mootness. The percentages were calculated excluding the categories (6) motion pending and (7) unknown. One stipulated agreement in the Eastern District of Pennsylvania and one stipulated agreement in the District of Columbia were rejected by the court; this is not reflected in the above figures.

Only two stipulated agreements for a protective order were rejected by the court on the record (one in the Eastern District of Pennsylvania and one in the District of Columbia). One explanation for the infrequency of this event is that parties discuss with the court whether a protective order is warranted and what provisions should be included before a formal agreement is presented, thus drastically reducing the number that are rejected. The alternate explanation is, of course, that judges are reluctant to reject an agreement between opposing parties, except in rare circumstances.

4. 166, 173, and 164 protective orders were entered in 127, 140, and 131 cases in the District of Columbia, the Eastern District of Michigan, and the Eastern District of Pennsylvania, respectively. Of the protective orders that were entered, between 45% and 61% were initiated by motion and between 31% and 46% were initiated by stipulated agreement between the parties (see Table 8). The objectives of these orders are summarized in Tables 9 and 10, and discussed below.

Table 8
Protective Orders Entered

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Initiated by motion	101	61%	78	45%	83	51%
Initiated by agreement of parties	52	31%	77	45%	76	46%
Initiated sua sponte by court order	13	8%	18	10%	5	3%
TOTAL NUMBER OF PROTECTIVE ORDERS ENTERED	166		173		164	

Note: By "sua sponte", we mean the protective order was entered by a judge in the absence of a docketed motion or stipulated agreement.

Table 9 on the next page summarizes the objectives of these orders. The percentages in the tables are of the total number of protective orders. Because the objective of some orders was multi-faceted, the numbers within columns do not sum to the number of orders entered nor do the percentages sum to 100. Table 10 shows the nature of suit of the cases in which such a restriction was imposed.

Seventy-six, 89, and 82 orders in 62, 81, and 75 cases in the District of Columbia, the Eastern District of Michigan, and the Eastern District of Pennsylvania, respectively, restricted a party from disclosing materials to others. Many of the orders originated with a stipulated agreement (63% in the District of Columbia, 74% in the Eastern District of Michigan, and 88% in the Eastern District of Pennsylvania).

Almost all of the orders applied the restriction to anyone outside the litigation; many also set forth an inclusive list of those people who were allowed access. Many of the orders restricting access to discovered material set forth a set of procedures for handling confidential information. A typical order would describe the general type of material to held confidential (e.g., "party-designated confidential", medical records, trade secrets, business records, financial information, personnel or payroll records, depending on the type of case); describe how a party designates material as confidential and how that designation can be challenged; identify who is (is not) to have access to confidential information; allow documents marked as confidential to be filed under seal; and require the return or destruction of discovered materials.

Table 9
Objective of protective orders

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
That discovery not be had	19	12%	17	11%	19	13%
That discovery be had only by a method of discovery other than that selected by the party seeking discovery	0	0%	1	1%	4	3%
That certain matters not be inquired into or that scope of discovery be limited to certain matters	9	6%	12	8%	11	7%
Restrict party from disclosing materials to others	76	48%	89	59%	82	55%
Require return or destruction of discovered materials	56	36%	61	41%	47	32%
Stay discovery pending, for example, ruling on dispositive motion or until other party complies with discovery request	43	27%	26	17%	14	9%
Limit number of interrogatories	0	0%	1	1%	2	1%
Limit number or length of deposition	0	0%	2	1%	2	1%
Designate time and place of discovery	6	4%	1	1%	14	9%
Other provision	7	4%	7	5%	13	9%
Objective of Order Unknown	9		23		16	
TOTAL NUMBER OF PROTECTIVE ORDERS	166		173		164	

Note: Percentages were calculated using the number of protective orders for which the objective was known (District of Columbia: 157; Eastern District of Michigan: 150, and Eastern District of Pennsylvania: 148.)

Table 10
Nature of Suit for Cases in Which a Protective Order Restricting Access to Discovery Materials was Entered

NATURE OF SUIT	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Contract	**11**	**17.7%**	**22**	**27.2%**	**18**	**24%**
Insurance (110)	0	0%	3	3.7%	5	6.7%
Miller Act (130)	0	0%	0	0%	1	1.3%
Negotiable Instrument (140)	0	0%	1	1.2%	0	0%
Other Contract (190)	11	17.7%	17	21.0%	12	16.0%
Product Liability (195)	0	0%	1	1.2%	0	0%
Real Property	**1**	**1.6%**	**0**	**0%%**	**0**	**0%**
Rent, Lease and Ejectment (230)	1	1.6%	0	0%%	0	0%
Personal Injury	**7**	**11.3%**	**6**	**7.4%**	**6**	**8.0%**
Airplane Personal Injury (310)	0	0%	1	1.2%	0	0%
Personal Injury: Assault, Libel and Slander (320)	1	1.6%	0	0%	0	0%
Personal Injury: FELA (330)	1	1.6%	0	0%	0	0%
Personal Injury: Marine Personal Injury (340)	0	0%	0	0%	1	1.3%
Personal Injury: Motor Vehicle (350)	1	1.6%	0	0%	0	0%
Personal Injury: Other Personal Injury (360)	2	3.2%	0	0%	1	1.3%
Personal Injury: Medical Malpractice (362)	2	3.2%	0	0%	0	0%
Personal Injury: Personal Injury Product Liability (365)	0	0%	5	6.2%	4	5.3%
Personal Property	**0**	**0%**	**4**	**4.9%**	**5**	**6.7%**
Personal Property Damage: Other Fraud (370)	0	0%	4	4.9%	3	4.0%
Personal Property Damage: Other Personal Property Damage (380)	0	0%	0	0%	2	2.7%
Civil Rights	**22**	**35.5%**	**21**	**25.9%**	**19**	**25.3%**
Other (440)	0	0%	11	13.6%	3	4.0%
Employment (442)	21	33.9%	10	12.3%	16	21.3%
Accommodations (443)	1	1.6%	0	0%	0	0%
Prisoner Petitions (550)	**1**	**1.6%**	**0**	**0%**	**0**	**0%**
Labor	**3**	**4.8%**	**8**	**9.9%**	**5**	**6.6%**
Fair Labor Standards Act (710)	1	1.6%	1	1.2%	1	1.3%
Other Labor Litigation (790)	0	0%	2	2.5%	1	1.3%
ERISA (791)	2	3.2%	5	6.2%	3	4.0%
Property Rights	**6**	**9.7%**	**13**	**16.0%**	**9**	**12%**
Copyright (820)	2	3.2%	3	3.7%	2	2.7%
Patent (830)	2	3.2%	4	4.9%	5	6.7%
Trademark (840)	2	3.2%	6	7.4%	2	2.7%
Other Statutes	**11**	**17.7%**	**7**	**8.6%**	**13**	**17.3%**
Antitrust (410)	3	4.8%	2	2.5%	2	2.7%
Withdrawal (423)	0	0%	1	1.2%	1	1.3%
Banks and Banking (430)	1	1.6%	0	0%	2	2.7%
Racketeer Influenced and Corrupt Organizations (470)	1	1.6%	0	0%	0	0%
Securities, Commodities, and Exchange (850)	0	0%	2	2.5%	7	9.3%
Other Statutory Actions (890)	4	6.5%	2	2.5%	1	1.3%
Freedom of Information Act (895)	2	3.2%	0	0%	0	0%
TOTAL	62		81		75	

5. Across the three districts, few protective orders had been modified or dissolved at the time the case files were examined.

It was not uncommon for protective orders, particularly those restricting access to discovery materials, to contain a provision indicating that the order could be dissolved by agreement of the parties or by the court. These orders, however, typically did not elaborate on the specific factors the court would consider in modifying or dissolving the order.

As shown in Tables 11 and 12, few protective orders had been modified or dissolved at the time the case files were examined. Following the tables, we describe the ways in which the orders were modified or dissolved.

Table 11
Modification of Protective Orders by the Court or by Agreement of the Parties

	District of Columbia	Eastern Michigan	Eastern Pennsylvania
Number of protective orders modified by the court	2	6	3
Number of protective orders modified by agreement between the parties	4	0	3
Number of protective orders the court affirmatively refused to modify	1	1	0
Number of protective orders for which a motion to reconsider the protective order was pending	1	2	0

Table 12
Dissolution of Protective Orders by the Court or by Agreement of the Parties

	District of Columbia	Eastern Michigan	Eastern Pennsylvania
Number of protective orders dissolved by the court	2	0	4
Number of protective orders dissolved by agreement between the parties	0	0	1
Number of protective orders the court affirmatively refused to dissolve	0	2	0
Number of protective orders for which a motion to reconsider the protective order was pending	1	2	0

Protective orders modified by the court

A confidentiality order was modified to add: "Nothing in this order shall prevent disclosure of confidential materials under Commission Rule 4.11(b), 16 C.F.R. Section 4.11(b), in response to a request from a Congressional committee or subcommittee."

A confidentiality order was modified to bind an intervenor to its terms.

A deadline for taking a telephone deposition was extended - the original date was specified in a protective order.

A protective order limiting the scope of discovery was modified -- information previously protected from discovery during a deposition is discoverable, as long as discovering party keeps the information confidential and does not disclose it to any other parties.

A confidentiality order was amended to include performers and groups, whose merchandising rights plaintiff had recently acquired, in the scope of persons who should not have access to confidential information.

An order prohibiting the asking of certain questions during a deposition was modified in undetermined way.

A confidentiality order was expanded to cover other documents.

A confidentiality order was modified to allow plaintiff's counsel access to limited documents pertaining to jurisdiction.

A confidentiality order was modified to permit defendant to use non-privileged discovery matters in another pending case to which it is a party, provided the defendant abides by the original confidentiality agreement.

A sealed complaint was partially unsealed to facilitate discussion between the plaintiff and defendant.

After in camera review of certain documents, the court modified (strengthened) a protective order to require the plaintiff to keep the documents confidential and to return them to the defendant after trial.

Protective orders modified by agreement of the parties

Parties agreed that to the extent the provisions of two confidentiality orders contradicted a third, they were vacated. The third order was sealed.

A confidentiality order was modified twice to change the list of persons having access to confidential material.

A confidentiality order was modified to clarify that parties have access to discovered materials.

A confidentiality order was modified to clarify how counsel should designate documents/depositions confidential and challenge the confidential designation, and who may view/use confidential information.

An order restricting access to discovered materials was extended for a period of two years after entry of a stipulation of dismissal with prejudice.

A confidentiality order initially proposed by the plaintiff was vacated and a confidentiality order stipulated to by the parties was entered in its place.

Protective orders the court affirmatively declined to modify

A motion by an intervening plaintiff to modify a confidentiality order was denied.

A motion to modify a protective order staying discovery was denied.

Protective orders vacated by the court

Court vacated a temporary protective order that barred a deposition and denied the original motion as moot.

Court vacated an order staying discovery pending resolution of defendant's motion to dismiss.

Court ordered that all sealed documents in the case be unsealed immediately (three orders in one case, one order in a second case).

Protective orders dissolved by agreement of the parties

Documents sealed under the stipulated protective order are to be unsealed.

Protective orders the court affirmatively declined to vacate

Court declined to vacate an order staying discovery. (two orders in two cases)

7. In the District of Columbia and the Eastern District of Pennsylvania, the nature of suit for 85% and 81%, respectively, of the cases involving protective order activity fell into the nature of suit categories (1) contract, (2) personal injury, (3) civil rights, and (4) other statutes. The cases in which a protective order was actually entered also were concentrated in these four categories. In the Eastern District of Michigan, the nature of suit for 40% of the cases involving protective order activity fell into the nature of suit categories (1) contract and (2) civil rights; from 9% to 12% of the cases fell into each of the following other nature of suit categories: (1) personal injury, (2) prisoner petitions, (3) labor, (4) property rights, and (5) other statutes. The cases in which a protective order was actually entered were distributed across nature of suit categories in a similar fashion.

Table 13 shows the nature of suit for the cases involving any protective order activity. Table 14 presents the same information for cases in which a protective order was entered. More detailed tables are attached as Appendices A and B.

Table 13
Nature of Suit for Cases Involving Protective Order Activity

NATURE OF SUIT	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Contract	33	16%	38	19%	54	27%
Real Property	1	<1%	2	1%	4	2%
Personal Injury	35	17%	22	11%	38	19%
Personal Property	3	1%	5	3%	11	5%
Civil Rights	48	24%	40	21%	39	19%
Prisoner Petitions	9	4%	24	12%	2	1%
Forfeiture and Penalty	1	<1%	2	1%	2	1%
Labor	8	4%	18	9%	9	4%
Property Rights	8	4%	20	10%	11	5%
Other Statutes	58	28%	24	12%	32	16%
TOTAL NUMBER OF CASES INVOLVING PROTECTIVE ORDER ACTIVITY	204		195		202	

Table 14
Nature of Suit for Cases in which a Protective Order was Entered

NATURE OF SUIT	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Contract	19	15%	28	20%	29	22%
Real Property	1	1%	1	1%	3	2%
Personal Injury	20	16%	15	11%	25	19%
Personal Property	2	2%	5	4%	7	5%
Civil Rights	35	28%	32	23%	28	21%
Prisoner Petitions	4	3%	16	11%	1	1%
Forfeiture and Penalty	0	0%	1	1%	1	1%
Labor	4	3%	12	9%	6	5%
Property Rights	7	6%	18	13%	11	8%
Other Statutes	34	27%	12	9%	20	15%
TOTAL NUMBER OF CASES IN WHICH A PROTECTIVE ORDER WAS ENTERED	127		140		131	

8. In the District of Columbia and the Eastern District of Michigan, protective order activity occurred and protective orders were entered most frequently in cases in which the plaintiff was an individual and the defendant was either a business or governmental entity or in which both the plaintiff and defendant were businesses. In the Eastern District of Pennsylvania, protective order activity occurred and protective orders were entered most frequently in cases involving an individual or business as the plaintiff and a business as the defendant.

Tables 15 A-C shows the types of parties in the cases involving protective order activity. All percentages in the tables are of the total number of cases in the given district involving protective order activity. Table 16 A-C presents the same information for cases in which a protective order was entered. All percentages in the tables are of the total number of cases in the given district in which a protective order was entered.

Table 15
Types of Parties in Cases Involving Protective Order Activity

A. District of Columbia

		DEFENDANT											
		Individual		Government		Business		Private Organization		Other			
	Individual	18	9%	59	29%	48	24%	7	3%	0	0%	**132**	**65%**
PLAINTIFF	Government	0	0%	3	1%	5	2%	0	0%	0	0%	**8**	**4%**
	Business	5	2%	17	8%	30	15%	1	<1%	0	0%	**53**	**26%**
	Private Organization	1	<1%	9	4%	1	<1%	0	0%	0	0%	**11**	**5%**
		24	**12%**	**88**	**43%**	**84**	**41%**	**8**	**4%**	**0**	**0%**	**204**	

B. Eastern District of Michigan

		DEFENDANT											
		Individual		Government		Business		Private Organization		Other			
	Individual	10	5%	57	29%	63	32%	2	1%	0	0%	**132**	**68%**
PLAINTIFF	Government	1	<1%	1	<1%	2	1%	1	<1%	2	1%	**7**	**4%**
	Business	2	1%	2	1%	46	24%	0	0%	0	0%	**50**	**26%**
	Private Organization	0	0%	1	<1%	4	2%	1	<1%	0	0%	**6**	**3%**
		13	**7%**	**61**	**31%**	**115**	**59%**	**4**	**2%**	**2**	**1%**	**195**	

C. Eastern District of Pennsylvania

		DEFENDANT											
		Individual		Government		Business		Private Organization		Other			
	Individual	15	7%	18	9%	84	42%	6	3%	0	0%	**123**	**61%**
PLAINTIFF	Government	0	0%	1	<1%	8	4%	0	0%	2	1%	**11**	**5%**
	Business	19	9%	1	<1%	47	23%	0	0%	0	0%	**67**	**33%**
	Private Organization	0	0%	0	0%	1	<1%	0	0%	0	0%	**1**	**<1%**
		34	**17%**	**20**	**10%**	**140**	**69%**	**6**	**3%**	**2**	**1%**	**202**	

Table 16
Types of Parties in Cases in which a Protective Order was Entered

A. District of Columbia

		DEFENDANT											
		Individual		Government		Business		Private Organization		Other			
	Individual	10	8%	40	32%	32	25%	3	2%	0	0%	**85**	**67%**
PLAINTIFF	Government	0	0%	2	2%	2	2%	0	0%	0	0%	**4**	**3%**
	Business	4	3%	9	7%	21	17%	0	0%	0	0%	**34**	**27%**
	Private Organization	0	0%	4	3%	0	0%	0	0%	0	0%	**4**	**3%**
		14	**11%**	**55**	**43%**	**55**	**43%**	**3**	**2%**	**0**	**0%**	**127**	

B. Eastern District of Michigan

		DEFENDANT											
		Individual		Government		Business		Private Organization		Other			
	Individual	6	4%	42	30%	44	31%	0	0%	0	0%	**92**	**66%**
PLAINTIFF	Government	1	1%	1	1%	2	1%	0	0%	1	1%	**5**	**4%**
	Business	0	0%	1	1%	38	27%	0	0%	0	0%	**39**	**28%**
	Private Organization	0	0%	0	0%	3	2%	1	1%	0	0%	**4**	**3%**
		7	**5%**	**44**	**31%**	**87**	**62%**	**1**	**1%**	**1**	**1%**	**140**	

C. Eastern District of Pennsylvania

		DEFENDANT											
		Individual		Government		Business		Private Organization		Other			
	Individual	9	7%	10	8%	59	45%	5	4%	0	0%	**83**	**63%**
PLAINTIFF	Government	0	0%	0	0%	6	5%	0	0%	1	1%	**7**	**5%**
	Business	12	9%	1	1%	27	21%	0	0%	0	0%	**40**	**31%**
	Private Organization	0	0%	0	0%	1	1%	0	0%	0	0%	**1**	**1%**
		21	**16%**	**11**	**8%**	**93**	**71%**	**5**	**4%**	**1**	**1%**	**131**	

9. In the District of Columbia and the Eastern District of Michigan, cases in which protective activity occurred were most frequently resolved by a dismissal under Fed. R. Civ. P. 41(a)(1)(ii), with no explicit mention of settlement. In both districts, a substantial number of the cases were resolved by summary judgment or dispositive motion and in the District of Columbia, a substantial number were resolved by dismissal pursuant to Fed. R. Civ. P. 41(b). In the Eastern District of Pennsylvania, cases with protective order activity were most frequently reported as settled, although a substantial number were resolved by jury decision or by dismissal pursuant to Fed. R. Civ. P. 41(a)(1)(ii). A similar pattern of results was found for cases in which a protective order had been entered.

Table 17 shows the disposition of the cases involving protective order activity. Table 18 presents the same information for cases in which a protective order was entered.

Table 17
Disposition of Cases Involving Protective Order Activity

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Summary Judgment	33	16%	41	21%	11	6%
Other dispositive motion	27	13%	18	9%	8	4%
Judicial decision after trial	12	6%	5	3%	13	7%
Jury decision	8	4%	8	4%	24	12%
Dismissal under Rule 41(a)(1)(i)	3	2%	0	0%	0	0%
Dismissal under Rule 41(a)(1)(ii) (with no explicit mention of settlement)	69	34%	62	32%	20	10%
Dismissal under Rule 41(a)(2)	5	3%	4	2%	4	2%
Dismissal under Rule 41(b)	5	3%	3	2%	3	2%
Settled/Consent Judgment	14	7%	32	16%	92	46%
Arbitration/Mediation	1	<1%	4	2%	5	2%
Transferred	9	4%	3	2%	4	2%
Remanded	3	1%	5	3%	3	1%
Other	2	1%	0	0%	7	3%
Case pending	12	6%	9	5%	7	4%
Disposition unknown	1	<1%	1	<1%	1	<1%
	204		195		202	

Table 18
Disposition of Cases in which a Protective Order was Entered

	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Summary Judgment	19	15%	31	22%	5	4%
Other dispositive motion	13	10%	13	9%	4	3%
Judicial decision after trial	10	8%	4	3%	9	7%
Jury decision	6	5%	6	4%	19	15%
Dismissal under Rule 41(a)(1)(i)	1	1%	0	0%	0	0%
Dismissal under Rule 41(a)(1)(ii) (with no explicit mention of settlement)	46	36%	46	33%	15	12%
Dismissal under Rule 41(a)(2)	2	2%	3	2%	3	2%
Dismissal under Rule 41(b)	2	2%	2	1%	2	2%
Settled	9	7%	23	16%	61	37%
Arbitration/Mediation	1	1%	3	2%	0	0%
Transferred	6	5%	1	1%	2	2%
Remanded	1	1%	1	1%	2	2%
Other	1	1%	0	0%	3	2%
Case pending	9	7%	6	4%	5	4%
Disposition unknown	1	1%	1	1%	1	<1%
	127		140		131	

Appendix A

Nature of Suit for Cases Involving Protective Order Activity

Table B
Nature of Suit for Cases Involving Protective Order Activity

NATURE OF SUIT	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Contract						
Insurance (110)	2		7		16	
Marine (120)	0		0		1	
Miller Act (130)	0		0		1	
Negotiable Instrument (140)	1		1		1	
Other Contract (190)	29		29		33	
Product Liability (195)	0		1		2	
Recovery of overpayment of Medicare (151)	1		0		0	
	33	**16%**	**38**	**19%**	**54**	**27%**
Real Property						
Rent, Lease and Ejectment (230)	1		0		0	
Torts to Land (240)	0		0		3	
All Other Real Property (290)	0		2		1	
	1	**<1%**	**2**	**1%**	**4**	**2%**
Personal Injury						
Airplane Personal Injury (310)	0		1		0	
Personal Injury: Assault, Libel and Slander (320)	5		0		1	
Personal Injury: FELA (330)	1		1		4	
Personal Injury: Marine Personal Injury (340)	0		1		2	
Personal Injury: Motor Vehicle (350)	7		4		9	
Personal Injury: Other Personal Injury (360)	12		6		6	
Personal Injury: Medical Malpractice (362)	4		0		2	
Personal Injury: Personal Injury Product Liability (365)	5		9		14	
Asbestos personal injury - product liability (368)	1		0		0	
	35	**17%**	**22**	**11%**	**38**	**19%**
Personal Property						
Personal Property Damage: Other Fraud (370)	2		5		6	
Personal Property Damage: Other Personal Property Damage (380)	1		0		3	
Personal Property Damage: Property Damage-Product Liability (385)	0		0		2	
	3	**1%**	**5**	**3%**	**11**	**5%**
Civil Rights						
Other (440)	15		27		16	
Jobs (442)	32		13		23	
Accommodations (443)	1		0		0	
	48	**24%**	**40**	**21%**	**39**	**19%**
Prisoner Petitions (550)	**9**	**4%**	**24**	**12%**	**2**	**1%**

NATURE OF SUIT	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Forfeiture and Penalty						
Food and Drug (620)	0		0		1	
Drug Forfeiture (625)	0		1		0	
Miscellaneous Forfeiture and Penalty (690)	1		1		1	
	1	**<1%**	**2**	**1%**	**2**	**1%**
Labor						
Fair Labor Standards Act (710)	1		1		1	
Labor Management Relations (720)	0		1		0	
Labor Management Reporting and Disclosure (730)	0		1		0	
Railway Labor Act (740)	1		0		0	
Other Labor Litigation (790)	2		3		1	
ERISA (791)	4		12		7	
	8	**4%**	**18**	**9%**	**9**	**4%**
Property Rights						
Copyright (820)	2		5		3	
Patent (830)	2		8		6	
Trademark (840)	4		7		2	
	8	**4%**	**20**	**10%**	**11**	**5%**
Other Statutes						
Antitrust (410)	5		4		4	
Withdrawal (423)	0		1		2	
Banks and Banking (430)	1		0		2	
Racketeer Influenced and Corrupt Organizations (470)	2		2		3	
Securities, Commodities, and Exchange (850)	3		7		12	
Social Security: SSID (864)	0		0		1	
Taxes (870)	0		1		0	
Other Statutory Actions (890)	26		9		8	
Environmental Matters (893)	4		0		0	
Freedom of Information Act (895)	17		0		0	
	58	**28%**	**24**	**12%**	**32**	**16%**
TOTAL	**204**		**195**		**202**	

Appendix B

Nature of Suit for Cases in which a Protective Order Was Entered

Table B-14
Nature of Suit for Cases in which a Protective Order was Entered

NATURE OF SUIT	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Contract						
Insurance (110)	0		6		8	
Marine (120)	0		0		0	
Miller Act (130)	0		0		1	
Negotiable Instrument (140)	0		1		1	
Other Contract (190)	19		20		18	
Product Liability (195)	0		1		1	
Recovery of overpayment of Medicare (151)	0		0		0	
	19	**15%**	**28**	**20%**	**29**	**22%**
Real Property						
Rent, Lease and Ejectment (230)	1		0		0	
Torts to Land (240)	0		0		3	
All Other Real Property (290)	0		1		0	
	1	**1%**	**1**	**1%**	**3**	**2%**
Personal Injury						
Airplane Personal Injury (310)	0		1		0	
Personal Injury: Assault, Libel and Slander (320)	1		0		1	
Personal Injury: FELA (330)	1		1		0	
Personal Injury: Marine Personal Injury (340)	0		0		2	
Personal Injury: Motor Vehicle (350)	4		1		6	
Personal Injury: Other Personal Injury (360)	9		5		4	
Personal Injury: Medical Malpractice (362)	2		0		2	
Personal Injury: Personal Injury Product Liability (365)	2		7		10	
Asbestos personal injury - product liability (368)	1		0		0	
	20	**16%**	**15**	**11%**	**25**	**19%**
Personal Property						
Personal Property Damage: Other Fraud (370)	1		5		4	
Personal Property Damage: Other Personal Property Damage (380)	1		0		2	
Personal Property Damage: Property Damage-Product Liability (385)	0		0		1	
	2	**2%**	**5**	**4%**	**7**	**5%**
Civil Rights						
Other (440)	6		19		8	
Jobs (442)	28		13		20	
Accommodations (443)	1		0		0	
	35	**28%**	**32**	**23%**	**28**	**21%**
Prisoner Petitions (550)	**4**	**3%**	**16**	**11%**	**1**	**1%**

NATURE OF SUIT	District of Columbia		Eastern Michigan		Eastern Pennsylvania	
Forfeiture and Penalty						
Food and Drug (620)	0		0		1	
Drug Forfeiture (625)	0		0		0	
Miscellaneous Forfeiture and Penalty (690)	0		1		0	
	0	**0%**	**1**	**1%**	**1**	**1%**
Labor						
Fair Labor Standards Act (710)	1		1		1	
Labor Management Relations (720)	0		0		0	
Labor Management Reporting and Disclosure (730)	0		0		0	
Railway Labor Act (740)	0		0		0	
Other Labor Litigation (790)	1		3		1	
ERISA (791)	2		8		4	
	4	**3%**	**12**	**9%**	**6**	**5%**
Property Rights						
Copyright (820)	2		4		3	
Patent (830)	2		7		6	
Trademark (840)	3		7		2	
	7	**6%**	**18**	**13%**	**11**	**8%**
Other Statutes						
Antitrust (410)	3		4		2	
Withdrawal (423)	0		1		1	
Banks and Banking (430)	1		0		2	
Racketeer Influenced and Corrupt Organizations (470)	1		0		2	
Securities, Commodities, and Exchange (850)	2		3		9	
Social Security: SSID (864)	0		0		1	
Taxes (870)	0		0		0	
Other Statutory Actions (890)	13		4		4	
Environmental Matters (893)	2		0		0	
Freedom of Information Act (895)	12		0		0	
	34	**27%**	**12**	**9%**	**20**	**15%**
TOTAL	**127**		**140**		**131**	