ADVISORY COMMITTEE
ON
CIVIL RULES

San Francisco, CA
May 6-7, 2002

AGENDA
ADVISORY COMMITTEE ON CIVIL RULES
MAY 6-7, 2002

1. Opening Remarks of Chair

2. **ACTION** — Approving Minutes of January 22-23, 2002, Committee Meeting

3. **ACTION** — Approving Proposed Amendments to Rule 51 (Jury Instructions) and Transmitting Them to the Standing Rules Committee

   a. Text and Committee Note
   b. Summary of Comments

4. **ACTION** — Approving Proposed Amendments to Rule 53 (Special Masters) and Transmitting Them to the Standing Rules Committee

   a. Background information
   b. Text and Committee Note
   c. Summary of Comments

5. **ACTION** — Approving Proposed Amendments to Rule 23 (Class Actions) and Transmitting Them to the Standing Rules Committee

   a. Report of Class-Action Subcommittee, including consolidated "clean version" of proposed amendments
   b. "Redlined" version of proposed amendments to Rule 23(c) and (e)
      i. Text and Committee Note
      ii. Summary of Comments
   c. "Redlined" version of proposed amendments to Rule 23(g) and (h)
      i. Text and Committee Note
      ii. Summary of Comments

6. **ACTION** — Future Course of Action Regarding Class-Action Issues, Including Consideration of Overlapping Class Actions

   a. Discussion of Class-Action Problems
   b. Summary of Comments on Overlapping Classes

7. **ACTION** — Bankruptcy Subcommittee's Report on National Bankruptcy Review Commission Pertaining to Mass Tort Futures Claims

8. Report of Discovery Subcommittee on Electronic Discovery Issues

9. Pending Agenda Topics

   a. Proposed amendment to Rule 15 to allow relation back if defendant had no information concerning identity of opposing party
   b. Report on proposed amendments of admiralty rules, separating forfeiture provisions from traditional admiralty provisions
   c. Proposed amendments to Rule 6(e) clarifying time counting provision
   d. Video deposition as taxed cost
   e. Consent calendar actions

10. Next Committee Meeting

ADVISORY COMMITTEE ON CIVIL RULES

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Honorable David F. Levi
United States District Judge
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Members:

Honorable Paul J. Kelly, Jr.
United States Circuit Judge
United States Court of Appeals
120 South Federal Place
Santa Fe, NM 87501

Honorable Lee H. Rosenthal
United States District Judge
11535 Bob Casey United States Courthouse
Houston, TX 77002

Honorable Richard H. Kyle
United States District Judge
764 Warren E. Burger Federal Building
316 North Robert Street
St. Paul, MN 55101

Honorable Shira Ann Scheindlin
United States District Judge
United States District Court
1050 United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Honorable John R. Padova
United States District Judge
United States District Court
7614 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1759

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.

Honorable Thomas B. Russell
United States District Judge
United States District Court
307 Federal Building
501 Broadway Street
Paducah, KY 42001

Honorable H. Brent McKnight
United States Magistrate Judge
United States District Court
168 Charles R. Jonas Federal Building
401 West Trade Street
Charlotte, NC 28202

Honorable Nathan L. Hecht
Justice, Supreme Court of Texas
201 West 14th Street
Austin, TX 78711

Professor Myles V. Lynk
Arizona State University College of Law
John S. Armstrong Hall
P.O. Box 877906
Tempe, AZ 85287-7906

Professor John C. Jeffries, Jr.
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903-1789

Mark O. Kasanin, Esquire
McCutchen, Doyle, Brown & Enersen
Three Embarcadero Center
San Francisco, CA 94111

Sheila L. Birnbaum, Esquire
Skadden, Arps, Slate, Maegher & Flom LLP
4 Times Square
New York, NY 10036

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Andrew M. Scherffius, Esquire
Scherffius, Ballard, Still & Ayres, L.L.P.
1201 Peachtree Street, N.E.
400 Colony Square, Suite 1018
Atlanta, GA 30361

Assistant Attorney General
Civil Division (ex officio)
Honorable Robert D. McCallum, Jr.
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

Liaison Members:

Honorable Sidney A. Fitzwater
United States District Judge
United States District Court
15A3 Earle Cabell Federal Building
and United States Courthouse
1100 Commerce Street
Dallas, TX 75242-1003

Honorable A. Thomas Small
United States Bankruptcy Judge
United States Bankruptcy Court
Post Office Drawer 2747
Raleigh, NC 27602

Reporter:

Professor Edward H. Cooper
University of Michigan Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

ADVISORY COMMITTEE ON CIVIL RULES (CONTD.)

Advisors and Consultants:

Professor Richard L. Marcus
University of California
Hastings College of Law
200 McAllister Street
San Francisco, CA 94102-4978

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON CIVIL RULES

SUBCOMMITTEES

Subcommittee on Class Action
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Sheila L. Birnbaum, Esquire
Andrew M. Scheriffius, Esquire

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April 22, 2002
Projects

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

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United States Circuit Judge
22614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, PA 19106

Honorable Samuel A. Alito, Jr.
United States Circuit Judge
357 United States Post Office
and Courthouse
Post Office Box 999
Newark, NJ 07101-0999

Honorable A. Thomas Small
United States Bankruptcy Judge
United States Bankruptcy Court
Post Office Drawer 2747
Raleigh, NC 27602

Honorable David F. Levi
United States District Judge
United States Courthouse
501 I Street, 14th Floor
Sacramento, CA 95814

Honorable Edward E. Carnes
United States Circuit Judge
Frank M. Johnson, Jr. Federal Building
and Courthouse
15 Lee Street
Montgomery, AL 36104

Honorable Milton I. Shadur
United States District Judge
United States District Court
219 South Dearborn Street, Room 2388
Chicago, IL 60604

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159

Prof. Patrick J. Schiltz
Associate Dean and
Professor of Law
University of St. Thomas
School of Law
1000 La Salle Avenue, TMH 440
Minneapolis, MN 55403-2005

Prof. Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton, OH 45469-2772

Prof. Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Prof. David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, TX 78228-8602

Prof. Daniel J. Capra
Fordham University
School of Law
140 West 62nd Street
New York, NY 10023

AGENDA DOCKETING

ADVISORY COMMITTEE ON CIVIL RULES

Proposal	Source, Date, and Doc #	Status
[Copyright Rules of Practice] — Update	Inquiry from West Publishing	4/95 — To be reviewed with additional information at upcoming meetings 11/95 — Considered by cmte 10/96 — Considered by cmte 10/97 — Deferred until spring '98 meeting 3/98 — Deferred until fall '98 meeting 11/98 — Request for publication 1/99 — Stg. Cmte. approves publication for fall 8/99 — Published 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud. Conf approves 4/01— Approved by Sup Ct 12/01–Effective **COMPLETED**
[Recommends clarification of Admiralty Rule B]	William R. Dorsey, III, Esq., President, The Maritime Law Association (01-CV-B)	6/00 — Referred to reporter, chair, and Mark Kasanin 11/01 — Discussed and considered **PENDING FURTHER ACTION**
[Admiralty Rule B, C, and E] — Amend to conform to Rule C governing attachment in support of an in personam action	Agenda book for the 11/95 meeting	4/95 — Delayed for further consideration 11/95 — Draft presented to cmte 4/96 — Considered by cmte 10/96 — Considered by cmte, assigned to Subcmte. 5/97— Considered by cmte 10/97 — Request for publication and accelerated review by ST Cmte 1/98 — Stg. Com. approves publication at regularly scheduled time 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct 4/00 — Supreme Court approved 12/00 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[Admiralty Rule C] — conform time deadlines with Forfeiture Act	Civil Asset Forfeiture Act of 2000	10/00 — Comte considered draft 1/01— Stg. Cmte approves publication; comments due 4/2/01 4/01 — Adv Cmte approved amendments 6/01 — Approved by ST Cmte 9/01 — Approved by Jud. Conf **PENDING FURTHER ACTION**
[Admiralty Rule-New]— Authorize immediate posting of preemptive bond to prevent vessel seizure	Mag. Judge Roberts 9/30/96 (96-CV-D) #1450	12/24/96— Referred to Admiralty and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) **PENDING FURTHER ACTION**
[Inconsistent Statute] — 46 U.S.C. § 786 inconsistent with admiralty	Michael Cohen 1/14/97 (97-CV-A) #2182	2/97 — Referred to reporter and chair Supreme Court decision moots issue **COMPLETED**
[Non-applicable Statute]— 46 U.S.C. § 767 Death on the High Seas Act not applicable to any navigable waters in the Panama Canal Zone	Michael Marks Cohen 9/17/97 (97-CV-O)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Subcmte rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[Admiralty Rule C(4) — Amend to satisfy constitutional concerns regarding default in actions *in rem*	Gregory B. Walters, Cir. Exec., for Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) **PENDING FURTHER ACTION**
[Simplified Procedures] — federal small claims procedures	Judge Niemeyer 10/00	10/99 — Considered, subcmte appointed 4/00 — Considered 10/00 — Considered **PENDING FURTHER ACTION**
[CV4(c)(1)] — Accelerating 120-day service provision	Joseph W. Skupniewitz	4/94 — Deferred as premature **DEFERRED INDEFINITELY**
[CV4(d)] — To clarify the rule	John J. McCarthy 11/21/97 (97-CV-R)	12/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Subcmte rec. accumulate for periodic revision (1) 5/02 — Cmte considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV4(d)(2)] — Waive service of process for actions against the United States	Charles K. Babb 4/22/94	10/94 — Considered and denied 4/95 — Reconsidered but no change in disposition **COMPLETED**
[CV4(e) & (f)] — Foreign defendant may be served pursuant to the laws of the state in which the district court sits	Owen F. Silvions 6/10/94	10/94 — Rules deemed as otherwise provided for and unnecessary 4/95 — Reconsidered and denied **COMPLETED**
[CV4(i)] — Service on government in Bivens suits	DOJ 10/96 (96-CV-B; #1559)	10/96 — Referred to Reporter, Chair, and Agenda Sub cmte. 5/97 — Discussed in reporter's memo. 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Standing Cmte approved 9/99 — Judicial Conference approved 4/00 — Supreme Court Approved 12/00 — Effective **COMPLETED**
[CV4(m)] — Extension of time to serve pleading after initial 120 days expires	Judge Edward Becker	4/95 — Considered by cmte **DEFERRED INDEFINITELY**
[CV4]— Inconsistent service of process provision in admiralty statute	Mark Kasanin	10/93 — Considered by cmte 4/94 — Considered by cmte 10/94 — Recommend statutory change 6/96 — Coast Guard Authorization Act of 1996 repeals the nonconforming statutory provision **COMPLETED**
[CV4] — To provide sanction against the willful evasion of service	Judge Joan Humphrey Lefkow 8/12/97 (97-CV-K)	10/97 — Referred to Reporter, Chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV5] — Electronic filing		10/93 — Considered by cmte 9/94 — Published for comment 10/94 — Considered 4/95 — Cmte approves amendments with revisions 6/95 — Approved by ST Cmte 9/95 — Approved by Jud Conf 4/96 — Approved by Sup Ct 12/96 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV5] — Service by electronic means or by commercial carrier; fax noticing produces substantial cost savings while increasing efficiency and productivity	Michael Kunz, clerk E.D. Pa. and John Frank 7/29/96; 9/10/97 (97-CV-N); William S. Brownell, District Clerks Advisory Group 10/20/97 (97-CV-Q)	4/95 — Declined to act 10/96 — Reconsidered, submitted to Technology Subcommittee 5/97 — Discussed in reporter's memo. 9/97 — Information sent to reporter, chair, and Agenda Sub cmte. 11/98 — Referred to Tech. Subcommittee 3/99 — Agenda Sub cmte. rec. Refer to other cmte (3) 4/99 — Cmte requests publication 6/99 — Stg. Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**
[CV5] — Resolution of dispute between court and courier as to whether courier or court was at fault for failure to file	Lawrence A. Salibra 6/5/00 (00-CV-C)	6/00 — Referred to reporter, chair, and Agenda Subc. **PENDING FURTHER ACTION**
[CV5(d)] — Whether local rules against filing of discovery documents should be abrogated or amended to conform to actual practice	Gregory B. Walters, Cir. Exec., for District Local Rules Review Cmte of Jud. Council of Ninth Cir. 12/4/97 (97-CV-V)	1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/98 — Cmte. approved draft 6/98 — Stg Cmte approves with revision 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg. Comte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct 4/00 — Supreme Court approved 12/00 — Effective **COMPLETED**
[CV5(d)]— Does non-filing of discovery material affect privilege	St Cmte 6/99	10/99 — Discussed **PENDING FURTHER ACTION**
[CV5] — Modifying mailbox rule	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV6] — Calculate "3" days either before or after service	Roy H. Wepner, Esq. 11/27/00 (00/CV/H)	12/00 — Referred to reporter and chair **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV6(b)] — Enlargement of Time; deletion of reference to abrogated rule (technical amendment)	Prof. Edward Cooper 10/27/97; Rukesh A. Korde 4/22/99 (99-CV-C)	10/97 — Referred to cmte 3/98 — Cmte approved draft with recommendation to forward directly to the Jud Conf w/o publication 6/98 — Stg Cmte approved 9/98 — Jud. Conf approved and transmitted to Sup. Ct. 4/99 — Supreme Court approved 12/99 — Effective **COMPLETED**
[CV6(e)] — Time to act after service	ST Cmte 6/94	10/94 — Cmte declined to act **COMPLETED**
[CV6(e)] — Amend the rule to treat service by electronic means the same as service by mail	See Rule 5	4/99 — Cmte requests publication 6/99 — Stg. Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Supreme Court approved 12/01 — Effective **COMPLETED**
[CV7.1] — See Financial Disclosure	Request by Committee on Codes of Conduct 9/23/98	11/98 — Cmte considered 3/99 — Agenda Subcmte rec. Hold until more information available (2) 4/99 — Cmte considered; FJC study initiated 10/99 — Discussed 4/00 — Considered; request for publication 6/00 — Stg Comte approves publication 8/00 — Published 4/01 — Cmte approved amendments 6/01 — Stg Cmte approved 10/01 — Jud Conf approved **PENDING FURTHER ACTION**
[CV8, CV12] — Amendment of the general pleading requirements	Elliott B. Spector, Esq. 7/22/94	10/93 — Delayed for further consideration 10/94 — Delayed for further consideration 4/95 — Declined to act **DEFERRED INDEFINITELY**
[CV9(b)] — General Particularized pleading	Elliott B. Spector	5/93 — Considered by cmte 10/93 — Considered by cmte 10/94 — Considered by cmte 4/95 — Declined to act **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV9(h)] — Ambiguity regarding terms affecting admiralty and maritime claims	Mark Kasanin 4/94	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Approved for publication 9/95 — Published 4/96 — Forwarded to the ST Cmte for submission to Jud Conf 6/96 — Approved by ST Cmte 9/96 — Approved by Jud Conf 4/97 — Approved by Supreme Court 12/97 — Effective **COMPLETED**
[CV11] — Mandatory sanction for frivolous filing by a prisoner	H.R. 1492 introduced by Cong Gallegly 4/97	5/97 — Considered by cmte 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Removed under consent calendar **COMPLETED**
[CV11] — Sanction for improper advertising	Carl Shipley 4/97 (97-CV-G)	5/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) **PENDING FURTHER ACTION**
[CV11] — Should not be used as a discovery device or to test the legal sufficiency or efficiency of allegations in pleadings	Nicholas Kadar, M.D. 3/98 (98-CV-B)	4/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Await preliminary review by reporter (6) 8/99 — Reporter recommends removal from the agenda 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV12] — Dispositive motions to be filed and ruled upon prior to commencement of the trial	Steven D. Jacobs, Esq. 8/23/94	10/94 — Delayed for further consideration 5/97 — Reporter recommends rejection 11/98 — Rejected by cmte **COMPLETED**
[CV12] — To conform to *Prison Litigation Act of 1996*	John J. McCarthy 11/21/97 (97-CV-R)	12./97 — Referred to reporter, chair, & Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full committee consideration (4) 5/02 — Cmte considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV12(a)(3)] —Conforming amendment to Rule 4(i)		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup.Ct. 4/00 — Supreme Ct transmits to Congress 12/00 — Effective **COMPLETED**
[CV12(b)] — Expansion of conversion of motion to dismiss to summary judgment	Daniel Joseph 5/97 (97-CV-H) #2941	5/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV14(a) & (c)] — Conforming amendment to admiralty changes		6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves and transmits to Sup. Ct. 4/00— Supreme Court approved 12/00 — Effective **COMPLETED**
[CV15(a)] — Amendment may not add new parties or raise events occurring after responsive pleading	Judge John Martin 10/20/94 & Judge Judith Guthrie 10/27/94	4/95 — Delayed for further consideration 11/95 — Considered by cmte and deferred **DEFERRED INDEFINITELY**
[CV15(c)(3)(B)] — Clarifying extent of knowledge required in identifying a party	Charles E. Frayer, Law student 9/27/98 (98-CV-E)	9/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV15(c)(3)(B) — Amendment to allow relation back	Judge Edward Becker, 266 F.3d 186 (3rd Cir. 2001)	10/01 — Referred to chair and reporter 1/02 — Committee considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV23] — Amend class action rule to accommodate demands of mass tort litigation and other problems	Jud Conf on Ad Hoc Communication for Asbestos Litigation 3/91; William Leighton ltr 7/29/94; H.R. 660 introduced by Canady on CV 23 (f)	5/93 — Considered by cmte 6/93 — Submitted for approval for publication; withdrawn 10/93, 4/94, 10/94, 2/95, 4/95, 11/95; studied at meetings. 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — Approved for publication by ST Cmte 8/96 — Published for comment 10/96 — Discussed by cmte 5/97 — Approved and forwarded changes to (c)(1), and (f); rejected (b)(3)(A) and (B); and deferred other proposals until next meeting 4/97 — Stotler letter to Congressman Canady 6/97 — Changes to 23(f) were approved by ST Cmte; changes to 23(c)(1) were recommitted to advisory cmte 10/97 — Considered by cmte 3/98 — Considered by cmte deferred pending mass torts working group deliberations 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte Considered 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered **PENDING FURTHER ACTION**
[CV23] — Standards and guidelines for litigating and settling consumer class actions	Patricia Sturdevant, for National Association for Consumer Advocates 12/10/97 (97-CV-T)	12/97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte considered 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV23(e)] — Amend to include specific factors court should consider when approving settlement for monetary damages under 23(b)(3)	Beverly C. Moore, Jr., for Class Action Reports, Inc. 11/25/97 (97-CV-S)	12/ 97 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte Considered 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered **PENDING FURTHER ACTION**
[CV23(e)] — Require all "side-settlements," including attorney's fee components, to be disclosed and approved by the district court	Brian Wolfman, for Public Citizen Litigation Group 11/23/99 (99-CV-H)	12/99 — Referred to reporter, chair, and Agenda Sub cmte. 4/00 — Referred to Class Action subcomte 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered **PENDING FURTHER ACTION**
[CV23(e)] — Preserve right to appeal for *unnamed* class members who do not file motions to intervene; and class members not named plaintiffs have right to appeal judicial approval of proposed dismissal or compromise without first filing motion to intervene	Bill Lockyer, Attorney General, for State of California DOJ 3/29/00 (00-CV-B) 6/21/00	4/00 — Referred to reporter, chair, Agenda Subcmte,, and Class Action Subcmte 6/00 — Referred to reporter, chair, Agenda Subcmte, and Class Action Subcmte 10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered **PENDING FURTHER ACTION**
[CV23(f)] — interlocutory appeal	part of class action project	4/98 — Sup Ct approves 12/98 — Effective **COMPLETED**
[CV23] — class action attorney fee		10/00 — Comte Considered 4/01 — Request for publication 6/01 — ST Cmte approved for publication 8/01 — Published for public comment 10/01 — Cmte considered **PENDING FURTHER ACTION**
[CV26] — Interviewing former employees of a party	John Goetz	4/94 — Declined to act **DEFERRED INDEFINITELY**

Proposal	Source, Date, and Doc #	Status
[CV26] —Initial disclosure and scope of discovery	Thomas F. Harkins, Jr., Esq. 11/30/94 and American College of Trial Lawyers; Allan Parmelee (97-CV-C) #2768; Joanne Faulkner 3/97 (97-CV-D) #2769	4/95 — Delayed for further consideration 11/95 — Considered by cmte 4/96 — Proposal submitted by American College of Trial Lawyers 10/96 — Considered by cmte; Sub cmte. appointed 1/97 — Sub cmte. held mini-conference in San Francisco 4/97 — Doc. #2768 and 2769 referred to Discovery Sub cmte. 9/97 — Discovery Reform Symposium held at Boston College Law School 10/97 — Alternatives considered by cmte 3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective **COMPLETED**
[CV26] —Does inadvertent disclosure during discovery waive privilege	Discovery Subcmte	10/99 — Discussed **PENDING FURTHER ACTION**
[CV26] — Presumptive time limits on backward reach of discovery	Al Cortese	10/99 — Removed from agenda **COMPLETED**
[CV26] — Electronic discovery		10/99 — Referred to Subcmte 3/00 — Subcmte met 4/00 — Considered 10/00 — Comte Considered 4/01 — Cmte considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV26] — Interplay between work-product doctrine under Rule 26(b)(3) and the disclosures required of experts under Rules 26(a)(2) and 26 (b)(4)	Gregory K. Arenson, Chair, NY State Bar Assn Committee 8/7/00 (00-CV-E)	8/00 — Referred to reporter, chair, incoming chair, and Agenda Subcmte **PENDING FURTHER ACTION**
[CV26(a)] — To clarify and expand the scope of disclosure regarding expert witnesses	Prof. Stephen D. Easton 11/29/00 (00-CV-I)	12/00 — Sent to reporter and chair **PENDING FURTHER ACTION**
[CV26(c)] — Factors to be considered regarding a motion to modify or dissolve a protective order	Report of the Federal Courts Study Committee, Professors Marcus and Miller, and Senator Herb Kohl 8/11/94; Judge John Feikens (96-CV-F); S. 225 reintroduced by Sen Kohl	5/93 — Considered by cmte 10/93 — Published for comment 4/94 — Considered by cmte 10/94 — Considered by cmte 1/95— Submitted to Jud Conf 3/95 — Remanded for further consideration by Jud Conf 4/95 — Considered by cmte 9/95 — Republished for public comment 4/96 — Tabled, pending consideration of discovery amendments proposed by the American College of Trial Lawyers 1/97 — S. 225 reintroduced by Sen Kohl 4/97 — Stotler letter to Sen Hatch 10/97 — Considered by Sub cmte. and left for consideration by full cmte 3/98 — Cmte determined no need has been shown to amend **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV26] — Depositions to be held in county where witness resides; better distinction between retained and "treating" experts	Don Boswell 12/6/96 (96-CV-G)	12/96 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**
[CV30] — Allow use by public of audio tapes in the courtroom	Glendora 9/96/96 (96-CV-H)	12/96 — Sent to reporter and chair 11/98 — Rejected by cmte **COMPLETED**
[CV30(b)] — Inconsistency within Rule 30 and between Rules 30 and 45	Judge Janice M. Stewart 12/8/99 (99-CV-J)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Discovery Sub cmte. 4/00 — Referred to Disc. Subcomte **PENDING FURTHER ACTION**
[CV30(b)(1)] — That the deponent seek judicial relief from annoying or oppressive questioning during a deposition	Judge Dennis H. Inman 8/6/97 (97-CV-J)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Rejected by cmte **COMPLETED**
[CV30(d)(2)] — presumptive one day of seven hours for deposition		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective **COMPLETED**
[CV30(e)] — review of transcript by deponent	Dan Wilen 5/14/99 (99-CV-D)	8/99 — Referred to agenda Subcmte 8/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**
[CV32] — Use of expert witness testimony at subsequent trials without cross examination in mass torts	Honorable Jack Weinstein 7/31/96	7/31/96 — Submitted for consideration 10/96 — Considered by cmte; FJC to conduct study 5/97 — Reporter recommends that it be considered part of discovery project 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV33 & 34] — require submission of a floppy disc version of document	Jeffrey K. Yencho (7/22/99) 99-CV-E	7/99 — Referred to Agenda Subcmte 8/99 — Agenda Sub cmte. rec. Refer to other Sub cmte. (3) **PENDING FURTHER ACTION**
[CV34(b)] — requesting party liable for paying reasonable costs of discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments with revisions (moved to Rule 26) 6/99 — Stg Comte approves 9/99 — Rejected by Jud. Conf. **COMPLETED**
[CV36(a)] — To not permit false denials, in view of recent Supreme Court decisions	Joanne S. Faulkner, Esq. 3/98 (98-CV-A)	4/98 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Rejected by cmte **COMPLETED**
[CV37(b)(3)] — Sanctions for Rule 26(f) failure	Prof. Roisman	4/94 — Declined to act **DEFERRED INDEFINITELY**
[CV37(c)(1)] — Sanctions for failure to supplement discovery		3/98 — Cmte approved draft 6/98 — Stg Cmte approves 8/98 — Published for comment 4/99 — Cmte approves amendments 6/99 — Stg Comte approves 9/99 — Jud. Conf. approves & transmits to Sup. Ct. 4/00 — Supreme Court approves 12/00 — Effective **COMPLETED**
[CV39(c) and CV16(e)] — Jury may be treated as advisory if the court states such before the beginning of the trial	Daniel O'Callaghan, Esq.	10/94 — Delayed for further study, no pressing need 4/95 — Declined to act **COMPLETED**
[CV40] — precedence given elderly in trial setting	Michael Schaefer 1/19/00; 00-CV-A	2/00 — Referred to chair, reporter, and Agenda Sub cmte. **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV43] — Strike requirement that testimony must be taken orally	Comments at 4/94 meeting	10/93 — Published 10/94 — Amended and forwarded to ST Cmte 1/95 — ST Cmte approves but defers transmission to Jud Conf 9/95 — Jud Conf approves amendment 4/96 — Supreme Court approved 12/96 — Effective **COMPLETED**
[CV43] — procedures for a "summary bench trial"	Judge Morton Denlow 8/9/00 (00-CV-F)	8/00 — Referred to reporter, chair, and incoming chair 10/00 — Comte considered, declined to take action as unnecessary at this time **COMPLETED**
[CV43(f)—Interpreters] — Appointment and compensation of interpreters	Karl L. Mulvaney 5/10/94	4/95 — Delayed for further study and consideration 11/95 — Suspended by advisory cmte pending review of Americans with Disabilities Act by CACM 10/96 — Federal Courts Improvement Act of 1996 provides authority to pay interpreters **COMPLETED**
[CV44] — To delete, as it might overlap with Rules of EV dealing with admissibility of public records	Evidence Rules Committee Meeting 10/20-21/97 (97-CV-U)	1/97 — Referred to chair, reporter, and Agenda Sub cmte. 3/98 — Cmte determined no need to amend **COMPLETED**
[CV45] — Nationwide subpoena		5/93 — Declined to act **COMPLETED**
[CV45] — Notice in lieu of attendance subpoenas	J. Michael Schaefer, Esq. 12/28/98 (99-CV-A)	3/99 — Referred to chair, reporter, and Agenda Sub cmte. 8/99 — Agenda Sub cmte. rec. Remove from agenda 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV45] — Clarifying status of subpoena after expiration date	K. Dino Kostopoulos, Esq. 1/27/99 (99-CV-B)	3/99 — Referred to chair, reporter, and Agenda Sub cmte. 8/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**
[CV45] — Discovering party must specify a date for production far enough in advance to allow the opposing party to file objections to production	Prof. Charles Adams 10/1/98 (98-CV-G)	10/98 — Referred to chair, reporter, Agenda Sub cmte., and Discovery Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV45(d)] — Re-service of subpoena not necessary if continuance is granted and witness is provided adequate notice	William T. Terrell, Esq. 10/9/98 (98-CV-H)	12/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/00 — Subcomte declines to take action **COMPLETED**
[CV47(a)] — Mandatory attorney participation in jury voir dire examination	Francis Fox, Esq.	10/94 — Considered by cmte 4/95 — Approved draft 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Considered by advisory cmte; recommended increased attention by Fed. Jud. Center at judicial training **COMPLETED**
[CV47(b)] — Eliminate peremptory challenges	Judge William Acker 5/97 (97-CV-F) #2828	6/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Cmte declined to take action **COMPLETED**
[CV48] — Implementation of a twelve-person jury	Judge Patrick Higginbotham	10/94 — Considered by cmte 7/95 — Proposed amendment approved for publication by ST Cmte 9/95 — Published for comment 4/96 — Forwarded to ST Cmte for submission to Jud Conf 6/96 — ST Cmte approves 9/96 — Jud Conf rejected 10/96 — Cmte's post-mortem discussion **COMPLETED**
[CV50] — Uniform date for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV50(b)] — When a motion is timely after a mistrial has been declared	Judge Alicemarie Stotler 8/26/97 (97-CV-M)	8 /97 — Sent to reporter and chair 10/97 — Referred to Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV51] — Jury instructions filed before trial	Judge Stotler (96-CV-E) Gregory B. Walters, Cir. Exec., for the Jud. Council of the Ninth Cir. 12/4/97 (97-CV-V)	11/8/96 — Referred to chair 5/97 — Reporter recommends consideration of comprehensive revision 1/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/98 — Cmte considered 11/98 — Cmte considered 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration 4/99 — Cmte considered 10/99 — Discussed 4/00 — Cmte considered 10/00 — Cmte considered 4/01 — Cmte considered **PENDING FURTHER ACTION**
[CV52] — Uniform date for filing for filing post trial motion	BK Rules Cmte	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV53] — Provisions regarding pretrial and post-trial masters	Judge Wayne Brazil	5/93 — Considered by cmte 10/93 — Considered by cmte 4/94 — Draft amendments to CV16 1 regarding "pretrial masters" 10/94 — Draft amendments considered 11/98 — Subcmte appointed to study issue 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 10/99 — Discussed (FJC requested to survey courts) 4/00 — Considered (FJC preliminary report) **PENDING FURTHER ACTION**
[CV54(d)(1)] — Proposed amendments to 28 U.S.C. § 1920 and Rule 54 re taxation of costs	Judge Jane J. Boyle 2/02 (02-CV-B)	2/02 — Referred to reporter & chair **PENDING FURTHER ACTION**
[CV54(d)(2)] —attorney fees and interplay with final judgment CV 58	ST Cmte; AP amendment to FRAP 4(a)(7), 1/00	4/00 — Request for publication 6/00 — Stg Comte approves publicatipon 8/00 — Published 4/01 — Cmte approved amendments 6/01 — ST Cmte approved 10/01 — Jud Conf approved **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV56] — To clarify cross-motion for summary judgment	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, & Agenda Sub cmte. **PENDING FURTHER ACTION**
[CV56(a)] — Clarification of timing	Scott Cagan 2/97 (97-CV-B) #2475	3/97 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Reporter recommends rejection 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) **PENDING FURTHER ACTION**
[CV56(c)] — Time for service and grounds for summary adjudication	Judge Judith N. Keep 11/21/94	4/95 — Considered by cmte; draft presented 11/95 — Draft presented, reviewed, and set for further discussion 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision 1/02 — Committee considered and set for further discussion **PENDING FURTHER ACTION**
[CV58] — 60-day cap on finality judgment	ST Cmte; AP amendment to FRAP 4(a)(7), 1/00	4/00 — Request for publication 6/00 — Stg Comte approves 8/00 — Published 4/01 — Cmte approved revised amendments 6/01 — ST Cmte approved 10/01 — Jud Conf approved **PENDING FURTHER ACTION**
[CV59] — Uniform date for filing for filing post trial motion	BK Rules Committee	5/93 —Approved for publication 6/93 — ST Cmte approves publication 4/94 — Approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV60(b)] — Parties are entitled to challenge judgments provided that the prevailing party cites the judgment as evidence	William Leighton 7/20/94	10/94 — Delayed for further study 4/95 — Declined to act **COMPLETED**
[CV62(a)] — Automatic stays	Dep. Assoc. AG, Tim Murphy	4/94 — No action taken **COMPLETED**
[CV62.1] — Proposed new rule governing "Indicative Rulings"	Advisory Comm on Appellate Rules 4/01	1/02 — Committee considered **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV65(f)] — rule made applicable to copyright impoundment cases	see request on copyright	11/98 — Request for publication 6/99 — Stg Cmte approves 8/99 — Published for comment 4/00 — Cmte approved 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**
[CV65.1] — To amend to avoid conflict between 31 U.S.C § 9396 governing the appointment of agents for sureties and the Code of Conduct for Judicial Employees	Judge H. Russel Holland 8/22/97 (97-CV-L)	10/97 — Referred to reporter, chair, and Agenda Sub cmte. 11/98 — Cmte declined to act in light of earlier action taken at March 1998 meeting **COMPLETED**
[CV68] — Party may make a settlement offer that raises the stakes of the offeree who would continue the litigation	Agenda book for 11/92 meeting; Judge Swearingen 10/30/96 (96-CV-C); S. 79 Civil Justice Fairness Act of 1997 and § 3 of H.R. 903	1/21/93 — Unofficial solicitation of public comment 5/93, 10/93, 4/94 — Considered by cmte 4/94 — Federal Judicial Center agrees to study rule 10/94 — Delayed for further consideration 1995 — Federal Judicial Center completes its study **DEFERRED INDEFINITELY** 10/96 — Referred to reporter, chair, and Agenda Sub cmte. (Advised of past comprehensive study of proposal) 1/97 — S. 79 introduced § 303 would amend the rule 4/97 — Stotler letter to Hatch 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV73(b)] — Consent of additional parties to magistrate judge jurisdiction	Judge Easterbrook 1/95	4/95 — Initially brought to cmte's attention 11/95 — Delayed for review, no pressing need 10/96 — Considered along with repeal of CV74, 75, and 76 5/97 — Reporter recommends continued monitoring 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV 74,75, and 76] — Repeal to conform with statute regarding alternative appeal route from magistrate judge decisions	Federal Courts Improvement Act of 1996 (96-CV-A) #1558	10/96 — Recommend repeal rules to conform with statute and transmit to ST Cmte 1/97 — Approved by ST Cmte 3/97 — Approved by Jud Conf 4/97 — Approved by Sup Ct 12/97 — Effective **COMPLETED**
[CV 77(b)] — Permit use of audiotapes in courtroom	Glendora 9/3/96 (96-CV-H) #1975	12/96 — Referred to reporter and chair 5/97 — Reporter recommends that other Conf. Cmte should handle the issue 3/99 — Agenda Sub cmte. rec. Remove from agenda (5) 10/99 — Consent calendar removed from agenda **COMPLETED**
[CV77(d)] — Electronic noticing to produce substantial cost savings while increasing efficiency and productivity	Michael E. Kunz, Clerk of Court 9/10/97 (97-CV-N); William S. Brownell, District Clerks Advisory Group 10/20/97 (CV-Q)	9/97 — Mailed to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for consideration by full Cmte (4) 4/99 — request publication 6/99 — Stg Comte approves publication 8/99 — Published for comment 4/00 — Cmte approves amendments 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**
[CV77.1] — Sealing orders		10/93 — Considered 4/94 — No action taken **DEFERRED INDEFINITELY**
[CV81] — To add injunctions to the rule	John J. McCarthy 11/21/97	12/97 — Referred to reporter, chair, and Agenda Sub cmte. **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[CV 81(a)(2)] — Inconsistent time period vs. Habeas Corpus Rule 1(b)	Judge Mary Feinberg 1/28/97 (97-CV-E) #2164	2/97 — Referred to reporter, chair, and Agenda Sub cmte. 5/97 — Considered and referred to Criminal Rules Cmte for coordinated response 3/99 — Agenda Sub cmte. rec. Hold until more information available (2) 4/00 — Comte considered 6/00 — Stg Comte approves publication 8/00 — Published 4/01 — Cmte approves amendments 6/01 — Approved by ST Cmte 9/01 — Approved by Jud Conf **PENDING FURTHER ACTION**
[CV81(a)(1)] — Applicability to D.C. mental health proceedings	Joseph Spaniol, 10/96	10/96 — Cmte considered 5/97 — Reporter recommends consideration as part of a technical amendment package 10/98 — Cmte. includes it in package submitted to Stg. Cmte. for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment 4/00 — Cmte approved 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Sup Ct approves 12/01 — Effective **COMPLETED**
[CV81(a)(1)] — Applicability to copyright proceedings and substitution of notice of removal for petition for removal	see request on copyright	11/98 — Request for publication 1/99 — Stg. Cmte. approves for publication 8/99 — Published for comment 4/00 — Cmte approved amendments 6/00 — Approved by ST Cmte 9/00 — Approved by Jud Conf 4/01 — Approved by Sup Ct 12/01 — Effective **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV81(a)(2)] — Time to make a return to a petition for habeas corpus	CR cmte 4/00	4/00 — Request for comment 6/00 — Stg Comte approved 8/00 — Published for comment 4/01 — Cmte approved amendments 6/01 — ST Cmte approved 10/01 — Jud Conf approved **PENDING FURTHER ACTION**
[CV81(c)] — Removal of an action from state courts — technical conforming change deleting "petition"	Joseph D. Cohen 8/31/94	4/95 — Accumulate other technical changes and submit eventually to Congress 11/95 — Reiterated April 1995 decision 5/97 — Reporter recommends that it be included in next technical amendment package 3/99 — Agenda Sub cmte. rec. Accumulate for periodic revision (1) 4/99 — Cmte considered **PENDING FURTHER ACTION**
[CV82] — To delete obsolete citation	Charles D. Cole, Jr., Esq. 11/3/99 (99-CV-G)	12/99 — Referred to reporter, chair, and Agenda Subcommittee 4/00 — Comte approved for transmission without publication 6/00 — Stg Comte approves 9/00 — Jud Conf approves 4/01 — Sup Ct approves 12/01 — Effective **COMPLETED**
[CV83(a)(1)] — Uniform effective date for local rules and transmission to AO		3/98 — Cmte considered 11/98 — Draft language considered 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) 4/00 — Comte considers **PENDING FURTHER ACTION**
[CV83] — Negligent failure to comply with procedural rules; local rule uniform numbering		5/93 — Recommend for publication 6/93 — Approved for publication 10/93 — Published for comment 4/94 — Revised and approved by cmte 6/94 — Approved by ST Cmte 9/94 — Approved by Jud Conf 4/95 — Approved by Sup Ct 12/95 — Effective **COMPLETED**
[CV83(b)] — Authorize Conference to permit local rules inconsistent with national rules on an experimental basis		4/92 — Recommend for publication 6/92 — Withdrawn at Stg. Comte meeting **COMPLETED**

Proposal	Source, Date, and Doc #	Status
[CV84] — Authorize Conference to amend rules		5/93 — Considered by cmte 4/94 — Recommend no change **COMPLETED**
[Recycled Paper and Double-Sided Paper]	Christopher D. Knopf 9/20/95	11/95 — Considered by cmte 6/00 — CACM assigned issue and makes recommendation for Judicial Conference policy **COMPLETED**
[Pro Se Litigants] — To create a committee to consider the promulgation of a specific set of rules governing cases filed by pro se litigants	Judge Anthony J. Battaglia, on behalf of the Federal Magistrate Judge Assn. Rules Cmte, to support proposal by Judge David Piester 7/17/97 (97-CV-I);	7/97 — Mailed to reporter and chair 10/97 — Referred to Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. schedule for further study (3) **PENDING FURTHER ACTION**
[CV Form 1] — Standard form AO 440 should be consistent with summons Form 1	Joseph W. Skupniewitz, Clerk 10/2/98 (98-CV-F)	10/98 — Referred to chair, reporter, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) **PENDING FURTHER ACTION**
[CV Form 17] Complaint form for copyright infringement	Professor Edward Cooper 10/27/97	10/97 — Referred to cmte 3/99 — Agenda Sub cmte. rec. Ready for full Cmte consideration (4) 4/99 — Cmte deferred for further study **PENDING FURTHER ACTION**
[Adoption of form complaints for prisoner actions]	Iyass Suliman, prisoner 8/3/99 (99-CV-F)	8/99 — Referred to reporter, chair, and Agenda Sub cmte. 8/99 — Subc recommended removal from agenda 10/99 – Cmte approved recommendation **COMPLETED**
[Electronic Filing] — To require clerk's office to date stamp and return papers filed with the court.	John Edward Schomaker, prisoner 11/25/99 (99-CV-I)	12/99 — Referred to reporter, chair, Agenda Sub cmte., and Technology Sub cmte. **PENDING FURTHER ACTION**
[Interrogatories on Disk]	Michelle Ritz 5/13/98 (98-CV-C); see also Jeffrey Yencho suggestion re: Rules 3 and 34 (99-CV-E)	5/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**

Proposal	Source, Date, and Doc #	Status
[To change standard AO forms 241 and 242 to reflect amendments in the law under the Antiterrorism and Effective Death Penalty Act of 1997]	Judge Harvey E. Schlesinger 8/10/98 (98-CV-D)	8/98 — Referred to reporter, chair, and Agenda Sub cmte. 3/99 — Agenda Sub cmte. rec. Refer to other Cmte (3) **PENDING FURTHER ACTION**
[To prevent manipulation of bar codes in mailings, as in zip plus 4 bar codes]	Tom Scherer 3/2/00 (00-CV-D)	7/00 — Referred to reporter, chair, and incoming chair **PENDING FURTHER ACTION**
[Notice to U.S. Attorney. Requires litigant to notify U.S. Attorney when the constitutionality of a federal statute is challenged and when United States is not a party to the action]	Judge Barbara B. Crabb 10/5/00 (00-CV-G)	10/00 — Referred to reporter and chair 1/02 — Committee considered **PENDING FURTHER ACTION**
[Specifying page limit for motions in Civil Rules]	Jacques Pierre Ward 1/8/01 (01-CV-A)	4/00 — Referred to reporter and chair 1/02 — Committee recommended no change **COMPLETED**
[To develop new Federal procedures for decisions on minority litigant discrimination cases]	Tracey J. Ellis 1/26/02, 4/10/02 (02-CV-A)	1/02 — Referred to reporter and chair 4/02— Referred to reporter and chair **PENDING FURTHER ACTION**
[Court filing fee: AO regulations on court filing fees should not be effective until adoption in the the FRCP or Local Rules of Court]	James A. Andrews 4/1/02 (02-CV-C)	4/02 — Referred to reporter and chair **PENDING FURTHER ACTION**

Draft Minutes January Meeting

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

January 22-23, 2002

The Civil Rules Advisory Committee met on January 22 and 23, 2002, at the Administrative Office of the United States Courts in Washington, D.C.. The meeting was attended by Judge David F. Levi, Chair; Sheila Birnbaum, Esq.; Justice Nathan L. Hecht; Dean John C. Jeffries, Jr.; Mark O. Kasanin, Esq.; Judge Paul J. Kelly, Jr.; Judge Richard H. Kyle; Professor Myles V. Lynk; Hon. Robert D. McCallum, Jr.; Judge H. Brent McKnight; Judge John R. Padova; Judge Lee H. Rosenthal; Judge Shira Ann Scheindlin; and Andrew M Scherffius, Esq. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Special Reporter. Judge Anthony J. Scirica, Chair, and Judge Sidney A. Fitzwater represented the Standing Committee. Peter G. McCabe, John K. Rabiej, and James Ishida represented the Administrative Office. Thomas E. Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Observers included Alfred W. Cortese, Jr.; Jonathan W. Cuneo (NASCAT); and Beverly Moore.

Monday January 22 was devoted to hearing 25 witnesses testify on the proposed Civil Rules amendments that were published for comment in August 2001. The Discovery Subcommittee met after the close of the hearing to discuss discovery of computer-based information.

Judge Levi opened the meeting on January 23 by observing that the purpose of the meeting would be to hear reports on activities since the April and October 2001 meetings, to attend to a few agenda items, and to begin discussion of the August 2001 proposals. Discussion of the August proposals would focus on the class-action proposals published for comment and also on the issues raised by the Reporter's call for informal comment on approaches that might be taken to address overlapping, duplicating, and competing class actions. No decisions are to be made; the public comment period has not yet closed. But the October conference at the University of Chicago Law School, a few written comments already received, and testimony at two public hearings have produced a substantial basis to begin further consideration of the published proposals. Several matters of concern have been raised and clearly deserve attention. The Chicago conference alone was a valuable experience. It could not have been better. Many participants have reported that the conference brought together practical knowledge and theoretical perspectives in a very challenging and useful way. The conference provided a model that the Committee will remember and follow in the future.

Minutes Approved

The Minutes for the April 2001 and October 2001 meetings were approved.

Admiralty Subcommittee Report

Mr. Kasanin reported for the admiralty subcommittee, observing that the current focus is more on forfeiture than admiralty. The Department of Justice believes that the time has come to establish a separate and independent Supplemental Rule to govern civil asset forfeiture

proceedings. By long tradition, civil forfeiture proceedings have been governed by the Supplemental Rules for admiralty and maritime cases. Many forfeiture statutes refer to the admiralty rules, leading the Department to conclude that the forfeiture rule should be included in the Supplemental Rules. The lead in drafting a proposed rule has been taken by Stefan Cassella at the Department of Justice. The first draft was reviewed with Department of Justice and Maritime Law Association participants at a meeting held after the November 30 San Francisco hearing on the August 2001 rules amendment proposals.

The background begins with the substantial effort expended over a period of several years to establish distinctive forfeiture procedure provisions within the text of the admiralty rules. The work involved close cooperation between the Maritime Law Association and the Department of Justice to ensure that the process recognized the distinctive traditions and needs of both admiralty and forfeiture practice. Substantial confusion had been caused by the different meanings attributed to "claim" and "claimant" in admiralty and forfeiture practice. The drafting effort sought to substitute different terms for forfeiture proceedings. Those changes took effect on December 1, 2000.

The next step arose from the Civil Asset Forfeiture Reform Act, which was enacted in April 2000. The new statute included provisions that were inconsistent with the admiralty rules scheduled to take effect six months later, creating the awkward prospect that the rules would supersede statutory provisions that were not foreseen when the rules were created. Amendments to conform the Supplemental Rules to the new statute have been pursued on an expedited basis; if the Supreme Court transmits them to Congress by May 1, they can take effect on December 1 of this year.

These efforts have not put the questions to rest. There are good reasons to undertake the project to establish an independent forfeiture rule within the set of Supplemental Rules. But there also are reasons to be careful, not only about the provisions of the new forfeiture rule but also about the separation. Admiralty practice should not be changed inadvertently.

Judge McKnight has been designated to join Mr. Kasanin in the process of considering and working through the proposed forfeiture rule. The Maritime Law Association will participate in the process, along with various persons within the Department of Justice.

Forfeitures may be accomplished administratively, through criminal proceedings, or through civil proceedings. Civil forfeiture cases are numerous, and the numbers are growing. Processing them is hampered by the lack of an integrated procedure. Current Rules A through F mesh imperfectly with the needs of law enforcement through civil forfeiture. There is, moreover, room to integrate forfeiture procedure better with the statutory provisions resulting from the reform act. A new Rule G can address conflicts within the rules; close gaps in the existing rules; and work free from the terms and provisions in Rules A through F that are irrelevant to civil forfeiture, and that generate confusion when the case law attempts to respond to the differences between good forfeiture procedure and good admiralty procedure.

The Maritime Law Association was reluctant at the outset, but has come to agree that it is better to undertake the separation.

The Reporter noted that the initial Department of Justice draft Rule G was very well prepared and explained. After the November 30 meeting a second draft was prepared in early December. Comments on this draft led to creation of a third draft in early January. The third draft, and comments on it, will be discussed at a meeting following the conclusion of the present Advisory Committee meeting. The great help of the Department of Justice in developing the successive drafts in response to questions and suggestions, and particularly in explaining the underlying needs that prompt the various provisions, has advanced the project close to the point that calls for expanded review. It will be important to ask advice from the Chair and Reporter of the Criminal Rules Advisory Committee, which has recently completed revision of criminal forfeiture rules. It also will be important to seek out advice from groups who represent the interests of people who seek to resist civil forfeitures.

It was observed that the National Association of Criminal Defense Lawyers participated actively in the process of revising the criminal forfeiture procedures, often taking positions contrary to the Department of Justice and to the provisions worked out by the Criminal Rules Advisory Committee. They worked with a section of the American Bar Association. Forfeiture procedure presents complex questions. It will be important to seek advice from these groups before preparing a rule draft to be recommended for publication. Careful attention must be paid to their advice both in preparing a draft to be presented to the Advisory Committee and in defending the draft before the Advisory Committee.

Discovery Subcommittee Report

Professor Marcus reported on the Discovery Subcommittee meeting. The most important item on the subcommittee agenda is discovery of computer-based information. It seems likely that in May the Subcommittee will request authority to draft proposed discovery rule amendments to address the problems that are emerging in this area. For this meeting, the Subcommittee recommends that the Advisory Committee ask the Federal Judicial Center to expand its current investigation of problems in this area by producing a "white paper" that will identify and summarize the current state of practice and thought. The FJC began its current work with an on-line survey, and then a follow-up questionnaire, addressed to magistrate judges. The second phase of its project is to undertake intense study of two dozen cases identified as involving intensive discovery of computer-based information. Getting quantitative information about these questions is very difficult, in part because the results would likely become obsolete in short order. The case study will give the flavor of the issues, but cannot identify the frequency with which problems occur. A motion to request the FJC to expand its project to include a white paper was adopted.

Standing Committee Meeting

Judge Kyle attended the January Standing Committee meeting in place of Judge Levi, who with Judge Rosenthal attended the meeting of the Federal-State Jurisdiction Committee. Among the topics discussed by the Standing Committee, four were directly relevant to the work of the Advisory Committee. The Local Rules Project delivered a lengthy report that was discussed at length. It was concluded that a gentle approach will be first taken to local rules that have been identified as potentially inconsistent with statutes or the national rules. The apparent

inconsistencies will be pointed out to the chief judge of the district, with a request for advice on the purposes served by the rule. The role of Committee Notes also was discussed at length. It was agreed that the notes should continue to be described as Committee Notes, not Advisory Committee Notes, reflecting the responsibility of the Standing Committee not only for the text of rules changes but also for the corresponding notes. It also was agreed that despite occasional feelings of frustration, it is better to adhere to the rule that a Committee Note cannot be revised without simultaneous amendment of the underlying rule. The purposes to be served by the notes, and the desire to avoid over-long notes, also were discussed. The Simplified Rules project was described briefly at the conclusion of the meeting; there was no time available for discussion. Finally, there was a thorough discussion of the prospect that the time has come to restyle the Civil Rules.

Discussion of this report focused on the style project, after a preliminary observation that the testimony about the proposed class-action rule amendments demonstrated the level of attention lawyers pay to committee notes and the need to think carefully about the function and length of committee notes.

It was observed at the beginning that the Advisory Committee will likely be charged with the style project. The history of the Civil Rules style work began nearly ten years ago, at the beginning of the Standing Committee's Style Committee. The Civil Rules Committee volunteered to become the bellwether project. Bryan Garner prepared a complete package that restyled all of the Civil Rules and Supplemental Admiralty Rules. Judge Pointer, then Advisory Committee Chair, reworked the complete package. Subcommittees were appointed and prepared further revisions. At first, these products were considered piecemeal as items to fill time remaining after exhaustion of other agenda topics at regular committee meetings. Progress in that fashion was so slow that a special meeting devoted solely to style was held. The story of this meeting at Sea Island has taken on nearly legendary dimensions as it is retold. Two days of intensive work made progress through nine or ten rules. The most important lesson was the futility of attempting to meet the original goal, defined to be clear restatement of the rules without any change of meaning. Time and again, ambiguities appeared that defied any resolution of the present rule's meaning. Clear restatement of an ambiguity without changing meaning did not seem possible. Further work on the style project was suspended.

The Appellate Rules have been successfully restyled. The Criminal Rules restyling project also appears to have been successful. Description of the Criminal Rules project at the Standing Committee meeting by Judge Carnes and Professor Schluetter offered many valuable insights into effective means of addressing the task. The advice ranged from the practical advice that the authoritative official draft should be maintained in an Administrative Office computer to advice about more complex matters such as the value of subcommittees, strict adherence to an agenda, and separation of substantive problems from style revision. It may prove desirable to ask veterans of the Criminal Rules process to attend the October Civil Rules meeting to offer further advice.

Description of the Criminal Rules style project included information about the decision to publish amendments on two tracks. One track included substantive changes in the rules that had been considered before the style project was launched; these rules were published separately, albeit in the form of current style conventions. The other track included the changes made during

the style process itself; these changes included some recognized substantive changes, which were pointed out separately but included within the style package.

One of the critical issues that will have to be faced in a style project is whether to attempt to present restyled Civil Rules in an entire package all at one time, as was done with the Appellate and Criminal Rules. The complete package could be unbundled in various ways. One approach would be to publish smaller packages at intervals, receiving and considering testimony and written comments but deferring presentation to the Supreme Court until the entire package had been completed. Another approach would be to complete work on each package as it matures, so that restyled rules would take effect in stages. The Criminal Rules Committee experience suggests that separate packages may present difficulties, because work on later rules continually presented the need to reconsider decisions made earlier with other rules. The Criminal Rules may have been distinctive in this respect, however, because most of the reconsideration related to definitions of terms used in the rules; the Civil Rules seldom attempt definitions, and are not likely to add definitions in the styling process.

It was pointed out that the Chief Justice has not wanted to have substantive changes blended in with style changes. That reluctance may foreclose yet another approach, which would be to undertake a long-range project to revisit all of the rules for content, advancing substantive changes through the medium of restyled rules. This approach necessarily would be undertaken in packages of related rules, but would take still longer.

It was recognized that the style work will have to be done "in pieces." But future deliberation is needed to determine whether the results should be put through the complete process of adoption in separate bundles or only as an entire package.

Federal Judicial Center

Mr. Willging presented a report for the Federal Judicial Center.

The class-action notice project has heard from Mr. Hilsee, who testified on class-action notices on January 22. He makes valid points. Samples of the notices he has prepared are good. The project has planned from the beginning to create an attention-grabbing one-page summary to be included with notice materials. As the project matures, it may prove wise to add to it caveats that the model notices are only illustrations, not a ceiling on what can be done.

Judge Rosenthal noted that the continuing study of class-action problems should take care to ensure that no problems are overlooked. It has often been suggested that we should create a settlement-class rule. The proposal published in 1996 was put aside to await the results first in Amchem and then Ortiz, and after that to monitor developments in the wake of those decisions. As questions and suggestions persist, we have asked the FJC to help.

Mr. Willging responded that the FJC will do two things. The first is quantitative, describing the numbers of class-action filings in six-month segments from 1994 to the present. These figures will give a picture of filing trends before the Third Circuit decision in Georgine; before Amchem; before Ortiz; and since. By happy chance, those decisions came at times shortly before the 6-month break periods, easing the task of assessing possible impact on filing rates. The numbers will be compiled from a nationwide data base of all docket-sheet entries; the methods of

compiling figures by this method are being refined. The "first cut" will count every filing as if an independent event. The next step will be to identify cases that have been consolidated, whether within a single district or for MDL proceedings, yielding a more precise picture. The results may be ready in time for the May meeting. The second phase is still being developed. The general plan is to survey attorneys who participated in recently concluded class actions. Distinctions will be drawn by type of case and like indicia. The survey will ask why the cases were in federal court, whether by initial filing or removal. The large number of factors that influence court choice will make it difficult, however, to determine how far distinctions between federal- and state-court settlement practices may affect filing decisions. But the lawyers will be asked to offer "retroactive" assessments of how the cases worked out, and an evaluation of how it might have worked out in a state court.

Judge Rosenthal noted that an attempt will be made to focus on the effects of Amchem and Ortiz on the ability to settle in federal court. Drafting of the survey is about to begin.

Mr. Willging pointed out that it will take some time to complete the second phase of the survey. The FJC research operation has become popular; many requests have been made for help, and some projects may have to be spaced out.

Judge Levi noted that FJC research projects have been very helpful to the Committee.

Legislative Proposals

Judge Levi noted that he and Judge Rosenthal had attended the January meeting of the Federal-State Jurisdiction Committee. This committee and the Bankruptcy Administration Committee are interested in class actions, particularly with respect to competing class actions and mass torts. Several members of the Federal-State Jurisdiction Committee attended the Chicago Law School conference on the pending Rule 23 proposals. They were impressed by the quality of the discussion and the level of information gained from it. They had a panel discussion of competing class actions at their meeting. Francis McGovern moderated the panel, which included Judges Corodemus, Mott, and Rothstein, lawyers Birnbaum and Cabraser, and Professors Hensler and Marcus. The panel discussion was good. Judges Levi and Rosenthal described the work of the Advisory Committee. At the end of the day, there seemed to be a consensus that serious problems are arising from overlapping, duplicating, and competing class actions. Real tensions are emerging. Some federal courts have enjoined competing state-court class actions without waiting for the more traditional injunction designed to protect an imminent or accomplished settlement.

Ultimately the Judicial Conference will be asked to take a position on pending legislation to establish minimal diversity jurisdiction of class actions. The Federal-State Jurisdiction Committee persuaded the Judicial Conference to express opposition to an earlier version of this legislation. But it appears that the Federal-State Jurisdiction Committee may not be opposed to the general principle. When the subject returns, the Standing Committee can make its views known. The Advisory Committee should discuss advice to the Standing Committee, particularly if it is decided not to pursue court rules on this subject.

Last year the Advisory Committee initially concluded, with some reservations, that it

should request approval to publish for comment draft Rule 23 amendments that would address some aspects of overlapping and competing class-action practices. In the end, however, it was decided that it would be better to seek comments through the informal process of a Reporter's Call For Comments. The process has worked. Much comment has been provided. The Chicago conference gave a sense that it may be better to seek legislative solutions, putting aside rule amendments. At the May meeting, it may be useful to develop a statement of principles that the Advisory Committee and Standing Committee could support before the Judicial Conference. The Advisory Committee has studied these problems more extensively than any other Judicial Conference Committee, and might make a valuable contribution.

Before the Federal-State Jurisdiction Committee meeting, Judge Levi met with Judge Stamp, chair of the Federal-State Jurisdiction Committee, and Judge Hodges, chair of the Judicial Panel on Multidistrict Litigation to discuss the role of state-court class actions. Reporters and other staff members of the committees and Panel participated. Particular attention was devoted to the distinction between "in-state" and multistate actions in state courts. No attempt was made to reach a formal consensus. But the Judicial Panel is increasingly concerned with the effects of overlapping state actions. It may be that the Panel will come to support legislation that would provide for removal of some state class actions to the Panel; the legislation would establish criteria for consolidation, and the Panel would decide case-by-case whether particular groups of related actions should be consolidated in federal court. One advantage of this procedure would be that the Panel could consider the consolidation court's docket pressures in seeking a court that could handle the consolidated proceedings.

Another legislative proposal has been advanced by the 1997 Report of the National Bankruptcy Review Commission. The Report recommends creation of a system that would appoint a mass future claims representative with authority to represent future tort claimants. The bankruptcy court would be authorized to "estimate" the future claims against the debtor for purposes of allowance, voting, and distribution. Assets would be designated by the reorganization plan to satisfy the future claims. All future claims would be directed by a "channeling injunction" to the designated assets, protecting the debtor and any successor against further tort liability. As with current Chapter 11 practice, a debtor need not show insolvency to initiate the proceeding. The Report seems to contemplate that bankruptcy proceedings could be used for the sole purpose of resolving future claims. Bankruptcy is thought to have advantages over group proceedings at law because it has an established tradition of bringing to a single federal court many matters that otherwise would fall to the state courts. The Bankruptcy Administration Committee is studying whether to endorse this model, and has a report from its Subcommittee on Mass Torts concluding that the Review Commission plan is "an important step in the right direction." They would like to know whether the Advisory Committee supports this Subcommittee report. The problems are difficult. It may be that the Bankruptcy Administration Committee will decide to hold a conference seeking further advice.

Judge Rosenthal, who participated in drafting the bankruptcy Subcommittee report, noted that the report was an attempt to summarize the issues that must be understood before deciding whether to develop a bankruptcy mechanism to address mass torts. Civil Rule 23 encounters two limits. The Ortiz decision severely limits the "limited fund" concept, and accordingly limits the

prospect of resolving many mass torts through mandatory (b)(1) classes. The Amchem decision severely limits the ability to settle future claims in the Rule 23 context, particularly with respect to future victims who do not yet even know that they have been exposed to an injury-causing event or thing. Some bankruptcy experts believe that bankruptcy procedures provide an answer. Bankruptcy can provide representatives, estimate claims, and channel future claims. This procedure could give relief to defendants. There are a number of issues. The Amchem decision clearly includes due process considerations; there is no apparent reason to believe that due process operates differently in bankruptcy. The Subcommittee report may be too optimistic — it represents a strong effort by those who believe that bankruptcy offers the last best hope to find a resolution of future claims within the judicial system. Earlier drafts of the report were still more ambitious. The actual report does highlight real limits on the use of Rule 23. And it serves to renew the question whether it would be useful to develop a settlement class rule, particularly for mass torts.

Brief discussion of the draft bankruptcy report noted again that the proposed system does not require that a tort defendant be insolvent. Indeed, several supporters seem to envision a system in which the bankruptcy court could be approached with a pre-packaged plan that "passes through" all obligations of the tort defendant unchanged, resolving only the future tort claims by the reorganization plan. This system might be characterized as using bankruptcy to overrule both the Amchem and Ortiz decisions. The contrast is to the real bankruptcies that have been experienced in the asbestos field, where many companies have experienced tort claims that exceeded their assets. The bankruptcies are now sweeping beyond asbestos producers to reach distributors. The next wave of claims are likely to reach the owners of premises and insurers. So far, fortunately, "asbestos is unique." The bankruptcy report does not explore any of the alternatives to the Review Commission proposal in any meaningful way. A conference to discuss the problems in greater depth would be a great help. The problems are indeed complex.

It was asked whether it would be useful to resurrect Rule 23 proposals to accomplish some of the same things as proposed for bankruptcy. It is important that we begin the review process. "Estimating" future claims is difficult to fit into Rule 23. But it may prove that asbestos again is unique: experience with other mass torts suggests that ordinarily is it much easier to find a secure basis to estimate the total number of victims, and that ordinarily the period in which injuries will become manifest is far shorter than it has been with asbestos. Estimating future claims, however, may easily be seen as a substantive issue, bound up with many matters that are controlled by state law. There also may be due process problems with addressing the "unself-conscious and amorphous" set of future victims who may not yet be aware even of exposure, much less potential injury. One perspective is that civil procedure worries about notice, and federalism. In bankruptcy they are accustomed to resolving these worries by the need to accomplish closure. The bankruptcy report "seems to leap over everything that we worry about." The main argument for bankruptcy proceedings is that nothing else will work. The Article I bankruptcy authority may help by providing an easily recognized basis for federal legislation.

The view was expressed that there has been no showing that bankruptcy courts can do a better job of estimating the number of victims and severity of injuries than can be done by trial courts that deal with tort litigation as a frequent and familiar event. Elizabeth Gibson did a fine

study of several real bankruptcies for the Federal Judicial Center; it deserves renewed attention as we approach these issues again.

The Bankruptcy Administration Committee has asked for the views of the Advisory Committee. The Advisory Committee was not able to schedule a review of the subcommittee report in time for the last meeting of the Bankruptcy Administration Committee, which has deferred action to next June. This question should be placed on the agenda for discussion at the Advisory Committee's May meeting. A summary of the issues will be prepared in time for possible discussion when the ad hoc mass-torts meeting is held in conjunction with the March Judicial Conference meeting.

Rule 23 Proposals

Overlapping Classes

The first question asked in the informal request for comments about overlapping and duplicating class actions was whether serious problems arise from parallel filings in state and federal courts. Discussion at the Chicago conference and testimony in the two hearings that have been held on the published Rule 23 proposals has provided a wealth of information about actual experience. The Advisory Committee concluded by consensus that this information shows that indeed there are serious problems that are not being adequately addressed.

The conclusion that there are serious problems that should be addressed if possible led to the question whether satisfactory answers can be found in amending the Civil Rules. The Reporter's Call for Comment included a description of theories that would establish authority in the Rules Enabling Act and would show compatibility with the anti-injunction provisions of 28 U.S.C. § 2283. Illustrative rules provisions were included. These questions were discussed extensively at the Chicago Conference. Nearly all of the participants were not persuaded that the Enabling Act and § 2283 strictures could be overcome.

The question remains: should the Advisory Committee pursue further Civil Rules provisions that might address such issues as repetitive efforts to win class certification in different courts, attempts to persuade one court to approve a class-action settlement after rejection by another court, or centralizing injunction authority in a federal class-action court? Whether yes or no, should the Committee support some effort to establish broader federal subject-matter jurisdiction over class actions?

Discussion began with the observation that it would be difficult to draft rules provisions that would both survive Enabling Act challenges and do much good. But there is a wealth of information to show the problems that must be addressed by some means. Among the many exhibits is the thoroughly researched report describing the growth of nationwide class actions in Palm Beach County, Florida; Jefferson County, Texas; and Madison County, Illinois. Expanded diversity jurisdiction could go a long way toward reducing the problems. With legislation that brings a greater portion of the cases to federal court, rules amendments might be adopted to further support the process.

The same view was expressed by observing that any rule solution will raise serious questions of authority. Whatever the actual resolution of the authority question might be, there

can be no good outcome of a process beset by such challenges and doubts.

It was recalled that the decision to put these questions to the test of drafting illustrative rules provisions was made for the purpose of testing the question of authority, and also to generate information on the extent and severity of the real-world problems. The responses have built a powerful case that there is a problem that should be addressed. Some of the cases now locked in state courts have a "uniquely federal character." As a matter of principled federalism, some method should be developed to bring to federal court the cases that truly implicate federal interests, while leaving to state courts the cases that predominantly involve state interests. The Advisory Committee should work toward Judicial Conference support for such principles.

One model, noted in earlier discussion, would be to establish a flexible case-specific procedure implemented by the Judicial Panel on Multidistrict Litigation. It could be developed as a simplified version of the more elaborate model proposed by the American Law Institute. The Judicial Panel is interested in the problems, and might support this basic approach.

Minimum diversity jurisdiction bills have been repeatedly introduced in Congress, and also deserve careful study. Although the Federal-State Jurisdiction Committee is charged with primary authority over these issues within the Judicial Conference structure, the Advisory Committee has devoted years of study to these problems and can make a valuable contribution to the process.

It was proposed that the May agenda should include discussion of expanded federal subject-matter jurisdiction over class actions. The purpose would not be to generate support for any specific pending bill. The focus rather would be on certain principles and features. Comment might be directed to specific features of pending bills if they include direct procedural principles, addressed to such matters as pleading standards, mandatory appeal from certification decisions, discovery stays pending disposition of dispositive motions, or the like. But otherwise the focus should be on general principles. There could be two parallel messages: there are severe problems that warrant expanded federal jurisdiction, probably through use of minimum diversity provisions; and these problems do not seem susceptible of satisfactory solutions through Civil Rules amendments alone.

It was asked whether it is appropriate for a rules advisory committee to advance recommendations on jurisdiction legislation. The Advisory Committee would act by recommendation to the Standing Committee. The Rules Committees have been asked to comment on legislation from time to time; indeed rules committee chairs have testified before Congress. Some matters have to go through the Judicial Conference. Class-action jurisdiction legislation is likely to fall into that category, remembering that the Federal-State Jurisdiction and Bankruptcy Administration Committees also are interested in these problems. The Advisory Committee and Standing Committee have considered class action proposals for several years, and generated the Ad Hoc Mass Torts Working Group. It is entirely appropriate to make recommendations as to general principles, while being wary of addressing particular pending bills.

The next question was whether a broad approach should be taken. There are many possible alternatives to minimum diversity legislation. Focus on the Judicial Panel has been explored in this discussion. It might be possible to focus more directly on limiting the reach of state-court class actions to embrace "nationwide" classes. Or federal courts could be given more

focused and case-specific power to channel or restrain state actions when a class action is brought within present jurisdiction limits, without the need to expand federal subject-matter jurisdiction. Or the Enabling Act might be amended to establish clearly the authority to proceed by court rule amendments. Choice-of-law issues also could be addressed.

It was suggested that it would be better to avoid the more contentious issues. It would be wise not to pursue Enabling Act amendments. Choice-of-law questions are so complex that they could defeat any reform effort. The focus should be on the approaches that already are on the table, on what is realistically doable.

A consensus was reached that some form of minimal diversity jurisdiction for class actions would be an appropriate partial solution to the problem of overlapping class-action litigation. It was agreed that the Rule 23 Subcommittee would present a proposal on legislative recommendations for discussion at the May meeting. The Civil Rules amendments described in the Reporter's Call will not now be pursued further.

Rule 23 Amendments

The agenda materials include illustrations of revisions that might be made to respond to testimony and comments already received on the Rule 23 amendments published in August 2001. Many of the illustrations are designed to streamline, shorten, and clarify Committee Note language. A number of issues have been identified.

One question frequently raised challenges the proposal to require some form of notice in (b)(1) and (b)(2) class actions. The proposal was not intended to raise a barrier that might thwart successful pursuit of some civil rights claims now brought occasionally as (b)(1) classes but most commonly as (b)(2) classes. Many public interest and civil rights lawyers have expressed concern that notice costs could easily deter filing. These concerns could be addressed by rewriting the Note language that, perhaps inadequately, warns that notice costs should not be allowed to defeat worthy class actions. A different approach would be to revise the rule to encourage notice, but to state expressly that notice is not required if notice costs would defeat pursuit of the action. A still different approach might be to retain the notice requirement, but make an exception for "civil rights" cases. It will be useful to seek advice from some of the people who have expressed these concerns, to see whether suitable protective language can be drafted. If these concerns cannot be addressed effectively, it may be that the provision should be abandoned.

Further discussion of the (b)(2) class notice requirement observed that the cases may be seen to fall on a continuum. Notice may be of little value in some cases, and impose great burdens. An example discussed at the January 22 hearing was an action claiming deliberate underfunding of mass transit in Los Angeles, discriminating against low-income users. The class included some 400,000 members. It is not clear that any significant gain could be had by requiring even modest efforts to notify the class. Other cases, however, involve significant individual interests. The most apparent interests arise when money is awarded as an "incident" to a (b)(2) injunction action, an apparently frequent occurrence in employment cases. To some extent, these actions seem to be (b)(3) actions disguised as (b)(2) actions. Another example may be the use of (b)(1) and (b)(2) certifications to establish medical monitoring programs that primarily involve the expenditure of money. It may be possible to establish a rule scale that

focuses on the importance of notice in relation to the cost. It also may be possible to abandon any notice provision for (b)(1) and (b)(2) classes, relying on the present discretionary power to require notice under subdivision (d)(2).

The "plain language" notice requirement might be expanded to take account of communications concerns: the object is not only to provide a notice that can be understood if read, but to provide a notice that *will* be read. The "designed to be noticed" phrase expresses the idea well.

The Note language addressing court approval of voluntary dismissal before a ruling on class certification has proved confusing. The question is whether there is an interest that deserves to be protected in this setting. Some case law interprets the ambiguous language in present Rule 23(e) as requiring approval, but the practice is not consistent. One of the initial concerns was that class members may rely on the class claim to toll the statute of limitations, deferring individual action filings. There has been much comment that this is a very rare circumstance — that most class-action filings do not receive the kind of public attention that could realistically lead to any reliance. Another concern, however, has been that the class allegations may be filed for strategic reasons, and may be dropped for strategic advantage. Forum-shopping is one concern, leading to pursuit of class claims in successive courts. Another is that the class allegation may not be intended seriously, but added to capture attention or perhaps to seek a premium settlement in return for abandoning the class allegations. It is not clear what a court is supposed to do about these concerns. It may be possible to impose a requirement that the lawyer not bring a class action in another federal court, since § 2283 does not apply. It may be possible to advise that a lawyer who uses class allegations for these purposes is not a suitable lawyer to represent the class, but ordinarily this question will be faced by the next court, not the court of initial filing. Ordinarily the court of first filing does nothing to interfere with a pre-certification settlement and dismissal. There are further complications with the right to amend as a matter of course established by Rule 15(a); an attempt to address them is included in the agenda's revised Note illustrations. Perhaps it would be wiser to remain with the ambiguity of the present rule.

Several witnesses have urged that the (e)(2) provision for disclosing side agreements should be changed to require that a description or summary of all side agreements be filed. Mandatory filing would require an attempt to define more precisely what agreements are sufficiently connected to a settlement to require filing.

The treatment of objectors in the Note to proposed (e)(4) has raised concern. At times the Note seems to recognize the importance of objections in reviewing a settlement, while at other times — and particularly in invoking the threatening specter of Rule 11 sanctions — the Note seems to discourage objections. The Note should capture the balance between the need to foster the valuable contributions objectors make and the offsetting need not to enhance the problems they can cause.

A choice must be made between the alternative (e)(3) versions of the settlement opt-out if there is to be a second opt-out. Some variation on the alternatives also might be considered.

The published Note suggests that a certification decision might be delayed to await developments in parallel state-court litigation. It has been suggested that the Note should also

point out that the presence of overlapping actions also may provide a reason to accelerate a certification decision. This addition is one of the many illustrations added to the Note in the agenda materials.

Some thought also might be given to the provision that requires notice of a fee application. It may be argued that there is no need to incur the expense of notice to class members when the fee application seeks a statutory award to be paid by the class adversary, not out of a common fund.

It has become apparent that further thought must be given to the time at which class counsel is appointed. Proposed subdivision (g) calls for appointment at the time of class certification. The Note addresses the need to act on behalf of the putative class during the proceedings that precede the certification decision. It may suffice to revise the Note statements.

The Note to the attorney-appointment provisions of proposed (g) has been read by many observers to invite competition for appointment as class counsel as a routine matter. The Note should be rewritten to address primarily the situation in which competition appears spontaneously. And it may be desirable to address in greater detail the court's responsibility to ensure that class counsel will adequately represent the class.

Concern has been expressed that courts may be encouraged to grant certification too readily by the published proposal to change the present provision that a certification order "may be" provisional to a provision that it "is" provisional. The agenda illustrations suggest deleting both phrases, retaining only the rule statement that a certification order may be revised at any time before final judgment.

General discussion led to further observations. The requirement in proposed (h) that Rule 52 findings be made on attorney fee applications was said to be a good thing. One of the witnesses suggested that courts might become involved in designating class counsel in some institutionalized way, perhaps similar to the ways in which panels of attorneys are constituted for representing criminal defendants. This suggestion may deserve further exploration.

Much broader questions also were noted. Several parts of the testimony by law professors suggested sweeping revisions of Rule 23. One example was the suggestion — embodied in an early draft that once was adopted by the Advisory Committee — that the familiar 1966 division of class actions into three categories should be abandoned. Many of these suggestions are cogent. But they cannot be pursued without further careful work leading to another round of publication, comment, and on through the process. Whatever steps may be taken next, it does not seem wise to defer present action on such parts of the August 2001 proposals as may seem to warrant adoption after completing the process of considering the public testimony and comments.

Another concern addressed by the January 22 testimony is that further tightening of federal class-action procedure may encourage still more plaintiffs to go to state courts. That is not of itself a reason to draw back from establishing the best class-action procedure we can for the federal rules. And some states may follow the lead of Rule 23 changes. But this concern reinforces the value of encouraging study of ways to make it easier to bring more class actions to the federal courts.

It was suggested that the Rule 23 work is valuable and should continue. But the question was raised whether it would be better to await conclusion, so as to have all eventual changes become effective at one time. One reason to defer might be the anticipation that changes in federal subject-matter jurisdiction for class actions could have an influence on Rule 23 revisions. But there are countervailing concerns. There is no way to predict whether statutory changes will be made, what they might be, or when they may occur. For that matter, there is no reason to suppose that any of the present proposals would be affected by immediate enactment of something like the minimum diversity bills now pending. Many of the suggestions for further study, moreover, involve topics that will require prolonged work. A settlement class rule, for example, will not be easily drafted. The present proposals have resulted from a long period of hard work, and the public comments and testimony are stimulating further hard work. If momentum is not maintained, it will prove necessary to repeat the work as the Advisory Committee continues to change, substituting new members for those who have become familiar with the debates. If still further proposals should emerge, they are not likely to move through the process at a speed that would lead to successive amendments within a year or two. If successful changes can be devised, a period of ten or fifteen years may be needed to complete the process.

Rule 15(c)(3)

The Third Circuit has suggested that the Advisory Committee should consider an amendment of Rule 15(c)(3) to address a specific question The question arises from the dilemma facing a plaintiff who cannot identify a potential defendant before filing. Pre-filing discovery is not readily available. Most of the cases that illustrate the problem involve plaintiffs who claim injury by police officers or correction officers. The plaintiff cannot identify the officer involved, and cannot find out. An action is filed against an identified defendant. Rule 15(c)(3) sets out circumstances in which an amendment changing the defendant can relate back to the time of the initial pleading, defeating a limitations defense if the initial pleading was timely filed. One of the conditions is that there have been a "mistake concerning the identity of the proper party." Several courts of appeals have ruled that a plaintiff who knows that a proper party has not been identified has not made a "mistake." Knowing ignorance does not count. The suggestion is that this distinction is inappropriate. The Committee voted to place this question on the agenda for consideration at the fall meeting.

Rule 56 Procedure

Several years ago, the Standing Committee approved a recommendation to the Judicial Conference that a thorough revision of Rule 56 be adopted. The Judicial Conference rejected the proposal, apparently out of concern with the attempt to restate the Supreme Court decisions that elucidate the standard for granting summary judgment. There is no indication that the Judicial Conference was dissatisfied with the portions of the proposed rule that clarified the procedures surrounding summary judgment. The question was brought back to the agenda in 1995, but has languished as attention has been devoted to more pressing matters. The Local Rules project has shown that many districts have local rules setting out elaborate summary-judgment procedures to supplement the requirements of Rule 56. Some of these provisions seem flatly inconsistent with Rule 56, but also seem useful. Discussion of local rules at the January Standing Committee meeting regularly advanced local summary-judgment rules as examples of the ways in which local

rules can provide valuable supplements to the national rules. The Committee voted to add Rule 56 procedures to the agenda for the fall meeting. A Rule 56 subcommittee may be appointed to advance the project.

Respectfully submitted,

Edward H. Cooper
Reporter

Rule 51

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

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

Rule 51. Instructions to Jury; Objections; Preserving a Claim of Error

(a) Requests.

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

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

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

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

(b) Instructions. The court:

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

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

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

(c) Objections.

(1) A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.

(2) An objection is timely if:

(A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); or

(B) a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) ~~Preserving a Claim of~~ Assigning Error; Plain Error.

(1) A party may assign as error:

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

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

(2) A court may notice a plain error in ~~or omission from~~ the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1) or (2).

Committee Note

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

Scope. Rule 51 governs instructions to the trial jury on the law that governs the verdict. A variety of other instructions cannot practicably be brought within Rule 51. Among these instructions are preliminary instructions to a venire, and cautionary or limiting instructions

delivered in response to events at trial.

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

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

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

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

(a)(2)(B) a request should be made before final instructions and before final jury arguments. What is a "final" instruction and argument depends on the sequence of submitting the case to the jury. If separate portions of the case are submitted to the jury in sequence, the final arguments and final instructions are those made on submitting to the jury the portion of the case addressed by the arguments and instructions.

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

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

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

Objections. Subdivision (c) states the right to object to an instruction or the failure to give an instruction. It carries forward the formula of present Rule 51 requiring that the objection state distinctly the matter objected to and the grounds of the objection, and makes explicit the requirement that the objection be made on the record. The provisions on the time to object make clear that it is timely to object promptly after learning of an instruction or action on a request when the court has not provided advance information as required by subdivision (b)(1). The need to repeat a request by way of objection is mollified, but not discarded, by new subdivision (d)(1)(B)~~(2)~~.

Preserving a claim of error and plain error. Many cases hold that a proper request for a jury instruction is not alone enough to preserve the right to appeal failure to give the instruction. The request must be renewed by objection. This doctrine is appropriate when the court may not have sufficiently focused on the request, or may believe that the request has been granted in substance although in different words. But this doctrine may also prove a trap for the unwary who fail to add an objection after the court has made it clear that the request has been considered and rejected on the merits. Subdivision (d)(1)(B)~~(2)~~ establishes authority to review the failure to grant a timely request, despite a failure to add an objection, when the court has made a definitive ruling on the record rejecting the request.

Many circuits have recognized that an error not preserved under Rule 51 may be reviewed

in exceptional circumstances. The foundation of these decisions is that a district court owes a duty to the parties, to the law, and to the jury to give correct instructions on the fundamental elements of an action. The language adopted to capture these decisions in subdivision (d)(2)~~(3)~~ is borrowed from Criminal Rule 52. Although the language is the same, the context of civil litigation often differs from the context of criminal prosecution; actual application of the plain-error standard takes account of the differences. The Supreme Court has summarized application of Criminal Rule 52 as involving four elements: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Johnson v. U.S.*, 520 U.S. 461, 466-467, 469-470 (1997). (The Johnson case quoted the fourth element from its decision in a civil action, *U.S. v. Atkinson*, 297 U.S. 157, 160 (1936): "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise substantially affect the fairness, integrity, or public reputation of judicial proceedings.")

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

The factor most directly implied by a "plain" error rule is the obviousness of the mistake. Obviousness reduces the need to rely on the parties to help the court with the law, and also bears on society's obligation to provide a reasonably learned judge. Obviousness turns not only on how well the law is settled, but also on how familiar the particular area of law should be to most judges. Clearly settled but exotic law often does not generate obvious error. Obviousness also depends on the way the case was presented at trial and argued.

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

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

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

Summary of Testimony & Comments: 2001 Rule 51

Thomas Y. Allman, Esq., D.C. Hearing Written Statement, 01-CV-026: "The restated Rule[] 51 seem[s] quite appropriate."

Hon. Malcolm Muir, 01-CV-01: The practice in M.D.Pa. is to instruct the jury before closing arguments. "Generally we do not advise counsel of our rulings on their proposed points for charge prior to instructing the jury." After the charge, we ask for objections; if an objection is sustained, supplemental instructions are given before closing arguments. Instructions before closing arguments are "highly beneficial" because counsel know precisely what the instructions are. No counsel has ever asked to be informed of rulings on requests before the instructions are given. The proposed amendment would require that counsel be informed of rulings on proposed points for charge before instructions are given; this is "an unnecessary and time-consuming requirement."

Hon. Gerard L. Goettel, 01-CV-02: It is "impractical" to make instructions available to counsel "either before the trial starts or at least days before it is given. * * * The trial evidence shapes the charge." Even after the evidence is closed, whether an instruction is appropriate may depend on the summations – as examples, a missing witness charge or "a charge concerning the plaintiff's counsel specifying the amount of damages that should be awarded need not be given unless the issue is raised in summation." "Indeed, on occasions, in the course of charging the jury, I add thoughts that had not previously occurred to me. I am told that some Judges, like the legendary Hubert Will, deliver the entire charge extemporaneously." Counsel will not only demand to see written text before the instructions, but "will also object to any deviation between the written and the spoken. The proposed change will accomplish little except to prompt appeals."

Court Advisory Comm., S.D.Ga., 01-CV-053: Opposes the limitation on the right to submit instructions at the close of the evidence. Disputes will arise with respect to whether the issue should have been reasonably anticipated. "The language of this proposed rule inevitably invites second guessing, disagreement, and ultimately appeals * * *."

Committee on Fed.Civ.P., Amer. Coll. Trial Lawyers, 01-CV-055: The proposal is "a notable improvement over the existing text." But it should be made clear that it refers to "preliminary, interim and final instructions other than those issued in the course of trial that are purely cautionary or limiting in nature." So instructions to an entire venire panel – which is not a jury – are not included. And cautionary instructions often are given in circumstances in which advance requests are not practicable.

Federal Magistrate Judges Assn., 01-CV-057: Supports the revision, which "clearly and succinctly provides guidance on the practice and procedure in this area."

Section of Antitrust Law, ABA, 01-CV-0-72: (1) Endorses 51(a). "Pretrial requests for jury instructions are especially helpful to

parties preparing to try complex cases." They can help the court decide whether to bifurcate the trial, or set the stage for summary judgment or severance of claims or parties. At the same time, pretrial requests are not necessary in every case. And the (a)(2) provisions for later requests are appropriate. (2) The changes included in 51(b) also are favored. Preliminary instructions at the outset of trial "may assist an antitrust jury by acquainting it with basic antitrust principles. Interim instructions, especially if made during an unusually lengthy or complex trial, may also be quite helpful * * *. Supplemental instructions given during jury deliberations may clarify issues for jurors." (3) Rule 51(c) is "a reaffirmation of existing law and practices. We concur * * *." (4) "We endorse proposed Rule 51(d)," which addresses the "potential pitfall" created by the present requirement that a party object to failure to give an instruction that has already been denied. And it codifies the plain error doctrine.

Department of Justice, 01-CV-073: Supports the purpose of amended Rule 51, but urges revision of the plain-error provision in (d)(3). This provision should be moved out of the "a party may assign as error" structure, and made a separate paragraph. The Advisory Committee states that its model is Criminal Rule 52(b). Rule 52(b) states that plain errors "may be noticed." U.S. v. Johnson, 1997, 520 U.S. 461, 467, 470, instructs that a court has discretion to ignore a plain error, and indeed may notice plain error only if failure to do so would seriously affect the fairness, integrity, or public reputation of judicial proceedings. These limits should be preserved. "The government would be exposed to significant harm if a new ruling affected a large number of civil judgments and the error was deemed, in hindsight, to have been 'plain.'" The cure is simple: retain proposed (d)(1) and (2) as (d)(1)(A) and (B); plain error would become (d)(2): "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Oregon State Bar Prac. & Proc. Comm., 01-CV-099: Rule 51(d)(3) seems to establish a "right" of plain-error review "without setting forth its limitations." Plain-error review should be limited to "exceptional cases in which it is necessary to avoid a clear miscarriage of justice." The four factors described in the Note are not restriction enough, for "there is no assurance that such commentary will assist a court in its interpretation of the 'plain' terms of the proposed rule." Review should be limited to error "'so serious and flagrant that it goes to the very integrity of the trial.'" (quoting Travelers Indem. Co. v. Scor. Reins. Co., 2d Cir. 1995, 62 F.3d 74, 79). The Rule should limit review to "extraordinary cases in which instructional error seriously affects the fairness and integrity of the proceedings." Or it could be modeled on Evidence Rule 103(d): "nothing in this rule requiring an objection precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

Rule 53: Reporter's Introduction

The comments on Rule 53 raise several issues that merit discussion. They are described below in order of the affected Rule 53 subdivisions, saving for the end a suggestion that corresponds to a draft provision that was deleted before publication.

These issues were discussed in a conference-call meeting of the Rule 53 Subcommittee. The Subcommittee agreed to recommend several changes in the Rule text. Those changes are marked by double-underlining in the Rule reproduced below; uncertainties are described in footnotes.

Changes in the Committee Note to reflect changes in the rule and other matters have not been reviewed by the Subcommittee. The Subcommittee further suggested that the Reporter should recommend changes that would substantially reduce the length of the Committee Note. The recommended changes appear in three guises: matter marked by overstriking is recommended for deletion. Matter marked by "redline" shadowing is recommended for deletion, but with the thought that the case for deletion is not as strong. Finally, overstriking appears on some of the redlined matter, indicating one clear vote to delete.

Several Rule 53 text changes are recommended. In order, they: (1) add a reference to "pretrial and post-trial matters" in Rule 53(a)(1)(C); (2) make a small style change in (a)(2); (3) add several details to the (b)(2) provisions that address the contents of the order appointing a master; (4) provide an opportunity to be heard before the appointment order is amended; (5) clarify the (b)(4) effective-date provision; (6) raise the question whether to say the court "must" afford an opportunity to be heard before acting on a master's report; (7) recommend a new (g)(3) provision for fact review that requires de novo decision by the court unless the parties stipulate either that review is for clear error or that the findings of a master appointed by consent of all parties or a master appointed for pretrial or post-trial duties will be final; (8) make a parallel change in the (g)(4) provision for review of law questions; (9) recommend adoption of the tentatively published (g)(5) provision for reviewing matters of discretion; and (10) delete subdivision (i) on appointment of magistrate judges as masters, transferring the provision on compensation of a magistrate judge-master to (h)(4).

Subdivision (a)

"Exception and not the Rule." The first sentence of present Rule 53(b) states: "A reference to a master shall be the exception and not the rule." As with the rest of present Rule 53, this sentence relates to trial masters. Trial masters are covered in new Rule 53(a)(1)(B), which limits appointment only by carrying forward the more explicit direction in present Rule 53(b) that a master may be appointed in an action tried without a jury "save in matters of account and of difficult computation of damages, only upon a showing that some exceptional condition requires it." Some comments express the fear that the "exceptional condition" phrase does not carry the full weight of present Rule 53(b). The "exception and not the rule" phrase was deleted as an archaic hangover from Equity Rule 59. The "exceptional condition" limit carried forward in new (a)(1)(B) carries forward the highly restrictive approach to trial masters adopted in *La Buy v. Howes Leather Co.*, 1957, 352 U.S. 249, and the Committee Note says so. There is no apparent need to go back to the "exception and not the rule" phrase. The Note discussion of this point is expanded, however, to reinforce the statement that

no change is implied.

(a)(1)(C): Pretrial and post-trial masters. The original reason for reexamining Rule 53 was that it addresses only trial masters. New subdivision (a)(1)(C) is intended to reflect the growing use of masters for pre- and post-trial purposes. Rather than the "exceptional condition" requirement for appointing a trial master, it invokes a more flexible standard: a master can be appointed to "address matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district." None of the comments have challenged this standard as it applies to pre- and post-trial masters. But concerns were expressed that paragraph (C) might be used to evade the "exceptional condition" limit applied by paragraph (B) to trial masters. These concerns can be addressed by adding a few words to paragraph (C): to "address pretrial or post-trial matters * * *." There may be some disputes over the definition of "pretrial" and "post-trial," but the change emphasizes the distinction from trial duties.

Another suggestion is that the Note should address a possible ambiguity in the limit to matters "that cannot be addressed effectively and timely by an available district judge or magistrate judge." The Note should make clear the intent that a master may be appointed either to perform duties that could properly be performed by a judge if one were available or to perform duties that a judge can never perform. "Mediation and settlement" and "investigating infractions of court orders and making findings on the basis of information obtained outside evidentiary hearings" are offered as examples of duties that a judge can never perform, or cannot perform in all of the ways open to a master. A few sentences of description have been suggested for the Note.

(a)(2) Style Change. A small style change in (a)(2) may be desirable: "unless the parties consent with the court's approval to appointment of a particular person after disclosure of a the potential grounds for disqualification."

(a)(3) Service Before Appointing Judge. New Rule 53(a)(3) prohibits a master from appearing as an attorney before the judge who made the appointment. Some of the comments urge that this prohibition will deter service as master, particularly as to lawyers in small firms. Perhaps the most pointed argument has been made on behalf of admiralty lawyers, who argue that members of their small and highly specialized bar may provide important services as masters in admiralty actions. Although there is force to this argument, the concerns that led to the prohibition remain important. This issue was explored carefully by the subcommittee in considering the proposed rule. No change is recommended.

Subdivision (b) - Order Appointing Master

The Department of Justice suggested several changes to add details to the description of a master's duties or powers. The suggestions generally corresponded to issues that pre-publication drafts covered in some detail. These provisions were deleted as the subcommittee process went on, in the belief that general provisions would provide flexible means of adapting the rule to developing experience. The Department, however, is in an apparently unique position as a litigant that frequently encounters special masters. Several additions are recommended to Rule (b)(2) to address many of the Department's concerns. The order appointing a master must now state more things. Paragraph (A) adds a reference to "any investigating or enforcement duties," which may be particularly sensitive. Paragraph (B) directs that the order limit ex parte communications with the court to administrative matters unless good cause is shown to permit ex parte communications on other matters. Paragraph

(D) requires specification of the method of filing the master's record. But it was decided not to require statement of the manner of presenting evidence and argument before the master, in the belief that such matters are better worked out by the master and the parties as the proceedings develop.

The subcommittee initially accepted the suggestion that subdivision (b)(3) should be amended to require party consent for amendment of an order appointing a master by party consent under subdivision (a)(1)(A). This change was deleted after further reflection. The court must have power to withdraw or limit a reference that is not working well. Beyond that, the court retains authority to expand a master's duties by acting under subdivisions (a)(1)(B) or (C).

The published "effective date" provision was intended to say that an order appointing a master takes effect on the date stated in the order, but if the master has not yet filed the required disqualification affidavit the appointment takes effect when the affidavit is filed and any possible disqualifications have been resolved. It was awkward to read. The suggested change presents a clean approach: the court may not enter the order until the affidavit is filed and possible disqualification issues have been resolved. This approach leaves it to the court to decide whether to prepare in advance an order that will enter automatically upon satisfaction of the affidavit conditions.

Subdivision (c) — Master's Authority

In addition to the Department of Justice recommendations described above, another suggestion was that Rule 53(c) should provide that a master may enter protective discovery orders under Civil Rule 26(c). This suggestion was put aside because it opens a door to confusion. If this power is specified, what of others that are not specified? Can a master, for example, make a Rule 26(b)(1) determination that there is good cause to expand discovery to the subject matter involved in the action?

Subdivision (f) — Master's Report

Present Rule 53(e)(5) provides that a master may circulate a draft report to the parties before filing the report. The subcommittee concluded that there is no need to continue this provision in the rule; the topic is addressed in the second paragraph of the Committee Note discussing subdivision (f). One witness suggested that the practice might be restored to the rule. The Subcommittee was not persuaded to change the published proposal.

Subdivision (g) — Standards of Review

There has been some inconclusive discussion of changing (g)(1) to require that in acting on a master's report the court "must," not merely "may," afford an opportunity to be heard. This is a familiar discussion. Our usual resolution has been that a requirement that the court "must" afford an opportunity to be heard can be satisfied by considering written submissions unless circumstances require witness testimony. But the risk that a "must" provision will be interpreted to require oral argument on demand leads to Note language explaining "must." It may be better to stick with the published proposal. In case "must" is chosen, corresponding language has been added to the Note in brackets.

The rule published for comment included alternative versions of Rule 53(g)(3), which sets the standard to review a master's fact findings. Both versions carry forward the provision in present Rule 53(e)(4) that permits the parties to "stipulate that a master's findings of fact shall be final." Version

1, which is simpler, states that a master's fact findings are subject to de novo review unless the appointment order provides for clear-error review. Version 2 adopts the same approach as Version 1 for "substantive fact issues," but states that "non-substantive fact findings" are reviewed only for clear error unless the appointment order provides for de novo review or the court receives evidence and decides the facts de novo. Version 2 was an attempt to establish a parallel between masters and magistrate judges, drawn from 28 U.S.C. § 636(b)(1). Each version departs from present Rule 53(e)(2), which provides clear-error review for findings of fact in actions tried without a jury.

Further consideration has persuaded the Subcommittee that neither published version should be adopted. Several appellate decisions have expressed doubts about delegating Article III powers to a master. Responsibility for determining the facts is an essential part of the judge's responsibility. The new recommended version of Rule 53(g)(3) requires the court to decide de novo all fact issues unless the parties stipulate with the court's consent that the master's findings will be reviewed for clear error, or stipulate that the findings of a master appointed by party consent or for pretrial or post-trial duties will be final.

Rule 53(g)(5) was published in brackets, indicating uncertainty whether to proceed further. It would establish an "abuse of discretion" standard to review "a master's ruling on a procedural matter." The Federal Magistrate Judges Association "wholeheartedly" supports adoption of this provision. The California Bar Committee on Federal Courts also supported adoption. The Subcommittee concluded that (g)(5) should go forward for adoption.

Subdivision (h) — Compensation

The only change recommended for consideration depends on the fate of the subdivision (i) provisions on appointment of a magistrate judge as master. If subdivision (i) is deleted, the final sentence stating that a magistrate judge is not eligible for compensation as a master could be made a new paragraph (4) in subdivision (h). This move is shown in the Rule 53 text below.

Subdivision (i) — Magistrate Judge as Master

It is recommended that subdivision (i) be deleted, preserving the final sentence by moving it to Rule 53(h).

The published version of Rule 53(i) included substantial changes made in the Standing Committee. The second sentence is the heart of the rule:

> Unless authorized by a statute other than 28 U.S.C. § 636(b)(2), a court may appoint a magistrate judge as master only for duties that cannot be performed in the capacity of magistrate judge and only in exceptional circumstances.

This sentence reflects at least three considerations.

The central concern is that a magistrate judge should function primarily in the role of judge. If there is a task that a magistrate judge can perform as judge, there is no proper reason for asking the judge to step outside the judicial role. This concern was tempered by the belief that at times a master may be assigned duties that a judge cannot perform in the role of judge. A common example is investigation of compliance with a judicial decree by methods of inquiry that go beyond presiding at an adversary hearing. If a master is to be used at all for such functions, it may be better to rely on the assured neutrality and judicial experience of a magistrate judge than to appoint someone else.

Section 636(b)(2), on the other hand, expressly provides that a judge may designate a magistrate judge to serve as a special master, and in a civil action may, with the consent of the parties, appoint a magistrate judge as special master without regard to the limits of Civil Rule 53(b).[1] The duties that may be assigned to a magistrate judge were broadened after § 636(b)(2) was adopted, however, and the preference for acting as judge now assumes a higher position. Hence the published provision that would limit appointment of a magistrate judge under § 636(b)(2) to duties that cannot be performed as magistrate judge.

Other statutes, finally, bear on the assignment of a magistrate judge as master. Title VII of the Civil Rights Act of 1964 expressly provides for appointment of a magistrate judge as special master, see 42 U.S.C. § 2000e-5(f)(5). Strong enthusiasm was expressed in the Standing Committee for this specific Title VII practice. Hence the published provision that would permit assignment of a magistrate judge to perform as master duties that instead could have been performed as magistrate judge when authorized by a statute other than § 636(b)(2).

The use of magistrate judges as special masters is a sensitive issue. There is no apparent need to test the possibility that a Civil Rule might supersede the provisions of § 636(b)(2), Title VII, or any other statute that might bear on this question. The most apparent consequences of assigning a magistrate judge to act as master in performing functions that could be performed as magistrate judge are that assignment for trial does not require party consent, may not require the "exceptional condition" demanded by Rule 53(a)(1)(B)(i), and — depending on how Rule 53(g) is shaped — may permit the court to limit review by a clear-error standard. There is room to debate whether these consequences are advantages or disadvantages.

Rather than attempt to address these issues in a new Rule 53, it seems wiser to put them aside. Deleting proposed Rule 53(i) will leave the matter where it rests in the statutes and in developing practice. Deletion is supported by the Committee on Administration of the Magistrate Judges System, the Federal Magistrate Judges Association, and others.

Rules 54, 71A

There have been no comments on the published conforming amendments to Rules 54 and 71A. It seems safe to recommend them for adoption in tandem with Rule 53.

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[1] The Committee Note to the 1983 Rule 53 amendments says that the term "special master" was retained in Rule 53 "to maintain conformity with" the statutory language. Standing masters were taken out of Rule 53 because the advent of magistrate judges eliminated the need.

RULE 53. MASTERS

(a) APPOINTMENT.

(1) Unless a statute provides otherwise, a court may appoint a master only to:

(A) perform duties consented to by the parties;

(B) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court if appointment is warranted by

(i) some exceptional condition, or

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

(C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

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

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

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

(b) ORDER APPOINTING MASTER.

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

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

(A) the master's duties, including any investigating or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances, ~~—~~ if any, ~~—~~ in which the master may communicate ex parte with the court or a party, limiting ex parte communications with the court to administrative matters unless there is good cause to permit ex parte communications on other matters;

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

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders and recommendations; and

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

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

(4) **Entry of Order. ~~Effective Date.~~** ~~A master's appointment takes effect~~ The court may not enter the order appointing a master until[2] ~~after~~ the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.

(c) **MASTER'S AUTHORITY.** Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend to the court a contempt sanction against a party and sanctions against a nonparty.

(d) **EVIDENTIARY HEARINGS.** Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel,

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[2] This could be: may enter the order appointing a master only after the master has filed . . .

take, and record evidence.

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

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

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

(1) **Action.** In acting on a master's order, report, or recommendations, the court ~~may~~ must[3] afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.

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

(3) **Fact Findings or Recommendations.**

{Recommended New Version} The court must decide de novo all fact issues [on which a master has made or recommended findings] unless the parties stipulate with the court's consent that:

(A) the [the master's] findings will be reviewed for clear error, or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

{Version 1} The court must decide de novo all fact issues on which a master has made or recommended findings unless: **(A)** the order of appointment provides that the master's findings will be reviewed for clear error, or **(B)** the parties stipulate with the court's consent that the master's findings will be final.

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[3] The question whether this should be "may" or "must" deserves some attention.

{Version 2} When a master has made or recommended findings of fact:

(A) the court must decide de novo all substantive fact issues unless: **(i)** the order of appointment provides that the master's findings will be reviewed for clear error, or **(ii)** the parties stipulate with the court's consent that the master's findings will be final.

(B) the court may set aside non-substantive fact findings or recommended findings only for clear error, unless **(i)** the order of appointment provides for de novo decision by the court, **(ii)** the court receives evidence and decides the facts de novo, or **(iii)** the parties stipulate with the court's consent that the master's findings will be final.

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

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

(h) COMPENSATION.

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

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

(A) by a party or parties; or

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

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

decision on the merits.

(4) Magistrate Judge. A magistrate judge is not eligible for compensation under Rule 53(h).

~~(i) APPOINTMENT OF MAGISTRATE JUDGE. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule. Unless authorized by a statute other than 28 U.S.C. § 636(b)(2), a court may appoint a magistrate judge as master only for duties that cannot be performed in the capacity of magistrate judge and only in exceptional circumstances. A magistrate judge is not eligible for compensation ordered under Rule 53(h).~~

COMMITTEE NOTE

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post-trial functions. ~~A study by the Federal Judicial Center documents the variety of responsibilities that have come to be assigned to masters.~~ See Willging, Hooper, Leary, Miletich, Reagan, & Shapard, *Special Masters' Incidence and Activity* (FJC 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if the parties consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes. Rule 53(g) also changes the standard of review for a master's findings of fact. The core of the original Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule. ~~Rule 53 was adapted from equity practice, and reflected a long history of discontent with the expense and delay frequently encountered in references to masters. Public judicial officers, moreover, enjoy presumptions of ability, experience, and neutrality that cannot attach to masters. These concerns remain important today.~~

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

SUBDIVISION (a)(1)

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

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

~~may well prefer to discharge all judicial duties through official judicial officers.~~

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

Subparagraph (a)(1)(B)(ii) carries forward the approach of present Rule 53(b), which exempts from the "exceptional circumstance" requirement "matters of account and of difficult computation of damages." This approach is justified only as to essentially ministerial determinations that require mastery of much detailed information but that do not require extensive determinations of credibility. Evaluations of witness credibility should only be assigned to a trial master when justified by an exceptional condition.

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

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

The central function of a trial master is to preside over an evidentiary hearing <u>on the merits of the claims or defenses in the action</u>. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master

should be a trial master. The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master might ~~may often need to~~ conduct evidentiary hearings on questions of compliance.

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

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

PRETRIAL AND POST-TRIAL MASTERS. Subparagraph (a)(1)(C) authorizes appointment of a master to ~~perform~~ address pretrial or post-trial ~~duties~~ matters. Appointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district. A master's pretrial or post-trial duties may include matters that could be addressed by a judge, such as reviewing discovery documents for privilege, or duties that might not be suitable for a judge. Some forms of settlement negotiations, investigations, or administration of an organization are familiar examples of duties that a judge might not feel free to undertake.

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

~~The statute specifically authorizes appointment of~~ There is statutory authority to appoint a magistrate judge as special master. 28 U.S.C. § 636(b)(2). In special circumstances, or when expressly authorized by a statute other than § 636(b)(2), it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). ~~These advantages are most likely to be realized with trial or post-trial functions. The advantages of relying~~

~~on a magistrate judge are diminished, however, by the risk of confusion between the ordinary magistrate judge role and master duties, particularly with respect to pretrial functions commonly performed by magistrate judges as magistrate judges.~~ There is no apparent reason to appoint a magistrate judge to perform as master duties that could be performed in the role of magistrate judge. ~~The situation might seem different as to trial functions, and as to post-trial functions not expressly enumerated in § 636(b).~~ Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53 unless specifically authorized by statute; see 42 U.S.C. § 2000e-5(f)(5). ~~Subdivision (i) requires that appointment of a magistrate judge as master be justified by exceptional circumstances.~~ These matters are not addressed by Rule 53. The only reference to magistrate judges is made in Rule 53(h)(4), which carries forward the provision that a magistrate judge is not eligible for compensation for service as a master.

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

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

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

A ~~P~~pretrial masters should be appointed only when the need is clear~~needed~~. ~~The parties should not be lightly subjected to the potential delay and expense of delegating pretrial functions to a pretrial master. Ordinarily public judicial officers should discharge public judicial functions.~~ Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. ~~Appointment of a master risks dilution of judicial control, loss of familiarity with important developments in a case, and duplication of effort.~~ At the extreme, a broad delegation of pretrial responsibility as well as a delegation of trial responsibilities can run afoul of

Article III. ~~See *Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir. 1992); *In re Bituminous Coal Operators' Assn.*, 949 F.2d 1165 (D.C.Cir. 1991); *Burlington No. R.R. v. Dept. of Revenue*, 934 F.2d 1064 (9th Cir. 1991). The risk of increased delay and expense is offset, however, by the possibility that a master can bring to pretrial tasks time, talent, and flexible procedures that cannot be provided by judicial officers. Appointment of a master is justified when a master is likely to substantially advance the Rule 1 goals of achieving the just, speedy, and economical determination of litigation.~~

Despite the need for caution, the demands of complex litigation may present needs that can be addressed only with appointment of a special master. Some cases may require more attention than a judge can devote while attending to the needs of other cases, and the most demanding cases may require more than the full time of a single judicial officer. Other cases may call for expert knowledge in a particular subject. The entrenched and legitimate concern that appointment of a special master may engender delay and added expense must be balanced against recognition that an appropriate appointment can reduce cost and delay. Recognition of the essential help that a master can provide is reflected in the wide variety of responsibilities that have been assigned to pretrial masters. Settlement masters are used to mediate or otherwise facilitate settlement. Masters are used to supervise discovery, particularly when the parties have been unable to manage discovery as they should or when it is necessary to deal with claims that thousands of documents are protected by privilege, work-product, or protective order. In special circumstances, a master may be asked to conduct preliminary pretrial conferences; a pretrial conference directed to shaping the trial should be conducted by the officer who will preside at the trial. Masters may be used to hear and either decide or make recommendations on pretrial motions. More general pretrial management duties may be assigned as well. With the cooperation of the courts involved, a special master even may prove useful in coordinating the progress of parallel litigation.

A master also may be appointed to address matters that blur the divide between pretrial and trial functions. The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. Determination of foreign law may present comparable difficulties. The decision whether to appoint a master to address such matters is governed by subdivision (a)(1)(C), not the trial-master provisions of subdivision (a)(1)(B).

The power to appoint a special master to perform pretrial functions does not preempt the field of alternate dispute resolution under "court-annexed" procedures. A mediator or arbitrator, for example, may be appointed under local alternate-dispute resolution procedures without reliance on Rule 53.

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

~~It is difficult to translate developing post-trial master practice into terms that resemble the "exceptional condition" requirement of original Rule 53(b) for trial masters in nonjury cases. The tasks of framing and enforcing an injunction may be less important than the liability decision as a~~

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

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

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

EXPERT WITNESS OVERLAP. This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. To be effective, a court-appointed expert witness may need court-enforced powers of inquiry that resemble the powers of a pretrial or post-trial master. Beyond some uncertain level of power, there must be a separate appointment as a master. Even with a separate appointment, the combination of roles can easily confuse and vitiate both functions. An expert witness must testify and be cross-examined in court. A master, functioning as master, is not subject to examination and cross-examination. Undue weight may be given the advice of a master who provides the equivalent of testimony outside the open judicial testing of examination and cross-examination. A master who testifies and is cross-examined as witness moves far outside the role of ordinary judicial officer.

Present experience is insufficient to justify more than cautious experimentation with combined functions. Whatever combination of functions is involved, the Rule 53(a)(1)(B) limit that confines trial masters to issues to be decided by the court does not apply to a person who also is appointed as an expert witness under Evidence Rule 706.

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

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

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

SUBDIVISION (b)

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

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

Rule 53(b)(2) ~~also~~ requires precise designation of the master's duties and authority. There should be no doubt among the master and parties as to the tasks to be performed and the allocation

of powers between master and court to ensure performance. Clear identification of any investigating or enforcement duties is particularly important. Clear delineation of topics for any reports or recommendations is also an important part of this process. And fit also is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties. And experience may show the value of describing specific ancillary powers that have proved useful in carrying out more generally described duties.

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

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

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

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guidelines to control total expense. The order of appointment should state the basis, terms, and procedures for fixing compensation. When there is an apparent danger that the expense may prove unjustifiably burdensome to a party or disproportionate to the needs of the case, it also may help to provide for an expected total budget and for regular reports on cumulative expenses. The court has power under subdivision (h) to change the basis and terms for determining compensation, but should recognize the risk of unfair surprise after notice to the parties.

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

Subdivision (b)(4) permits entry of the order appointing a master only after ~~describes the effective date of a master's appointment. The appointment cannot take effect until~~ the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455. If the affidavit discloses a possible ground for disqualification, the order can enter ~~appointment can take effect~~ only if the court determines that there is no ground for disqualification or if the parties, knowing of the ground for disqualification, consent with the court's approval to waive the disqualification. ~~The appointment order must also provide an effective date, which should be set to follow the filing of the (b)(4)(A) affidavit.~~

SUBDIVISION (c)

Subdivision (c) is a simplification of the provisions scattered throughout present Rule 53 It is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities. The most important delineation of a master's authority and duties is provided by the Rule 53(b) appointing order. It is made clear that the contempt power referred to in present Rule 53(d)(2) is reserved to the judge, not the master.

SUBDIVISION (d)

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

SUBDIVISION (e)

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

SUBDIVISION (f)

Subdivision (f) restates some of the provisions of present Rule 53(e)(1). The report is the master's primary means of communication with the court. The materials to be provided to support review of the report will depend on the nature of the report. The master should provide all portions of the record preserved under Rule 53(b)(2)(C) that the master deems relevant to the report. The parties may designate additional materials from the record, and may seek permission to supplement the record with evidence. The court may direct that additional materials from the record be provided and filed. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report or review record against public access — a report on

continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Such circumstances may even justify denying access to the report or review materials by the parties, although this step should be taken only for the most compelling reasons. Sealing is much less likely to be appropriate with respect to a trial master's report.

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

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

SUBDIVISION (g)

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

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

Subdivision (g)(3) establishes the standards of review for a master's findings of fact or recommended findings of fact. The court must decide the facts de novo unless the parties stipulate, with the court's consent, that the findings will be reviewed for clear error or — with respect to a master appointed on the parties' consent or appointed to address pretrial or post-trial matters — that the findings will be final. [Clear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses. A finding of the facts bearing on a privilege objection to a discovery request would be one of many examples.]

~~*{version 1}* Subdivision (g)(3) provides several alternative standards for review of a master's fact findings or recommendations for fact findings, but the court must decide de novo all fact issues unless the order of appointment provides a clear-error standard of review or the parties stipulate with the court's consent that the master's findings will be final. The determination whether to establish a clear-error standard of review ordinarily should be made at the time of the initial order of~~

appointment. Although the order may be amended to establish this standard at any time after notice to the parties under Rule 53(b)(3), such an amendment should be made only with the consent of the parties or for compelling reasons. The parties may rely on the expectation of de novo determination by the court in conducting proceedings before the master. If a clear-error standard of review is set by the order of appointment, application of the standard will be as malleable in this context as it is in Rule 52; in applying the clear-error standard, moreover, the court may take account of the fact that the relationship between a court and a master is not the same as the relationship between an appellate court and a trial court. A court may not accord the master's findings or recommendations greater weight than clear-error review permits without the consent of the parties; clear-error review marks the outer limit of appropriate deference to a master. Parties who wish to expedite proceedings, however, may — with the court's consent — stipulate that the master's findings will be final.

In choosing between de novo and clear-error review, the court should heed the distinction between trial and the other duties that may be assigned to a master. Present Rule 53(e)(2) establishes a clear-error standard of review for a master's findings of fact in an action to be tried without a jury. The Supreme Court, however, has made it clear that the judge, not a master, should be responsible for deciding the facts that bear on liability. If exceptions are ever to be made, they can be made only in the most extraordinary circumstances. *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). Decisions by several courts of appeals suggest that Article III may prohibit an Article III judge from surrendering the Article III responsibility to decide ultimate issues of liability by limiting review of a master to a clear-error standard. See *U.S. v. Microsoft Corp.*, 147 F.3d 935, 953-956 (D.C.Cir.1998); *Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir.1992); *In re Bituminous Coal Operators' Assn.*, 949 F.2d 1165 (D.C.Cir.1991); *Burlington Northern R.R. v. Department of Revenue*, 934 F.3d 1064 (9th Cir.1991); *In re U.S.*, 816 F.2d 1083 (6th Cir.1987); *In re Armco, Inc.*, 770 F.2d 103, 105 (8th Cir.1985). However the Article III question is ultimately resolved, the very presence of substantial Article III doubts weighs heavily in favor of de novo fact determination. An obligation to decide fact questions de novo, to the extent that it prevails, ordinarily defeats any purpose in referring trial issues to a master. The result is more likely to add delay and expense, and to diminish the quality of the ultimate decision, than to enhance the process.

A clear-error standard of review may be inappropriate in settings outside the trial of liability issues. A master appointed to investigate compliance with a decree, for example, may make recommendations that are better tested by the opportunity for full and formal evidentiary presentations to the court. Clear-error review may be appropriate with respect to more routine matters of case administration. A court may, for example, direct application of a clear-error standard to review a master's determinations as to compliance with discovery orders.

{Version 2} Subdivision (g)(3) provides standards for review of a master's findings or recommendations for fact findings. The structure is adapted from the system established by 28 U.S.C. § 636(b)(1) for review of the decisions or recommendations of a magistrate judge. Substantive fact issues are to be decided de novo by the court unless the order of appointment establishes a clear-error standard of review or the parties stipulate with the court's consent that the master's findings will be final. Non-substantive fact issues — one example would be determinations with respect to discovery conduct — are to be reviewed only for clear error unless the order of appointment provides for de novo review, the court receives evidence and decides the facts de novo, or the parties stipulate with the court's consent that the master's findings will be final. The

~~determination whether to establish a different standard of review in the order of appointment ordinarily should be made at the time of the initial order. Although the order may be amended to depart from the presumptive standard at any time after notice to the parties under Rule 53(b)(3), such an amendment should be made only with the consent of the parties or for compelling reasons. The parties may rely on the anticipated standard of review in conducting proceedings before the master. When a clear-error standard of review applies, application of the standard will be as malleable in this context as it is in Rule 52; in applying the clear-error standard, moreover, the court may take account of the fact that the relationship between a court and a master is not the same as the relationship between an appellate court and a trial court. A court may not accord the master's findings or recommendations greater weight than clear-error review permits without the consent of the parties; clear-error review marks the outer limit of appropriate deference to a master. Parties who wish to expedite proceedings, however, may — with the court's consent — stipulate that the master's findings will be final.~~

~~Absent consent of the parties, questions of law cannot be delegated for final resolution by a master.~~ As with matters of fact, a party stipulation can make the master's disposition of legal questions final only if the master was appointed on the parties' consent or appointed to address pretrial or post-trial matters and the court consents to the stipulation.

Apart from factual and legal questions, masters often make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The court may set a standard for review of such matters in the order of appointment, and may amend the order to establish the standard. If no standard is set by the original or amended order appointing the master, review of procedural matters is for ~~an~~ abuse of discretion. ~~The abuse-of-discretion standard is as dependent on the specific type of procedural issue involved in this setting as in any other. In addition, t~~The subordinate role of the master means that the trial court's review for abuse of discretion ~~is much~~ may be more searching than the review that an appellate court makes of a trial court. ~~A trial judge who believes that a master has erred has ample authority to correct the error.~~

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

SUBDIVISION (h)

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

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. ~~Many factors, too numerous to enumerate, may affect the allocation.~~ The amount in controversy and the means of the parties may provide some guidance in making the allocation~~, although it is likely to be more important in the initial decision whether to~~

appoint a master and whether to set an expense limit at the outset. The means of the parties also may be considered, and may be particularly important if there is a marked imbalance of resources. Although there is a risk that a master may feel somehow beholden to a well-endowed party who pays a major portion of the fees, there are even greater risks of unfairness and strategic manipulation if costs can be run up against a party who can ill afford to pay. The nature of the dispute also may be important — parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case.

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

~~SUBDIVISION (i)~~

~~This subdivision carries forward present Rule 53(f). It is changed, however, to emphasize that a magistrate judge should be appointed as a master only when justified by exceptional circumstances. Ordinarily a magistrate judge should not be appointed as a master to discharge duties that could be discharged in the capacity of magistrate judge. 28 U.S.C. § 636(b)(2) provides for designation of a magistrate judge to serve as a special master pursuant to the Federal Rules of Civil Procedure. This provision was adopted before later statutes that expanded the duties that a magistrate judge may perform as magistrate judge. Subdivision (i) recognizes this expansion, and implements the statutory purpose to have magistrate judges function as magistrate judges whenever authorized by § 636. Specific provisions in other statutes that authorize the appointment of a magistrate judge as special master, however, may be implemented according to their terms; an example is provided by 42 U.S.C. § 2000e-5(f)(5). See the discussion in subdivision (a). Because the magistrate judge remains a judicial officer, the parties cannot consent to waive disqualification under 28 U.S.C. § 455 in the way that Rule 53(a)(2) permits with respect to a master who is not a judicial officer.~~

COMMITTEE NOTE (Minus all suggested deletions)

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post-trial functions. See Willging, Hooper, Leary, Miletich, Reagan, & Shapard, *Special Masters' Incidence and Activity* (FJC 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if the parties consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes. Rule 53(g) also changes the standard of review for a master's findings of fact. The core of the original Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule.

SUBDIVISION (a)(1)

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

CONSENT MASTERS. Subparagraph (a)(1)(A) authorizes appointment of a master with the parties' consent. Party consent does not require that the court make the appointment; the court retains unfettered discretion to refuse appointment.

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

The use of a trial master without party consent is abolished as to matters to be decided by a jury unless a statute provides for this practice. Present Rule 53(b) authorizes appointment of a master in a jury case.

Abolition of the direct power to appoint a trial master in a jury case leaves the way free to appoint a trial master with the consent of all parties. In no circumstance may a master be appointed to preside at a jury trial.

The central function of a trial master is to preside over an evidentiary hearing on the merits of the claims or defenses in the action. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a

preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master might conduct evidentiary hearings on questions of compliance.

Rule 53 has long provided authority to report the evidence without recommendations in nonjury trials. This authority is omitted from Rule 53(a)(1)(B). In special circumstances a master may be appointed under Rule 53(a)(1)(A) or (C) to take evidence and report without recommendations.

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

PRETRIAL AND POST-TRIAL MASTERS. Subparagraph (a)(1)(C) authorizes appointment of a master to address pretrial or post-trial matters. Appointment is limited to matters that cannot be addressed effectively and in a timely fashion by an available district judge or magistrate judge of the district. A master's pretrial or post-trial duties may include matters that could be addressed by a judge, such as reviewing discovery documents for privilege, or duties that might not be suitable for a judge. Some forms of settlement negotiations, investigations, or administration of an organization are familiar examples of duties that a judge might not feel free to undertake

Magistrate Judges. Particular attention should be paid to the prospect that a magistrate judge may be available for special assignments. United States magistrate judges are authorized by statute to perform many pretrial functions in civil actions. 28 U.S.C. § 636(b)(1). Ordinarily a district judge who delegates these functions should refer them to a magistrate judge acting as magistrate judge.

There is statutory authority to appoint a magistrate judge as special master. 28 U.S.C. § 636(b)(2). In special circumstances, or when expressly authorized by a statute other than § 636(b)(2), it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). There is no apparent reason to appoint a magistrate judge to perform as master duties that could be performed in the role of magistrate judge. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53 unless specifically authorized by statute; see 42 U.S.C. § 2000e-5(f)(5). These matters are not addressed by Rule 53. The only reference to magistrate judges is made in Rule 53(h)(4), which carries forward the provision that a magistrate judge is not eligible for compensation for service as a master.

Pretrial Masters. The appointment of masters to participate in pretrial proceedings has developed extensively over the last two decades as some district courts have felt the need for additional help in managing complex litigation. This practice is not well regulated by present Rule 53, which focuses on masters as trial participants. Rule 53 is amended to confirm the authority to appoint — and to regulate the use of — pretrial masters.

A pretrial master should be appointed only when the need is clear. Direct judicial performance of judicial functions may be particularly important in cases that involve important public issues or many parties. At the extreme, a broad delegation of pretrial responsibility as well as a delegation of trial responsibilities can run afoul of Article III.

A master also may be appointed to address matters that blur the divide between pretrial and

trial functions. The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. Determination of foreign law may present comparable difficulties. The decision whether to appoint a master to address such matters is governed by subdivision (a)(1)(C), not the trial-master provisions of subdivision (a)(1)(B).

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

Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC*, 478 U.S. 421, 481-482 (1986). The master's role in enforcement may extend to investigation in ways that are quite unlike the traditional role of judicial officers in an adversary system.

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

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

The rule prohibits a lawyer-master from appearing before the appointing judge as a lawyer during the period of the appointment. The rule does not address the question whether other members of the same firm are barred from appearing before the appointing judge, leaving that question to the discretion of the appointing judge.

SUBDIVISION (b)

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

Rule 53(b)(2) requires precise designation of the master's duties and authority. Clear

identification of any investigating or enforcement duties is particularly important. Clear delineation of topics for any reports or recommendations is also an important part of this process. And it is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties.

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

Similarly difficult questions surround ex parte communications between a master and the parties. Ex parte communications may be essential in seeking to advance settlement. Ex parte communications also may prove useful in other settings, as with in camera review of documents to resolve privilege questions. In most settings, however, ex parte communications with the parties should be discouraged or prohibited The rule requires that the court address the topic in the order of appointment.

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

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guidelines to control total expense. The court has power under subdivision (h) to change the basis and terms for determining compensation after notice to the parties.

The provision in Rule 53(b)(3) for amending the order of appointment is as important as the provisions for the initial order. Anything that could be done in the initial order can be done by amendment. [The hearing requirement can be satisfied by an opportunity to make written submissions unless special circumstances require live testimony.]

Subdivision (b)(4) permits entry of the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455. If the affidavit discloses a possible ground for disqualification, the order can enter only if the court determines that there is no ground for disqualification or if the parties, knowing of the ground for disqualification, consent with the court's approval to waive the disqualification.

SUBDIVISION (c)

Subdivision (c) is a simplification of the provisions scattered throughout present Rule 53. It is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities. The most important delineation of a master's authority and duties is provided by the Rule 53(b) appointing order. It is made clear that the contempt power referred to in present Rule 53(d)(2) is reserved to the judge, not the master.

SUBDIVISION (d)

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

SUBDIVISION (e)

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

SUBDIVISION (f)

Subdivision (f) restates some of the provisions of present Rule 53(e)(1). The report is the master's primary means of communication with the court. The materials to be provided to support review of the report will depend on the nature of the report. The master should provide all portions of the record preserved under Rule 53(b)(2)(C) that the master deems relevant to the report. The parties may designate additional materials from the record, and may seek permission to supplement the record with evidence. The court may direct that additional materials from the record be provided and filed. Given the wide array of tasks that may be assigned to a pretrial master, there may be circumstances that justify sealing a report or review record against public access — a report on continuing or failed settlement efforts is the most likely example. A post-trial master may be assigned duties in formulating a decree that deserve similar protection. Such circumstances may even justify denying access to the report or review materials by the parties, although this step should be taken only for the most compelling reasons. Sealing is much less likely to be appropriate with respect to a trial master's report.

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

SUBDIVISION (g)

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

The subdivision (g)(2) time limits for objecting to — or seeking adoption or modification of

— a master's order, report, or recommendations, are important. They are not jurisdictional. Although a court may properly refuse to entertain untimely review proceedings, the court may excuse the failure to seek timely review. The basic time period is lengthened to 20 days because the present 10-day period may be too short to permit thorough study and response to a complex report dealing with complex litigation. If no party asks the court to act on a master's report, the court is free to adopt the master's action or to disregard it at any relevant point in the proceedings.

Subdivision (g)(3) establishes the standards of review for a master's findings of fact or recommended findings of fact. The court must decide the facts de novo unless the parties stipulate, with the court's consent, that the findings will be reviewed for clear error or — with respect to a master appointed on the parties' consent or appointed to address pretrial or post-trial matters — that the findings will be final. [Clear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses. A finding of the facts bearing on a privilege objection to a discovery request would be one of many examples.]

As with matters of fact, a party stipulation can make the master's disposition of legal questions final only if the master was appointed on the parties' consent or appointed to address pretrial or post-trial matters and the court consents to the stipulation.

Apart from factual and legal questions, masters often make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The court may set a standard for review of such matters in the order of appointment, and may amend the order to establish the standard. If no standard is set by the original or amended order appointing the master, review of procedural matters is for abuse of discretion. The subordinate role of the master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court.

SUBDIVISION (h)

The need to pay compensation is a substantial reason for care in appointing private persons as masters.

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. The amount in controversy and the means of the parties may provide some guidance in making the allocation. The nature of the dispute also may be important — parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master, on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case.

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

Summary of Comments, August 2001 Rule 53

General

Thomas Y. Allman, Esq., D.C. Hearing Written Statement 01-CV-026: "The restated Rule[] * * * 53 seem[s] quite appropriate." The change is "long overdue and quite useful." Experience with special masters shows that they free up overworked Magistrate Judges "while allowing a body of expertise to build on a specific case." The protections built into the appointment and management process are consistent with a practical approach.

Peter J. Ausili, Esq., E.D.N.Y. Civil Justice Committee, D.C. Hearing 211 ff.: Rule 53 does need to be revamped to bring it in line with common practice. A common role of special masters is to reduce the court's workload.

Federal Magistrate Judges Assn., 01-CV-057: "[O]verall, the amendments provide an excellent guideline and framework to regularize the practice of utilizing special masters and do reflect contemporary practice. The rules are most helpful in providing the court and counsel an effective resource for the use of Special Masters * * *."

Section of Antitrust Law, ABA, 01-CV-072: Generally supports the "efforts to update the standards for appointment and utilization of special masters. The Section * * * is of the view that Rule 53 should have little impact on antitrust litigation. Because antitrust cases typically involve complicated facts, the Section of Antitrust Law believes that the assigned judge, rather than a special master or a magistrate judge, should supervise the pretrial phase of the case. Involvement of the assigned judge from day one serves to educate the judge and minimizes the inefficiencies that inevitably arise when two or more judicial officers are involved in the pretrial phase of a case."

State Bar of Cal., Comm. on Fed. Cts., 01-CV-089: Agrees that there is room to explore more creative models, and that they will be difficult to develop. And agrees that collaboration at least between the Evidence and Civil Rules Committees will be required. Perhaps consideration of this extensive Rule 53 revision should be postponed until this other "important further work" can be done.

Margaret G. Farrell, Esq., 01-CV-092: Amendment is necessary to deal with issues not now addressed by Rule 53. The treatment of pretrial, trial, and post-trial stages recognizes that these distinctions are made by courts in present practice. Having studied these matters for the FJC, has concluded that it is wise to require courts to address discrete issues (such as ex parte communication) but at the same time allow judges considerable latitude and discretion. Finally, the Note recognition of the diverse roles and functions performed by special masters "is a valuable modernization of the rationale for the flexibility that Rule 53 has in fact provided." But it might be wise to address the appealability of an order appointing a special master. Mandamus is the only method now available before final judgment; the standards

for mandamus are demanding, and the burdens of cost and delay of proceedings that lead to final judgment cannot be restored. An interlocutory appeal provision akin to Rule 23(f) might be wise.

On a different matter, suits against special masters for misfeasance and malpractice have been dismissed on judicial immunity grounds. See, e.g., Smith v. District of Columbia, No. 92-555, Order No. 42192 (D.D.C.Apr.20, 1992), on appeal, No 93-7046 (DCCir.1993); Wagshal v. Foster, 1993 WL 84699 (D.D.C.). "Such immunity ought to apply, if at all, only when a special master is performing judicial functions, not when he or she is performing administrative or other tasks not judicial in nature. The Comment might acknowledge this issue and recognize that like other risks of liability, this one can be insured by malpractice insurance or a bond, the costs of which are properly included in the costs of the reference."

Subdivision (a) - Appointment

Peter J. Ausili, Esq., E.D.N.Y. Civil Justice Committee, D.C. Hearing 212 ff.: (1) The committee believes that once the parties consent to a master, further judicial authorization is not necessary. (2) The exceptional condition provision is carried forward; the committee believed examples would be useful. One is matters that are unduly burdensome, as where the parties are so contentious that the court is forced largely to ignore the rest of its docket. (The written statement, 01-CV-056, adds: the matter is overwhelming, or it "simply does not make sense for the judge to deal with the particular matter.") (3) (a)(1)(C) deals with pretrial and post-trial matters, but does not say so expressly. The rule itself might refer to pretrial matters, collateral matters arising during trial, and post-trial matters. (4) It places a hardship on small-firm lawyers to exclude them from appearing before the appointing judge in other matters. (The written report, 01-CV-056, notes that some committee members thought the proposed rule is necessary to avoid the appearance of impropriety. The majority feared that disqualification from cases already pending before the appointing judge would impose undue hardship on clients.) (5) 01-CV-056: Rule 53(a) presently provides that a master can obtain a writ of execution against a party who fails to pay court-ordered compensation. A majority of the committee believe that Rule 53(h) covers the need; a minority believe the rule provision should be restored.

Department of Justice, 01-CV-073: (Attaches the Department policy on the use of masters in cases involving the United States.) **(1)** The existing language of Rule 53(b) should be retained to emphasize the need to limit appointment of trial masters: such appointment "shall be the exception and not the rule." Masters should not be appointed to alleviate caseload problems, nor because a case presents difficult technical issues. Nor is it appropriate to appoint a master whose decision will be reviewed in substantial detail. Cost should be considered. **(2)** (a)(1)(C) is problematic for similar reasons: the reference to matters that cannot be effectively and timely addressed by a judge may be used to

undermine the limits on appointment – (C) is not explicitly limited to pretrial and post-trial masters, and might be invoked to appoint a trial master without a need to show exceptional conditions. The rule should be revised to read: "address matters involving pretrial and post-trial duties that cannot be addressed effectively and timely * * *." Finally, the Department agrees that "[a]bsent some extraordinary situation, a master should not serve as a court-appointed expert in the same case."

Maritime Law Association, 01-CV-081: The Rule 53(a)(3) bar on appearing before the appointing judge "is not necessary or appropriate. * * * When a master is appointed in a maritime case, he or she often is a maritime specialist whose practice and that of his or her firm is concentrated in the federal courts. Barring that lawyer (or possibly that lawyer's firm) from appearing before the appointing judge * * * would unnecessarily hinder the master or his firm in their representations of their clients and would discourage the attorneys from accepting appointments * * *."

State Bar of California, Comm. on Fed. Cts., 01-CV-089: (a)(1)(C) seems to permit reduction of the "exception and not the rule" approach. Increased use of special masters, particularly those with special expertise in particular disciplines, is generally beneficial. But Rule 53 should "not be too readily invoked to facilitate appointment of special masters to act as discovery referees or as settlement masters, where particular expertise or unique experience is *not* required." This concern is heightened when the cost of a master is substantial, most particularly when the litigants have modes means or amounts in controversy.

Margaret G. Farrell, Esq., 01-CV-092: **(1)** Elimination of the "exception not the rule" language of present Rule 53 seems designed to reflect a different standard for pretrial and post-trial masters. Application of Rule 53 now does distinguish – the conditions must be more exceptional to warrant appointment of a trial master. This distinction should be clarified in the Rule. **(2)** And the language of (a)(1)(C) is "problematic": it is not clear whether it limits appointments to duties that cannot be performed by a judge or magistrate judge – such as mediation and settlement, or investigating infractions of court orders and making findings on the basis of information obtained outside evidentiary hearings. The Note could be revised to make clear the intent that masters can be appointed both to perform duties that could be performed by a judge or magistrate judge if one were available and also to perform duties that cannot be performed by a judge or magistrate judge. **(3)** It is not clear that a master can be appointed to trial duties subject only to clear error review – see subdivision (g).

Subdivision (b) - Order Appointing Master

Peter J. Ausili, Esq., E.D.N.Y. Civil Justice Committee, D.C. Hearing 215-216: The rule need not require the judge to address questions of ex parte communications up front. Still, it is good practice to deal with this in the order.

Department of Justice, 01-CV-073: Subdivisions (b) through (f) may

provide a helpful structure, but a number of specific concerns remain. **(1)** (b)(2)(A) does not refer to the parties' conduct of the hearing before the master, including the opportunity to be heard or to submit evidence. Present Rule 53(c) requires a record of evidence presented and excluded. The Rule "should require that the appointing order describe specifically the manner of the parties' presenting evidence and argument before the master." Due process requires the protection of notice and hearing on the record, especially if review is for clear error; see Ruiz v. Estelle, 5th Cir.1982, 679 F.2d 1115, 1162-1163. At least the Notes should reflect a presumption that if review is to be for clear error the appointing order must require the master to hold a hearing and take evidence unless the parties consent otherwise. **(2)** (b)(2)(A) does not address the special needs of masters involved in framing and enforcing complex decrees. "The asserted occasional need for 'sweeping investigative powers,' as well as the 'limits on' such powers * * * are of sufficient importance to require a more specific statement of authority in the Rule's text." A new subparagraph should require that the order describe "the nature and extent of a post-trial master's investigative or enforcement powers, if any." **(3)** (b)(2)(B) addresses ex parte communications. Ex parte contacts with a master may be subject to the same ethical constraints as contacts with a judge; see Jenkins v. Sterlacci, D.C.Cir.1988, 849 F.2d 627, 630; in re Joint Eastern & Southern Districts Antitrust Litigation, E.D., S.D.N.Y.1990, 737 F.Supp. 735, 739-740. The rule should state expressly a presumption that ex parte contacts with the judge should be limited to administrative matters. **(4)** (b)(2)(C) should state a presumption that the master's record is to be filed in matters in which the judge is to review and act on the master's report, order, or recommendations. A filing requirement would reduce uncertainty as to what constitutes the record for review – see Shafer v. Army & Air Force Exchange Serv., 5th Cir.2002, 277 F.3d 788. One provision might be: "unless otherwise provided by the order of appointment, the master shall file the record of all the materials on which he or she has relied in producing the order, report, or recommendations. The record shall include a transcript of all proceedings held on the record." **(5)** (b)(3) permits amendment of the appointing order after notice to the parties. Literally, it would permit changes in the duties of a master appointed on the parties' consent. A new sentence should be added: "If the appointment of the master was by consent of the parties, any amendment of the order must also be by the consent of the parties." **(6)** (b)(4) contemplates that the appointment order take effect only after both events – the affidavit is filed and the date set by the appointing order has arrived. It should say "appointment takes effect <u>on the later of"</u> the two dates.

<u>Maritime Law Assn., 01-CV-081</u>: Restrictions or prohibition of ex parte communications with a party are appropriate "in almost all instances," but there is "no justification for requiring the appointing order to state the circumstances in which a master may communicate ex parte with the court. Indeed, we believe that free communication between the appointing judge and the appointed master

is essential for the effective utilization of the master."

Subdivision (c) – Master's Authority

Margaret G. Farrell, Esq., 01-CV-092: The Note addresses the confidentiality of material submitted to a master. "In my experience," the vital importance of confidentiality may be especially so "when documents are produced in proceedings before a master who is trying to mediate or settle a case." It is not now clear whether a master can enter a protective order under Rule 26(c). "Perhaps the question could be clarified."

Subdivision (f) - Master's Report

Peter J. Ausili, Esq., E.D.N.Y. Civil Justice Committee, D.C. Hearing 214-215: The Rule does not provide for circulation of a draft report, which is in the current rule. The Note refers to it. It might be put into the rule.

Subdivision (g) - Standards of Review

Prof. Anthony M. Sabino, 01-CV-67: Proposed Rule 53 seeks to be neutral, neither encouraging nor discouraging use of masters. The proper standard of review is essential to maintain this balance. Version Two is troubling. De novo review of "substantive" fact issues will invite disputes seeking to distinguish substantive facts from others. The clear error standard for reviewing "non-substantive" facts "simply puts too much factfinding power in a nonjudicial officer." Version One is better. De novo review of factfinding "provides a superior check and balance upon the work of the master, and is consonant with the constitutional authority of the Article III courts." De novo review is also appropriate for conclusions of law; the rule should not permit the parties to stipulate that a master's conclusions of law will be final.

Peter J. Ausili, Esq., E.D.N.Y. Civil Justice Committee, D.C. Hearing 213-214: The clear error standard should be the general provision, allowing a de novo standard on a particular issue when necessary. A master might, for example, be appointed to conduct a Markman claim-construction hearing in a patent case. Construction of the claim might turn on fact matters; it might be something that could be decided as a matter of law on the face of the claim. In response to a question, agreed that the issue of claim construction may be equivalent to a "quasi summary judgment."

Committee on Administration of Magistrate Judges System, Hon. Harvey E. Schlesinger, 01-CV-052: It is anomalous that under present Rule 53, and under the proposed versions as well, "a court may give greater deference to the factual findings of a non-judge master than to those of a magistrate judge." A magistrate judge's recommendations on a case-dispositive matter are reviewed de novo; the proposal would permit clear error review.

Mikel L. Stout, Esq., 01-CV-054: Recommends version 2 of (g)(3). "This would be consistent with the manner in which the courts utilize the magistrate judge efforts in pretrial matters" and seems better from experience.

Federal Magistrate Judges Assn., 01-CV-057: (1) Supports Alternative 1. De novo review of all fact issues, unless otherwise specified in the appointing order, is appropriate. The distinction in Alternative 2 between substantive fact issues and other fact issues "is one that is hard to articulate under any general standard and this distinction will likely lead to collateral issues with regard to the matter of review." (2) "Wholeheartedly" supports inclusion of the proposed (g)(5) standard to review procedural rulings for abuse of discretion.

Department of Justice, 01-CV-057: **(1)** (g)(1) should say not that the court "may" but instead should say "shall afford an opportunity to be heard. **(2)** The parties should have the right to select de novo review, as incorporated in the order of appointment. The first published alternative "provides a more definitive statement of the factual burden of proof by which to apply a 'clear error' rule of review." The second alternative turns on the distinction between "substantive" and "non-substantive" issues: this distinction "creates a potential for ambiguity and confusion," but this alternative is "more versatile, addressing, for example, fact-finding concerning discovery conduct. On balance, the Department prefers the first version." But it should be amended to express the parties' right to choose: (g)(3)(A) "thus would state that the court would decide all fact issues de novo unless 'the parties stipulate with the court's consent that the master's findings will be reviewed for clear error . . ."

Maritime Law Assn., 01-CV-081: Favor Version 1. But (1) the court's consent should not be necessary if the parties agree that the master's findings of fact will be final. At the same time, (2) when the parties agree that the findings will be final, the court should retain jurisdiction, as in arbitration, to ensure that the master has given the parties a fair hearing. Former Admiralty Rule 43 1/2 provided that in such circumstances the court would review the report according to the principles governing review of an arbitral award. Rule 53(g) should add a new "(6) If the parties have stipulated as provided above for the master's findings of fact to be final, such final findings shall be subject to review by the appointing court under 9 U.S.C. §§ 10-11 as if they were contained in an arbitration award."

State Bar of Cal., Comm. on Fed. Cts., 01-CV-089: Supports the first alternative, establishing de novo review unless the appointing order specifies a different standard. And also supports (g)(5) "as it provides both a definite standard and one which will protect the rights of the litigants if applied by the district court in the searching manner envisioned by the Advisory Committee."

Margaret G. Farrell, Esq., 01-CV-092: **(1)** It is not clear whether the default rule of clearly erroneous review "applies where a master makes findings or recommendations based on something other than a formal evidentiary hearing." In current practice, discovery/settlement masters and post-trial masters "do, in fact, make findings based on information – like the inspection of prisons

– that is not gained at a formal evidentiary hearing." Due process problems are raised by limiting review to clear error. Some courts now provide for a de novo evidentiary hearing at the request of an objecting party when a master finds facts on the basis of an informal fact-finding proceeding. **(2)** Article III may not permit a clear-error standard of review for findings "of the merits of liability." Case law provides uncertain guidance. See U.S. v. Microsoft Corp., D.C.Cir.1998, 147 F.3d 935; In re Bituminous Coal Operators Assn., D.C.Cir.1991, 949 F.2d 1165, 1169; Stauble v. Warrob, Inc., 1st Cir.1992, 977 F.2d 690, 694, 695. (And Stauble should not be cited for its pretrial aspects [p. 137]: in the court of appeals the major issue was the master's trial role.

Subdivision (i) - Magistrate Judges

Committee on Administration of Magistrate Judges System, Hon. Harvey E. Schlesinger, 01-CV-052: **(1)** Subdivision (i) and associated "commentary" should be deleted. The paragraph beginning at the bottom of p. 135 should be deleted, and replaced by this: "Title 28 U.S.C. § 636(b)(2) authorizes courts to appoint United States magistrate judges as special masters under the Federal Rules of Civil Procedure. For this reason, language referring to magistrate judges in the current Rule 53 is eliminated as unnecessary. Because the range of duties assignable to magistrate judges is comprehensive even without recourse to special master provisions, see generally 28 U.S.C. § 636, courts have seldom invoked those provisions, although they retain the option to do so." **(2)** The Note "could be changed to make clear that a magistrate judge retains his or her statutory contempt authority even when serving as a master." See § 636(e)(2), added in 2000.

Mikel L. Stout, Esq., 01-CV-054: Would delete the second sentence of (i). There is no need to limit the authority to appoint a magistrate judge whenever the court finds appointment appropriate.

Federal Magistrate Judges Assn., 01-CV-057: Recommends deletion of all of subdivision (i). Continued "inclusion of magistrate judges in this role would undermine the position and authority of magistrate judges as judicial officers and would be inconsistent with the best utilization for magistrate judges." The role of magistrate judges acting as judges has continued to expand. Although § 636(b)(2) provides for acts as special master under the Federal Rules of Civil Procedure, this statute was adopted before later expansions of magistrate judge authority, and "is now obsolete." Appointment of magistrate judges as special masters is becoming increasingly rare. Proposed Rule 53(a)(1)(c) limits appointment of special masters to matters that cannot be addressed effectively by a district judge or magistrate judge; this recognizes that a magistrate judge may appoint a master, either for such pretrial matters as discovery or when a magistrate judge is exercising consent jurisdiction for trial. Application of Rule 53 to magistrate judges would be inconsistent with the standards of review set in § 636, which provides de novo review on dispositive matters and "clearly erroneous or contrary to law" review on other matters. A magistrate judge appointed under Rule 53 would be

reviewed by these standards only if adopted in the appointing order. The alternative of appointing a magistrate judge as master only when specifically authorized by a statute other than § 636(b)(2) would create confusion. Congress can enact specific statutes, such as § 2000(e)(5); that disposes of those specific matters.

Prof. Anthony M. Sabino, 01-CV-67: There is very good reason to limit appointment of a magistrate judge "to prevent confusion over a Magistrate Judge's duties as already clearly defined in Title 28 * * *." It is better to eliminate any confusion of by eliminating this provision entirely. We should "keep Magistrate Judges and special masters at a respectful distance from one another." This will avoid any conflict with Article III.

State Bar of Cal., Comm. on Fed. Cts., 01-CV-089: Supports deletion of the second sentence of (i), "leaving the issues to the evolution of developing practice and experience." This arises in part from concerns about substituting non-judicial officers for judicial officers, including magistrate judges.

Rule 23(c)(1)(B) and (C): The Order Certifying the Class

Although some thoughtful suggestions made during the public comment period urged that the certification order should "indicate which elements of the class claims and defenses" will be tried on a class basis, other commentators emphasized that this is sufficiently captured in the requirement that the certification order define the class "claims, issues, or defenses." No change is recommended.

In a very useful change from the published version, the proposed Rule language is amended to include class counsel appointment as a part of the order certifying a class. Including the requirement in this part of the Rule reflects when such decisions are actually made in the "life" of a class action.

The published proposed amendment changed the language stating that a certification order "may be conditional" to "is conditional." The present recommendation is to delete the reference to "conditional" certification, stating instead that an order may be "altered or amended before final judgment." Deleting the word "conditional" removes any suggestion that courts should certify first and consider later, or err on the side of certifying doubtful cases because the determination is "conditional" and can be corrected later. The change also removes possible ambiguities, raised during the public comment period, such as whether "recertification" after a "conditional" certification permits a second application for a Rule 23(f) appeal, or taking an opposing view, whether, given the conditional nature of certification, appeal is ever appropriate. Removing the reference to "conditional" is consistent with the comments received and with the substance of the published proposal.

The public comment on the substitution of "final judgment" for "decision on the merits" as the cutoff point for amendments to a class certification order raised questions that are addressed in the revised Note language emphasizing that the court has the authority to modify class definitions, or even decertify a class, based on information developed if liability is determined after certification.

Rule 23(c)(2): (b)(1), (2) Notice

The comments submitted to the Committee raised important issues that are reflected in the revisions to the published amendments. As published, the amendment required a court to provide notice to (b)(1) and (b)(2) classes, although not the "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort," as required in a (b)(3) class. The primary concern raised in the public comment period was that any notice requirement imposes a cost, and any additional cost may deter thinly-financed public interest groups from filing civil rights suits. The argument was also made that Rule 23(d)(2) already provides authority for a court to require notice in (b)(1) and (b)(2) cases, although this authority is apparently not invoked except for "hybrid" (b)(2)/(b)(3) classes that include damages relief. Civil rights plaintiffs' lawyers also argued that there is little need for notice in (b)(1) and (b)(2) classes, because these classes are relatively homogeneous and class counsel should be relied upon to communicate with class members to inform and educate them about the action.

Those favoring the extension of a notice requirement to (b)(1) and (b)(2) classes argued that preclusion by representation, even if damages are not involved, is unprincipled and risky without at least some attempt to effect notice. Absent class members do have interests that merit protection in all class actions, including an interest in knowing about the action and its possible consequences and in knowing the identity of, and decisions made by, class counsel, defendants and their counsel, and the courts. Proponents of notice argued that in addition to the lack of clear or principled distinctions among (b)(1), (b)(2), and (b)(3) class actions, the need for notice is enhanced by the prospect that class members may be precluded in later litigation even from challenging the adequacy of representation.

In response to these important concerns, the published proposal has been revised toward a more limited approach. The requirement that a court "must direct appropriate notice" to any class is changed to state that in certifying a (b)(1) or (b)(2) class, the court "may direct appropriate notice to the class." The Note emphasizes that this calls attention to the court's authority already established in Rule 23(d)(2). The Note emphasizes that this authority should be "exercised with care" and sets out

the competing considerations that courts should weigh in deciding whether notice should be required and, if so, in what format and through what means. The Note stresses the "discretion and flexibility" that a court has in deciding on the method of giving notice, taking into consideration the costs of providing notice; the probable reach of inexpensive means of providing notice; and the interests served by providing notice.

In response to comments expressing concern that the amendment might expand the use of (b)(2) classes in actions that include damages claims, the Note makes clear that if the (b)(3) class is certified in conjunction with a (b)(2) class, the notice requirements of (b)(3) must be satisfied. Several comments raised concerns about the Note suggestion that a court may make use of the defendant's regular means for addressing class members, emphasizing both pragmatic problems and more conceptual difficulties in requiring a defendant to use a means of communication identified as its own to prosecute the case. This suggestion is deleted.

The proposed revisions acknowledge the concerns raised in the public comment period and attempt to meet them, while recognizing a court's ability to direct appropriate notice when it certifies a class, even if no damages are involved.

Rule 23(c)(1) and (2): Other Order and Notice Issues

The proposed changes from the published version respond to several suggestions received during the public comment period. One change brings consistency to the words used to describe the contents of the certification order and the notice of that order. Another change deletes the requirement that the certification order state when the right to request exclusion must be exercised, recognizing that notice of the right to request exclusion is often negotiated after certification is ordered and that the class list itself often cannot be compiled until the class is defined by the certification order. Other revisions clarify and streamline both Rule and Note language and respond to specific comments received. The concept behind the proposed amendment remains intact: a clear statement in the rule itself of what a Rule(b)(3) notice must convey and the obligation of plain and easily understood language are important additions.

Rule 23(e): Settlement Review

This section of the proposed Rule amendment received very helpful attention in the public comment period, reflected in the revisions. The first revision deletes the requirement of court approval for precertification dismissal of class allegations. The change reflects the fact that while cases assert the existence of this requirement, it is frequently ignored, and there is no obvious remedy for noncompliance. Comments received in the public comment period pointed out that if applied rigorously, the requirement of court approval for precertification dismissal or withdrawal of some or all of the class allegations potentially conflicts with Rule 15(a), governing the right to amend. The Note language states that if "special circumstances" accompany a precertification dismissal or withdrawal of class allegations, a court may impose terms to protect potential class members or to prevent "abuse of the class action procedure." More court supervision than that seems unnecessary.

The proposal carries forward the settlement notice of present Rule 23(e), when the settlement binds the class. In response to comments urging greater recognition of the importance of individual settlement notice in some cases, the Note language emphasizes criteria for identifying when individual notice may be appropriate.

The comments received on the settlement review provisions resulted in the language clarifying that a court must make findings to support its conclusion that the settlement is fair, reasonable, and adequate, in sufficient detail to explain to the class and a reviewing court the factors applied in the settlement review. The Note is revised to delete the "laundry list" of factors pertinent to settlement review, relying instead on the developing case law to flesh out the characteristics of a fair, reasonable, and adequate settlement. The revision responds to comments pointing out that any list of factors presented in a rule or note will be seen as exclusive, exhaustive, and applicable in every case, despite language to the contrary, and that neither a rule nor note is the best place for most "laundry lists."

The provision on the disclosure of "side agreements" is revised to require parties to file with the court a statement identifying agreements or

understandings made in connection with the settlement. This changes the prior language that permitted a court to order the parties to file copies or summaries of such agreements or understandings. The revision is intended to make the disclosure requirement for "side agreements" mandatory, while limiting the information about agreements that must be disclosed. The Note provides that a court may direct the parties to provide additional information, including a copy of agreements that the parties identified or a copy or summary of other agreements the court considers relevant to its review of the proposed settlement. The revisions attempt to provide additional clarity and predictability to the disclosure requirement, while also permitting flexibility. The result strikes a balance between those comments urging that full disclosure of side agreements should be made mandatory in every case, and those urging no disclosure requirement.

The Notes have been revised to respond to comments urging better definition of the agreements and understandings covered by the disclosure obligation. The Notes have also been revised to respond to comments urging that courts should recognize that some agreements a court may need to review for a full understanding of the proposed settlement may include confidential information that should be protected against unlimited disclosure.

Some comments urged that the Rule or Notes specify the consequences of failure to disclose. The Notes have been revised to acknowledge that the Rule does not specify sanctions for a failure to identify an agreement or understanding connected with the settlement. The Note explains that courts will devise appropriate responses and specifically refers to the possibility of reopening a settlement if information bearing significantly on the reasonableness of the terms has not been provided.

The two alternative versions of the post-certification opportunity to request exclusion once the settlement terms are known received extensive comment. Practicing lawyers expressed views ranging from a belief that no later opt-out should ever occur, because it is inconsistent with the class-action concept and is reminiscent of one-way intervention, to a belief that later opt-out opportunities should always be required, because pre-settlement opt-out is illusory and does not permit class

members' informed choice. The more pragmatic comments from defense lawyers expressed concern that unlimited opportunities for settlement opt-out may erode one of the few benefits of (b)(3) classes — resolution of claims on a broad class-wide basis — and may diminish the certainty needed for settlement. Concern was also expressed that opportunities for abuse will be created, in the form of "orchestrated" settlement opt-outs that may drive up fees and present "free rider" problems.

The first alternative was favored by those who would go further. Comments favoring the first alternative emphasized that it would tend to provide more protection; greater institutional incentives for better settlement terms; and a stronger incentive for careful judicial review as the court examines the settlement terms for fairness to all class members in determining whether there is good cause to deny a second opt-out. Those favoring the second alternative pointed out that the first alternative's standard of "good cause" is vague and may become confused with doubts about the adequacy of the settlement; it does not take account of the myriad circumstances in which settlements may be negotiated; and judicial discretion will provide a mechanism for permitting a second opt-out when it is useful and appropriate, while guarding against the abuses that it may generate.

The second alternative is recommended as striking the best balance among the competing concerns. If a case has been certified and then settles later, the proposed Rule amendment explicitly provides a means to increase protection to absent class members who did not earlier request exclusion, by allowing them to make that decision based on knowledge of the settlement terms. The proposed Rule amendment allows the court to obtain the absent class members' assessment of the fairness, reasonableness, and adequacy of the proposed settlement. At the same time, recognizing that there may be cases that do not require these additional steps, or in which they may be inappropriate, the proposed amendment allows courts the necessary flexibility to tailor the settlement process to the specific requirements of each case. The Note language for the second opt-out has been revised to address potential problems that a second opt-out may present more explicitly.

The provisions on objectors have been revised to clarify the considerations that apply to a court's review of objections to class settlements,

recognizing that the comments described both benefits and abuses in the practice. The Note language states that if an objector withdraws an objection, the court may inquire into the circumstances, recognizing that different standards may apply if the objector purports to assert class-wide interests; if the objections are withdrawn on terms that lead to modification of the settlement of the class; or if the objections are withdrawn on terms that lead to a benefit only or primarily for the objector. The Note language that some read as providing greatly increased discovery rights for objectors has been revised to make clear that discovery by objectors is subject to court control.

The revised proposal to amend Rule 23(e) responds to concerns identified in the public comment period, while strengthening judicial scrutiny over one of the most criticized aspects of class action practice.

Rule 23(g): Attorney Appointment

Most of the comments received on proposed new Rule 23(g) accepted its premise: a rule explicitly addressing attorney appointment in class actions is a useful and important addition, that explicitly recognizes the unique responsibilities of class counsel; provides a predictable framework for the appointment process; and encourages early attention to fee arrangements. Many of the comments pointed out an unintended emphasis on competition for the position of class counsel, as opposed to the far more common case in which the court recognizes as class counsel the only applicant, the lawyer who filed the case. The revisions clarify the Rule and Note to respond to these criticisms.

The attorney-appointment requirement is incorporated into Rule 23(c), as part of the order certifying a class, and the attorney-appointment criteria are moved into Rule 23(g)(1)(C). The Note language is revised to clarify the relationship of new Rule 23(g) to Rule 23(a)(4), which requires adequate class representatives. The revised Note recognizes that the importance of judicial evaluation of the proposed lawyer for the class is not a new concept; courts have scrutinized proposed class counsel, as well as the proposed class representative, under Rule 23(a)(4). Under the amendments, Rule 23(a)(4) will continue to require judicial scrutiny of the proposed

class representative, while Rule 23(g) will guide the court in assessing proposed class counsel as part of the class certification process.

In response to the criticisms that Rule 23(g) appeared to promote competition for the position of class counsel, the Rule and Note language are revised to make clear that the procedures and standard for appointment will vary depending on whether there are multiple applicants to be class counsel. The Note language is revised to delete citations that some had read as specifically encouraging competition for class counsel selection. Revised Note language adds several clarifications on the procedure and criteria that apply when only one lawyer, who filed the action, seeks appointment as class counsel, as opposed to the less frequent case involving multiple applicants.

In the single-applicant situation, the goal is to ensure adequate representation. If there are multiple applicants for appointment as class counsel, the Rule directs the court to select the attorney "best able to represent the interests of the class." The Note language relating to Rule 23(g)(2)(B), which addresses the timing of attorney appointment, recognizes that a court's authority to defer appointment of class counsel to allow time for additional applications is ordinarily limited to cases in which the court anticipates that there will be competition for class counsel appointment, as when there are a number of cases filed that will be consolidated.

A number of comments were received on the Rule's listing of the criteria courts must consider in evaluating the proposed lawyer for the class. Besides the statement of the obligation of class counsel to the class, this is the heart of the proposed rule. Many of the comments reflected a concern that the factors would favor the selection of established class action firms and further entrench their position, limiting competition from less experienced but qualified and worthy lawyers. One solution, to eliminate any reference to specific criteria from the rule, would make the Rule too open-ended and inadequate as a guide to the information that lawyers must provide in seeking such appointments. The criteria are revised instead to emphasize that counsel's relevant experience is not merely experience in handling class actions or other complex cases, but also in the substantive area of the law, and to emphasize that counsel's knowledge of the applicable law is a factor in

the selection. These factors are in addition to the work the lawyer has done in the specific case to identify and investigate potential claims.

Several comments expressed concern over including the resources that counsel will commit to representing the class among the criteria that must be considered, as unduly favoring large or established firms. Others recognized that this is a standard factor in evaluating the ability of class counsel to provide the necessary level of representation. As the Note language states, no single factor should be determinative in a given case and the resources that counsel will commit should not lead a court to "limit consideration to lawyers with the greatest resources."

The Rule and Note language specifically address the designation of interim class counsel to "protect the interests of the putative class" in the precertification period. The language responds to comments stressing the need to ensure representation for the putative class during the precertification period. The Note specifically refers to different precertification activities that require action by counsel, such as conducting or responding to discovery relevant to a certification motion, citing Rule 23(c)(1); filing or responding to other motions; and engaging in settlement negotiations. The Rule and Notes recognize that in taking actions during the precertification period, counsel must act in the best interest of the putative class, an obligation that applies whether or not the court formally designates interim class counsel.

As revised, proposed Rule 23(g) provides support and guidance to courts and lawyers for class counsel appointment, a critical aspect of class action practice, lacking in the present rule.

Rule 23(h): Attorney Fees Award

During the public comment period, many applauded adding a rule provision on attorney fee awards in class actions; some opposed doing so. Some applauded the discussion in the Note; others raised questions about the length or specifics included in the Note. The revisions respond to specific criticisms of the Rule and Note provisions and significantly shorten the Note discussion.

Several commentators suggested deleting the reference to Rule 54(d)(2) in Rule 23(h)(1). There are, however, good reasons for retaining the reference. Rule 54(d)(2) provides further details on how such a motion is to be handled that may be useful in ways that cannot be predicted in advance. In addition, Rule 58, governing appeals, has just been amended to refer to Rule 54(d)(2); there may be a need to amend it again unless the motion for attorney fees is clearly identified as a Rule 54(d)(2) motion.

Some suggested that the requirement that notice of class counsel's fee motion must be "given to all class members in a reasonable manner," should be removed because notice may be costly and, at least where the fee does not come from a common fund, unnecessary. Others applauded the inclusion of the notice requirement, along with other features that regulate the opportunity of objectors to challenge the fee award. The argument that class members have no stake in the fee award so long as it does not overtly come from their recovery disregards the possibility of trade-offs between relief on the merits and attorney fees. The cost concern is reflected in the change in the Rule to state that notice of class counsel's motion for fees must be "directed to class members in a reasonable manner," deleting the word "all" and substituting "directed" for "given," to employ the same term as is used in Rules 23(c) and (e). The revised Note similarly urges that unnecessary costs be avoided by having the notice of class counsel's fee motion accompany a settlement notice, already required and not disputed when there is a settlement. The Note warns of the need to avoid undue expense for notice of fee motions in adjudicated cases as well.

The Rule and Note continue to recognize the right of a class member or a party from whom payment is sought to object to the attorney fee award motion. The Notes respond to comments received about providing objectors discovery by emphasizing the need to weigh why the information is sought against the delay and costs that will result. Several comments noted that it is difficult to obtain sufficient information about the basis for the fee award sought before the deadline for filing objections. Rather than placing time limits in the Rule, the Note observes that a court should provide sufficient time after the full fee motion is filed to enable potential objectors to examine the motion.

A number of comments addressed the problems a court faces in judging the value of a settlement in order to assess the reasonableness of the fee award sought. The Note emphasizes the importance of "the result actually achieved for class members" and urges caution in assessing the value of settlements involving future payments, payments that require a claims procedure, and settlements involving nonmonetary provisions. The Notes cite to the PSLRA provisions that the fee award should bear a reasonable relationship to amounts "actually paid to the class." The Note balances this discussion by recognizing that in certain kinds of class actions, such as civil rights cases, monetary relief is not the only criterion for determining the fee award.

A number of commentators criticized the comment in the Note about the treatment of risk; that language has been deleted. In response to other comments, the Note discussion of the role of agreements among the parties about the fees claimed by the motion, and of fees charged by class counsel or other attorneys for representing individual claimants or objectors, is clarified.

Conclusion

The proposed amendments to Rule 23 do not attempt aggressive revision. Such aspirations for rulemaking in the class actions arena have proven unrealistic. The proposed changes are modest. They are intended to provide additional support, guidance, and rigor to the process by which class actions are litigated. The revisions resulting from the public comment period have refined the proposals further, toward this limited, but important, purpose. We thank all those who helped in this process.

Rule 23. Class Actions

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(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1) **(A)** When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2) **(A)** For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly describe in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- the right of a class member to enter an appearance through counsel if the member so desires,
- the right to elect to be excluded from the class, stating when and how members may elect to be excluded, and

- the binding effect of a class judgment on class members under Rule 23(c)(3).

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) **(A)** The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement or understanding made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the Rule 23(e)(1)(B) notice may state terms that afford individual class members a second opportunity to elect exclusion from the class.

(4) **(A)** Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(C).

(B) An objector may withdraw objections made under Rule 23(e)(4)(A) only with the court's approval.

* * * * *

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

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

(C) In appointing class counsel, the court

(i) must consider:

- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law,
- the work counsel has done in identifying or investigating potential claims in the action, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim class counsel before determining whether to certify the action as a class action.

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

(C) If more than one applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

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

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member or a party from whom payment is sought may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

Committee Note

Subdivision (c). Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is replaced by requiring determination "at an early practicable time." The notice provisions are substantially revised.

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made "at an early practicable time." The "as soon as practicable" exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. See Willging, Hooper & Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26-26 (Federal Judicial Center 1996).

Time may be needed to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between "certification discovery" and "merits discovery." A critical need is to determine how the case will be tried. Some courts now require a party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof. See Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

Other reasons may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might

have been certified. Time may be needed to explore designation of class counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim class counsel under Rule 23(g)(2)(A).

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not unjustifiably delayed.

Subdivision (c)(1)(C) reflects two amendments. The provision that a class certification "may be conditional" is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met. The provision that permits alteration or amendment of an order granting or denying class certification is amended to set the cut-off point at final judgment rather than "the decision on the merits." This change avoids the possible ambiguity in referring to "the decision on the merits." Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible, particularly in protracted litigation.

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of "one-way intervention" that was rejected by the 1966 revision of Rule 23. A determination of liability after certification, however, may show a need to amend the class definition. In unusual circumstances, decertification may be warranted after further proceedings.

Paragraph (2). The first change made in Rule 23(c)(2) is to call attention to the court's authority — already established in part by Rule 23(d)(2) — to direct notice of certification to a Rule 23(b)(1) or (b)(2) class. The present rule expressly requires notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) have interests that may deserve protection by notice.

The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice.

The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.

When the court does direct certification notice in a (b)(1) or (b)(2) class action, the discretion and flexibility established by subdivision (c)(2)(A) extend to the method of giving notice. Individual notice, when feasible, is required in a (b)(3) class action to support the opportunity to request exclusion. If the class is certified under (b)(1) or (b)(2), notice facilitates the opportunity to participate. Notice calculated to reach a significant number of class members often will protect the interests of all. Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(A)(ii) notice requirements must be satisfied as to the (b)(3) class.

The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. Courts may need to consider whether the case involves class members who are more likely to understand notice in a language other than English, or who are more likely to receive notice delivered through a means other than — or in addition to — the mail. The Federal Judicial Center has created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.

Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. Settlement may be a desirable means of resolving a class action. But court review and approval is essential to assure adequate representation of class members who have not participated in shaping the settlement.

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses.

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be — and at times was — read to require court approval of settlements with putative class representatives that resolved only individual claims. See Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise. When a putative class has not been certified, special circumstances may lead a court to impose terms that protect potential class members who may have relied on the class allegation or that prevent abuse of the class-action procedure. As an alternative, the court may direct notice to the putative class under Rule 23(d)(2).

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e) when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously.

Reasonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action — such as filing claims — to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3).

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class.

Subdivision (e)(1)(C) states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir. 1998). Further guidance can be found in the Manual for Complex Litigation.

The court must make findings that support the conclusion that the settlement is fair, reasonable, and adequate. The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard.

Settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal divergent interests of class members and demonstrate the need to redefine the class or to designate subclasses.

Paragraph (2). Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a statement identifying any agreement or understanding made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1). It aims instead at related undertakings. The reference to "agreements or understandings made in connection with" the proposed settlement is necessarily open-ended. An agreement or understanding need not be an explicit part of the settlement negotiations to be connected to the settlement agreement. Explicit agreements may be reached that are not reflected in the formal settlement documents. There may be accepted implicit conventions or unspoken understandings that accompany settlement. The functional concern is that the seemingly separate agreement may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. This functional concern should guide counsel for the settling parties in identifying agreements for the court to review as part of the settlement process. Doubts should be resolved by identifying agreements that may be connected to the settlement.

The court may direct the parties to provide a copy of any agreement identified by the parties under Rule 23(e)(2). The court also may direct the parties to provide a copy or summary of any other agreement the court considers relevant to its review of a proposed settlement. A direction to disclose may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure. Agreements between a liability insurer and a defendant may present distinct problems. An understanding of the insurance coverage available to compensate class members may bear on the reasonableness of the settlement. Bare identification of such agreements may not provide the information the court needs.

Unrestricted access to the details of such agreements, on the other hand, may impede resolution of important coverage disputes. These and other needs for confidentiality can be addressed by the court.

Rule 23(e)(2) does not specify sanctions for failure to identify an agreement or understanding connected with the settlement. Courts will devise appropriate sanctions, including the power to reopen the settlement if the agreements or understandings not identified bear significantly on the reasonableness of the settlement.

Paragraph (3). Subdivision (e)(3) authorizes the court to permit class members to elect exclusion from a class certified under Rule 23(b)(3) after settlement terms are announced. An agreement by the parties themselves to permit class members to elect exclusion at this point by the settlement agreement may be one factor supporting approval of the settlement. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic opportunity to elect exclusion applies without further complication. In some cases, particularly if settlement appears imminent at the time of certification, it may be possible to achieve equivalent protection by deferring notice and the opportunity to elect exclusion until actual settlement terms are known. This approach avoids the cost and potential confusion of providing two notices and makes the single notice more meaningful. But notice should not be delayed unduly after certification in the hope of settlement.

Paragraph (3) creates a second opportunity to elect exclusion for cases that settle after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. This second opportunity to elect exclusion reduces the influence of inertia and ignorance that may undermine the value of a pre-settlement opportunity to elect exclusion. A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action.

The decision whether to allow a second opportunity to elect exclusion is confided to the court's discretion. The decision whether to permit a second opportunity to opt out should turn on the court's level of confidence in the extent of the information available to evaluate the fairness, reasonableness, and adequacy of the settlement. Some circumstances may present particularly strong evidence that the settlement is reasonable. The facts and law may have been well developed in earlier litigation, or through extensive pretrial preparation in the class action itself. The settlement may be reached at trial, or even after trial. Parallel enforcement efforts by public agencies may provide extensive information. Other circumstances as well may enhance the court's confidence that a second opt-out opportunity is not needed.

The terms set for permitting a second opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Or the court might condition exclusion on the term that a class member who opts for exclusion will not participate in any other class action pursuing claims arising from the same underlying transactions or occurrences. Still other terms or conditions may be appropriate.

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C). The court has discretion whether to provide procedural support to an objector.

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different

considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

Subdivision (g). Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process. In the future, Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the class certification process. This subdivision recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. The procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. The new subdivision also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members. It also sets out the factors the court should consider in assessing proposed class counsel.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class. Class counsel must be appointed for all classes, including each subclass that the court certifies to represent divergent interests.

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

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole.

Paragraph (1)(C) articulates the basic responsibility of the court to appoint class counsel who will provide the adequate representation called for by paragraph (1)(B). It identifies criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court's duty, the listing also informs counsel seeking appointment about the topics that should be addressed in the application for appointment or in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (1)(C) or about any other relevant topic. For example, the court may direct applicants to inform the court concerning any agreements about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate how parallel litigation might be coordinated or consolidated with the action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. Attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique. Paragraph (2)(D) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful, the court need not consider it in all class actions.

Some information relevant to class counsel appointment may involve matters that include adversary preparation in a way that should be shielded from disclosure to other parties. An appropriate protective order may be necessary to preserve confidentiality.

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. Unlike the multiple application situation governed by Rule 23(g)(2)(C), the goal in cases in which there is one applicant is to ensure adequate representation for the class. The resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration to lawyers with the greatest resources.

If, after review of all applicants, the court concludes that none would be satisfactory class counsel, it may deny class certification, reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it provides the framework for appointment of class counsel in all class actions. In cases in which there is one applicant, the court's task is limited to ensuring that the applicant is adequate under the criteria specified in Rule 23(g)(1)(C). For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (g)(1)(C) is included.

In some instances, there will be multiple applicants for appointment as class counsel, and paragraph (2)(B) permits the court to defer appointment for a reasonable

time to allow additional applications. Other applicants ordinarily would file a formal application detailing their suitability for the position. If there are multiple applicants, paragraph (2)(C) directs the court to select the applicant best able to represent the interests of the class.

In a plaintiff class action the court would ordinarily appoint as class counsel only an attorney or attorneys who have sought appointment. Different considerations may apply in defendant class actions.

The rule states that the court should appoint "class counsel." In many instances, the applicant will be an individual attorney. In other cases, however, an entire firm, or perhaps numerous attorneys who are not otherwise affiliated but are collaborating on the action will apply. No rule of thumb exists to determine when such arrangements are appropriate; the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure.

Paragraph (2)(A) authorizes the court to designate interim class counsel during the pre-certification period in order to protect the interests of the putative class. Rule 23(b)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class certification, however, it will usually be important for an attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before certification. Current practice recognizes the practical necessity that counsel who file a class action manage the litigation during the period required to reach a certification determination. Paragraph 2(A) provides for formal designation of interim class counsel, although failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim class counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

Paragraph (2)(B) provides that the court may allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate

competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating competing applications in such a case is to afford the best possible representation for the class. Another possible reason for deferring appointment would be that the initial applicant was found inadequate, but it seems appropriate to permit additional applications rather than deny class certification.

Paragraph (2)(C) directs the court to select the class counsel best able to represent the interests of the class if there are multiple applicants. This decision should be made using the factors outlined in paragraph (1)(C), but in the multiple applicant situation the court is to go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants. As with the decision whether to appoint the sole applicant for the position, no single factor should be dispositive in selecting class counsel in cases in which there are multiple applicants. The fact that a given attorney filed the instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. Depending on the nature of the case, one important consideration might be the applicant's relationship with the proposed class representative.

Paragraph (2)(D) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action, to facilitate the court's later determination of a reasonable attorney fee.

Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.

Subdivision (h) applies to "an action certified as a class action." This includes cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself.

This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular, there is some variation among courts about whether in "common fund" cases the court should use the lodestar or a percentage method of determining what fee is reasonable. The rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.

Active judicial involvement in measuring fee awards is singularly important to the healthy operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court's responsibility. "In a class action, whether the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper." *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328 (9th Cir. 1999). Even in the absence of objections, the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors. One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or declaratory relief").

Any directions or orders made by the court in connection with appointing class counsel under Rule 23(g) should weigh heavily in making a fee award under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: "If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made." The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the

court remains responsible to determine a reasonable fee. "Side agreements" regarding fees provide at least perspective pertinent to an appropriate fee award.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments in the class fee award were necessary as a result.

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. If costs were addressed in the order appointing class counsel, those directives should be a presumptive starting point in determining what is an appropriate award.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4. Owing to the distinctive features of class action fee motions, however, the provisions of this subdivision control disposition of fee motions in class actions.

The court should direct when the fee motion must be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). In cases litigated to judgment, the court might also order class counsel's motion to be filed promptly so that notice to the class under this subdivision (h) can be given.

Besides service of the motion on all parties, notice of class counsel's motion for attorney fees must be "directed to the class in a reasonable manner." Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. In cases in which settlement approval is contemplated under Rule 23(e), notice of class counsel's fee motion should be combined with notice of the proposed settlement, and the provision regarding notice

to the class is parallel to the requirements for notice under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties -- for example, nonsettling defendants -- may not object because they lack a sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion. If a class member wishes to preserve the right to appeal should an objection be rejected, it may be necessary for the class member to seek to intervene in addition to objecting.

The court may allow an objector discovery relevant to the objections. In determining whether to allow discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. *See* Rule 26(b)(2). One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information.

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases. The form and extent of a hearing depend on the circumstances of the case. The rule does require findings and conclusions under Rule 52(a).

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process might entail.

Rule 23(c), (e)

Introductory Note

The versions of Rule 23(c) and (e) that follow show some of the changes that might be made to react to comments and testimony on the published drafts. Different conventions are used to show the changes.

The text of the rules was published with underlining and overstriking. To show the changes, the basic convention is simple: when new matter proposed in the published version is recommended for deletion, it is shown with the as-published underlining and with new overstriking. New matter recommended for addition to the published draft is shown in bold. When it is recommended to make new deletions from current Rule 23, the deleted material is shown in small type and overstriking. So current rule 23 says that a certification order "may be conditional." The published version recommended changing that to "is conditional." The present recommendation is to delete all reference to "conditional," shown as follows: ~~may be~~ is ~~conditional~~.

For Notes, matters are somewhat simpler. Proposed new material is underlined. Proposed deletions from the published Notes are overstricken. The fuss appears when it is suggested that if we choose to retain overstricken passages there be some changes. The changes are shown in bold; the words replaced are overstricken, but not readily distinguished from the general overstriking.

Footnotes are used to indicate the purpose of proposed changes. Footnotes to overstricken material merit no further consideration if the proposal to delete is adopted.

The attorney-appointment rule published as proposed Rule 23(g) has been incorporated in subdivision (c) to reflect its place as part of the certification process.

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CIVIL PROCEDURE*

Rule 23. Class Actions

* * * * *

(c) Determin~~ingation~~ by Order Whether to Certify a Class Action ~~to Be Maintained~~; Appointing Class Counsel; Notice and Membership in Class; Judgment; ~~Actions Conducted Partially as Class Actions~~ Multiple Classes and Subclasses.

(1) (A) ~~As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.~~ When a person sues or is sued as a representative

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

of a class, the court must — at an early practicable time — determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses**, and must appoint class counsel under Rule 23(g)**. ~~When a class is certified under Rule 23(b)(3), the order must state when and how members may elect to be excluded from the class.~~[1]

(C) An order under ~~this subdivision~~ Rule 23(c)(1) ~~may be~~ ~~is~~ ~~conditional, and~~[2] may be altered or amended before ~~the decision on the merits~~ final judgment.[3]

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[1] The substance of this provision has been moved to paragraph (2)(A)(i) as a "bullet" in the list of things to be stated in the notice of certification. The move reflects the argument that it is difficult to state the time for opting out at the time of the initial (b)(3) certification order if certification is contested. The parties do not begin to plan the notice campaign until certification has been ordered, and in many cases a substantial period is required to develop both the notice and the plan for reaching class members. It may not be sensible even to compile a list of class members until the class is defined by certification. It might be added that in some cases it will make sense to defer notification until it is determined whether post-certification settlement can be reached; a single notice of certification, opportunity to elect exclusion, and settlement saves much.

[2] The original purpose of "may be conditional" was to authorize an order stating that the class is certified only on satisfying stated conditions. The one example given in the 1966 Committee Note reads: "the court may rule, for example, that a class action may be maintained only if the representation is improved through intervention of additional parties of a stated type." Both testimony and comments repeatedly expressed the fear that the reference to "conditional" certification would be misread to invite a casual approach to the certification decision. In effect, a court would be tempted to certify just to find out what might happen next. There is little apparent purpose to a conditional certification that will take effect only in the future. It is better to defer certification until the court's concerns, whatever they may be, are adequately addressed.

[3] One consequence of moving the Class Counsel provisions into (c)(1) is that this drafting makes explicit the court's authority to revise the appointment.

(2) **(A)** ~~When ordering certification of a class action under Rule 23, the court must direct appropriate notice to the class.~~ **For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.**[4]

(B) For any class certified under ~~subdivision~~ Rule 23(b)(3), the court ~~shall~~ must direct to class ~~the~~ members ~~of the class~~ the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly describe in plain, easily understood language:

- the nature of the action,
- **the definition of the class certified,**[5]
- the **class** claims, issues, or defenses ~~with respect to which the class has been certified,~~[6]

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[4] This deletion reflects the strong negative testimony that mandatory notice would deter many lawyers from filing socially important actions for injunctive or declaratory relief under Rule 23(b)(2). The opponents of the notice requirement argued that the chilling effect cannot be dispelled by rule language directing that the court must not direct a means of notice that would cripple the action.

[5] This seems an essential part of the notice, not adequately expressed in the description of the class claims, issues, or defenses.

[6] This change makes this language identical with the language describing the certification order in (1)(C). This formulation seems less stilted than "the claims, issues, or defenses with respect to which the class has been certified."

• the right of a class member to enter an appearance through counsel if the member so desires,

• the right to elect to be excluded from ~~a~~ **the** class ~~certified under Rule 23 (b)(3)~~, **stating when and how members may elect to be excluded,**[7] and

• the binding effect of a class judgment on class members under Rule 23(c)(3).

~~(ii) For any class certified under Rule 23 (b)(1) or (2), the court must direct notice by means calculated to reach a reasonable number of class members.~~

~~(iii)~~ In ~~For~~ any class action maintained ~~certified~~ under subdivision ~~Rule~~ ~~23~~(b)(3), ~~the court shall~~ must direct to ~~class~~ ~~the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through~~

[7] This addition corresponds to deleting the second sentence in (c)(1)(B); see note 1.

~~counsel.~~

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Committee Note

Subdivision (c). Subdivision (c) is amended in several respects. The requirement that the court determine whether to certify a class "as soon as practicable after commencement of an action" is replaced by requiring determination "at an early practicable time." The notice provisions are substantially revised. ~~Notice now is explicitly required in (b)(1) and (b)(2) classes.~~

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made "at an early practicable time." The "as soon as practicable" exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. See Willging, Hooper & Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26-26 (Federal Judicial Center 1996). ~~The Federal Judicial Center study showed many cases in which it was doubtful whether determination of the class-action question was made as soon as practicable after commencement of the action. This result occurred even in districts with local rules requiring determination within a specified period. These seemingly tardy certification decisions often are in fact made as soon as practicable, for practicability itself is a pragmatic concept, permitting consideration of all the factors that may support deferral of the certification decision. If the "as soon as practicable" phrase is applied to require determination at an early practicable time, it does no harm. But the "as soon as practicable" exaction may divert attention from the many practical reasons that may justify deferring the initial certification decision. The period immediately following filing may support free exploration of settlement opportunities, although settlement discussions should not become the occasion for deferring the activities needed to prepare for the certification determination. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(g).~~

Time ~~also~~ may be needed ~~for discovery to support~~ to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial.[8] In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately wasteful division between "certification discovery" and "merits discovery." ~~of the dispute. A court must understand the nature of the disputes that will be presented on the merits in order to evaluate the presence of common issues; to know whether the claims or defenses of the class representatives are typical of class claims or defenses; to measure the ability of class representatives adequately to represent the class; to assess potential conflicts of interest within a proposed class; and particularly to determine for purposes of a (b)(3) class whether common questions predominate and whether a class action is superior to other methods of adjudication. The most~~ A critical need is to determine how the case will be tried. Some courts now require a party requesting class certification to present a "trial plan" that describes the issues ~~that~~ likely ~~will~~ **to** be presented at trial **and tests whether they are susceptible of class-wide proof.**~~, a desirable — and at times indispensable — practice~~ **Such trial plans** ~~that often requires better knowledge of the facts and available evidence than can be gleaned from the pleadings and argument alone. Wise management of the discovery needed to support for the certification decision recognizes that it may be most efficient to frame the discovery so as to reduce wasteful duplication if the class is certified or if the litigation continues despite a refusal to certify a class.~~ See Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

~~Quite different reasons for deferring the decision whether to certify a class appear if related litigation is approaching maturity. Actual Developments in other cases may provide invaluable information bearing on the desirability of class proceedings and on class definition. If the related~~

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[8] The early comments suggest continuing concern by some plaintiffs that defendants may attempt an artificial separation of discovery into two phases — a first phase aimed at the certification decision, then a second phase aimed at the merits — for the purpose of increased delay and expense. The delay and expense arise because certification discovery inevitably overlaps merits discovery. Others believe that certification discovery can be controlled effectively, and that it can be managed to reduce any duplication.

~~litigation involves an overlapping or competing class, indeed, there may be compelling reasons to defer to it. **If related litigation remains in a relatively early stage, on the other hand, the prospect that duplicating, overlapping, or competing classes may result in conflicting or disruptive developments may be a reason to expedite the determination whether to certify a class.**~~[9][10]

Other reasons may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim class counsel under Rule 23(g)(2)(A).[11] ~~The period immediately following filing may support free exploration of settlement opportunities, although settlement discussions should not become the occasion for deferring the activities needed to prepare for the certification determination.~~

Although many circumstances may justify deferring the certification decision, active management may be necessary to ensure that the certification decision is not unjustifiably delayed ~~beyond the needs that justify delay~~. ~~These amendments are~~ **The rule is** ~~not intended to encourage or excuse a dilatory approach to the certification determination. Class litigation must not become the occasion for long-delayed justice. Class members often need prompt relief, and orderly relationships between the class action and possible individual or other parallel actions require speedy proceedings in the class action. Tthe party opposing a proposed class also is entitled to a prompt determination of the scope of the litigation, see *Philip Morris v. National Asbestos Workers Medical Fund*, 214 F.3d 132 (2d Cir. 2000). The object of Rule 23(c)(1)(A) is to ensure that the parties act with reasonable dispatch to gather and present information required to support a well-informed determination whether to certify a class, and that the court make the~~

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[9] These words respond to a suggestion at the Chicago Conference.

[10] In place of the overstricken material, we might add a chaste reference to the treatment of trial plans in the Manual for Complex Litigation Third. Sections 30.12 and 30.13 seem the most relevant.

[11] These words are added as a reminder of a theme often sounded with respect to appointment of class counsel. The reference to (c)(1)(B) is provisional, depending on the ultimate location of the Class Counsel provisions.

~~determination promptly after sufficient information is submitted.~~

~~Subdivision (c)(1)(B) requires that the order certifying a (b)(3) class, not the notice alone, state when and how class members can opt out. It does not address the questions that may arise under Rule 23(e) when the notice of certification is combined with a notice of settlement.~~[12]

Subdivision (c)(1)(C), reflects two amendments. The provision that a class certification "may be conditional" is deleted. A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met. The provision that ~~which~~ permits alteration or amendment of an order granting or denying class certification, is amended to set the cut-off point at final judgment rather than "the decision on the merits." This change avoids ~~any~~ the possible ambiguity in referring to "the decision on the merits." Following a determination of liability, for example, proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. ~~The determination of liability might seem a decision on the merits, but it is not a final judgment that should prevent further consideration of the class certification and definition.~~ In this setting the final judgment concept is pragmatic. It is not the same as the concept used for appeal purposes, but it should be flexible ~~in the same way as the concept used in defining appealability~~, particularly in protracted ~~institutional reform~~ litigation. ~~**For example, proceedings to enforce a complex decree in protracted institutional reform litigation may require several adjustments in the class definition after liability is determined.** may generate several occasions for final judgment appeals, and likewise may demonstrate the need to adjust the class definition.~~

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of "one-way intervention" that was rejected by the 1966 revision of Rule 23. ~~A court may not decide the merits first and then certify a class. It is no more appropriate to certify a class after a determination that seems favorable to the class than it would be to certify a class for the purpose of binding class members by an adverse judgment previously rendered without the protections that flow from class certification.~~ A determination of liability after certification, however, may show ~~the~~ a need to amend the class definition. In ~~extreme~~ **unusual** circumstances,

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[12] This paragraph should be deleted if the notice sentence is moved from (c)(1)(B) to (c)(2)(A)(i). See note 2.

decertification may be warranted after further proceedings ~~show that the class is not adequately represented or that it is not proper to maintain a class definition that substantially resembles the definition maintained up to the time of ruling on the merits~~.

Paragraph (2). The first change made in Rule 23(c)(2) is to ~~require~~ call attention to the court's authority — already established in part by Rule 23(d)(2) — to direct notice of certification to a Rule 23(b)(1) or (b)(2) class. ~~in Rule 23(b)(1) and (b)(2) class actions~~. The present rule expressly requires notice only in actions certified under Rule 23(b)(3). Members of classes certified under Rules 23(b)(1) or (b)(2) ~~cannot request exclusion, but~~ have interests that ~~should be~~ may deserve protection~~ed~~ by notice. ~~These interests often can be protected without requiring the exacting efforts to effect individual notice to identifiable class members that stem from the right to elect exclusion from a (b)(3) class~~.

The authority to direct notice to class members in a (b)(1) or (b)(2) class action should be exercised with care. For several reasons, there may be less need for notice than in a (b)(3) class action. There is no right to request exclusion from a (b)(1) or (b)(2) class. The characteristics of the class may reduce the need for formal notice. The cost of providing notice, moreover, could easily cripple actions that do not seek damages. The court may decide not to direct notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice.

When the court does direct certification notice in a (b)(1) or (b)(2) class action, the discretion and flexibility established by subdivision (c)(2)(A) extend to the method of giving notice. Individual notice, when feasible, is required in a (b)(3) class action to support the opportunity to request exclusion. If the class is certified under (b)(1) or (b)(2), notice facilitates the opportunity to participate. Notice calculated to reach a significant number of class members often will protect the interests of all. Informal methods may prove effective. A simple posting in a place visited by many class members, directing attention to a source of more detailed information, may suffice. The court should consider the costs of notice in relation to the probable reach of inexpensive methods.

If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(A)(iii) notice requirements must be satisfied as to the (b)(3) class.

The direction that class-certification notice be couched in plain, easily understood language is ~~added as~~ a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is ~~virtually impossible~~ difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure ~~itself~~ raise the barriers high. Courts may need to consider whether the case involves class members who are more likely to understand notice in a language other than English, or who are more likely to receive notice delivered through a means other than — or in addition to — the mail. ~~In some **many** cases, **it has proved useful to provide** these barriers may be reduced by providing an introductory summary that briefly expresses the most salient points, leaving full expression to the body of the notice.~~ The Federal Judicial Center has ~~undertaken to~~ created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms. ~~Even with these illustrative guides, the responsibility to "fill in the blanks" with clear language for any particular case remains challenging. The challenge will be increased in cases involving classes that justify notice not only in English but also in another language because significant numbers of members are more likely to understand notice in a different language.~~[13]

~~Extension of the notice requirement to Rule 23(b)(1) and (b)(2) classes justifies applying to those classes, as well as to (b)(3) classes, the right to enter an appearance through counsel. Members of (b)(1) and (b)(2) classes may in fact have greater need of this right since they lack the protective alternative of electing exclusion.~~

~~Subdivision (c)(2)(A)(ii) requires notice calculated to reach a reasonable number of members of a Rule 23(b)(1) or (b)(2) class. The means of notice designed to reach a reasonable number of class members, should be determined by the circumstances of each case. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950): "[N]otice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all * * *." Notice affords an opportunity to protect class interests.~~

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[13] It has been suggested that notice written by collaboration of class lawyers with opposing lawyers will inevitably be made incomprehensible by the need to protect themselves. On this view, notice should be written by the court or by someone appointed by the court; the most daring suggestion is that the court should appoint a person who is not a lawyer. That suggestion seems to go beyond the sphere of the Note.

~~Although notice is sent after certification, class members continue to have an interest in the prerequisites and standards for certification, the class definition, and the adequacy of representation. Notice supports the opportunity to challenge the certification on such grounds.[14] Notice also supports the opportunity to monitor the continuing performance of class representatives and class counsel to ensure that the predictions of adequate representation made at the time of certification are fulfilled. These goals justify notice to all identifiable class members when circumstances support individual notice without substantial burden. If a party addresses regular communications to class members for other purposes, for example, it may be easy to include the class notice with a routine distribution. But when individual notice would be burdensome **or intrusive**,[15] the reasons for giving notice often can be satisfied without attempting personal notice to each class member even when many individual class members can be identified. Published notice, perhaps supplemented by direct notice to a significant number of class members, will often suffice. In determining the means and extent of notice, the court should attempt to ensure that notice costs do not defeat a class action worthy of certification. The burden imposed by notice costs may be particularly troublesome in actions that seek only declaratory or injunctive relief.~~

~~If a Rule 23(b)(3) class is certified in conjunction with a (b)(2) class, the (c)(2)(A)(iii) notice requirements must be satisfied as to the (b)(3) class.~~

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[14] It has been forcefully urged by one regular participant in the drafting deliberations that this sentence should be stricken. We should not invite repetition of the careful process that led to the initial certification order.

[15] As noted with the text of the rule, public-interest groups continue to urge that this Note language does not allay the risk that notice costs will defeat the ability to maintain worthy (b)(1) and (2) classes. One specific suggestion is that defendants should be made to share or pay notice costs. A similar suggestion has been put aside as to small-stakes (b)(3) actions. The present Note language was intended to urge courts to carefully consider these concerns. Perhaps something more could be said about the costs of published notice and the suitability of such alternatives as posting in a place of employment. It also would be possible to suggest that the court should avoid pressures to narrow the class definition in order to reduce notice costs.

There is a separate question about notice to identified class members in civil rights and discrimination cases. Jocelyn D. Larkin testified at the San Francisco hearing that Rule 23 is important in part "because of the anonymity it provides." That concern might extend to efforts to identify class members for notice purposes.

RULE 23(e): REVIEW OF SETTLEMENT

Rule 23. Class Actions

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise~~, and Withdrawal~~. ~~A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.~~

(1) (A) ~~A person who sues or is sued as a representative of a class may settle, voluntarily dismiss, compromise, or withdraw all or part of the class claims, issues, or defenses, but only with the court's approval.~~ The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.[16]

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or

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[16] This change undoes the requirement that the court approve pre-certification retraction of class claims. Deletion of the reference to the class representative flowed from concerns about the situation in which a settlement is negotiated by a person who hopes to be designated as class representative but who has not been designated by the time the settlement agreement is reached. The court must in the end certify the class before it can approve a class settlement.

compromise that would bind class members only after a hearing and on finding[17] that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The ~~court may direct the~~ parties seeking approval of a settlement, voluntary dismissal, **or** compromise~~, or withdrawal~~ under Rule 23(e)(1) **must** ~~to~~ file **a statement identifying** ~~a copy or a summary of~~ any agreement or understanding made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) ***[Alternative 1]*** In an action previously certified as a class action under Rule 23(b)(3), the Rule 23(e)(1)(B) notice must state terms on which individual class members may elect exclusion from the class, but the court may for good cause refuse to allow an opportunity to elect exclusion if class members had an earlier

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[17] Serious thought was given to a revision incorporating Rule 52: "on making findings of fact and conclusions of law under Rule 52(a)." That is the language used for attorney fees in what is to become Rule 23(g). In the end it was decided that the determination that a settlement is "fair, reasonable, and adequate" is too much a matter of gestalt judgment to be filtered through specific findings. The universe of potential settlement terms is heavily populated. Detailed findings are difficult to express without comparison to hypothetical alternatives. The lengthy list of often complex factors published in the draft Note illustrates the complications invited by a specific findings requirement. Many of the comments reflected a fear that any list of factors would become the occasion for rote findings that simply check off each factor; that danger persists even after deleting the list from the Note, as the many opinions on settlement can be used to generate similar lists. The legal standard set by Rule 23(e)(1) — fair, reasonable, and adequate — seems even less susceptible of translation into the language of detailed "fact" than such familiar standards as the reasonable care standard. Beyond this concern, invocation of Rule 52(a) invokes also the clear-error standard of review. Although the clear-error standard is malleable, it may be better not to fix it to settlement approvals. Attorney-fee determinations, on the other hand, may often involve questions that clearly turn on historic fact.

opportunity to elect exclusion.[18]

(3) ***[Alternative 2]*** In an action previously certified as a class action under Rule 23(b)(3), the Rule 23(e)(1)(B) notice may state terms that afford individual class members a second opportunity to elect exclusion from the class.

(4) **(A)** Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(C).

(B) An objector may withdraw objections made under Rule 23(e)(4)(A) only with the court's approval.

* * * * *

Committee Note

Subdivision (e). Subdivision (e) is amended to strengthen the process of reviewing proposed class-action settlements. ~~It applies to all classes, whether certified only for settlement, certified as an adjudicative class and then settled, or presented to the court as a settlement class but found to meet the requirements for certification for trial as well.~~ Settlement may be a desirable means of resolving a class action. But court review and approval is essential to assure adequate representation of class members who have not participated in shaping the settlement.[19]

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[18] Alternative 2 is recommended for adoption. Alternative 1 is preserved here to help frame the debate.

[19] This sentence is a possible response to the occasional protests that the tone of the Note is unnecessarily negative. More pervasive reminders of the value of settlement could be added, but the whole purpose of subdivision (e) is to ensure that the attractions of settlement do not overwhelm the imperative of fair, reasonable, and adequate disposition

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

~~The court-approval requirement is made explicit for voluntary pre-certification dismissals to protect members of the described class and also to protect the integrity of class-action procedure.~~ **If a pre-certification settlement or withdrawal of class allegations appears to include a premium paid not only as compensation for settling individual representatives' claims, but also to avoid the threat of class litigation, the court may seek assurances that the class-action allegations were not asserted, or withdrawn, solely for strategic purposes, and that the rights of absent class members are not unfairly prejudiced.** ~~Because~~ **When special circumstances suggest that** class members may **have** rely**ied**[20] ~~on the class action to protect their interests, the court may direct~~ **consider whether some reasonable form of** notice of the dismissal **is warranted** to alert class members that they can no longer rely on the class action to toll statutes of limitations or otherwise protect their interests. As an alternative, the court may provide an opportunity for other class representatives to appear similar to the opportunity that often is provided when the claims of individual class representatives become moot. Special difficulties may arise if a settlement appears to include a premium paid not only as compensation for settling individual representatives' claims but also to avoid the threat of class litigation. A pre-certification settlement does not bind class members, and the court cannot effectively require an unwilling representative to carry on with class representation. Nor is it fair to stiffen the defendant's resolve by forbidding payment of a premium to avoid further subjection to the burdens of class litigation. One effective remedy again may be to seek out other class representatives, leaving it to the parties to determine whether to complete a settlement that does not conclude the class

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[20] This change would respond to the suggestion that most class actions are not publicized at the time of filing; absent general notice, it is unlikely that any potential class member has relied on the action. It would be possible to say more along that line in the Note. It also would be possible to be even more restrained in describing the possibility of notice, to say nothing about notice, or to refer to Rule 23(d)(2) as a source of authority to give notice of a pre-certification dismissal "in an unusual case in which putative class members may have relied on continuing progress of the action as a class action."

proceedings.[21]

~~Administration of subdivision (e)(1)(A) should not interfere with exercise of the right to amend once as a matter of course provided by Rule 15(a). During the period before a responsive pleading is filed, class counsel may discover reasons to reformulate the claims in ways that omit some theories included in the original complaint. There is a risk that inquiry into the reasons for such changes might interfere with the adversary balance of the litigation. In most circumstances the court should not inquire into the reasons for changes made by an amended complained filed as a matter of course unless the changes appear to surrender central parts of the original class claims.~~[22]

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be — and at times was — read to require court approval of settlements with putative class representatives that resolved only individual claims. See Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise When a putative class has not been certified, special circumstances may lead a court to impose terms that protect potential class members who may have relied on the class allegation or that prevent abuse of the class-action procedure. As an alternative, the court may direct notice to the putative class under Rule 23(d)(2).

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e)~~, but makes it mandatory only for settlement, voluntary dismissal, or compromise~~

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[21] It was urged at the Chicago Conference that the court should not take on the role of seeking out class representatives to replace those who, for reasons good or not so good, seek to surrender before a certification determination. One easy response would be to delete this sentence. A different response would be to make this sentence parallel to the third sentence in the paragraph: "One remedy again may be to delay dismissal for a suitable period to allow other class representatives to appear " The difficulty with this response is that absent notice of some sort, appearance by other would-be representatives seems unlikely.

[22] This new paragraph is an attempt to respond to a suggestion in Barry Himmelstein's written statement for the San Francisco hearing. Mr. Himmelstein urges that the Note should say that court approval is not required for an amendment made as a matter of right "unless the amendment would delete the class allegations in their entirety." Saying that in the Note would create an apparent disagreement between Rule and Note. Saying it in the text of the Rule would provide a clear direction, but might go too far: the amendment might leave no more than an insignificant class claim, or a claim that manifestly could not be certified.

~~of the class claims, issues, or defenses. Notice is required~~ when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously. ~~both when the class was certified before the proposed settlement and when the decisions on certification and settlement proceed simultaneously — the test is whether the settlement is to bind the class, not only the individual class representatives, by the claim- and issue-preclusion effects of res judicata. The court may order notice to **members of the proposed** class of a disposition made before a certification decision, and may wish to do so if **special circumstances show** there is reason to suppose that other class members may have relied on the pending action to defer their own litigation. **The court may also require** Nnotice also may be ordered if there is an involuntary dismissal after certification, **although such orders are unusual.**; o**O**ne likely reason would be concern that the class representative may not have provided adequate representation.~~

Reasonable settlement notice may require individual notice in the manner required by Rule 23(c)(2)(B) for certification notice to a Rule 23(b)(3) class. Individual notice is appropriate, for example, if class members are required to take action — such as filing claims — to participate in the judgment, or if the court orders a settlement opt-out opportunity under Rule 23(e)(3).

Subdivision (e)(1)(C) confirms and mandates the already common practice of holding hearings as part of the process of approving settlement, voluntary dismissal, or compromise that would bind members of a class. ~~The factors to be considered in determining whether to approve a settlement are complex, and should not be presented simply by stipulation of the parties.~~

Subdivision (e)(1)(C) ~~also~~ states the standard for approving a proposed settlement that would bind class members. The settlement must be fair, reasonable, and adequate. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir. 1998). Further guidance can be found in the Manual for Complex Litigation.

The court~~, further~~, must make findings that support the conclusion that the settlement is fair, reasonable, and adequate ~~meets this standard~~. The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard. ~~"The district court must show that it has~~

explored these factors comprehensively to survive appellate review." *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000).

The seemingly simple standard for approving a settlement may be easily applied in some cases. A settlement that accords all or nearly all of the requested relief, for example, is likely to fall short only if there is good reason to fear that the request was significantly inadequate. **In other cases, however,**

Rreviewing a proposed class-action settlement often will not be easy. Many settlements can be evaluated only after considering a host of factors that reflect the substance of the terms agreed upon, the knowledge base available to the parties and to the court to appraise the strength of the class's position, and the structure and nature of the negotiation process. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir. 1998). Any list of these factors must be incomplete. **Recent decisions should always be consulted, and guidance can be found in the Manual for Complex Litigation.** The examples provided here are only **illustrative; some** examples of factors that may be important in some cases but irrelevant in others. Matters excluded omitted from the examples may, in a particular case, be more important than any matter offered as an example.

A number of variables influence settlement evaluation. Application of these factors will be influenced by variables that are not listed. One dimension involves the nature of the substantive class claims, issues, or defenses. Another involves the nature of the class, whether mandatory or opt-out. Another involves the mix of individual claims. — a **A** class involving only small claims may be the only **sole** opportunity for relief, and also pose less **little** risk that the settlement terms will cause sacrifice of recoveries that are important to individual class members; a class involving a mix of large and small individual claims may involve conflicting interests; a class involving many claims that are individually important, as for example a mass-torts personal-injury class, may require special care. Still other dimensions of difference will emerge.

Among the factors that may bear on review of a settlement are these:

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

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

~~(C) the probability that the class claims, issues, or defenses could be maintained[23] through trial on a class basis;~~

~~(D) the maturity of the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge,[24] and other facts that bear on the ability to assess the probable outcome of a trial on the merits of liability and individual damages as to the claims, issues, or defenses of the class and individual class members;~~

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

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

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

~~() the effect of the settlement on other pending actions;~~[25]

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

~~(I) the comparison between the results achieved for individual class or subclass members by the settlement or compromise and the results achieved — or likely~~

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[23] Judge Schwarzer suggests substituting "resolved" for "maintained."

[24] Judge Schwarzer suggests adding "the discovery in the litigation."

[25] This suggestion was made at the Chicago Conference.

~~to be achieved — for other claimants **pressing similar claims**;~~

~~**(J)** whether class or subclass members, or the class adversary, are accorded the right to opt out of **request exclusion from** the settlement**, and if so, the number exercising the right to do so**;~~

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

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

~~**(M)** whether another court has rejected a substantially similar settlement for a similar class; and~~[26]

~~**(N)** the apparent intrinsic fairness of the settlement terms.~~[27]

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

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[26] Judge Schwarzer suggests adding two additional factors:

(N) Whether the settlement will have significant effects on claimants in actions in other courts; and

(O) Whether the settlement will have significant effects on potential claims of class or subclass members arising out of the same or related transactions or occurrence but excluded from the settlement.

[27] Judge Rosenthal has suggested that if we retain this list of settlement review factors in the Note, it should be rearranged in this order: A, B, C, I, F, J, E, G, (), H, D, K, L, M, N.

~~(1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).~~[28]

Paragraph (2). Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a statement identifying ~~authorizes the court to direct that settlement proponents file copies or summaries of~~ any agreement or understanding made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1) ~~must be filed~~. It aims instead at related undertakings. ~~Class settlements at times have been accompanied by separate agreements or understandings that involve such matters as resolution of claims outside the class settlement, positions to be taken on later fee applications, division of fees among counsel, the freedom to bring related actions in the future, discovery cooperation, or still other matters.~~[29] The reference to "agreements or understandings made in connection with" the proposed settlement is necessarily open-ended. An agreement or understanding need not be an explicit part of the settlement negotiations to be connected to the settlement agreement. Explicit agreements ~~or unspoken understandings~~ may be reached that are not reflected in the formal settlement documents ~~outside the settlement negotiations~~. There may be accepted implicit conventions or unspoken understandings that accompany settlement.[30] ~~Particularly in substantive areas that have generated frequent class actions, or in litigation involving counsel that have tried **litigated** other class actions, there may be accepted conventions that tie agreements reached after the settlement agreement to the settlement.~~ The functional concern is that the seemingly separate agreement may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. This functional concern

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[28] Judge Schwarzer suggests revising this paragraph to read as follows: Settlement review may also lead to problems concerning the cogency of the initial class definition and the adequacy of representation. The terms of the settlement or objections may reveal the existence of conflicting interests among class members. Rule 23(c)(1) recognizes that an order certifying a class "may be altered or amended before the decision on the merits." However, a redefinition of the class or the creation of subclasses may affect substantial rights and raise the potential of prejudice, in particular should it result in the exclusion of claimants heretofore considered members of the class. Problems may be resolved by identifying needs for adequate representation of conflicting interests. See Ortiz v. Fibreboard, [etc.]

[29] It would be possible to add another set of examples offered at the Chicago Conference: agreements by class attorneys to indemnify lead plaintiffs against liability for costs, and "simple money buy-outs of objectors."

[30] Judge Rosenthal suggests that if the following sentence is retained, it could be written: Such conventions or understandings are likely to arise in substantive areas that have generated frequent class actions, or in litigation involving counsel that have tried other class actions.

should guide counsel for the settling parties in ~~disclosing~~ identifying ~~to~~ agreements for the court to review as part of the settlement process. ~~the existence of agreements that the court may wish to inquire into.~~ Doubts should be resolved by identifying agreements that may be connected to the settlement. ~~The same concern will guide the court in determining what agreements should be revealed and whether to require filing complete copies or only summaries. Filing will enable the court to review the agreements as part of the settlement review process. In some circumstances it may be desirable to include a brief summary of a particularly salient separate agreement in the notice sent to class members.~~

The court may direct the parties to provide a copy of any agreement identified by the parties under Rule 23(e)(2). The court also may direct the parties to provide a copy or summary of any other agreement the court considers relevant to its review of a proposed settlement. ~~The direction to file copies or summaries of agreements or understandings made in connection with a proposed settlement should consider the need for some measure of confidentiality.~~ A direction to disclose may raise concerns of confidentiality. Some agreements may include information ~~involve work-product or related interests~~ that ~~may deserve~~ merits protection against general disclosure.[31] ~~One example frequently urged relates to some forms of opt-out agreements. A defendant who agrees to a settlement in circumstances that permit class members to opt out of the class may condition its agreement on a limit on the number or value of opt-outs. It is common practice to reveal the existence of the agreement to the court, but not to make public the threshold of class-member opt-outs that will entitle the defendant to back out of the agreement. This practice arises from the fear that knowledge of the full back-out **specific** terms may encourage third parties to solicit class members to opt out.~~ Agreements between a liability insurer and a defendant may present distinct problems. An understanding of the insurance coverage available to compensate class members may bear on the reasonableness of the settlement. Bare identification of such agreements may not provide the information the court needs. Unrestricted access to the details of such agreements, on the other hand, may impede resolution of important coverage disputes. These and other needs for confidentiality can be addressed by the court.

Rule 23(e)(2) does not specify sanctions for failure to identify an agreement or understanding connected with the settlement. Courts will devise appropriate sanctions, including the power to reopen the settlement if the agreements or

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[31] Judge Schwarzer would revise these two sentences: "The direction to file copies or summaries of agreements or understandings made in connection with a proposed settlement may give rise to a need for protection of confidential materials or information. The court should provide an opportunity to make appropriate claims to work product or other relevant protection."

understandings not identified bear significantly on the reasonableness of the settlement.

Paragraph (3). Subdivision (e)(3) authorizes the court to permit class members ~~creates an opportunity~~ to elect exclusion from a class certified under Rule 23(b)(3) after settlement terms are announced. An agreement by the parties themselves to permit class members to elect exclusion at this point by the settlement agreement may be one factor supporting approval of the settlement. Often there is an opportunity to opt out at this point because the class is certified and settlement is reached in circumstances that lead to simultaneous notice of certification and notice of settlement. In these cases, the basic ~~Rule 23(b)(3)~~ opportunity to elect exclusion applies without further complication. In some cases, particularly if settlement appears imminent at the time of certification, it may be possible to achieve equivalent protection by deferring notice and the opportunity to elect exclusion until actual settlement terms are known. This approach avoids the cost and potential confusion of providing two notices and makes the single notice more meaningful But notice should not be delayed unduly after certification in the hope of settlement. ~~Paragraph (3) creates a second opportunity to elect exclusion for cases in which there has been an earlier opportunity to elect exclusion that has expired by the time of the settlement notice.~~

Paragraph (3) creates a ~~This~~ second opportunity to elect exclusion for cases that settle after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. This second opportunity to elect exclusion reduces the influence ~~forces~~ of inertia and ignorance that may undermine the value of a pre-settlement opportunity to elect exclusion. A decision to remain in the class is ~~apt~~ likely to be more carefully considered and is better informed when settlement terms are known.

~~The second opportunity to elect exclusion also recognizes the essential difference between disposition of a class member's rights through a court's adjudication and disposition by private negotiation between court-confirmed representatives and a class adversary. No matter how carefully **a court inquires** the inquiry into the **terms of a proposed** settlement, terms, a class-action settlement **often** does not **provide the court with the same type or quality of information as to the fairness, reasonableness, and adequacy of the outcome for class members that the court obtains in an adjudicated resolution. A settlement can lack the assurance of justice that an adjudicated resolution provides.** carry the same reassurance of justice as an adjudicated resolution. **A settlement, moreover, may seek the greatest benefit for the greatest number of class members by homogenizing individual claims that have distinctively different values, harming**

~~some members who would fare better in individual litigation.~~

~~Objectors may provide important support for the court's inquiry~~ **review of a proposed settlement**, ~~but attempts to encourage and support objectors may prove difficult. An opportunity to elect exclusion after the terms of a proposed settlement are known provides is a valuable protection against improvident settlement that is not provided by an earlier opportunity to elect exclusion and that is not reliably provided by the opportunity to object. The opportunity to opt out of a proposed settlement may afford scant protection to individual class members when there is little realistic alternative to class litigation, other than by providing an incentive to negotiate a settlement that — by encouraging class members to remain in the class — is more likely to win approval.~~ **In some settings, however, a sufficient number of class members may opt out to support a successor class action.** ~~The protection is quite meaningful as to~~ **The decision of most class members to remain in the class after they know the terms of the settlement may provide a court added assurance that the settlement is reasonable. This assurance may be particularly valuable if** ~~class members whose~~ **have** ~~individual claims~~ **that** ~~will support litigation by individual action, or by aggregation on some other basis, including another class action; in such actions, the decision of most class members to remain in the class may provide added assurance that the settlement is reasonable. The settlement agreement can be negotiated on terms that~~ **protect against the risk that a party will become bound by an agreement that does not afford an effective resolution of class claims by** ~~allowing any party to withdraw from the agreement if a specified number of class members request exclusion.[32] The negotiated right to withdraw protects the class adversary against being bound to a settlement that does not deliver the repose initially bargained for, and that may merely set the threshold recovery that all subsequent settlement demands will seek to exceed.~~

The opportunity to request exclusion from a proposed settlement is limited to members of a (b)(3) class. Exclusion may be requested only by individual class members; no class member may purport to opt out other class members by way of another class action. ~~Members of a (b)(1) or (b)(2) class may seek protection by objecting to certification, the definition of the class, or the terms of the settlement.~~

[Alternative 1: Although the opportunity to elect exclusion from the class after settlement terms are announced should apply to most settlements, paragraph (3)

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[32] The bold words are added to dispel the possible confusion of this reference to negotiated back-out provisions with the settlement opt-out provided to class members by proposed 23(e)(3).

allows the court to deny this opportunity if there has been an earlier opportunity to elect exclusion and there is good cause not to allow a second opportunity. Because the settlement opt-out is a valuable protection for class members, the court should be especially confident — to the extent possible on preliminary review and before hearing objections — about the quality of the settlement before denying the second opt-out opportunity. Faith in the quality and motives of class representatives and counsel is not alone enough. But the circumstances may provide particularly strong evidence that the settlement is reasonable. The facts and law may have been well developed in earlier litigation, or through extensive pretrial preparation in the class action itself. The settlement may be reached at trial, or even after trial. Parallel enforcement efforts by public agencies may provide extensive information. Such circumstances may provide strong reassurances of reasonableness that justify denial of an opportunity to elect exclusion. Denial of this opportunity may increase the prospect that the settlement will become effective, establishing final disposition of the class claims.*]*

[Alternative 2: The decision whether to allow a second opportunity to elect exclusion is confided to the court's discretion. The decision whether to permit a second opportunity to opt out should turn on the court's level of confidence in the extent of the information available to evaluate the fairness, reasonableness, and adequacy of the settlement. Some circumstances may present particularly strong evidence that the settlement is reasonable. The facts and law may have been well developed in earlier litigation, or through extensive pretrial preparation in the class action itself. The settlement may be reached at trial, or even after trial. Parallel enforcement efforts by public agencies may provide extensive information. ~~The pre-settlement activity of class members or even class representatives may suggest that any warranted objections will be made.~~ Other circumstances as well may enhance the court's confidence that a second opt-out opportunity is not needed.*]*

~~An opportunity to elect exclusion after settlement terms are known, either as the initial opportunity or a second opportunity, may reduce the need to provide procedural support to~~ **rely upon** objectors ~~**to reveal deficiencies in a proposed settlement**. Class members who find the settlement unattractive can protect their own interests by opting out of the class. Yet this opportunity does not mean that objectors become unimportant. It may be difficult to ensure that class members truly understand settlement terms and the risks of litigation, particularly in cases of much complexity. If most class members have small claims, moreover~~ **and lack meaningful alternatives to pursue them**~~, the decision to elect exclusion is more a symbolic protest than a meaningful pursuit of alternative remedies.~~

The terms set for permitting a second opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential

misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Or the court might condition exclusion on the term that a class member who opts for exclusion will not participate in any other class action pursuing claims arising from the same underlying transactions or occurrences. Still other terms or conditions may be appropriate.

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C). The court has discretion whether to provide procedural support to an objector. ~~If the disposition would not bind the class, requiring approval only under the general provisions of subdivision (e)(1)(A), the court retains the authority[33] to hear from members of a class that might benefit from continued proceedings and to allow a new class representative to pursue class certification. Objections may be made as an individual matter, arguing that the objecting class member should not be included in the class definition or is entitled to terms different than the terms afforded other class members. Individually based objections almost inevitably come from individual class members, but~~ **Unless a number of class members raise objections, they** ~~are not likely to provide much information about the overall reasonableness of the settlement unless there are many individual objectors.[34] Objections also may be made in terms that effectively rely on class interests; the objector then is acting in a role akin to the role played by a court-approved class representative. C~~ **Such** class-based objections ~~may be the only means available to provide strong~~ **present the most effective** adversary challenges to the reasonableness of the settlement. ~~— the parties who have presented the agreement for approval may be hard-put to understand the possible failings of their own good-faith efforts. It seems likely that in practice m~~ **Many** objectors will argue ~~in terms that seem to involve~~ **invoke** both individual and class interests.[35]

~~A class member may appear and object without seeking intervention. Many courts of appeals, however, have adopted a rule that recognizes standing to appeal only if the objector has won intervention in the district court. See, e.g., *In re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456 (7th Cir. 1997). An~~

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[33] Judge Schwarzer suggests substituting "discretion" for "the authority."

[34] Judge Schwarzer suggests deleting this sentence.

[35] The shaded material clearly is not essential to explain the purpose of adding paragraph (4). It may, however, stimulate some courts to consider matters that otherwise would go unconsidered.

~~objector who wishes to preserve the opportunity to appeal is well advised to seek intervention.~~[36]

~~The important role~~ **objectors** ~~played by objectors may justify substantial procedural support. The parties to the settlement agreement may provide access to the results of all discovery in the class action as a means of facilitating appraisal of the strengths of the class positions on the merits.~~[37] ~~If settlement is reached early in the progress of the class action, however, there may be little discovery. Discovery in — and even the actual dispositions of — parallel litigation may provide alternative sources of information, but may not. If an objector shows reason to doubt the reasonableness of the proposed settlement, the court may allow discovery reasonably necessary to support the objections. Discovery into the settlement negotiation process should be allowed, however, only if the objector makes a strong preliminary showing of collusion or other improper behavior. An objector who wins changes in the settlement that benefit the class may be entitled to attorney fees, either under a fee-shifting statute or under the "common-fund" theory.~~

~~The need to support objectors may be reduced when class members have an opportunity to opt out of the class after settlement terms are set. The opportunity to opt out may arise because settlement occurs before the first opportunity to elect exclusion from a (b)(3) class, or may arise when a second opportunity to opt out is afforded under Rule 23(e)(3).~~

~~The important role that is played by some objectors~~ **play in some cases** ~~must be balanced against the risk that objections are made for strategic purposes. Class-action practitioners often assert that a group of "professional objectors" has emerged, appearing to present objections for strategic purposes unrelated to any desire to win~~

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[36] It was urged again at the Chicago Conference that the Committee should restore the short-lived proposal to add an express provision permitting appeal by an objector who did not intervene. Class members, it is urged, often act pro se without any awareness of such procedural refinements. This question is pending before the Supreme Court.

[37] Barry Himmelstein's written statement for the San Francisco hearing thinks this Note paragraph is "overly solicitous of objectors." The sentence observing that parties to a settlement may make the results of discovery available to objectors is met by the observation that almost invariably, an objector who is interested enough to review hundreds of thousands or millions of pages of document is "of the 'professional' variety." The objector may "seek[] to park time in a case," investing many hours in reviewing the discovery materials, demanding some adjustment of the settlement, and then seeking compensation. This comment echoes the familiar theme sounded by both plaintiff and defense representatives.

~~significant improvements in the settlement. An objection may be ill-founded, yet exert a powerful strategic force. Litigation of an objection can be costly, and even a weak objection may have a potential influence[38] beyond what its merits would justify in light of the inherent difficulties that surround review and approval of a class settlement. Both initial litigation and appeal can delay implementation of the settlement for months or even years, denying the benefits of recovery to class members.[39] Delayed relief may be particularly serious in cases involving large financial losses or severe personal injuries. It has not been possible to craft rule language that distinguishes the motives for objecting, or that balances rewards for solid objections with sanctions for unfounded objections. Courts should be vigilant to avoid practices that may encourage unfounded objections. Nothing should be done to discourage the cogent objections that are an important part of the process, even when they fail. But little should be done to reward an objection~~ **should not be rewarded** ~~merely because it succeeds in winning some change in the settlement; cosmetic changes should not become the occasion for~~ **on the basis of insignificant or cosmetic changes in the settlement.** ~~fFee awards that~~ **made on such grounds** ~~represent acquiescence in coercive use of the objection process. The provisions of Rule 11 apply to objectors, and courts should not hesitate to invoke Rule 11 in appropriate cases.[40]~~

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances. ~~A difficult uncertainty is created if the objector, having objected, simply refrains from pursuing the objections further. An objector should not be required to pursue objections after concluding that the potential advantage does not justify the effort. Review and approval should be required if the objector surrendered the objections in return for benefits that would not be available to the objector under the settlement terms available to other class members. The court may inquire whether such benefits have been accorded an objector who seems to have abandoned the objections. An objector who receives a benefit should be treated as withdrawing the~~

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[38] Judge Schwarzer suggests substituting "impact" for "influence."

[39] Judge Schwarzer suggests adding "and may indeed place the entire settlement in jeopardy."

[40] It was urged at the Chicago Conference and by many later comments that this sentence "comes across as a threat." Early drafts included a cross-reference to Rule 11 in Rule 23 text; perhaps the demotion should become deletion.

~~objection and may retain the benefit only if the court approves.~~[41]

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. ~~Greater difficulties arise~~[42] Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. ~~as to the class.~~ Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay.; ~~and purport to represent class interests. The objections may be~~ If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry. ~~In some situations~~ unusual circumstances, ~~the court may fear that other potential objectors have relied on the objections already made and seek some means~~ provide an opportunity for others to appear ~~to replace the defaulting objector. In most circumstances, however,~~ the court should allow an objector to abandon the objections. ~~an objector should be free to abandon the objections, and the court can approve withdrawal of the objections without elaborate inquiry.~~

~~Quite different problems arise if settlement of an objection provides the objector alone terms that are more favorable than the terms generally available to other class members. An illustration of the problems is provided by *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999). The different terms may reflect genuine distinctions between the objector's position and the positions of other class members, and make up for an imperfection in the class or subclass definition that lumped all together. Different terms, however, may reflect the strategic value that objections can have. So long as an objector is objecting on behalf of the class, it is appropriate to impose on the objector a fiduciary duty to the class similar to the duty assumed by a named class representative. The objector may not seize for private advantage the strategic power of objecting. The court should approve terms more favorable than those applicable to other class members only on a showing of a reasonable relationship to facts or law that distinguish the objector's position from the~~

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[41] The shaded words may count as a "nice try." Court approval is required for withdrawal of the objection. If the court does not approve withdrawal, the court will rule on the objection. That does not of itself affect the objector's right to retain anything received for desisting from supporting the objection.

[42] Judge Schwarzer suggests replacing "Greater difficulties may arise" with "Closer scrutiny may be required."

~~position of other class members.~~[43]

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

[43] This paragraph addresses a real problem. The amendment that brings objectors into Rule 23(e) for the first time may justify this amount of "tough problem — good practice" advice.

5bii

Rule 23 2001 Proposals: General Comments

Conference: There is a lot of sensible stuff here. But Rule 23 should be amended only if there is a real need. Caution is indicated even though there are no "hot-button" issues. Rule 23(b)(3) is the source of the difficulties. Perhaps the time has come to abandon it.

Conference: With a couple of exceptions, the Committee should go forward. The proposals are good. It is useful to codify good practice; not all judges are as adept as the best in managing class actions. The Notes are too long; the attorney-fee Note includes material that should be in the Manual. "A Note should explain the reason for the Rule." Lists of factors should not be included in the Rules; they should be set out in Notes, or not at all. Amendments of themselves will not have destabilizing effects; the Evidence Rules have codified Daubert, and it has worked.

Conference: The group that recreated Rule 23 in 1966 did not know what powers they were unleashing. "It has become a de facto political institution." The proposals are not remarkable, but remarkable proposals cannot be put through the rulemaking process. Rule 23 affects many interests, so much so that it is difficult to get disinterested advice from the people with the greatest experience. It is wise to be cautious about engraving current practices in Rule 23. "Rule 23 has a very sophisticated set of followers. That should be taken into account. The Notes are intelligent, complete, but longer than needed after the present process is worked through." The lists of factors seem to work pretty well. But there are some inconsistencies.

Conference: Both Notes and Rules have grown longer over the years. The earlier attitude was to be sparse, to give direction and describe intent. It is useful to describe the purpose of a Rule, but to leave out advice on how to exercise the power conferred. Notes now are attempting to become legislative history.

Conference: The proposals would not change much. They are largely "instructive" to lawyers, trial judges, and appellate judges. The Notes are too long and sometimes contradict themselves or something in the accompanying Rule.

Conference: There is no need to cover everything in Rule 23. Most of this is useful in guiding the district judge. The factors in the Notes will help judges. Case management will be improved. The Notes to the 1993 Rule 26 amendments are a good model; they are not short, but they are a good source of guidance. The draft Rule 23 Notes are too much text, and too much resource about the law. The law may change.

Conference: Rule 23 should be amended to address the problem of discovery from "absent" class members.

Conference: Consideration should be directed to the Department of Justice proposal prepared more than 20 years ago with Dan Meador that would establish authority for the Department to pursue important "consumer" actions.

Michael J. Stortz, Esq., Written Statement for S-F Hearing: The Note on Rule 23(e) suggests that the development of scientific knowledge bears on the maturity of the substantive issues and the review of a settlement. It should be noted that the development of scientific knowledge also is relevant to certification of a class.

Mary Alexander, Esq., S-F Hearing pp 55 ff: For ATLA. Class actions can be an important means of deterring wrong conduct and providing compensation for small-scale damages claims. But it is important to protect also the right to dedicated legal counsel, trial by jury, and the right of an individual plaintiff to control litigation of an individual claim. There should be meaningful opt-out rights. We must be vigilant to prevent erosion of individual class members' rights.

John Frank, Esq., S-F Hearing pp. 92 ff: I dissented from the adoption of Rule 23(b)(3) in 1966. It should be repealed and replaced by administrative agencies appropriate to the subject matter. It simply produces a commercial transaction, blessed by the courts, in which defendants buy res judicata from the plaintiff for a considerable sum of money. The published proposals produce a number of decision points. Each will require time. Anything that adds time to the judicial process must be evaluated to ensure that the gain is worth the cost.

Anna Richo, Esq., S-F Hearing 139: As Chief Judge Posner has quoted Judge Friendly, "settlements induced by a small probability of an immense judgment in a class action" are "blackmail settlements."

Alfred W. Cortese, Jr., Esq., S-F Hearing 156 ff, 01-CV-015: "What has happened in the class action area is that we have a burdensome, expensive, ineffective method of transferring wealth from one segment of the economy, the wealth creators, the target defendants that I generally represent, to another segment of the economy and very little of that wealth ends up with the alleged victims. That's a very serious problem and it's a much deeper and much more serious problem than is even addressed, as many of the Committee members know, in the proposed amendments." John Frank's recommended surgery may, at this late date, be too bold, but it reflects a feeling at both ends of the political and philosophical spectrum that we need to do something about class actions one way or another. The pending amendments are a start. "I would urge you not to stop there."

It is unfair to have a class that includes a wide range of injury or damages among individual class members. Fundamental fairness, due process, and the right to jury trial are involved. The opt-out (b)(3) class shifts the burden of inertia to class members and weighs in favor of inclusion in the class. Opt-in classes would be better.

Defendant classes are "really truly legalized blackmail." Individual defendants are precluded from raising individual defenses. Individual causation liability disappears in the crush to get a result.

Prof. Judith Resnik, D.C. Hearing Written Statement, 01-CV-044: The first several pages of the statement, through text at note 18, trace the transformation of Rule 23 since 1966, concluding that the distinctions between (b)(1), (2), and (3) classes "no longer fit the practice. The larger lesson is that writing rules that assume the durability of categorization is ill-advised." Much of the focus is on the role of the court in designating class counsel. But there are other themes. Among them is that the Advisory Committee should establish "a catalogue of * * * desirable revisions that other institutions have authority to initiate." Examples are reconsideration of "the common law preclusion rule and the implicit standard on adequacy of representation" created by the outcome of the Matsushita litigation, Epstein v. MCA, Inc., 9th Cir.1999, 179 F.3d 641; and the 1979 Department of Justice proposal that the Department be authorized to bring small-dollar-value claims on behalf of injured individuals.

David Snyder, Esq., and Kenneth A. Stoller, Esq., D.C. Hearing 173: The most important rule to be made would provide "an absolute as of right appeal, immediate appeal on a class certification and a mandatory stay of proceedings pending the final resolution of the appeal." The written statement, 01-CV-022, adds that merits discovery should be stayed pending appeal. Immediate appeal will help prevent settlements that result from the need to prevent extortionate litigation and discovery expenses.

National Assn. of Consumer Advocates, 01-CV-062: The Notes are much too long. "Frankly, the commentary appears to those of us in the advocacy community to be a backdoor effort to accomplish many biased and pro-business restrictions on good class actions that could never see the light of day if they were in the actual proposed rule changes. This is dishonest and damaging and must be corrected."

Joseph L.S. St.Amant, Esq., 01-CV-075: Raises a number of issues that tie to several of the proposals, but are more general. As a Fifth Circuit Appellate Conference Attorney, he is concerned about a number of issues that affect appeals. He recognizes that some of these issues may arise at the borders between the Civil Rules and the Appellate Rules. The questions begin with a pre-certification dismissal: how far does counsel's obligation to the putative class include a duty to appeal? What if the dismissal results from voluntary settlement of the representative plaintiff's claims? Is there always a duty to appeal denial of certification — and is it acceptable to take money for the individual client not to appeal in this setting? Settlement after a notice of appeal has been filed raises different questions. If a class has been certified, it seems to be understood that court approval is required, and that remand to the district court is appropriate. But if certification has been denied, there seldom is a reason for supervision of settlement by the court of appeals, yet it might be better to adopt a rule that the initial filing of class allegations creates a need for district-court supervision of settlement at any stage.

Association of the Bar of the City of New York, 01-CV-071: There is

a statement the reflects other comments not separately noted. The Committee Notes "go far beyond the particular rule changes they purport to elucidate. Instead of explaining the amendments and the reasons for their enactment, the Notes purport to take jurisprudential positions on the way class actions should be conducted and resolved. Because of their breadth, the Notes – more than the rule amendments themselves – are likely to be cited by parties as precedent to support their positions." Examples are found in the notes to (c)(1)(A) (discovery in connection with certification) and (e)(1)(C) (factors for reviewing settlement). "Because the Notes carry weight with the courts, it is important * * * that their content and scope be limited to explaining the purpose of the amendments proposed, and not be used to import into jurisprudence the Committee's views of best practice."

Federal Trade Commission, 01-CV-085: The FTC has substantial experience with class actions that parallel, or follow on, FTC enforcement investigations and actions. These private actions may affect the FTC's ability to obtain appropriate relief, at times yielding remedies that the FTC cannot get under its own authority. The FTC has worked with class counsel to ensure that the parallel actions would, together, provide appropriate relief. Private actions also may threaten to settle on terms – including attorney fees – that do not afford adequate consumer relief; the FTC may seek to intervene. Rule 23 should be revised to require the parties to provide notices of two sorts. First, the parties should be required to inform the court of any previous or pending action conducted by the government of which they are aware and that relates to the same conduct. This notice makes the court aware of the full context of the case, and will facilitate the court's understanding of the issues, review of any settlement, and award of attorney fees. Second, the parties should give notice of the class action to any government agency that they know to be conducting, or to have conducted, an action or investigation that relates to substantially the same conduct. Notice to the agency will enable the agency to seek intervention when appropriate, and to provide the court with relevant information. One district court, further, has held that the FTC is precluded by the res judicata effects of a class-action judgment from seeking additional relief on behalf of class members; the FTC should know of this danger. On the other hand, the FTC may be able to settle its own action on terms that integrate with the class action.

Lawyers' Committee for Civil Rights Under Law, 01-CV-091: (For 18 civil rights, public interest organizations, and bar associations; joined by law firms, practitioners, and professors.) Raises several questions that are not addressed by the published proposals: **(1)** Rule 23 should be amended to make clear the propriety of certifying civil rights class actions for compensatory and punitive damages. Some courts refuse (b)(2) certification for classes that seek significant damages awards, and others refuse (b)(3) certification because common questions do not predominate, or because class treatment is not superior in seeking to establish a pattern or practice of discrimination. "Such misguided

interpretations of Rule 23 turn expanded civil rights remedies [the addition of damages relief] against the victims of discrimination * * *." It should be made clear that Rule 23 permits certification of civil rights actions that seek both equitable and damages relief. **(2)** Rule 23 should be amended to state that prior to certification unnamed class members are "represented" for purposes of the Model Rule 4.2 prohibition on communications by counsel opposing the class with class members. Present practice, launched by cases seeking to restrict communications by class counsel with class members, authorizes limitations on communications only when there is a clear record and specific findings that weigh the potential abuse against the rights of the parties and then seeks to limit speech as little as possible. Protection of class members from communications from opposing counsel is critical, "particularly regarding waiver or compromise of their claims. * * * Both courts and commentators have recognized that putative class members should not be required to evaluate waivers or releases without the assistance of counsel." The Rule 4.2 approach will provide protection even when class counsel is not aware of the communications and not in a position to seek control. Class counsel will continue to be able to communicate with class members, and counsel for different proposed representative class plaintiffs also will remain free to communicate with class members. This approach would not establish an attorney-client relationship with class members for any other purpose. **(3)** The 2000 discovery amendments threaten to make it more difficult to pursue civil rights litigation. The 2001 proposed Rule 23 amendments "add entire new proceedings, require new decisions and new notices, authorize new appearances, and encourage the relitigation of certification decisions, mandating a much greater direct involvement of judges * * *." But judges, burdened with the new responsibilities for managing discovery, have no time for added Rule 23 responsibilities. The result will be further delay in the prompt disposition of class actions. Delay is particularly undesirable in actions that seek injunctive relief. **(4)** There is an alarming trend toward displacing employment discrimination litigation by arbitration. The character of arbitration proceedings that may preclude resort to class actions remains to be resolved. It is important that Rule 23 establish clear, functional standards for federal civil rights claims, "[f]or it is against these standards that arbitration regimes will be measured to determine whether a mandatory arbitration agreement affects only a change in forum, or will affect substantive rights." **(5)** The Advisory Committee should devise means to achieve "earlier and fuller input from the civil rights community regarding the agenda, problems, and proposals to be considered by the Advisory Committee."

Prof. Howard M. Erichson, 01-CV-097: The current (b)(1), (2), and (3) typology should be preserved. (b)(1) and (2) "essentially replicate Rule 19 compulsory joinder in cases where the necessary parties are so numerous that actual joinder would be impracticable." Properly – narrowly – construed, they define situations with a class of necessary parties. The language of

(b)(2) overemphasizes remedy, and might be changed to make it clear that not every action demanding primarily injunctive or declaratory relief need be a mandatory class action. Medical monitoring actions are an example of classes that might be treated as opt-out.

Summary of Comments & Testimony: 2001 Rule 23 – Mass Torts

Conference: The proposals fail to address mass torts.

Conference: There is a real problem with fitting mass torts into Rule 23. Perhaps they deserve a separate rule.

Conference: Discussion of mass-tort classes has included consideration of opt-in classes. What might such a rule be? Another participant suggested that a mass-torts rule that "does not involve a class" might be useful. Perhaps it would be useful to revive consideration of the first Advisory Committee drafts that collapsed the (b) categories, permitted opt-in classes, allowed denial of opt-out from any type of class, would permit a judge to condition the right to opt-out on specified preclusion consequences, and so on.

Conference: Mass torts are different from securities, antitrust, or consumer class actions. Different rules are needed. We are trying too hard to fit disparate forms of litigation into a single procedural bottle. "There are sufficient needs of judicial economy to justify work on a mass-torts rule."

Conference: One approach might be to establish a procedure that facilitates "judicial management of individual settlements." This would not be a class action, but a process to establish a method for settlement or resolution that does not depend on counsel alone in the way that class settlements do.

Professor Owen M. Fiss, John Bronsteen, Written Statement for D.C. Hearing, 01-CV-023: In discussing the Ortiz decision, states that the class action "rests on too attenuated a concept of representation" to serve the need to represent all claimants to a limited fund. "[T]he interests of all the potential claimants in the limited fund are likely to be in competition with one another," so "the named plaintiff is not likely to be an adequate representative of the interests of the unnamed members of the class."

Washington Legal Foundation, 01-CV-082: "Mass torts are routinely being certified as Rule 23(b)(3) class actions, despite the clear admonition in the Advisory Committee Notes." The Committee should "take up the question of the appropriateness of class certification in cases in which issues surrounding liability and damages quite clearly vary considerably from class member to class member. Certification in such cases often renders them essentially untriable; class certification generally is sought as a means of imposing irresistible settlement pressure * * *. The fact that federal courts are more than occasionally granting certification in such cases is an [sic] strong indication that Rule 23 needs to be amended to make clear that certification is virtually never appropriate in such cases." Cases not suitable for certification include personal injury claims and employment discrimination claims.

General Practice

Prof. Owen M. Fiss, John Bronsteen, Written Statement for D.C. Hearing, 01-CV-023: Defendant class actions should be abolished. They involve the most suspect form of representation – the plaintiff appoints the defendants' representative. They do not involve the need to make a suit economically viable when harm is dispersed among many. They are extremely rare. "Clarity of purpose would be served by eliminating any pretense that they are authorized by Rule 23."

Bruce Alexander, Esq., D.C. Hearing 310 ff. and Written Statement, 01-CV-041: (1) If class certification is denied, there should not be a stay pending appeal; if certification is granted, ordinarily there should be a stay pending appeal. (2) A new phenomenon is presented by class actions advancing claims on behalf of people who have filed individual bankruptcy proceedings. An illustration is provided by a class claiming that sending notices to customers while in bankruptcy violates the automatic stay. Another illustration involves the question whether it is permissible to claim an attorney fee for preparing a proof of claim in a Chapter 13 proceeding. These situations do not call for class treatment. The class members already are involved in litigation before a court, and often have lawyers; the theory that a class is needed to represent people who otherwise do not have access to court is inapplicable.

Summary of Comments & Testimony: 2001 Rule 23(c)(1)

At an Early Practicable Time

Conference: In 1997 the Standing Committee rejected the "when practicable" proposal. It was concerned that this would lead to delay, and reinstate "one-way intervention." It also was concerned that the parties need to know the stakes of the litigation. But to apply the certification criteria, the judge "needs to know what the substance" of the dispute is. The pleadings alone do not reveal enough in many cases. The premise of the proposal is that it is proper to take the time needed to uncover the substance of the dispute, "but not to indulge discovery on the merits or decision on the merits." The proposal simply confirms practices that have emerged over many years. If this were the only change to be made in Rule 23, probably it would not be worth it. But if Rule 23 is to be changed in other ways, "this change is probably a good one."

Conference: From a plaintiff's perspective, the proposal makes no difference. "As soon as practicable" gives all needed flexibility, and courts understand that. The Note says the purpose is to preserve current practice. But there is a risk of unintended consequences. More precertification activity will be encouraged. It is a mistake to fine-tune the rules, to make them into a "Code." Rule 23(c)(1) works now.

Conference: The "at an early practicable time" proposal is a close call, but "I favor it." There has been a substantial change in practice in the last few years, in response to appellate demands that a record be made to support the certification determination. The FJC study documents the change. One reason to revise the rule is to support publication of the Committee Note. In most cases, at least some discovery is needed to support the certification determination. "The question is now much discovery – there should be an adequate record, but no more discovery than needed for that." The Note properly encourages trial courts to play an active role in determining how much discovery is needed. The change also may drive out lingering vestiges of practice that allow certification on the pleadings with minimal or no discovery. It will discourage local rules that require a determination within a stated period; often the stated period expires before disclosure or discovery can even begin. It also will encourage courts to understand that they can rule on 12(b)(6) and summary-judgment motions before the certification determination.

Conference: The proposal reflects present practice. In 1976 there was de minimis discovery to support a certification determination, or none at all. There has been progressive movement; in some cases, it may carry too far into discovery on the merits. The Committee Note helps. The proposed language is indeed "fastidious." And it is a good thing that the Note refers to trial plans; if they are kept brief, they are a good thing.

Conference: The underlying principle is salutary. The Note deals adequately with the risk of unintended consequences. The trial plan should look carefully at what issues are assertedly common,

and how they will be proved. More importantly, it should look at what individual issues will be left at the end of the class trial, and at how they will be proved; if there is a lot of proof to be taken individually after the class trial, we need to ask whether a class trial is worthwhile. It is a good idea to submit a draft class notice with the trial plan because the notice often shows issues not reflected in the plan, including problems with choice of law and jury trial. Even the identification of the persons to whom notice is directed is important.

Conference: A plaintiffs' lawyer thought there is no need to change. "As soon as practicable" provides ample flexibility, and courts use it wisely. In parallel litigation, it may be advisable to defer certification until merits discovery has been completed in a nonclass action; that has worked well. It might be helpful simply to publish the Note without changing the Rule. (And class counsel must be appointed before the certification determination, in part to manage discovery that bears on the determination.)

Conference: (The "as soon as practicable" proposal was the focus of much of the discussion on the proper role of a Committee Note. One view was that a Note is useful because it gives detailed guidance, making it possible to frame the Rule itself in general and flexible terms. A different view was that all this material should be put into the Manual for Complex Litigation. One judge suggested that judges generally do not seem much persuaded by Committee Notes. A lawyer responded that more judges seem familiar with Committee Notes than seem familiar with the Manual. "Without the Notes, it will be hard for judges to follow the change from 'as soon as practicable' to 'at an early practicable time.'" Another judge thought the Committee Notes should make more frequent references to the Manual, and say less directly.)

Conference: The Second Circuit has not followed the lead of the Seventh Circuit's Szabo opinion. The rule change and Note will allow more leeway to the trial judge. "The Note, however, is somewhat Janus-faced."

Conference: There was general discussion of the question whether it is possible to permit enough discovery to inform the certification decision without launching full discovery on the merits. One defense lawyer recognized that this feat may not be universally possible, but that it has been done successfully. A plaintiff's lawyer agreed that it is possible, although difficult — if an antitrust conspiracy is claimed, for example, it is important to know whether the claim will be proved by documents or by offering evidence — and urging inferences from the pattern — of each class member's transactions. If the parties inform the judge the feasibility of certification discovery can be worked out at an early Rule 16 conference. A judge observed that when certification discovery is possible (and it is not always possible), it is not fruitful to engage in fights over the purpose of specific discovery requests: much discovery will be useful both on the merits and for certification. A defense lawyer observed that common issues always can be found; "the real question is what are the individual

issues, how will they be proved, and how important are they. Discovery can focus on that, and can be a lot simpler than mammoth document discovery on the merits." A plaintiffs' lawyer disagreed – the defense is too much prone to conjuring up hosts of individual issues. But another plaintiffs' lawyer thought that it is proper to separate discovery to support an early certification decision; "generally you can tell the difference."

Conference: The FJC study found a full spectrum of practice on the question whether "as soon as practicable" defeats pre-certification 12(b)(6) and summary-judgment rulings. The "early time" change may not address that issue. The Note says the court may not decide the merits first and then certify; there is an ambivalence here.

Conference: It was asked whether the change will support defense delay by "going after the representatives."

Conference: It was suggested that today the certification issue is considered several times as discovery unfolds. A judge responded that that is not common practice. A lawyer observed that in federal courts there tends to be one consideration of certification; multiple consideration may become a problem when there are parallel federal and state filings. Another lawyer observed that in federal courts, MDL practice waits for federal filings to accumulate and then provides one certification decision for all. "But there has been an uptick in trying to get certification by filing another case after certification is denied in the first case."

Conference: The proposed rule on attorney appointment underscores the need for an early certification decision so class counsel can be appointed.

Conference: Early appointment of class counsel is needed so the class adversary knows who can discuss discovery.

Conference: Some state courts proceed with alacrity into full merits discovery while federal courts languish over the certification decision. That makes coordination more difficult.

Michael J. Stortz, Esq., S.F. testimony 14-15: There is a risk that deferring a certification decision will cede the lead to state courts. The Note should say that pending litigation may be a ground not to defer but instead to move more quickly to resolve the issues that arise from overlapping litigation.

Barry R. Himmelstein, Esq., S.F. testimony 16: The Note seems to express a preference for bifurcated discovery, first on certification then on the merits. This should be left to the judge's discretionary case management. Plaintiffs and defendants typically disagree about bifurcation. The line between certification and merits discovery is very fuzzy; bifurcation leads to discovery battles about what is appropriate to certification discovery. If plaintiff is left free, discovery will be sought "as to what we really need now to move the case forward." Given a deadline to move for certification, plaintiff will focus on the information needed to prevail on certification. (His written

statement suggests that it may be desirable to set a deadline for certification that de facto requires plaintiffs' counsel to focus discovery on matters required for the certification motion.) Defendants typically object to discovery as not relevant before certification, and draw from their own information to show the reasons why certification should be denied. The plaintiff must be able to discover the defendant's information to be able to show why certification should be granted. (His written statement, 01-CV-008, adds that when discovery is successfully bifurcated, discovery on the merits after certification often requires the producing party to go through the same documents twice, and produce the same witnesses for multiple depositions.)

Mary Alexander, Esq., S-F Testimony pp 58 ff: For ATLA. The change to at an early practical time "will provide an opportunity for extensive precertification discovery and litigation that could be used to delay crucial certification." Although the change seems modest, we are concerned that it will make the situation "even worse," that defendants will use the new language to convince courts to do further discovery and make plaintiffs more desperate to settle. Discovery, even if it is said to be on class certification only, "is much more open for abuse on the part of the litigants." Keep the present language. The danger is that discovery will be so extensive "that you are really litigating the case prior to certification," and that this will be done to delay the case. (In response to a question: ATLA does not have a position on dismissing causes of action before certification.) (In response to another question: we have often seen defendants resisting discovery, but this too is done to delay things. What we need is judicial oversight of discovery; it has to be taken on a case-by-case basis. (In response to yet another question: there is a need to develop sufficient information so the court is able to determine whether a proposed class is unfair to individual class members because it homogenizes claims that should not be homogenized. Individual rights and also defendant rights need to be protected, but that should not mean undue delay just for discovery on the certification question.) ATLA would be happy to look into the question whether it would be desirable to provide for bifurcated discovery, with a first wave limited to certification issues, in return for a prompt certification determination. We will examine the proposed Note language again to see how well it expresses the need for balance, but we are concerned that the change of Rule language will be used inappropriately to persuade the court that this discovery has to be done.

John Beisner, Esq., D.C. Hearing Written Statement: The change to "at an early practicable time" is appropriate. Appellate courts are stressing the need for an adequate record to support a certification determination. "[T]ime must be allowed to permit development of this record. But the Note may inadvertently encourage too much discovery before determination of the certification issue. The Note should stress the need for active trial-court involvement in establishing discovery parameters by demanding a showing that discovery is needed to resolve the

certification issue. And the Note should state that first priority should be given to resolution of any initial motions to dismiss the class claims.

Prof. Judith Resnik, D.C. Hearing Written Statement, 01-CV-044: It is suggested that the text and Note show a sotto voce version of the "just ain't worth it" proposal that was abandoned years ago. "By softening the mandate for quick certification and acknowledging the possibility of discovery, the proposed delay invites litigants and judges to consider the merits."

Victor E. Schwartz, Esq., for American Tort Reform Assn. & American Legislative Exchange Council, D.C. Hearing and Written Statement, 01-CV-031: The change has an important purpose, "to allow a court to gather full and complete information before making a decision as to whether to certify a class." This will remind federal judges of the extraordinary importance of the certification decision. But the amendment will expand the gulf between federal practice and practice in some state courts, where some judges have even certified classes before the defendant has been served.

Thomas Y. Allman, Esq., D.C. Hearing 104 ff: Improvident certification "is our greatest single concern. * * * I really like the comment that the early review of a trial plan should be part of the manageability review of the trial court. My experience in both State and Federal Court has been that many courts prefer to delay the unpleasant thinking about the consequences of certification and simply focus on the contentious allegations of liability. There will be a tension in discovery, as plaintiffs demand discovery that bears on certification information and as defendants resist the same discovery by arguing that it goes to the merits. But that is true of every class-action certification, "and we've always been able to work out an accommodation." Further, "we should have a skeptical review when it comes to boilerplate allegations." (His written statement adds that improvident class certification is "brutally coercive." Trial courts tend to focus on the inflammatory allegations without thinking about the need to address the individualized issues. When the individual issues problems appear after certification, the response may be to resort to statistical models on causation and damages issues. The Note should say that the court should look beyond boilerplate allegations; see Szabo v. Bridgeport Machines, Inc., 7th Cir.2001, 249 F.3d 672, certiorari denied 122 S.Ct. 348.)

Lewis H. Goldfarb, Esq., D.C. Hearing Written Statement 01-CV-019: "This small change is very important." Plaintiff lawyers benefit from the coercive effects of fast certification. Discovery in aid of the certification decision "is critical to a fair resolution of this often case-dispositive issue." The Note suggests "a fair delineation" of the discovery balance. It also should note that the pendency of related litigation, or a government investigation, is reason to defer a certification determination.

Patrick Lysaught, Esq., for Defense Research Institute, 01-CV-033, 01-CV-034, pp 4-8: Opposes the change. The certification decision

is critical; it determines the stakes, the structure of trial, the methods of proof, and the scope and timing of discovery and motion practice. Nothing should be done to foster delay in the certification decision. The Rule and Note seem to reflect a proper approach to balancing the need for discovery on certification issues with the need for prompt decision, but implementation of the Rule may not achieve this. Delay is unfair for another reason: it prolongs the tolling of limitations periods. Prompt decision also is entwined with the need to reduce competing class actions. One of the reasons for rejecting the 1996 proposal was the belief that all Rule 23 proposals should be considered in a single package. The Advisory Committee has indicated that it is working toward rules to address the overlapping class-action problem. Action on the timing of certification should be deferred until proposals are ready to address overlapping class actions directly.

Michael Nelson, Esq., D.C. Hearing 166-167: It is important for the Note to describe the importance of maintaining a close watch on merits discovery. (His written statement, 01-CV-021, is more detailed. The Note should stress that discovery should be limited to matters necessary to decide certification — the parties should be required to justify discovery in these terms. The Note also should state that in most cases priority should be given to motions to dismiss, perhaps avoiding the need for any discovery. And the Note should observe that the existence of parallel actions may be a reason to accelerate, not defer, a certification determination.)

Stephanie A. Middleton, Esq., D.C. Hearing Written Statement 01-CV-032: The change "will provide a district court with more flexibility."

American Ins. Assn., D.C. Hearing Written Statement 01-CV-022: Agrees with certification at an early practicable time, but cautions that courts should closely monitor discovery to ensure a close nexus with certification issues.

Peter J. Ausili, Esq., E.D.N.Y. Committee on Civil Litigation, D.C. Hearing 204: The proposed change might not have any significant practical effect; some committee members felt it might encourage delay. (01-CV-056 is similar.)

Walter J. Andrews, Esq., D.C. Hearing 281-282: The changed language is appropriate. There should be an efficient and complete record related to certification issues before the certification determination. The benefits accrue, however, only if the court actively limits discovery to developing a complete record on certification. The court must be a gatekeeper to deter wasteful and costly discovery.

Bruce Alexander, Esq., D.C. Hearing 310 ff. and Written Statement, 01-CV-041: Generally endorses (c)(1)(A). But the note about merits discovery should be clarified to recognize that good case management may require discovery that supports summary judgment on the individual claims before reaching the certification issue. There is no need to force discovery on certification issues when the case can be dispatched early by this simple means.

Professor Charles Silver, 01-CV-048: (1) There should be more guidance about the trial plan. There is a risk that a defendant will raise all sorts of issues to oppose certification that would not in fact be raised after certification – examples are counterclaims against class members (which never should be permitted in any event), or affirmative defenses. The court should not be required to resolve at this stage issues that may never need to be resolved, such as choice of law. A happy medium is the goal, a trial plan that ensures that parties and court have identified the major issues that are certain to be litigated. (2) The comment should state that it is proper to certify on fewer than all claims or legal theories, and that a decision to request such certification does not show the inadequacy of representation or create a risk that class members will be precluded from individual litigation of theories or claims not included in the class action. (3) Any mention in the Note of maturing litigation invites the mistake of focusing on cases actually tried. The Note should require a party who argues from the maturity of litigation "to present evidence including the entire claim market," settlements as well as adjudicated judgments. And it should be stated clearly that there is no maturity requirement, particularly with respect to small claims. (4) The comment that the court may not try the merits first and then certify a class is wrong. This is frequently done by "amending up." "There is nothing wrong with it, as long as the defendant is given the opportunity of having certification decided first." For that matter, there is no reason to allow the defendant to veto certification after decision on the merits. This is no more than an argument against nonmutual issue preclusion. The argument that the defendant would have litigated more vigorously if the stakes had been defined to be the class claim is no more persuasive here than with respect to nonmutual preclusion. Indeed, "a class action need not be a million-dollar slugfest and should not be when it is possible to keep costs low. In a perfect class action, every claim is identical to that of the named plaintiff."

Court Advisory Comm., S.D.Ga., 01-CV-053: This will not materially alter practice.

Committee on Federal Civ. P., Amer. Coll. Trial Lawyers, 01-CV-055: The new form "is only slightly clearer (although definitely more accurate) * * * ." The change is an improvement. The Committee should think about adding part of the Note to the Rule text: a certification determination should be made promptly after submission of sufficient information to permit a well-informed determination.

Federal Magistrate Judges Assn., 01-CV-057: This change is consistent with better practice; the Note clearly states that the change is not intended to permit undue delay.

Exxon Mobil Corp., 01-CV-059: Supports the change. But the Note should stress that the court should require the parties to justify the need for any certification-related discovery. The Note also should state more clearly that a motion to dismiss class claims

should be considered before taking up the certification issue.

Bruce S. Harrison, Esq., D.C. Hearing Written Statement 01-CV-060: The Note to (c)(1)(A) should state that the pendency of competing state class actions is a ground not to defer a certification decision but to accelerate it.

National Assn. of Consumer Advocates, 01-CV-062: The rule effects a slight change of wording. The Note "is grossly inappropriate and overlong." "It is essentially a practice guide and practitioners will point to it as precedent. Even this seemingly innocuous rule change, therefore, becomes a platform for a specific theory and position on class action certification, rather than a clarification of what the rule is."

Allen D. Black, Esq., 01-CV-064: This change should not be made. Courts apply "as soon as practicable" with all needed flexibility. Discovery is allowed before the certification decision – "often too much in my view." In a few rare cases, courts have deferred class certification proceedings, where unusual facts warrant, until completion of all or a substantial amount of merits discovery. There is no evidence of abuse. Any beneficial effects to be served can be accomplished by adding language to the Note or to the Manual for Complex Litigation.

Equal Employment Advisory Council, 01-CV-065: Supports the proposal "to remove any residual sense of urgency * * * and to make it clear that motions to dismiss and for summary judgment may be entertained by the trial court prior to certification."

Alliance of American Insurers, 01-CV-068: Supports the change.

ABA Sections of Antitrust Law and Litigation, 01-CV-069: Supports the concept and Committee Note, but suggests more explicit changes to direct courts to do what the Note advises. Courts need flexibility in timing the certification decision to accommodate appointment of counsel, dispositive motions, and development of a record to support the certification decision. At the same time, the parties are entitled to an early decision that defines the scope and stakes of the litigation. "In whole, the commentary of the proposed Note is guidance that is much needed by district courts today." But "some district courts view such Notes in the same light as legislative history, giving it little or no weight." The Rule language does not seem to supersede local district rules that require early filing of certification motions. More detailed instructions to district courts might be included in the Rule itself, "such as by requiring entry of a scheduling order for pre-certification proceedings that would deal on a case-by-case basis with the timing of the certification briefing and decision in the context of the sequence of other proceedings." It might be desirable to look to Rule 16(b). And there should be some method, similar to the discovery conference in Rule 26(f), to enlist the parties in advising the court on framing the pre-certification scheduling order. (The discussion of scheduling orders also is directed to the Rule 23(g) provisions for appointing class counsel. If an appointment procedure is adopted, "it should occur first and

quickly, so that plaintiff's counsel – who presumptively will be class counsel if the class is certified – is appointed as the advocate for the putative class in the remainder of the certification proceedings.")

Association of the Bar of the City of New York, 01-CV-071: "The slight change in wording, on its face, would not seem to suggest any significant change in result." The Federal Courts Committee is opposed to non-substantive amendments of this nature. Stability in the rules is important. The Note, however, undertakes to talk at length about discovery, trial plans, and consideration of parallel actions. Notes should not be used in this way to import the Committee's views of best practice into the jurisprudence.

National Treasury Employees Union, 01-CV-078: Opposes the change. The current approach is not flawed. "The change is likely to lead to excessive discovery prior to class certification." Defendants will flood plaintiffs with excessive discovery requests; there is no sufficient limit on the scope and degree of pre-certification discovery requests. "Another concern is that pre-certification discovery could lead to a premature examination into the merits," jeopardizing the long-standing rule that certification should be decided without reference to the merits.

Washington Legal Foundation, 01-CV-082: "[I]t makes sense to remind federal judges that they should not render a class certification decision until they are in a position to make an informed decision * * *."

Mehri & Skalet, PLLC, 01-CV-083: "The potential concerns here lie not with the nuances of the wording of the Rule, but rather with the larger issue of whether courts are appropriately managing class certification discovery." The firm's experience with employment-discrimination, consumer-protection, and other class litigation shows that "delays in moving for certification frequently arise because defendants contest the discovery necessary to determine whether Rule 23's elements are satisfied." Discovery often is necessary, but "must not provide an excuse for defendants to drag out discovery disputes with an eye toward lengthy delays of the class certification decision." District judges should be instructed to manage discovery "with the goal of an informed, but expeditious resolution of the class certification issue." A case management plan aimed at this is desirable; an example order is attached. And the Note suggestion for consideration of summary judgment motions against named plaintiffs "should be tempered by acknowledgement that the class claims exist independently of the individual claims." Dismissal of the claims of a named representative does not preclude certification if new representatives can be found.

Mortgage Bankers Assn., 01-CV-087: Supports and encourages the change. But the Note should make clear that courts should manage pre-certification discovery "so that initially the parties focus on that material necessary to fairly and efficiently prosecute motions relating to class certification." Phasing discovery can be quite

effective. There is no need for unfettered class-wide merits discovery before a certification decision is made.

State Bar of California Committee on Federal Courts, 01-CV-089: Supports the change. It "gives courts some flexibility in allowing discovery on issues that may further illuminate issues bearing on certification." And the Note states that it is not intended to encourage or permit extensive discovery unrelated to certification.

Committee on Rules of Practice, W.D.Mi., 01-CV-090: The Rule language is relatively noncontroversial. The Note suggests a "cookie cutter" approach in which for all class actions, discovery is artificially bifurcated between certification issues and merits issues. This will protract litigation and discourage early settlement negotiations by emboldening defendants to provoke delay. The Note should be revised to leave control of discovery in the district court.

Lawyers' Committee for Civil Rights Under Law, 01-CV-091: (For 18 civil rights, public interest organizations, and bar associations; joined by law firms, practitioners, and professors.) "As soon as practicable" should be retained. Of course certification is not practicable until plaintiffs have fully sufficient responses to discovery regarding the identity of the class and class certification issues; in civil rights cases, in particular, almost all of this information is possessed by the party opposing the class. The FJC Empirical Study shows that present practice works well. Motions to dismiss or for summary judgment are often decided before a certification determination is made. The present priority on prompt certification helps to move civil rights actions toward conclusion. Delay is particularly important in the many actions seeking injunctive relief to protect against losses that cannot be compensated with money. The proposed Committee Note, moreover, suggests that delay may be appropriate to consider appointment of class counsel or in light of overlapping classes; that invites too much delay. "The proposed wholesale changes to Rule 23 dictate a 'one size fits all,' micro-management approach to class actions that is simply inappropriate to most civil rights class actions."

NASCAT and Committee to Support the Antitrust Laws, 01-CV-093: The current draft reiterates that consideration of the merits is not properly part of the certification decision, and that the change is not intended to support unnecessary delay. These revisions "adequately address our concerns" on these accounts. But the Note also suggests that it is possible to have controlled discovery on the merits, limited to aspects that support a certification determination. This is helpful as a suggestion to control precertification discovery. But it also suggestions a bifurcation of discovery that is rarely appropriate. There seldom is a bright line between merits and certification discovery. Artificial distinctions can defeat discovery of information needed for a certification decision, and lead to unnecessary delays and inefficient discovery. Flexible deadlines provide a better method.

David J. Piell, Student, 01-CV-094: "At an early practicable time"

does not suggest that the court give any urgency to the certification decision. The incentive for delay lies with defendants, not class counsel. Defendants will argue that the changed language justifies further delay, no matter what the Note says. Precertification discovery should focus on the Rule 23(a) factors; "[g]oing much beyond this requires delving into the merits." The suggestion that this change dovetails with the process for appointing counsel under 23(g) simply points to the flawed provisions of 23(g).

Steven P. Gregory, Esq., 01-CV-096: The change "may indicate to some courts that they should or at least may delay their certification decisions deeply into the litigation of the case * * *. All parties * * * are benefited in any class action by an early determination regarding certification."

Prof. Howard M. Erichson, 01-CV-097: (c)(1)(A) makes perfect sense and codifies best practice.

Other (c)(1)

Conference: (c)(1)(C) carries forward the present statement that a certification determination is conditional. "The word should be deleted. Certification is supposed to be 'for keeps.'" (This view was repeated later.)

Conference: Appointment of class counsel is tied to certification; the class-counsel rule should be added to subdivision (c).

Michael J. Stortz, Statement for S-F Hearing: Proposed Rule 23(c)(1)(B) requires the order certifying a class to "define the class and the class claims, issues, or defenses." Proposed Rule 23(c)(1)(A)(i) requires the notice to the class to describe "the claims, issues, or defenses with respect to which the class has been certified." The language should be made parallel. The order should describe the claims, issues, or defenses; the notice should set forth the class definition.

Barry R. Himmelstein, Esq., S.F. Hearing 19: It is not practicable to require that the certification order set an opt-out deadline. The court should be free to enter this order later. (His written statement amplifies: an opt-out date cannot be set until you know when notice is to be accomplished. Typically notice plans are not worked out among the parties until certification has actually been ordered.)

Mary Alexander, Esq., S-F Hearing 64: For ATLA. Supports requiring certification orders to define the class and identify class claims, issues, and defenses. Takes no position on (c)(1)(C) provisions for amending the certification order.

John Beisner, Esq., D.C. Hearing 15-16 (and written statement): (1) The (c)(1)(B) provisions should be made more pointed. Rule 23(f) appeals already are working to improve class-action jurisprudence. But appellate courts are finding that it is difficult to "figur[e] out what the District Court intended to treat on a class basis * * * I would urge that the proposed rule be clarified to specify that a District Court indicate which elements of the class claims and defenses thereto it intended to try on a class basis, thereby indicating by omission what elements of those claims would be left to be adjudicated on an individual basis." The Note should state that one purpose is to facilitate appellate review. (2) It is troubling to refer to certification orders as conditional – this may revive the discredited view that a court should err on the side of granting certification on the theory that it can be unwound later. The Note should refer to cases like Isaacs v. Sprint Corp., 7th Cir. 2001, to stress that rigorous application of Rule 23 criteria remains important. The Note also might underscore even more emphatically the proposition that the authority to amend the order at any time before final judgment does not open the door to granting class certification after determining the merits in an individual action.

Victor E. Schwartz, for American Tort Reform Assn. and American

Legislative Exchange Council, D.C. Hearing and Written Statement 01-CV-031: The requirement that the order define the class and identify class claims, issues, and defenses will clarify the issues for the parties and an appellate court. But it will expand the gulf between federal practice and the practice in some state courts.

Thomas Y. Allman, Esq., D.C. Hearing 106: The reference to the conditional nature of certification in (c)(1)(B) is good. But "you should not avoid the consequences of dealing with certification by calling it conditional." (His written statement adds that the Note should stress that actual, not presumed conformance with Rule 23 is essential. See General Tel. Co. v. Falcon, 1982, 457 U.S. 147, 160.)

Brian Wolfman, Esq., D.C. Hearing Written Statement 01-CV-043: (c)(1)(B) should be clarified by referring to the claims, etc., "with respect to which the class has been certified."

Michael Nelson, Esq., D.C. Hearing Written Statement 01-CV-021: It is proper to require that the certification order define the class and the class claims, issues, or defense. This facilitates appellate review. The Note should amplify the need for a clear statement of the matters to be adjudicated on a class basis. The notice requirements should parallel the order requirements, so that the notice defines the class, etc.

Walter J. Andrews, Esq., D.C. Hearing 281-282: (1) The statement that certification is conditional may encourage courts to err on the side of granting class status. That should be discouraged. But it is proper to recognize the need to modify class definition at the remedy stage. The Note should emphasize that plaintiffs must establish ultimately that the requirements for certification are met. (2) The order certifying a class should not only define the class but also define the elements of each class claim or issue that are certified for class treatment, making clear what issues plaintiffs will be required to prove individually. That will reduce uncertainty and increase the likelihood of settlement.

Bruce Alexander, Esq., D.C. Hearing Written Statement, 01-CV-041: The Note should emphasize that the conditional nature of certification does not relax the standards for certification.

Court Advisory Comm., S.D.Ga., 01-CV-053: Spelling out requirements for the certification order will generate disputes; there is no need for the specification.

Comm. on Civil Litigation, E.D.N.Y., 01-CV-056: (1) It is impractical to require that the certification order specify the class claims, issues, or defenses; often they are not then known. And this will frustrate litigants: at certification, defendants often prefer a narrow class definition, but at settlement they prefer a broad definition. This tilts the balance against certification. And the order need not state the mechanics of opting out. (2) Courts have consistently held certification orders are conditional. There is no need to change.

Federal Magistrate Judges Assn., 01-CV-057: The change from "decision on the merits" to "final judgment" "would eliminate the ambiguity associated with determining when 'the decision on the merits' has occurred."

Allen D. Black, Esq., 01-CV-064: In general it is good to provide guidance in the Rule as to the contents of the certification order. But: (1) Need every order define the class claims, issues, or defenses? Ordinarily the order certifies a class for all claims asserted in the complaint; repetition in the order is superfluous. It is useful to spell this out in the order only if the class is certified as to fewer than all claims or issues; this might be said in the rule, or the rule might be left silent. (2) Stating "when" class members may request exclusion is difficult because at the time of the order it is difficult to know precisely when notice will go out. The class list must be compiled, disputes about wording must be resolved, and circumstances may change (as a settlement may be reached). The most that can be said is that exclusion must be requested within a reasonable time in response to the class notice; that need not be in the rule.

Alliance of American Insurers, 01-CV-068: Supports the requirement that the order define the class and the class claims, issues or defenses. Also supports the requirement that the notice state when and how class members can opt out. The changes "would bring more specificity to class certification orders." But recommends revision of the (c)(1)(C) provision for amending a certification order – it should state that the order can be amended at any time up to final judgment *in the trial court*. This change will make it clear that the parties cannot amend the class definition "throughout the appeals process."

Peter J. Ausili, Esq., E.D.N.Y. Committee on Civil Litigation, D.C.Hearing 205: It is impractical to insist that the certification order identify the class issues. The definition should be in terms of the transaction or occurrence in order to bring in claim preclusion. A defendant, for example, may argue for narrowly defined class issues at certification time, and then seek a broad definition on settlement.

Professor Charles Silver, 01-CV-048: The Note on the conditional nature of certification should address Rule 23(f): if a judge recertifies after an initial conditional certification, is there a second appeal opportunity? "One appeal is enough."

ABA Antitrust Law and Litigation Sections, 01-CV-069: (1) Supports (c)(1)(B)'s requirement that the certification order state when and how class members can elect exclusion. This embodies the better practice now followed. (2) Is concerned about the change in (c)(1)(C) that allows amendment of a certification order at any time before "final judgment." They are not aware of any case in which the present rule language has prevented necessary modifications based on developments in the litigation. The hypothetical of changes during the remedial phase has not seemed to be a real problem. There is a risk, despite the Note, that using

the "final judgment" phrase will generate ambiguity because of the long association with appeal concepts. There may be no real-world reason to modify the present language. In addition, the amendments may seem to endorse the view that a court can conditionally certify a class without strict compliance with Rule 23 requirements. If there really is a need to modify the present Rule, the Note should "make it clear that the change is not a basis for failing rigorously to apply the requisites of Rule 23 when class certification is first considered."

National Treasury Employees Union, 01-CV-078: Allowing amendment of the class definition at any time up to final judgment "would be a good change, because class definitions sometimes can be imprecise when crafted at an early stage in the litigation."

Mehrie & Skalet, PLLC, 01-CV-083: The substitution of "final judgment" makes it even more important that the Notes clarify that the certification decision does not turn on the merits of the dispute.

State Bar of California Committee on Federal Courts, 01-CV-089: Supports the provisions giving specific guidance on the content of the class-certification order. Also supports the amendment that refers to "final judgment," eliminating a possible ambiguity in the present reference to decision on the merits.

Committee on Rules of Practice, W.D.Mi., 01-CV-090: It is a mistake to require the certification order to definitively detail issues, claims, and defenses. The issues and claims evolve. And the requirement will complicate the certification decision by burdening both parties with the burden of defining issues and claims at an early stage where they cannot be definitively identified. Only a general statement of claims should be required.

Lawyers' Committee for Civil Rights Under Law, 01-CV-091: (For 18 civil rights, public interest organizations, and bar associations; joined by law firms, practitioners, and professors.) The present provision that certification "may be" conditional reflects the 1966 Committee Note statement that a court may rule that a class action may be maintained only if representation is improved through intervention of additional parties of a stated type, or for similar reasons. To make every certification conditional is to encourage constant relitigation of the certification issues, and even to invite "the unscrupulous to attempt to manipulate factors affecting class certification after the initial determination." There is a further special problem for civil rights cases. Plaintiffs and defendant may be able to agree on injunctive relief, while remaining far apart on monetary relief; they should have the flexibility to achieve interim injunctive relief, without fear that the injunction will be subject to later reconsideration because the certification was only conditional. And the provision permitting alteration up to "final judgment" does not define the ambiguous meaning of final judgment. And if a certification determination is always conditional, can it ever be suitable for Rule 23(f) appeal?

David J. Piell, Student, 01-CV-094: It should be made clear that

(c)(1)(B) does not require immediate notice to the class. Often it may be wise to defer notice – settlement negotiations, for example, may begin in earnest only after the certification determination. It is unnecessarily costly and confusing to have an initial notice, followed perhaps promptly by a second settlement notice. The costs of an unnecessary certification notice, further, will impede settlement as plaintiffs seek to recover the costs from the settlement fund.

Prof. Howard M. Erichson, 01-CV-097: (c)(1)(B) provisions for the content of a certification order make perfect sense and codify sound practice.

Summary of Comments: Rule 23(c)(2) 2001

(b)(1), (2) Notice

Conference: Notice can be given now. The proposal for notice to a "reasonable number" of class members "is odd."

Conference: Notice in (b)(1) and (2) classes is to be applauded. But it is troubling to suggest that individual notice is not required; we should demand that. Still, notice need not be "as extensive" as in (b)(3) classes. It should be made clear that the defendant can be made to pay for the notice, or to include it in regular mailings to class members.

Conference: Notice to (b)(1) and (2) classes "should be meaningful."

Conference: The Committee Note, p. 49, says that notice supports an opportunity for (b)(1) and (2) class members to challenge the certification decision. "This should not be what you have in mind. Change it."

Mary Alexander, Esq., S-F Testimony 64: Notice is expensive, time-consuming, but necessary to protect the rights of individual litigants. Some notice processes are shaped so that class members do not even realize the notice describes a civil action in which their rights may be taken away. ATLA supports the plain language provision. It takes no position on (C)(2)(A)(ii) or (iii).

James M. Finberg, Esq., S-F Testimony 97 ff: Actions for declaratory and injunctive relief are often – perhaps almost always – brought by public-interest groups that have limited economic resources. Notice can be very expensive; the cost will deter many meritorious cases. As an example, consider the class action in California to challenge Proposition 187 that would limit health, education, and welfare benefits to immigrants. It is a very large class; it would be difficult to notify that class at the certification stage. The Notes recognize the burdens and suggest that courts look at the issue, but the language of the Rule is mandatory. There is no option to refuse to order any notice. It also says that notice must be calculated to reach a reasonable number of class members. But that could be so costly as to defeat the action. Perhaps the rule should say "shall consider directing," and also should allow the court to decide who must pay for the cost of notice as an initial matter. (His written statement, 01-CV-07, says the presumption should be that the defendant pay the notice costs.) Remember that Rule 23(e) requires notice of settlement. The settlement notice will give an opportunity to members of a (b)(1) or (b)(2) class to appear and challenge the settlement; at that stage, the burden of payment will be on the defendant, and will not deter filing. (In response to a question: There were several Proposition 187 cases. The one that went to judgment did not settle; so deferring notice to settlement would not work. The class won that one. Notice before settlement or judgment would support monitoring by class members, but is it worth the cost of deterring meritorious actions? (In response to

another question: some notice, such as posting on the internet, is relatively inexpensive, but the rule seems to demand more by requiring notice to a reasonable number of class members. Many members of the Proposition 187 class do not have access to computers; many do not speak English. Reaching even a high percentage of the class, though less than a majority, would be extraordinarily expensive.) The rule should be modified to give the court discretion to have minimal notice, or even no notice, in some cases.

James C. Sturdevant, Esq., S-F Testimony 117 ff: For Consumer Attorneys of California (p. 127). Began practice in public interest cases on behalf of people with entitlements under federal and state programs; they were mostly (b)(1) or (b)(2) classes. Since then, has tried consumer protection and employment class actions as (b)(3) actions. Mandatory notice in (b)(1) and (b)(2) classes will eliminate a number of cases, including "cases that are brought on a daily basis by public interest organizations challenging policies and practices of governmental agencies, both state and federal, which violated federal law or a mixture of state and federal law." One recent case against AT&T challenged an arbitration provision in a new agreement required by the detariffing of the telecommunications industry. The class included AT&T's California long-distance customers, some 7,000,000 to 9,000,000 persons. The case was filed on July 30; trial began November 13; evidence has been completed. Adding any form of notice cost to this action seeking predominantly injunctive or declaratory relief would have added tens or hundreds of thousands of dollars, perhaps even millions, to the cost, depending on the form of notice selected. Individualized notice would have cost at least $5,000,000. Publication might have been $30,000 to $60,000. Internet notice might be of some assistance, but only 40% to 45% of American households have internet connections, and of them notice would go only to those who were plugged into the particular website. There is no opt-out opportunity to protect. The determinations required to be made under Rule 23(a) to certify the class are protection enough for class members. Most of these true public interest cases "do not settle * * * until there is some certainty as to how the liability hammer is going to fall."

Jocelyn D. Larkin, Esq., S-F Testimony 139 ff: For The Impact Fund, which maintains its own class-action practice, and provides both grants and training to lawyers to bring other class actions. The focus is on civil-rights actions, particularly employment discrimination actions. The number of civil-rights class actions declined greatly between 1979 and 1989, and has essentially held steady since then despite significant enhancements of the civil rights statutes. (Her written statement, 01-CV-012, observes that one reason that class actions are less effective is that some courts have come to analyze civil rights class actions as if they were personal injury mass-tort classes; one court even drew an analogy to a tobacco class action.) In employment discrimination litigation against mid-sized companies, with classes of 100 to 800 members, class actions are important. One reason for this

importance is that individual class members are reluctant to invite retaliation by filing suit; the anonymity of the class is important. The mandatory notice provision for (b)(2) actions "will deter the filing of many worthy civil rights class actions." The number one problem faced by civil-rights practitioners is resources. The clients cannot afford to advance the costs of notice. Our grants average $10,000; typically there is no other resource to pay for litigation costs. These may be small cases involving public benefits, environmental justice, criminal justice, voting rights, as well as the smaller employers. $10,000 is not adequate for deposition costs and experts. "Adding a big ticket cost like notice is simply going to mean they don't bring those cases." (In response to a question whether low-cost notice would satisfy the rule as proposed — whether, for example, notice to employees posted at the job site, or notice to a class of homeless persons posted at various places, would do: Where people are centralized, as in employment, perhaps that will do. But the more worrisome cases are those that involve people who have applied for a job and are turned away; only fairly expensive notice can find them. Or a case in which a local public agency stopped taking applications from disabled people for public housing: notice to reach them would have to be fairly broad. Or, in response to a question, a class involving all blacks and hispanics in the City of New York who were allegedly stopped on the basis of racial profiling.) The Carlisle case also is troubling — it says that nothing in Rule 23 suggests that notice requirements may be tailored to fit the pocketbooks of particular plaintiffs.

In addition to cost, we must consider the practical reality: what is the benefit of notice? There is no right to opt out. The Committee envisions class members being able to monitor class representatives and class counsel, but "I must respectfully suggest that that's just not a reality. Class members in civil rights cases don't have the interest, the time, the resources or the capacity to monitor the progress of a class action or hire their own attorneys to do it. And that's not to suggest for a moment that class counsel should not be closely monitored in these cases. Judicial scrutiny of adequate representation is absolutely critical." And the representatives often do have an interest in monitoring their class counsel. In one recent example, the representatives in a gender discrimination case came to the Impact Fund because their lawyers had negotiated a settlement that they thought was wrong. We agreed, and were able to substitute in as class counsel. (Her written statement adds the observation that in civil rights litigation notice may be both expensive and ineffective: "the typical civil rights class member does not read the Wall Street Journal." Non-English speaking class members also pose a problem.)

So: "Don't change the rule because changing the rule will effectively close the door or may effectively close the courthouse doors to the least powerful members of our society."

(Her written supplement, 01-CV-012, adds that internet notice may not be much help: the "digital divide" is real. The poor, and

members of minority groups of all income levels, have distinctively low access to the Internet. She adds other examples of diffuse classes whose members are hard to identify – people told by the hotel there are no available accessible rooms, or unable to attend a theater that is not accessible.)

John Beisner, Esq., D.C. Hearing Written Statement, 01-CV-027: (1) The success of a rule directing plain language and specifying elements of class notice will depend on additional specific guidance. The Federal Judicial Center forms are guides. But it might be desirable to add a limited collection of notice forms to the Appendix of Forms that accompanies the Rules. (2) Requiring notice in (b)(1) and (2) classes appears on balance to be a positive change. It would "halt" the strategy of transforming damages classes into these forms. The Note should make clear that the change is not intended to broaden use of (b)(2) classes; there is a circuit split on the extent to which damages claims may be added to a (b)(2) class, and the Note should state that the rule change is not intended to address this split. The Note, further, should state more clearly that the notice obligations are less onerous than in (b)(3) classes. And it is very troubling to suggest that a defendant can be required to use its own public communications mechanisms to assist in providing notice to the putative class. The notice burden lies with the purported class representatives. To require a defendant to include a class notice in a regular mailing, for example, raises due process issues because it requires the defendant to pay for prosecuting litigation against itself even though no merits determination has been made. And, citing Pacific Gas & Electric Co. v. PUC, 1986, 475 U.S. 1, suggests there also may be a First Amendment problem in requiring a defendant to convey this "very negative message."

Bill Lann Lee, Esq., D.C. Hearing 20-40: Mandatory notice should not be required in (b)(1) or (b)(2) class actions. Judges have authority to order notice now under (d)(2), and are aware of the authority. Although the notice requirement is proposed for good motives, it will seriously hamper the prosecution of civil rights actions. Experience as Assistant Attorney General for the Civil Rights Division shows that private enforcement carries the principal burden in the civil rights arena. Congress foresaw the need for private enforcement by adding attorney fee provisions. Other countries, as South Africa, recognize the importance of class actions in enforcing civil rights. The number of private enforcement actions has dropped since the 1970s. Civil rights class actions tend to be brought under (b)(1) and (2). When notice is required courts uniformly have required plaintiffs to pay. Notice costs will deter many plaintiffs from bringing class actions. An example is provided by an action to address discriminatory funding of public transportation in Los Angeles. The plaintiffs unsuccessfully sought lawyers to represent them until the NAACP Legal Defense Fund took on the case. The out-of-pocket costs for discovery and the like were $150,000, and strained the budget. On settlement, notice was provided by publication in four local newspapers for three days and by posting short notices

in such public places as bus stops. The cost of that limited notice program was $140,000. The prospect of paying that cost would have prevented filing the action; the result of the decree is estimated at $600,000,000 to $1,000,000,000 of enhanced spending on inner-city bus transportation. If there were no cost, the notice proposal would present a different question. The value of notice in these cases is symbolic; we do not need to incur the costs for symbolic reasons. Alternative means of notice may be effective, such as paycheck notices in an employment discrimination case, but no defendant has ever voluntarily offered to do that. A court might compel notice by modest means, but is not likely to shift the cost to the defendant. So it is not a sufficient remedy to state more clearly that the court should consider the impact of notice costs on the ability to maintain the action; the mandatory notice provision should be dropped. The increasing cost of litigating these actions probably accounts for the decreased filing rates. And individual actions do not provide an adequate alternative to class actions. Class actions tend to be noticed, and can accomplish actual tangible results. Opting out of a class action to pursue individual remedies may be a good thing, but that does not detract from the value of a larger remedy that affects a larger group of people. An alternative to mandatory notice might be to work through proposed Rule 23(g)(2), "to put potential class action counsel on notice that courts and this committee think communications with the class is a very important aspect of their representation."

Mr. Lee's written statement offers additional points. (1) Civil rights actions are appropriately brought under (b)(1) as well as (b)(2). (2) There are no studies indicating that class counsel have been inadequate in communicating with class members; what the cases reflect are disputes about efforts to communicate. (3) The concern with the ability of class members to monitor proceedings and to decide whether to participate individually arises from case-specific circumstances, not a problem inherent in (b)(1) and (2) classes. (4) The use of notice power under (d)(2) does not seem to have had a deterrent effect on filing. (5) Procedures for notice of settlement and the fairness hearing "in effect promote the interest of assuring that the class is kept informed."

Prof. Owen M. Fiss, D.C. Hearing 40-57: Proposes a two-notice regime. The first notice would go out prior to certification "to test for the adequacy of representation." This notice would be tested by the general formula of Mullane v. Central Hanover Bank & Trust: the best notice practicable under the circumstances. The second notice would go out after certification but before trial, to "seek to operationalize the right to opt out." The right to opt out should not be limited to (b)(3) classes. Rule 23 rests on "interest representation," and "any individual should have the right to disavow that representation." But the opt-out right might be limited to circumstances in which "the interest of the individual members of the class is of a sufficient magnitude and particularity to make opting out just and appropriate." Once the opt-out right is generalized, if perhaps limited, there is no

remaining need to maintain the distinctions between (b)(1), (2), and (3) classes. Predominance and superiority should be required for all classes. The cost of notice in civil rights cases is a concern, but "we're also deeply committed to procedural justice." The cost of notice before certification need not be crippling. And there is more of a role for individual actions to vindicate civil rights than Mr. Lee's testimony suggests. An individual student, for example, is entitled to education in a desegregated school system as a matter of an individual remedy. Settlement, moreover, is a very special event; it should be limited to class members who choose to opt into the class. (In response to questions: Perhaps it is possible to discard opt-in, and even eliminate opt-out, when class members have identical and de minimis individual stakes; Eisen v. Carlisle & Jacquelin may be an illustration. That will require more thought.)

The written statement, prepared with John Bronsteen, 01-CV-023, amplifies several points. (1) The provision for the best notice practicable under the circumstances might include a check-list of factors: cost; the importance of reaching every class member — which will vary with the size of interest and the variation of interest among members; and the consequences for "maintainability of the class action." If expensive notice would likely cripple a class action to redress claims that could not be brought as separate individual suits, the judge should seek to avoid such stringent notice. (2) The right to opt out might be denied if a class member seeks to abuse the privilege — "for example, if all class members' interests are absolutely identical and all stand to benefit if the remedy sought is granted — say an injunction to end discrimination or institute an accelerated promotion policy — but some seek to opt out solely for the purpose of preserving their claim for a 'second bite at the apple' if the plaintiff class loses." (3) Notice of the right to opt out seems to be limited: "the judge should ascertain where [sic - whether?] there is a reasonable likelihood that a significant number of people will opt out, as when individual stakes are high and interests are heterogeneous."

Professor Judith Resnik, D.C. Hearing 58 ff.: There remains room for both mandatory and opt-out classes. But the distinction should not be drawn at the beginning of the action. There is no need to determine at the beginning whether the remedy will be injunctive, declaratory, or damages. The distinction should be drawn only when remedies are actually on the table. That may be when certification and settlement are proposed simultaneously, but even that line is not so bright: there may be "adjudications along the way and the settlement is being shaped there." Sampling notice should be considered. The notice proposal stems from a worry about monitoring. A class may include people with different views about the remedy, so monitoring is important. But monitoring does not require that the courthouse door be closed by the costs of individual notice. Initial sampling notice suffices. At the remedy stage, if it is decided that an injunction or limited "pie" require that the action be made mandatory, "at that point you need

better notice." Who pays is now part of the negotiation. In some cases, defendants are interested in "group-based processing. In addition, courts have an interest in class adjudication – "We want fewer of these cases and we need to resolve them en masse." The courts might absorb some of the notice costs. And costs can be reduced "using court-based data accessing capacities and e-mail and the like * * *." Even recognizing that not everyone is a computer user, this can help. (Her written statement provides similar suggestions. The notice draft retains the distinctions among (b)(1), (2), and (3) classes. The certification question should be divorced from the opportunity to request exclusion. The certification test should be addressed in Rule 23(a) to establish a "uniform standard of both the need and desirability of class certification." It should not be required that a class action be superior; it should be enough that it is a useful way to proceed, "suitable to the claims presented." Purposes could be "to facilitate access and quality representation for small claimants, or to buffer against disparate outcomes for classes of similarly situated plaintiffs, or to create enforcement rights in a wide set of claimants." Present subdivision (b) would be replaced by provisions on appointment and compensation of class counsel.)

Norman J. Chachkin, Esq., NAACP Legal Defense & Educational Fund, D.C. Hearing: The problems of (b)(2) class actions are not illuminated by the Advisory Committee's extensive study – supported by the FJC and RAND – of mass-tort and consumer class actions. In (b)(2) civil rights action there is no lack of communication between unnamed class members and class counsel. Some of the communication involves class members who wish to add to the class litigation individual problems that they are encountering with the defendant. But any attorney serious about representing a (b)(2) class must be in communication with, and accessible to, class members. Most of these actions result in settlement. It is difficult to present the pros and cons of a settlement to class members unless there has been effective communication with class counsel before the settlement is proposed. All of the current proposals should be recommitted for further study to the extent that they involve (b)(1) and (2) classes. The advice in the Note that the costs of class notice should not defeat a "worthy" class is merely advisory. There is, moreover, a great deal of latitude for the individual judge to weigh the costs and advantages of notice; this "could even permit personal or ideological opinions to affect procedural decisions." The (b)(2) class was added in 1966 to emphasize the suitability of class actions in civil rights and race discrimination claims; that is still a valid, necessary, and worthy purpose. In the real world, we cannot achieve as much reform and enforcement of constitutional and statutory rights through individual actions as we achieve through class actions. Inadequate representation can be cured by decertification when it becomes apparent, or by collateral attack. Rule 24 establishes a right to intervene on showing inadequate representation. A further problem is that notice is to be given only after the certification decision. Once notice is given, the class certification issues will have to be revisited. The resulting problems of manageability

will be worsened by the provision that allows a class member to appear through counsel without satisfying Rule 24 intervention standards. Most of the Rule 24 cases involving attempted intervention "involve disagreements with the litigation judgment of class counsel, and almost without exception, although there are some few exceptions, District Courts have determined that that disagreement doesn't affect the substantial substantive interests of absent class members and it doesn't justify complicating the litigation by allowing individuals to intervene." So, p. 103, "a mere disagreement over whether you should file a summary judgment motion this week or take another deposition is not the sort of thing that meets the Rule 24 requirements." The notion of permitting exclusion from a (b)(2) class also is puzzling: if a class action were brought to desegregate a public school, could a class member ask "'to continue to go to school in the system that's operated in violation of the United States Constitution.'" The Committee also should not attempt to address the ongoing development of decisional law on the extent to which damages can be sought incident to a (b)(2) class, as in Title VII actions. If the costs of notice were substantially lower, notice would not be as much of an issue. But the important time for notice is the time of settlement: that is when class members have the most important contribution to evaluating the adequacy of representation. Finally, courts hear from class members in (b)(2) actions. They get lots of letters that they put in the file and send to counsel to be dealt with as counsel wish. "There's not a lack of initiative being taken, in my experience, by unnamed class members who are dissatisfied with what's happened."

The written statement, 01-CV-051, adds more. The FJC Study shows the median cost of class notice in four districts was $36,000; in two districts it was $75,000 and $100,000. There is no experience to suggest that class members have often attempted to relitigate the certification issues; in any event, notice prior to certification would be needed to support such efforts. There has been some challenge to adequacy of representation, but that is relatively infrequent and commonly involves mere disagreements about litigation strategy. (Pages 12-13 illustrate cases denying intervention; the parenthetical descriptions suggest strong reasons for granting intervention in at least several.) "In the class context class counsel's responsibility is to the class, and is not mechanically dependent upon the desires of the named plaintiffs." Indeed, "'class counsel is entitled to be free from harassment by class members. All of his judgments cannot be challenged in court.'" Defense counsel will take advantage of a right to appear by encouraging disruptive class members to participate and undermine the class proceeding. On the other hand, defendants too may suffer if class members who appear contribute in such a way as to be entitled to attorney-fee awards.

Brian Wolfman, D.C. Hearing and Written Comment: Notice in (b)(1) and (2) classes is desirable, although cost is a problem. It should be directed to "a reasonable number of class members comprising a fair cross-section of the class." Notice to only a

reasonable number may not suffice if there are divergent interests. If there are formal subclasses, notice should go to a fair cross-section of each subclass. This seems to be similar to what others have called "sampling" notice. The Note should state that opt-out rights are due when some of the relief is damages: "Due process, and possibly Rule 23 as currently written, demands that result."

Leslie Brueckner, Esq., D.C. Hearing 146-155: Has just won a state-wide (b)(2) class action to defeat a mandatory arbitration clause that had been inserted in a consumer contract by a long-distance provider. It is likely that anticipating the cost of giving notice to the class would have prevented filing the action. The alternative of writing protections into the rule so that the judge must consider whether notice costs are inimical to bringing the action are "too little, too late." If there is a chance that significant notice costs will be imposed, lawyers will not file. Although the power is there now in (d)(2), it is used so rarely that practitioners do not anticipate being required to fund notice costs. The deterrent effect will be increased by the proposal to require notice of attorney-fee applications. Although there would be no added notice cost in cases that settle, civil rights cases often are litigated to judgment, and then there would be the cost of an additional notice not required for any other purpose. Sampling notice would be an improvement, but even that would exert a substantial chilling effect. What sample would suffice? In what form would notice be given? "[I]t's simply too uncertain and will have a huge negative impact on civil rights cases." Reforms in this area might be justified, but further study is needed. The RAND study has not looked at this issue. (Her written statement, 01-CV-020, urges withdrawal of any notice requirement. Notice is required in (b)(3) actions to preserve opt-out rights. (b)(1) and (2) classes are analogous to interpleader or quasi-in-rem actions in which circumstances dictate the need for unitary disposition regardless of class-member consent. The Note does not provide sufficient protection. It quotes the Mullane case statement that notice reasonably certain to reach most of those interested in objecting suffices. It states that notice to all identifiable class members is required when there is no substantial burden. This is too much. There is no showing of abuses in this area, and the homogeneity of interests in (b)(1) and (2) classes is sufficiently strong to be adequate safeguard.)

Peter J. Ausili, E.D.N.Y. Civil Litigation Committee, D.C. Hearing 206: Mandatory notice should not be required in (b)(2) actions; it may be unduly expensive, and thwart some meritorious class actions. (The written statement, 01-CV-056, adds that notice to the class is appropriate in (b)(1) actions.)

Ira Rheingold, Esq., (National Assn. of Consumer Advocates), D.C. Hearing 261 ff.: Notice should not be required for non-damage classes. The reason is cost. Consumer class actions often do not make a lot of money. They present the same problems as civil rights actions: the anticipated cost of notice will have a chilling effect. If notice is needed in a (b)(2) action, courts now have the authority to order it. (This theme is repeated in the written

statement, 01-CV-062. Many advocates conduct good, beneficial actions under (b)(2) and are not getting rich but are helping many people. Imagine a case in which 10,000 people nationwide are injured to the extent of $5 each, a typical consumer class action; the cost of notice could exceed the potential recovery.)

Patrick Lysaught, Esq., for Defense Research Institute, 01-CV-033, 01-CV-034, 046, 047: Generally this is a positive proposal. But the Note should make two things clear: this is not intended to foster increased use of (b)(2) classes for claims that seek damages, and it is not intended to reduce the notice requirements for (b)(3) classes. The Note, further, seems to endorse a requirement that the defendant use its usual communications methods to reach a plaintiff class. This is a bad idea as presented. It implies that the defendant may be made to bear the cost of notice; it is not likely to be effective notice, because it will not attract attention in the same way as a separate formal notice; and it may cause class members to give greater credence to what seem to be the defendant's self-accusations of wrong conduct. On the other hand, it may be sensible to require that a company make available to the class a regular means of communication used by the company to reach class members.

Walter J. Andrews, Esq., D.C. Hearing Statement, 01-CV-036: It is a positive change to require notice in (b)(1) and (2) class actions. But the Note should stress that the notice requirement is not intended to broaden the use of (b)(2) classes. And the Note reference to use of a defendant's regular communications is a problem. Even if the issues of cost are addressed, the Note should emphasize that notice is the plaintiffs' burden and that use of the defendant's resources is discouraged.

Professor Charles Silver, 01-CV-048: "The inability to opt out of a mandatory class action makes monitoring more important in these cases than in opt out class actions. All of the conflicts that inhere in (b)(3) class actions also inhere in (b)(1) and (b)(2) class actions." They are more dangerous because exclusion is not possible. "Only monitoring is possible, and monitoring cannot occur without good notice. Consequently, courts should be especially careful in mandatory class actions to see that all persons with sizeable interests receive notice and an opportunity to participate." But the discussion of notice to fewer than all class members makes a point that should be extended to (b)(3). The present (b)(3) requirement of individual notice is wrong, and "the Supreme Court compounded the error in Eisen." Due process is a functional standard; individual notice is required only for class members with large claims, important interests, and relevant information. The cheapest possible notice should be provided all other class members. Newspaper publication never should be required; internet publication is much cheaper.

Exxon Mobil Corp., 01-CV-059: Supports mandatory notice. But the Note should state that the burden of notice is on class representatives. The defendant should not be saddled with the burden simply because it uses mass mailings in its business; due

process and First Amendment implications must be considered.

Allen D. Black, Esq., 01-CV-064: It is a good idea to require modest notice in (b)(1) and (2) actions. But the Note ventures on dangerous ground when it invites challenges to the certification, encouraging relitigation of the certification question. That sentence should be deleted.

Equal Employment Advisory Council, 01-CV-065: The Council is an association of employers that, collectively, employ more than 20,000,000 workers in the United States. It opposes notice in (b)(1) and (b)(2) actions. There is no right to request exclusion to require notice. Notice will not help class members, but "is likely only to confuse and frustrate them." The class representative is responsible for representing and communicating with the class; if the representative fails, certification is not appropriate. Notice, further, will enlarge the size of the class as "individuals who never before thought they were victims of employment discrimination may recast their experiences to make themselves part of the class." The provision that describes a right to enter an appearance through counsel will only further complicate the litigation. Even a matter as simple as a request for an extension of time requires, in many courts, consultation with counsel for opposing parties: many lawyers representing many class members will increase the difficulty of simple procedural steps. Many lawyers also will expand the number of parties that can file discovery requests and motions. The Note proposal that a defendant might be required to include notice in a regular communication with class members puts an unfair added burden on the defendant – it is likely to put the burden of cost and notice in defendants in all cases, since defendants do regularly communicate with their employees.

Alliance of American Insurers, 01-CV-068: Supports notice in (b)(1) and (2) class actions.

ABA Antitrust Law and Litigation Sections, 01-CV-069: "In most instances," requiring notice in (b)(1) and (2) classes "serves the salutary purpose of giving such class members the opportunity to monitor class proceedings." But there is a tension, recognized in the Note, arising from recognition that notice costs may deter some plaintiffs from filing actions seeking only injunctive relief, particularly civil rights actions. It would help to include a safety valve giving "the district judge discretion to vary the form and content of the notice * * * to comport with the special needs of a particular case." The Note suggests that notice could be included in a regular communication. Ordinarily it is the defendant who regularly communicates with class members – examples are an employer or a credit-card company. The Note is ambiguous on who should bear the costs. The Note should be modified by deleting the reference to regular communications or by clarifying them.

Association of the Bar of the City of New York, 01-CV-071: Mandatory notice will reduce the number of class actions, especially in such fields as civil rights, consumer, and

environmental cases, because of the prohibitive cost of notice. Courts have authority to order notice under present (d)(2). The requirement for notice of settlement makes it in the interest of class counsel to keep class members informed.

Civil Division, U.S. Department of Justice, 01-CV-073: There is no advantage in notice to class members who cannot request exclusion. The district court has authority under (d)(2) to direct notice in appropriate circumstances. Notice will be costly, and may generate confusion. In addition, it may invite filing individual actions — prisoner litigation is an example. Matters will be complicated still more if the separate litigation is filed in a different district and is not subject to control by the class-action court.

National Assn. of Protection & Advocacy Systems, 01-CV-077: (An association of state protection & advocacy systems for persons with disabilities.) The protection & advocacy systems file most of their class-action enforcement actions under (b)(2). ADA Title III, for example, provides for declaratory and injunctive relief but not damages. There is no right to exclusion, so no need for notice. The provision "will deter the filing of worthy disability-based civil rights cases by resource-strapped civil rights practitioners. * * * Similarly, the P&A systems have limited resources to fund potential class action litigation." Increased costs will deter filing or strenuous prosecution of worthy civil rights actions.

National Assn. of Treasury Employees, 01-CV-078: "This section ignores the significant differences between b(3) and b(1) and b(2) cases. The Supreme Court underscored this difference in Eisen, where it noted that subdivision (c)(2) does not apply to (b)(2) classes. There is no right to opt out. The apparent purpose of the notice proposal is to encourage class members to monitor the progress of class actions. But requiring notice often will mean that there is no action to monitor, as notice costs will preclude nonprofit groups from filing. Class counsel already serves the monitoring role, as do the named plaintiffs. "The judge, of course, has the ultimate monitoring responsibility," as shown by the requirement that a settlement be approved. Rule 23(d)(2) already gives sufficient notice authority.

David H. Williams, Esq., 01-CV-079: Writes from experience with (b)(2) classes challenging improper deprivations of government benefits, most often Medicaid assistance. The costs of notice are significant since no funds are being recovered for the class. The only practical ability to monitor the progress of the action is given by the ability to appear through counsel; that is rarely a viable option. "A more practical monitoring tool might be giving class members a means to contact class counsel." Class notices will not often do this, since the proposed rule does not require the relevant information. "Confused and anxious class members can be counted on to call court staff." Notice, further, will promote reliance on the class action, including reliance by persons who are not within the class and who should be pursuing relief by alternative means. It creates the need for further notice if the

case is involuntarily dismissed, to protect members who relied; and since only "reasonable" notice is required, there is no way to determine which class members may have relied. Finally, there is a danger that a notice requirement will make emergency relief unavailable: a class must be certified to support interlocutory relief on a class-wide basis. An immediate 23(f) appeal of the certification order may "overload[] what must be accomplished to grant the emergency relief."

Mehri & Skalet, PLLC, 01-CV-083: (1) Drawing from extensive employment discrimination and consumer protection class-action experience, agrees with the testimony opposing the change "and we strongly agree that no good can come of it." The informed judgment of the district court under Rule 23(d)(2) suffices. An excellent example of wise judicial discretion is found in the cases that require notice and opt-out rights in "hybrid" (b)(2) classes that include significant damages elements. It is illogical to respond to the problems of mass-tort cases by adopting a notice requirement that will severely damage (b)(2) classes. A better approach is to strengthen the methods of communication with the class throughout the litigation. (2) It is wrong to permit a class member to enter an appearance at the certification stage. The defendant could exploit this procedure to defeat certification. "Further, the broader interests of the class may be easily sabotaged by [a] small group of individuals with antagonistic goals." The problem is akin to the problem of standing to appeal; class members have been required to intervene to achieve appeal standing, for fear "that individuals with interests adverse to the class, or with non-typical claims, will interfere with or complicate the litigation." The purpose of the class action is to render manageable litigation that involves numerous members of a homogeneous class. Those individuals who seek to appear most likely "are trying to place their individual interests ahead of the class." They present the same risks as the risks presented by some objectors.

Prof. Susan P. Koniak, 01-CV-086: (These comments offer a very broad spectrum of issues that are summarized here because they are brought to bear on the question of mandatory notice in (b)(1) and (b)(2) class actions.)

There is a justified public crisis of confidence in class-action procedure. The proposals do not adequately protect the interests of absent class members. Class members need protection from class counsel; from the defendant and its lawyers; and from the overworked judges "who do not function as adequate fiduciaries for absentees." "The instances in which class representation is now permitted do not match any principled justification for disposing of the rights of individuals without their explicit consent." Every reasonable effort to notify those individuals should be required.

The "efficient" functioning of the judicial system is not alone justification for class procedure. The principled purpose underlying (b)(3) classes was that small claims otherwise would receive no hearing; it is proper to protect against loss of the

deterrent function of the law. But transferring (b)(3), and later (1) and (2), to mass torts is not principled. The acceptance of "side deals" as in Ortiz and Amchem in the lower courts illustrates the unfairness of the procedure.

"[T]he lines between the (b) categories are so ephemeral that until those categories get fixed it is simply unjust to tie important procedural rights to these categories." It is vitally important to clearly understand categories that determine important procedural rights, but that we do not understand. Plaintiffs' and defendants' lawyers alike benefit from the uncertainty: the defendants can bargain for a "locked-in" class, and by paying more for global peace create an incentive for class counsel to go along. "[T]here is presently no theory that adequately explains why absentees in the (b)(1) and (2) categories are due so much less process than absentees in (b)(3) classes. That makes Rule 23 arbitrary." Rule 23 should "include a strong presumption that absent class members in any (b) category receive the best practicable notice and a right to opt-out." A district court must provide a clear justification for deviating from the presumption, and there should be de novo appellate review.

The Ninth Circuit decision in Epstein v. MCA, 1999, 179 F.3d 641, creates great doubts about the freedom of class members to remain aloof from a class action that does not provide adequate representation. It seems to preclude collateral attack so long as a class member could have made an objection in the class action. "This Committee should make clear that Epstein does not preclude a collateral attack in one federal court on the adequacy of representation provided absentees in an earlier class action in state or federal court, and at a minimum in the latter situation, i.e., two federal court proceedings. * * * If you do not believe it is important that absentees retain the right to right to remain absent, I believe Rule 23 should be amended to require that all absentees receive individual notice to inform them that they will be bound with no recourse, if they fail to travel across the country (if need be) to monitor what is happening and to ensure that the representation they receive is adequate."

Lawyers' Committee for Civil Rights Under Law, 01-CV-091: (For 18 civil rights, public interest organizations, and bar associations; joined by law firms, practitioners, and professors.) **(1)** The FJC Empirical Study of class actions contradicts anecdotes and other unsupported assertions regarding class-action practice. A number of the problems addressed by the proposed amendments are not problems at all, or are not problems with class-action practice generally. The perceived problems do not appear in civil rights actions, and the proposed solutions would have untoward effects. For the 12-month period ending September 30, 2000, 273 civil rights class actions were filed in federal courts, 11.4% of all federal-court class actions. Together with securities class actions, nearly 40% of class actions fall into circumstances that the FJC study described as routine, easy, and well-established applications of Rule 23. It is a mistake to restructure practice in ways that affect these successful experiences. The economics of civil rights

class-action practice are an important consideration. There is no economic competition among lawyers for these cases; it is all too difficult to recruit lawyers. Statutory fee awards tend to award compensation that would be fair for a case without any risk; there is a risk, and the awards are correspondingly inadequate to entice representation. (The report attaches a report by Professor Stewart J. Schwab analyzing Administrative Office Data that show the low success rates in federal-court civil rights actions.) Requiring notice at the time of certification will greatly increase the costs of bringing these actions – in some cases without extensive discovery or expert witness costs, the cost of notice will match or exceed the cost of litigation. No real need or interest is served by notice. In school desegregation, employment or housing discrimination, voting rights, and other cases, class members receive notice of the litigation as members of the community involved: "The drafters of the 1966 Amendments understood that this would be the case * * *." Mandatory notice after certification cannot serve a constructive purpose. The suggestion that it supports an opportunity to challenge certification invites relitigation without benefit. "The factors determining (b)(2) class certification depend on the claims asserted, the conduct of the defendant, and objective characteristics of affected class members, not the subjective views of individual class members." The party opposing the class, moreover, can be expected to raise whatever issues counsel against class certification, including conflicts among class members. Rule 23(d)(2) provides authority for directing notice in "the rare case" where class members cannot be expected to be aware of the action or there is some particular reason. **(2)** 23(c)(2)(A)(i) subtly adds a further new requirement for (b)(2) classes by providing notice of the right of a class member to enter an appearance through counsel. This contradicts the intervention provisions of Rule 24 and is "logically flawed. It is not the notice currently supplied to (b)(3) classes that gives rise to the right to individually appear through counsel, but the right to opt-out of the class. Members of (b)(3) classes that do not opt-out have no such right in the absence of appropriate grounds for intervention under Rule 24, and logic provides no basis to afford that right to members of (b)(2) classes." This amendment could result in (b)(2) actions "becoming no more than cumulative individual actions with multiple counsel acting on behalf of multiple individuals." If substantial interests are not represented, Rule 24 intervention provides protection.

NASCAT and Committee To Support the Antitrust Laws, 01-CV-093: Generally support notice in (b)(1) and (2) classes, but room should be made to accommodate plaintiffs who cannot afford notice. The court should have discretion to balance the benefit of notice against the cost and the ability of plaintiffs to pay, "permitting the court in exceptional circumstances to wholly dispense with notice."

Prof. Howard M. Erichson, 01-CV-097: At least some notice should be required in (b)(1) and (2) class actions. In some cases "a reasonable number" may be very few class members when greater

notice would be cost-prohibitive. Indeed, there should be greater flexibility to dispense with notice to all identifiable class members in (b)(3) classes, as contemplated in earlier Advisory Committee proposals. The Note might address the timing of notice: in (b)(1) and (2) classes, notice is most important at the settlement or remedy phase, when it is more realistic to expect class-member participation. Monitoring of the action's progress up to that time is likely to be rare.

Association of Trial Lawyers of America, 01-CV-098: Generally, ATLA favors as much communication as possible by attorneys with all class members throughout the pendency of a class action. But the cost of notice could force counsel to abandon class actions. "Depending on the type and extent of the notice directed, the cost of the notice could easily exceed a proper award of damages and/or legal fees." This result might make it more expensive to pursue a class action than to enforce rights through individual actions. Defendants could use a notice requirement to avoid the court's consideration of the merits. "We can only suggest that, if class action defendants are truly concerned about the adequacy of communications between the plaintiff class and its attorneys, they might pay for such notice themselves, especially when they know that their liability is clear." At a minimum, it should be "much clearer that in (b)(1) and (b)(2) actions it is not necessary to provide notice in the same ways and to the same extent as in (b)(3) actions. Notice by the most economical means should be the standard, and the rule should be structured in such a way that class action defendants cannot use it aggressively to induce plaintiffs to abandon legitimate cases."

Todd B. Hilsee, D.C. Hearing 238-241: The "reasonable number" term is vague. How many is that? Should it be measured as reaching a particular percentage of the class, given the ability of communications professionals to determine what percentage of a class will be reached by various methods of notice? But it is difficult to be precise; what is reasonable depends on the circumstances. It would be foolish to spend $3,000,000 to give notice of a $3,000,000 settlement. But a "reasonable number" is not a useful phrase.

Bruce Alexander, Esq., D.C. Hearing 310 ff. and Written Statement, 01-CV-041: Notice to members of a (b)(1) or (b)(2) class is a good thing. But the Note on including notice with a defendant's regular communications to the class is not. Communicating with the class is the responsibility of class counsel. Sadly, many class counsel do not want to have anything to do with communicating with their clients – they do not want their name, address, or phone numbers on any communication lest class members call for an explanation of what is going on. Even the simple addition of a "stuffer" increases costs. But other burdens are far greater. Recipients will conclude that a notice mailed out by the defendant is a sign that the defendant is liable or has admitted liability. Sending notice will be further complicated because it is not likely that the class definition will coincide completely with any established mailing list. Mistakes will occur in attempting to focus the class

communication. Moreover, inquiries about the notice will naturally be made to the defendant. The defendant will have to establish special systems to respond to the inquiries, including training people who can respond appropriately. "There is simply no good substitute for a separate mailing with separate controls, properly targeted, with a separate return address and with a separate number to call or place to write with inquiries."

Bruce S. Harrison, Esq., D.C. Hearing 335-338: In response to a question, observed that notice to class members has never been a problem in over 50 employment class actions he has litigated. Notice was given; plaintiffs' counsel did not object to providing notice. The cases were all money damages cases.

Keith L. Fisher, Esq., State of Wisconsin Investment Bd., 01-CV-066: "Because class members in these cases do not have the right to protect their individual interests by opting out, their ability to monitor the cases is all the more important." The notice requirement should be no less demanding than the requirement in a (b)(3) class. "This is not to say that district judges cannot balance the cost of providing notice with the benefits, and require a lesser manner of notice in those instances where providing individual notice is not economically feasible."

Other Notice

Conference: There should be automatic review of the notice plan in a nonadversarial setting as part of the case-management plan.

Conference: To be effective, notice should be directed individually to class members as a letter from the court.

Conference: No one will argue with a "plain language" requirement. "Almost every notice is unintelligible to the ordinary person." Lawyers, anxious to protect themselves, draft impenetrable language. Plain language is achieved only when the judge writes the notice. The Rule might focus on encouraging the judge to write the notice, or else to appoint someone – preferably not a lawyer – to write it.

Conference: We should consider imposing notice costs on defendants in (b)(3) class actions. And we should consider softening the requirement of notice to every individual (b)(3) class member; in some small-claims classes, representative notice is enough. (A panel member noted that the Advisory Committee had abandoned this idea in face of the difficulty of deciding which class members would get notice.)

Barry R. Himmelstein, Esq., S.F. Hearing 15, 19-: It is not practical to require that the order granting certification also direct appropriate notice to the class, (c)(2)(A)(i). That is practical when the parties have worked out a settlement and agreed on notice before certification. But if there is a contested certification the defendants are not willing to work with the plaintiffs on notice until certification is granted. Publication often is important. The AARP publication is very effective, but it has a two-month advance booking requirement. It is proper to require that notice be covered by a court order, but not practical to require that the order issue at the time certification is granted.

James M. Finberg, Written Statement for S-F Hearing: The FJC notices appear to attach opt-out forms, objection forms, and claim forms to the notice. Only claim forms should be attached. My practice is to contact people who have opted out; in the overwhelming majority of instances, they did not understand what they were doing; they did not understand that by opting out they lost the right to participate in the settlement. They are misled to believe that they must complete the opt-out form to be able to participate in the settlement. The same is true for the objection form. The sample notice forms also are too long. Class members will feel overwhelmed and will not try to read the notice. In addition, it costs more to print and mail a long form. The maximum length should be four printed pages. (The written statement 01-CV-07, is similar.)

Brian Wolfman, D.C. Hearing Written Statement 01-CV-043: The notice provision refers to a right to appear through counsel. It should say "with or without counsel," so that objectors know they can object without having to retain a lawyer. The Notice also should

include an opt-out form; parties often do not use them, and courts have not demanded them. Instead, the parties craft procedures that make it onerous to opt out. And the notice should not be drafted in terms that discourage opt outs, as often happens when the parties draft the notice to explain the disadvantages of opting out without noting the advantages. "[A]n easy-to-use form is the best means for insuring that class members can exercise their opt-out rights if they wish to do so." Rule 23(c)(1)(A)(i) should include, p 3, lines 36-37, this phrase: "including an explanation of the consequences of exclusion on members of the class."

Michael Nelson, Esq., D.C. Hearing Written Statement 01-CV-021: The notice should state the class definition, issues, and defenses in the same terms as the certification order.

Stephanie A. Middleton, Esq., D.C. Hearing Written Statement 01-CV-032: The Note seems to endorse requiring the defendant to assist in providing notice to the putative class "and to pay for the prosecution of the litigation against itself when no determination of the merits has been made." This is troubling.

Alliance of American Insurers, 01-CV-068: Approves plain language and the added categories of information specified for notices. This information is typically found in class notices.

Peter J. Ausili, Esq., E.D.N.Y. Civil Litigation Committee, D.C. hearing 206: The list of factors to be put in the notice may discourage inclusion of other information that should be there. The notice should indicate the relief sought, identify the opposing parties including class representatives and class counsel, provide the names and addresses of class counsel, and describe succinctly the substance of the action and the parties' positions. (The written statement, 01-CV-056, adds that including the class claims, issues, and defenses is not appropriate – it is too early to know them at the time of notice. If there is to be a definition, it should be in terms of transaction or occurrence to assure that claim preclusion fully applies.)

Todd B. Hilsee, D.C. Hearing 219-241: Plain language alone is not enough. Notice must satisfy three criteria: (1) It must get to the class. "Net reach" and "frequency of exposure" analyses by communications professionals can determine this for various methods of notice. It is difficult to speak in general terms about the possibility of reaching a large percentage of class members by low-cost means such as press releases and internet notices. Something like an ad in USA Today does not reach many people – our figures show a maximum opportunity to reach 3% of a target audience. (2) The notice must be noticed. (3) The notice must be read and understood – this is the part addressed by the plain language requirement. As to being noticed, the Rule might require notice "**designed to be noticed.**" Prominent headlines, appropriate envelope call-outs, and other inviting and well-known design features are important. Even the sample summary notice developed by the FJC will not work as a model for publication: parties will struggle to include too much information, and then present it all

in small type in the back pages to save money. "The main message, who is affected, and why it is important to them must be the first item that draws their attention." It is useful to mention the court, as on the envelope, because that lends credibility. There also is a risk that notices may be designed not to be noticed: a party wants to minimize negative publicity, or to reduce class participation – even plaintiffs may want to avoid a costly campaign or the potential for handling responses or opt-outs. The idea of "sampling notice" is relevant only if you have names and addresses; even then, it is difficult because experience does not yet enable us to determine whether many or very few of those who actually get notice will respond to it. So too, an opt-in system is difficult because there is no way to determine whether those who do not opt in are in fact not interested in participating. It is important to use notice professionals, not lawyers. And the notice must not look like advertising – Postal Service statistics show that 87% of mail that is perceived as advertising is not read. (His written statement, 01-CV-030, suggests that the FJC sample notices are too long and complicated; the color-coded forms are too much for anything but very big cases. He has been working with the FJC to help improve the samples.)

Court Advisory Comm., S.D.Ga., 01-CV-053: The courts already approve notices to the class. Rather than spell out notice items, the rule should read: "The notice shall contain such information to class members as the court determines is necessary to describe the action, its consequences for the class, and the right of a class member to participate in or be excluded from the case."

Bruce S. Harrison, Esq., D.C. Hearing Written Statement 01-CV-060: (c)(2)(A) should require that the notice advise potential class members of the existence and status of any competing class actions.

Prof. Susan P. Koniak, 01-CV-086: The notice description of the right to appear in a class action should not refer to "counsel as if counsel were necessary to appear as an objector or supporter of the class action litigation or settlement." There is a particular problem that a pro se objector may not understand that an appearance may waive some jurisdictional objections: "the notice must explain in plain English that showing up may cost you and explain what that cost is. Not an easy task in plain English, although possible." It would be better to adopt a rule that any appearance is "special," "so that any objections to the jurisdiction of that court are not deemed waived because the spider told the fly to come into his web."

Plain Language

Conference: This adds nothing. Plain language is sought now.

Jocelyn D. Larkin, Esq., S-F Testimony 146: For The Impact Fund. The notice language change is welcome.

ABA Antitrust Law and Litigation Sections, 01-CV-069: "[T]he laudable goal of easy-to-understand notices should be reinforced by inclusion of this requirement in the rule."

Victor E. Schwartz, Esq., for American Tort Reform Assn. and American Legislative Exchange Council, D.C. Hearing and Written Statement, 01-CV-031: Plain language is "probably more important to lay people than any other proposal you have here." But there should be more direction as to notice elements. The notice should inform class members of "what do they get"?; what class lawyers will get if the action is successful; and any costs or burdens on class members. It also should describe any counterclaim or notice of intent to assert a counterclaim against class members, and the address of counsel to whom class members may direct inquiries.

David Snyder, Esq., and Kenneth A. Stoller, Esq., D.C. Hearing 174: Agree with plain language in class-action notices. (The same statement is made in the Written Statement, 01-CV-022.)

David E. Romine, Esq., D.C. Hearing 243: Endorses the plain language requirement.

Ira Rheingold, Esq. (National Assn. of Consumer Advocates), D.C. Hearing 266: Plain language is extremely important. But Mr. Hilsee's testimony suggests that the proposal may need a little more work. (The written statement, 01-CV-062, expands on this: the FJC sample forms are long. They should not become the standard, but "should be the exception." Items that should be included in a short introductory statement that prefaces the body of a more detailed notice are detailed in the NACA Guidelines, 176 F.R.D. at 400-401.)

Patrick Lysaught, Esq., for Defense Research Institute, 01-CV-033, 034, 046, 047: Plain language is good. The success of the rule will depend on the clarity of the sample notices being prepared by the FJC. Because the second opt-out provision of proposed (e)(3) should be rejected, the items included in the notice should include a statement that class members who do not opt out of a (b)(3) class will be bound by any settlement negotiated by counsel and approved by the court as fair, reasonable, and adequate.

Comm. on Civil Litigation, E.D.N.Y., 01-CV-056: The Committee "is not aware of problems created by the wording in notices and hence sees no need for the plain language requirement."

Allen D. Black, Esq., 01-CV-064: Favors plain language, but is not sure the rule does enough. "Dense, long, and over-detailed notices are a real problem today. Empirical study of the forms most likely to convey core information to human being class members might be

useful. The cause of the problem is that lawyers draft the notices, and work too hard to protect themselves and their clients by including everything. The suggestion that there be an introductory summary helps, "but is not a cure all. The body of the notice remains too dense to be meaningful to most class members. And in my experience, even the introductory summaries are frequently opaque." The FJC samples move in the right direction, but are still too dense. Perhaps responsibility for clarity could be put on the court. Expanded use of websites might be a good solution: a very short and simple notice could be sent, designed to capture attention and convey essential core information. Or a short and plain notice could include an 800 telephone number to call for more information; a neutral entity would be needed to staff the phone bank. However that may be, the Committee Note should deal with remedies for inadequate notice: it could say that only severely inadequate notice, in effect no notice at all, justifies collateral attack on the judgment, while slight deficiencies can be ignored.

Keith L. Johnson, Esq., State of Wisconsin Investment Bd., 01-CV-066: Expresses concern that the effort to provide notice in plain language will lead to less information in class notices. The Note "should encourage courts to tailor the tone and content of the notice to the expected ability of members of the particular class to comprehend the notice and the complexity of the case." And offers several suggestions for the content of settlement notices; these suggestions are summarized with Rule 23(e)(1).

Civil Division, U.S. Department of Justice, 01-CV-073: "[S]upports improving the clarity of class certification orders and notices."

Washington Legal Foundation, 01-CV-082: "Nor can it hurt to specify that class-action notices must be in 'plain, easily understood language.'"

Mehri & Skalet, PLLC, 01-CV-083: Supports the change. But adds that local rules in some courts have hampered direct communication by class counsel with members of employment discrimination and consumer protection classes. And "there are well-documented examples of defendants communicating information to class members to discourage them from participating in the lawsuit." There should be better legal protections against communications between defendants and members of a putative class.

Federal Trade Commission, 01-CV-085: "[E]nthusiastically endorses this provision as an important step toward ensuring that consumers are better informed and, as a result, better able to make rational decisions regarding the exercise of any legal rights affected by the class action." And commends the FJC for its efforts to develop sample notices, and in particular for its efforts to test notices empirically through focus groups.

Professor Susan P. Koniak, 01-CV-086: "The plain language requirement is a long overdue and quite welcome amendment." But each notice should include an opt-out form, with a preaddressed and postage-paid envelope.

State Bar of California Committee on Federal Courts, 01-CV-089: Supports the plain language requirement.

David J. Piell, Student, 01-CV-094: The plain language proposal is an example of the "no brainer" amendment that simply diminishes the force of the rule as a whole. There is no need to tell the courts to make this obvious effort.

Summary of Comments: Rule 23(e) 2001 General

Conference: The proposal largely codifies existing practice. Let it be assumed that a settlement satisfies the requirements of Amchem and Ortiz; that it is not possible to adopt rules that make more drastic changes; that the Notes are fine; and that the settlement opt-out is a distinct problem. On those assumptions,it must be decided whether proposed (e)(1), (2), and (4) are an improvement. The first statement was that there are no major problems; the notice provision in (1)(B) is an improvement; it is proper to spell out the standard for approval; it is good to require findings. But there are some problems with the Note.

Conference: What is attempted is sensible. But the proposal does not address the "current crisis." It addresses past wars. Clever attorneys in the hip-implant litigation are attempting to create a non-opt-out class. And a settlement rule must address the need to achieve fairness and avoid discrimination. A matrix settlement will create disadvantages for some, who should be free to opt out. "The fact that a majority of class members want a settlement does not justify giving the class an impregnable first lien, but only for those who remain class members by refusing to opt out."

Conference: The proposal generally is a nice job in doing what the Committee is allowed to do – codify best practices. "It would be desirable to be more daring." Reform efforts have been killed by the excessive demands of defense counsel, seeking such things as opt-in classes. The hip-implant ploy is new; we should not fight a war before it starts.

Conference: The rule is "a step forward, as a codification of practice with some additions." It will help courts that do not often encounter class actions, and that tend to view settlement from the bi-polar view taken in simple litigation. It is difficult to believe that the lien ploy adopted in the hip-implant litigation will be approved; there is no need yet to think about shaping the rule to reject it.

Conference: If the proposal largely tracks and formalizes existing practice, it would be better to leave it alone. Changes lead lawyers and judges to look for reasons beyond confirming existing practice. Judges will think they are being asked to "put the brakes on." But if substantive change is intended, it should be considered on the merits.

Conference: Why require approval of dismissal or withdrawal before certification? And why require notice if a class is not certified: who gets the notice? And an attempt to list factors is a problem; the list tends to be treated as describing the only factors to be considered, but is not likely to be complete.

Conference: It is good to express present good practice in an expanded rule. This is a useful guide to judges and lawyers.

Conference: Notice of pre-certification dismissal, if any, should be simple.

Conference: The Note should refer to the need to consider subclasses at the time of settlement review.

Conference: Notice and opt-out exist because unscrupulous class and defense counsel sell valid claims down the river. Small claimants do not need individual notice.

Conference: Settlement is an area where both plaintiffs and defendants have agreed for years that Rule 23 could be amended. We need assurances of fairness in the nonadversary setting of settlement review. One possibility is to appoint an objector, but consideration of that approach caused real consternation. Trial and summary judgment are different from settlement; they were presented by adversaries and decided by the court.

Conference: Settlement classes are always adversarial: someone always appears from the class as an objector, or a member of the plaintiffs' bar appears, or a co-defendant objects. "The day-to-day problem is the sweetheart settlement that no one objects to."

Conference: That observation applies only in mass torts. The FJC study showed that 90% of the settlements reviewed were approved without objections and without change. "Class settlements are fundamentally different from individual actions, where settlement is favored."

Conference: Why give notice of a pre-certification dismissal that does not bind the class? A defendant who wants such notice should pay for it.

Conference: There is no authority to do anything before certification; a defendant should not be forced to pay for notice of a pre-certification dismissal because the plaintiff brought a bad case.

Conference: There is confusion about dismissal of individual claims without notice. Why mention notice in connection with voluntary settlement? The Note can be greatly condensed; but the listed factors "are a good start," and it is better to have them in the Note than in the Rule.

Conference: We do not want the judge to be a fiduciary for the class, "part of the strategy that causes the defendant to pay money." Page 54 of the Note refers to seeking out other class representatives when the original representative seeks to settle before certification; the present lawyers, or other lawyers, may seek another representative, but the judge should not be involved. Page 68 is similar in suggesting that the court might seek some means to replace a defaulting objector; at most, the court should set a defined period for other objectors to appear. Generally, the Notes should be shorter. But the factors for reviewing and approving a settlement are good and well stated. Citing cases helps.

Conference: Proposed 23(e)(1)(C) speaks only of "finding" the settlement is fair, reasonable, and adequate; the Note, p. 55, requires detailed findings. The detailed findings requirement

should be stated in the Rule. The settlement-review factors properly belong in the Note, but factor (I) needs "some tweaking": it should say explicitly that it looks to results for other claimants who press similar claims. The Note observes, p. 65, that an objector should seek intervention in order to support the opportunity to appeal. It would be better to adopt an explicit rule provision — similar to a draft considered by the Advisory Committee — that would support class-member appeal without intervention. Class members often act pro se; such refinements on objection procedure as the need to seek intervention in order to protect appeal rights are inappropriate. And the p. 67 reference to Rule 11 sanctions against objectors "comes across as a threat"; we should be hospitable to objectors.

Conference: The "fairness" of a settlement is not defined. Should it be the greatest good for the greatest number of class members, even though the settlement may be ruinous for some? The Note, and perhaps the Rule text, should incorporate a test of nondiscrimination. The "trick" of imposing a lien on the defendant's assets only for the benefit of those who remain in the class is subordination of one group to another, and unfair.

Conference: The Note list of settlement-review factors should expand to include the effect of the settlement on pending litigation.

Conference: The first sentence on Note p. 55 says that notice may be given to the class of a disposition made before certification; it is not possible to give notice to a class that does not exist.

Conference: The settlement-review proposal seems about right.

Conference: The Note focuses on the need for findings; this should be in the Rule.

Written Statement for S.F. Hearing: It is proper

complicated actions, made more complicated by interlocking state and federal cases, choice-of-law rules, MDLs, fast-developing fact situations, and even continuing legal research. After filing it may prove wise to eliminate a particular theory. A RICO theory, for example, may seem to jeopardize certification if a court applies an individual reliance requirement; rather than run this risk, it may be wise to withdraw that theory by amending the complaint. It may advance the class position, not harm it, to withdraw a theory that may prevent certification. "It is best to bypass marginal theories if their presence would spoil the use of an aggregation device that on the whole is favorable to the holders of small claims. So a class action complaint is very much a work in progress." Generally there is a motion to dismiss; that does not cut off the right to amend. An answer will come months later, after a ruling on the motion. "A lot happens before then. And plaintiffs' lawyers of various jurisdictions who have been pursuing various theories come together and, hopefully, try and put together the best combined work product for their clients." We should not have to explain the reasons for changing theories "and have to explain our strategy and legal theories to the defendants." Clarification of the Rule and Note would help. Court approval should be required if class action allegations are amended out entirely, but not for one amendment as a matter of right. We need a bright-line rule. That means that the rule should not distinguish between a minor amendment and a major amendments such as one that drastically narrows the class definition. If there are side-deals going on, the defendant will want total withdrawal of class allegations because settlement with any class claims remaining will require judicial scrutiny. Proposed Rule 23(e)(2) requires that information about side deals be available to the judge. "The judge will find out about it sooner or later and if you try to pull something, * * * you will be held accountable."

John P. Frank, Esq., 01-CV-03; again in S-F Hearing 92 ff: (The specific focus is on settlement review, but the underlying theme is broader:) Administrative Office Reports show 2,393 class actions in federal courts for the year 2000. The proposed Rule 23 revisions

court approval of every precertification settlement or dismissal of class claims "would be that plaintiffs would file class actions in order to gain settlement leverage for their individual claims. On the other hand, defendants are encouraged to simply 'buy off' a class representative and/or his or her attorney in order to avoid a class action. There ought to be some adverse consequences in the Rule to prevent these actions by plaintiffs or defendants or their counsel."

Mary Alexander, Esq., S-F Hearing 65: ATLA generally supports the concept of judicial involvement and scrutiny. Although often exaggerated in debate, there are some problems and abuses in class actions, "and many of these involve settlements and the settlement process." ATLA also supports (e)(1)(B) requiring notice of a settlement that would bind class members.

Jocelyn D. Larkin, Esq., S-F Hearing 146: For The Impact Fund. The settlement review and other proposals are welcome.

John Beisner, Esq., D.C. Hearing Written Statement: (1) (e)(1)(A) does not change current law, but the Note implies an intent to crack down on named-plaintiff-only settlements. All too often a named plaintiff adds a class allegation simply to draw attention, without any intention to pursue class claims. The Note should recognize the need to resolve such cases on a named-plaintiff-only basis. It may be difficult to articulate this proposition, but if it is not stated indisputably nuisance class actions will loom larger. (2) The Note to (e)(1)(B) should be clearer about the circumstances that might justify notice to the class of a pre-certification dismissal: only if irregularities are spotted, such as collusive agreements to dismiss, should notice be required. (3) The (e)(1)(C) hearing requirement is consistent with current practice and should be adopted. The requirement that the court make findings is important. The factors described in the Note "track existing law on class settlement reviews and appear to reflect appropriate lines of inquiry."

Prof. Judith Resnik, D.C. Hearing p 63: In the course of discussing court appointment of class counsel, observes that some cases characterize the court as fiduciary for the class at the time of settlement. "There, I think the language is a little loose and you might not really want to use the word 'fiduciary.'"

Thomas Y. Allman, Esq., D.C. Hearing 110: Rule 23(e) "is an excellent rule." Professor Fiss is wrong to insist that a settlement is simply a contract. The involvement of the district court makes the judgment a judgment. Amchem has not impeded the ability to settle. "Where you have a settlement, manageability drops out and the question is, is it fair and adequate * * *." (His written statement adds that active participation by the district court is essential to allay lingering suspicions about the collusive nature of national class-action settlements, particularly when there are competing plaintiff groups and a defendant eager to settle. When a settlement does not bind the class, however, it is unnecessary, even futile, to require formal notice to putative

class members or to require a full hearing.)

Brian Wolfman, Esq., D.C. Hearing 120: Notice of the settlement should be individualized notice, particularly when there is a claim procedure or some other procedure that will extinguish class members' rights for failure to become involved. There have been cases of publication notice at the settlement stage "with an enormous adverse effect on class members."

Mr. Wolfman's written statement, 01-CV-043, adds many further observations. **(1)** Generally supports proposed (e). **(2)** The introductory paragraph of the Note should drop the confusing reference to settlements presented to the court as a settlement class but found to meet the requirements for certification for trial. There is no need to mention that here. **(3)** Why does (e)(1)(A) refer to "withdrawal"? The Note should clarify this. **(4)** The Note discussion of payments to a representative to stave off the class action seems to encourage the buy-off by observing that it would be wrong to force continued class proceedings with an unwilling representative and a defendant eager to buy out. The reference to seeking another representative suggests a process that would make a buy-out unlikely unless there is an understanding that plaintiffs and their lawyers will go away. An agreement by a lawyer to restrict future practice in this way runs into Model Rule 5.6(b). Rule 23(e) "should prohibit [this type of conduct] as part of the process in which the court reviews the propriety of dismissal of a putative class action." The "plaintiff should not be allowed to do an about-face for personal gain, leveraged only by his or her class allegations." **(5)** Notice in a reasonable manner to those who would be bound by a settlement does not refer to "withdrawal"; the Note should explain that this is because a withdrawal does not bind the class. **(6)** The line between notice and no notice is not properly drawn. Dismissal of "all" class claims does not bind the class. If class members have not known of an action before withdrawn, there is no reliance and no need for notice. But if there is reliance, notice should be required even if there is no preclusive effect – this can happen when class members have been notified or have otherwise learned of the class allegations and have reason to believe their interests are being represented. **(7)** (e)(1)(B) raises and does not answer an important question of settlement notice. To require "reasonable notice" overlooks the need for "best practicable" notice, no matter what type of notice occurred earlier at certification. "Because settlement is the point at which absentees' rights are extinguished, that often will be the point where notice to the class is most valuable." This is particularly important when the notice is the means used to "register" class members or to receive their claims "and thus actually furnish them the relief that the settlement provides." It makes no difference whether the class is a (b)(1), (2), or (3) class. (e)(1)(B) "should state that when the settlement notice would effectively dis[sic for ex]tinguish the substantial property interests of the absentees, the notice requirements of proposed Rule 23(C)(1)(A)(iii) apply." "Reasonable manner" is not understood in this sense. **(8)** (e)(1)(C) codifies

existing practice; it is a useful reminder. The Note list of factors "will be useful to courts, particularly those that do not often consider class action settlements." Two of the factors should be clarified. (H) refers to claims by other classes and subclasses – if it is intended to refer to claims in separate actions, it should say so. (I) refers to results achieved for other claimants; if it is intended, as it seems, to refer to results achieved outside the class action, it should say so. And the Note reference to the need to make findings should be brought into the Rule – it might be wise to refer explicitly to Civil Rule 52. **(9)** Later, in discussing 23(h)(3), states that the Note should stress the importance of combining into one hearing consideration of the fairness of a proposed settlement and attorney fees: "the fee determination cannot be made separately because it is a critical consideration in the court's overall fairness and adequacy of representation determinations."

Lewis H. Goldfarb, D.C. Hearing 138-140: The Committee Note at p. 54 speaks to court approval of pre-certification dispositions in terms that imply that class members can be bound be a disposition reached before class certification. That cannot be. This language will lend impetus to the incentives of lawyers to piggyback on government investigations. One client had resolved a government investigation and begun "giving redress to owners" when class actions were filed and the class lawyers asked the court to give them 25% out of the class redress "and to put their names in the notices that the government had already approved to be sent out in order to get a piece of the action."

Michael Nelson, Esq., D.C. Hearing 165-166: Something should be done to control voluntary dismissals before certification. (This statement is tied to concern that plaintiffs' lawyers may repeatedly file, decide that the court is unfavorable, and dismiss for the purpose of filing the same action in another court.) (His written statement, 01-CV-021,states explicitly that requiring approval of pre-certification dismissal may deter forum shopping. But the Note overstates the possible impact on class members. Unless there has been substantial news coverage, it is unlikely that putative class members will rely on the filing to toll the statute of limitations. We do not require notice when a court refuses to certify a class, an event that ends the tolling; there is no more reason to require notice when the plaintiff voluntarily dismisses and the court approves the dismissal.)

David E. Romine, Esq., D.C. Hearing 242 ff.: The RAND study included five federal-court class actions; it concluded that the settlement reviews in four of them were strong and effective. The study's conclusion that there is a need for better settlement review draws more from the state-court class actions included in the study. The FJC study also seems to suggest that federal settlement review is adequate. Settlement rates for class actions were approximately the same as for other actions; the majority of class-action settlements were preceded by some ruling on the merits such as a motion to dismiss. The problem in federal courts is a matter of public relations and public education. It would be a

mistake to add further settlement review requirements. These would impose costs of delay; the procedural requirements will take time. Monetary costs also result, because lawyers will spend time on the review.

Patrick Lysaught, Esq., for Defense Research Institute, 01-CV-033, 034, 046, 047: (1) (e)(1)(A) does not provide any criteria for evaluating a pre-certification settlement or withdrawal. The action may have been filed with class allegations only to enhance the ability to extract an unjustified settlement; it may have been filed in good faith, but the class allegations are later withdrawn because they prove insupportable. There should be further guidance to help the courts in identifying and assessing abuses. (2) (e)(1)(B) makes it clear, in line with the better present view, that pre-certification dismissal does not require notice to the class. DRI supports this. (3) (e)(1)(C) for the most part adopts the best current practice. The requirement of detailed findings is a critical step in the process and important for appellate review. The 19 factors for review are generally consistent with current law, but the Note should state more clearly that these factors are not exclusive and that the importance of each factor depends on a case-specific analysis.

Bruce Alexander, Esq., D.C. Hearing Written Statement 01-CV-041: The Notes to (e)(1) should encourage courts to grant a voluntary dismissal expeditiously if the class has not been certified; the only check should be a determination that there is no material prejudice to putative class members.

Professor Charles Silver, 01-CV-048: (1) The comment that notice should be "reasonable" is important, if reasonableness is measured by the size of claim, likelihood that an individual possesses valuable information, and likelihood that an individual has interests in common with others. (2) There is no need for notice when a class action is "involuntarily dismissed on the merits." (3) The suggestion that class members may rely on a class action, and deserve notice of dismissal is unpersuasive. "Knowledge of class actions is extraordinarily limited, even after notice is sent." A class member who wants protection can file an individual action and abate. If dismissal occurs after certification, class members are aware of the action and aware that they can enter an appearance. (4) Settlements involving non-cash relief should be discouraged. It might be required that the court insist on a cash offer as well. The cash-relief package would be used to measure fees. Class counsel could then argue for approval of the in-kind relief package as worth more to the class – perhaps because of tax advantages – but would have a heavy burden of proof.

Court Advisory Comm., S.D.Ga., 01-CV-053: (Refers to 23(d), seeming to mean (e)(1)(A):) Voluntary dismissal should be permitted as provided in Rule 41(a)(1). "We do not favor a mandate that notice to an alleged but yet uncertified class must be given * * *."

Comm. on Civil Litigation, E.D.N.Y., 01-CV-056: Current Rule 23(e) is sufficient; there is no need to change. The Notes suggest

Equal Employment Advisory Council, 01-CV-065: (These comments reflect a misreading of the (e)(1) proposal, and may reflect a need to clarify the rule or Note.) (e)(1)(A) requires notice of dismissal to all class members even though the case was never certified as a class action. This is not appropriate. It would prolong even nonmeritorious litigation. And it drastically reduces the incentive to settle with individual class members. There is no reason to fear reliance by putative class members; in a (b)(1) or (b)(2) class, indeed, the only source of reliance would be the proposal that notice be provided to class members – that proposal itself is a bad idea.

Keith L. Fisher, Esq., State of Wisconsin Investment Bd., 01-CV-066: (1) The comments on (c)(2) include lengthy suggestions for information that should be included in settlement notices, including the procedural posture of the case, whether there have been substantive rulings, the evidence bearing on key allegations, the defendants' ability to pay including insurance coverage, whether individual defendants will contribute to the settlement, whether the defendant has adopted changes of policy to prevent future wrongdoing, the risks of not settling, an explanation that attorney fees will reduce net recovery, the terms of attorney fees, the number of firms sharing the fees, the work performed by each firm for the class, the factors that account for varying allocations to class members, and when payments are likely to be distributed. (2) The (e)(1)(C) standard for approval is an important step toward heightened judicial scrutiny. The requirement of detailed findings also is important: "Encouraging judges to address these findings will deter inadequate settlements * * *."

Alliance of American Insurers, 01-CV-068: Supports changes that require approval of settlement or withdrawal of class claims; require notice of a proposed settlement that would bind the class; require settlements be fair, reasonable, and adequate; and require hearings on settlement.

ABA Antitrust Law and Litigation Sections, 01-CV-069: (1) "[T]hese proposals for settlement review are a welcome clarification of what is, and is not, required in the murky world of pre-certification settlements and dismissals." But the Note reference to notice of a precertification dismissal should be deleted. There may be inherent power to order notice, but the Note may create confusion as to the purpose of the amendment. (2) As to settlements that would bind a class, the rule incorporates existing best practices. The most important purpose is to set forth in detail what courts must do. Not all courts may be as experienced as those that routinely proceed in the manner directed by the Rule. "We strongly support this incorporation of best practices into the Rule." The Note provides "ample comfort that the factors enumerated * * * are but examples * * *."

Association of the Bar of the City of New York, 01-CV-071: Attaches a September 19, 2000 letter suggesting that a draft rule that included a list of factors to consider in reviewing a settlement

would only exacerbate the effects of attempting to codify best practices. Courts are likely to take the list as exclusive, no matter what the Rule says.

Civil Division, U.S. Department of Justice, 01-CV-073: "The Department does not take a position on the proposed provisions concerning court approval of the dismissal or withdrawal of class claims or issues."

National Treasury Employees Union, 01-CV-078: The Note refers to the number and force of objections. Confusion about settlement terms or about important court rulings may lead to many forceful objections that lack substance. The court should focus on "the quality and substance" of the objections.

Mehri & Skalet, PLLC, 01-CV-083: A number of the 23(e) changes "are an appropriate codification of existing law," such as formalizing the "fair, reasonable, and adequate" standard and requiring a hearing.

Beverly C. Moore, Esq., 01-CV-084: (1) The amendment does not deal with coupon settlements. Coupon settlements are receding; apparently defense proponents "and their willing plaintiff counsel fee recipients, have been 'shamed' out of this device, but only to some degree." The rule ought to require a "final accounting" of how many cash dollars actually flow to class members. (2) It should be required that the settlement notice inform class members of the relationship between the settlement amount and the amount that could reasonably be expected at trial. PSLRA notices are required to state this, but the notices show only that both parties cannot agree to what these figures are. The Note should urge that specific estimates, or informed guesstimates, be provided. (3) The Note proposes a list of settlement-review factors that is both over- and under-inclusive. Maturity is not a review factor, but a certification superiority factor. The very novelty of a case may militate in favor of settlement – who is to know what will happen on the merits? There are too many factors, and they repeat. The main factor is the comparison of settlement benefits to likely trial results. Too many judges will feel compelled to make meaningless pro forma specific findings as to each factor. And the Note should say that a settlement is less than fair and adequate if it has a claim procedure requiring class members to provide information the defendant already has, or if damage checks could be mailed without any claim procedure. (4) Approval of pre-certification dismissal is most needed when the defendant buys off the plaintiff. The court should be authorized to condition approval "on the plaintiff giving notice to at least a sample of class members, inviting the substitution of new representative plaintiffs."

Federal Trade Commission, 01-CV-085: Supports (e)(1)(C), "believing that close judicial scrutiny is the most effective means of protecting the interests of injured class members. But the rule should be changed to direct specific assessment of the realistic value of "coupon" settlements. The Note should list factors that

bear on the value, including the history of coupon redemption rates in similar cases, whether the defendants will track redemption data, whether all class members will be entitled to use coupons, whether redemption is easy, what time and product restrictions limit redemption, whether coupons must be issued until a minimum redemption level is reached, whether coupons benefit the defendant by bonus sales more than they benefit the class, whether there are significant restrictions on transfer, how the face value of the coupon relates to the purchase price of the product, and how coupons are distributed.

Prof. Susan P. Koniak, 01-CV-086: (1) Notice at the time of settlement should be a matter of right, directed to all class members, not shaped in the court's discretion. (2) The notice must include information on what others in and out of the class are getting from the class settlement or any side deal. This will further the purposes attempted to be served by Model Rule of Professional Responsibility 1.8(g), which requires a lawyer who simultaneously settles the claims of two or more clients to inform each client of what each is getting. (3) The decision in Matsushita Electrical Indus. Co. v. Epstein, 516 U.S. 367, has been interpreted by the Ninth Circuit in a way that permits counsel to bring a class action on one claim (violation of state fiduciary responsibility law) "with the intent of settling a different set of claims – claims that would have prevented certification entirely or under the subsection of (b) that counsel desired to use." There is a risk that this approach will be generalized. "Rule 23 should make clear that it is improper for a court to approve a class action settlement that releases claims that have not been certified as appropriate for class action treatment, even if the class receives notice that the claims will be released."

Committee on Rules, W.D.Mi., 01-CV-090: To require approval of precertification settlement "undermines the objective of eliminating improvident certifications * * *." It often happens that soon after filing it becomes apparent that certification is not appropriate, for want of numerosity or failure to satisfy some other requirement. In turn, that realization often results in "a quiet and prompt resolution of what was initially pleaded as a class action." The amendment creates a disincentive to prompt resolution and burdens the court with added work merely because the initial complaint included class allegations.

NASCAT and Committee To Support the Antitrust Laws, 01-CV-093: (1) The requirement that the court approve withdrawal of class claims may thwart the policy of Rule 15(a). The right to freely amend to withdraw some class claims will be burdened, and counsel may be required to disclose confidential thought processes. To the extent that the plaintiff must make a record of reasons to drop a claim, there may be untoward difficulty if further discovery shows reason to reinstate the claim. Defendants, on the other hand, will not have to seek permission to amend the answer. Plaintiffs will be left with an incentive to stick with the original claims, imposing unnecessary work on them and on defendants as well. The January 2002 drafting suggestions propose additions to the Note to address

this problem. They represent progress, but remain vague: what is a "central part" of a claim? The footnote states that concern is directed toward amendments that leave only an insignificant class claim, or one that manifestly could not be certified. The better approach is to limit the rule to complete withdrawal of all class claims, and note that the court has inherent power to control attempts to skirt the rule. (2) Notice of voluntary pre-certification dismissal should be directed only in an unusual case in which putative class members may have relied. Unless there was notice of the class action, reliance is unlikely. So it is suggested in the January 2002 footnotes, and they are supported. Today courts ask about the time that elapsed from filing and whether the filing attracted media attention; that is good practice.

David J. Piell, Student, 01-CV-094: Several of the Note criteria for evaluating a settlement cause concern. The court will find it difficult to be impartial with respect to (B) and (E) — for example, it has an interest in avoiding lengthy trial proceedings. The cost of trial is not an appropriate consideration where there will be fee shifting. The extent of participation in settlement negotiations by court or a court-appointed officer is also a problem: if the judge is involved, objective review is unlikely; even if it is a court-appointed officer, the judge is under pressure to accept the officer's recommendation. Factor (G) calls for findings similar to those required by Ortiz to approve a limited-fund class — that is a lot of work for something that is only one factor. The standard should be simpler: what do similar cases settle for absent class treatment? Could a class member recover more in individual litigation, after paying fees? How many class members have opted out of the settlement, and what percentage of the class are they? How much effort is required to participate in the settlement — some claims administrators have an incentive to prolong the proceedings, especially if affiliated with the bank that holds the settlement fund.

Prof. Howard M. Erichson, 01-CV-097: Requiring approval of pre-certification settlements or dismissals should be adopted. This wisely resolves an issue that has caused confusion.

Side Agreements

Conference: It is a mistake to require disclosure of side agreements. Side agreements "often fuel settlement." They will not remain secret. Judges will look into the deals. "But you need empirical evidence that these deals are promoting unjust settlements."

Conference: Side agreements should be disclosed, and should be disclosed early. This is particularly important when the agreements deal with fees, or effect settlements outside the class settlement.

Conference: Individual premiums incidental to settlement "are a real problem."

Conference: Some lead plaintiffs now ask attorneys to indemnify them against liability for costs. There may be a simple money buy-out of an objector. The Note should make clear that these are examples of side agreements.

Mary Alexander, Esq., S-F Hearing 65: ATLA is less concerned than some about so-called side agreements. "We wonder just how practical or appropriate it is for federal judges to try to police such agreements unless there really are serious allegations of wrongdoing and meritorious dissatisfaction by class members."

John Beisner, Esq., D.C. Hearing Written Statement: In concept, disclosure is laudable. But definition of what must be disclosed is critical. The Note should state that the intent is to "get on the table directly related undertakings." As one example, a defendant may be engaged in simultaneous negotiations with named plaintiffs in private class actions, with federal regulators, and with state attorneys general. Need all of these arrangements be disclosed? Or a defendant may be negotiating with class counsel on other matters – individual actions, or other class actions: critics of a settlement may argue that all of the negotiations are interrelated and should have been disclosed. "The Note also should address the ramifications of the failure to disclose these other agreements on a settlement that has been approved."

Prof. Owen M. Fiss, with John Bronsteen, D.C. Hearing Written Statement, 01-CV-023: "[T]he proposal that the court may (why not 'must'?) require disclosure of any agreement or understanding" would help.

Prof. Judith Resnik, D.C. Hearing Written Statement, 01-CV-044: Full disclosure of "side agreements of all kinds" should be required.

Brian Wolfman, Esq., D.C. Hearing 120-122, 126-129: There should be mandatory disclosure of all side deals. How much are class representatives getting? How have lawyers agreed to split the fees – are there arrangements that will bloat the fees to pay off people who otherwise have no interest in the case? "And what additional deals does the defendant have with the lawyers or with class members inside or outside the case"? There is no justification for

secrecy. In addition, objectors' deals should be subject to disclosure and approval "even when a settlement is pending on appeal." The suggestion that disclosure should be limited to directly related agreements is difficult to understand. If there are agreements between the defendant and class members "that truly have nothing to do with the rights asserted in the complaint or released in the settlement," there would be no point in disclosure. But if the agreement is related in any manner to the class action, it potentially impinges on class interests and should be disclosed. Confidentiality should be a concern only with respect to trade secrets or other items that would be subject to protection in discovery. Summaries might be appropriate if the agreements are very long, but that is "not my experience. My experience in doing these cases is that there are agreements to pay certain members outside the class, to pay certain counsel to go away." Absentees should be informed of these agreements.

(The written statement, 01-CV-043, says expressly that side-agreement filing should be mandatory. And the full agreement, not a summary, should be filed. "Based on our experience representing objectors, there is no way to know which settlements may be masking relevant side-agreements unless the parties disclose them." So it was only after the Amchem settlement was rejected that the settling parties disclosed that defendants had agreed to pay "what turned out to be millions of dollars of class counsel's costs in litigating the fairness of the settlement, even in the event that the settlement was not approved." This agreement was collusive. There is no countervailing benefit to non-disclosure. The proposal calls for agreements to be filed: this means, properly, that they will be available to everyone, including class members. It also means that they must be served; the Note should reiterate the service requirement. If there is work-product material in the agreement – a not likely event – there should be full disclosure to the court, even if publicly-filed versions are purged of the work-product. "[C]onfidentiality should never be granted for side-deals involving payments to similarly-situated plaintiffs" (as in Amchem and Ortiz), "incentive" payments for named plaintiffs, and other arrangements that may trade away class benefits. But confidentiality may be proper as to a settlement condition that allows a party to withdraw if a limit of numbers or value of opt-outs is exceeded – the numbers may be protected until the opt-out period expires, but the condition itself should be disclosed.)

Leslie Brueckner, Esq., D.C. Hearing Written Statement, 01-CV-020: Parties should be required to disclose: the rule should provide they must file a copy of any agreement made in connection with a proposed settlement. The court, for example, should know of the extent to which a defendant has agreed to settle an inventory of class counsel's individual cases in exchange for an agreement to file and settle a class action. The Note seems to give complete freedom, speaking of considerations that should guide counsel in disclosing agreements. "The difficulty here is that counsel for the settling parties have every incentive not to disclose the existence of related agreements * * *."

Walter J. Andrews, Esq., D.C. Hearing 282-284, 285-291: The filing requirement should not include confidential insurance agreements between insurers and their policy holders; Rule 23(e)(2) should exempt all underlying insurance agreements. These agreements may resolve many different sorts of issues between insurer and insured: whether or not there is a duty to defend; who will choose or direct counsel; what is the amount or applicability of insurance, deductibles, or self-insured retentions; whether there are multiple occurrences (a very common subject of dispute). The insured tells the insurer that settlement is possible, and they work out an agreement as to what the insurer is willing to contribute, subject to a reservation of rights. Although it might be useful for the court to know what assets are realistically available for settlement, there is a risk of abuse: "once that gets out, then the plaintiffs are going to believe that there's an even more attractive target to go after * * *." It would be some help to provide for disclosure in camera or under seal, at least if the information actually remains protected. (The written statement, 01-CV-036, adds that apart from that problem, the rule does not address the question whether failure to disclose a side agreement may be grounds for upsetting the settlement after it has been approved and reduced to judgment.)

Leslie Brueckner, Esq., D.C. Hearing 156-157: Disclosure of side deals is important, but the proposal lacks teeth. There is no affirmative obligation to disclose. "[T]hose agreements most likely to influence the court's thinking regarding a proposed settlement are those least likely to be disclosed to the court." There should be mandatory disclosure.

American Ins. Assn., D.C. Hearing Written Statement 01-CV-022: Insurance agreements should be exempted from the scope of "related undertakings," to preserve the confidential relationship between insurers and policyholders.

Bruce Alexander, Esq., D.C. Hearing Written Statement 01-CV-041: A few words should be added: "any agreement or understanding among any of their parties or their counsel made in connection with the proposed settlement * * *." [There is no further explanation.]

Patrick Lysaught, Esq., for Defense Research Institute, 01-CV-033, 034, 046, 047: The proposal seems to be designed to ensure a record of the complete agreement. Such disclosures should be automatic. But disclosures should be expressly limited to "matters directly related to the class settlement at issue." There may, for example, be overlapping actions pending simultaneously; the defendant may be negotiating separate settlements in each action, and the terms of each settlement may indirectly affect the terms of other settlements, but there is no reason to require disclosure of the indirectly related matters. To the contrary, there is no reason to create a device that enables counsel in other actions to obtain leverage or information used in separate settlement negotiations.

Professor Charles Silver, 01-CV-048: The comment on agreements to divide fees, as the attorney-appointment and fee provisions,

"reflects an unwarranted preference for regulation over private arrangements." The fee should be set up front; the court should not care how, given this incentive, counsel maximizes the value of representation by working with other lawyers. The comment about accepted conventions that may tie agreements made after settlement to settlements needs to be clarified.

Federal Magistrate Judges Assn., 01-CV-057: Proposed (e)(2) "will correct the problems associated with 'side agreements,' which are often not disclosed to the court, but are part and parcel of the overall settlement."

Allen D. Black, Esq., 01-CV-064: (1) The Note reference to "complete" copies or summaries of agreements is puzzling: I had read "summary" in the black letter to refer to oral agreements, and "copies" to require complete copies of any written agreement. (2) on p 59, third line from the bottom, the reference should be to counsel who have "litigated" class actions; "[v]ery few counsel have actually tried a class action." (3) p. 62 of the Note makes an important point that a class member may not purport to opt out a whole class of other class members; somewhere the Note should make the same point with respect to litigation class opt outs.

Equal Employment Advisory Council, 01-CV-065: "The proposed subsection is so broad that it is incomprehensible." It would seem to apply to a contract setting forth defense counsel fees, "or a document setting forth remedial measures the defendant company undertakes after a lawsuit is filed. Agreements or understandings like these do not relate to the terms of the settlement agreement * * *." Such documents, further, are likely to contain confidential information.

Keith L. Johnson, Esq., State of Wisconsin Investment Bd., 01-CV-066: Endorses (e)(2). Nondisclosure may be appropriate for "blow provisions" – the agreement that defendants can avoid the settlement if an excessive number of class members opt out; and "an agreement on valuation of other pending insurance claims as part of the settlement."

Alliance of American Insurers, 01-CV-068: Supports the (e)(2) provision that a court may direct the parties to file, etc.

ABA Antitrust Law And Litigation Sections, 01-CV-069: "We suggest that the language be revised or clarified to require, if the court so directs, disclosure of any side agreements involving objectors, insurance carriers and others who, although not technically parties, may nonetheless be subject to the court's jurisdiction or under the control of a party." (There is no further explanation.)

National Assn. of Protection & Advocacy Systems, 01-CV-077: (e)(2) filing should be made mandatory. "The permissive nature of the proposed rule opens it to abuse because of possible collusion between settling parties' counsel."

Beverly C. Moore, Jr., 01-CV-084: The (e)(4) requirement that withdrawal of an objection be approved serves the same purpose as the (e)(2) side-agreement provision, and should be included in it.

"A concern arises only if the objector receives something in return for the withdrawal." Even then, there is no problem if the payment is not at the expense of the class but is merits-based; disclosure is all that is needed. The element of real concern often is a fee payment to some competing group of class counsel who have brought a similar case in some state court; there even are cases where competing counsel first filed the competing case after the settlement was announced. Settling counsel have no choice but to pay, in order to avoid the protracted delays that result from objections. "Surely this needs to be disclosed as a 'side agreement' — and disapproved by the settling court." The recent practice of awarding fees in a lump sum to lead class counsel, to be allocated by lead counsel as seems fit, increases the need for disclosure. "The 'side agreement' disclosures most likely to be sought by settling defendants or objectors are how the total fees are to be divided among class counsel * * * . This will become fodder for more 'scandal.' * * * Critics will claim to have found instances of 'you scratch my back in this case, and I'll scratch your back in another."

Federal Trade Commission, 01-CV-085: Active judicial oversight requires that the court be fully informed as to the context of any settlement. For that reason, the FTC supports (e)(2).

Prof. Susan P. Koniak, 01-CV-086: (1) The unfairness of mass-tort class actions is shown by the "side deals" approved by lower courts in Amchem and Ortiz: in Ortiz, one-third of those injured were left outside the class and provided much better deals. And courts routinely allow selective extension of opt-out deadlines so the settling parties can "get rid of annoying objectors who might otherwise cause trouble at the fairness hearing or on appeal." (2) (e)(2) should mandate that settling parties disclose "all agreements, formal and informal, between them that were made contemporaneously with the settlement or dismissal of a class action. Moreover, the rule should provide strong and mandatory sanctions for failing to disclose such deals." The urge to cheat is great. (3) In addition, the settling parties should be required to disclose material facts about the settlement negotiation, the settlement itself, and the relationships among class counsel, the defendants, and objectors; the sanctions for failure to disclose such facts should be discretionary because the scope of the disclosure obligation is mushy. (4) "Disclosure to the court is not enough. The absent class deserves to know of any conflicting interests of its counsel." The class should have access to the content of the deals, the actual terms, not just a summary. An exception could be made that requires disclosure only of the existence of an agreement that allows the defendant to withdraw if an opt-out threshold is reached, without disclosing the threshold itself.

David J. Piell, Student, 01-CV-094: This is a welcome addition, but does not go far enough. What is the sanction for failure to disclose? Can the judgment be reopened? Can class members who opted out because the settlement was inadequate choose to come back in when an enhanced settlement results? Guidance should be

provided, including a statement whether it is proper to deny any sanction if the failure to disclose resulted from a good-faith belief that the agreement was not "in connection with" the settlement.

correct; free appeal could result in an avalanche. If intervention is denied, the class member can appeal the denial.

Thomas Y. Allman, Esq., D.C. Hearing Written Statement, 01-CV-026: It is wise to require approval for the withdrawal of objections, but for a reason not expressed in the Note. Approval will support involvement of the district court in the review process. There is a need for aggressive court involvement as to all objections that have been made.

Brian Wolfman, Esq., D.C. Hearing 121-125, 130-131: Objectors' deals should be disclosed even when reached on appeal. Objectors must be provided substantial procedural support; unfortunately the proposed rule does not do that. Objectors should be provided access to all settlement documents. Settling parties should be required to file and serve the full justification for the settlement prior to the objection debate – now, they often hold back evidentiary support for the settlement until after the objecting date, and indeed until right before the fairness hearing. The rule should require that objectors be given a stated ample time to file. (The written statement, 01-CV-043, brings these together: Often settling parties submit the settlement for preliminary approval without any notice to interested parties, and with only a bare-bones joint memorandum. Class members are given notice and only a few weeks to respond. Class counsel commonly refuse to provide information to objectors on a timely basis. "The game is 'hide the ball.'" Objectors should be afforded a minimum of 45 days to object after settlement proponents file full supporting materials.) The rule should establish a right to take discovery, even about the settlement terms. But discovery into the negotiation process is not appropriate in most circumstances. The requirement in many circuits that an objector intervene in order to establish a right to appeal should be deleted; the Supreme Court has taken up the issue (Devlin v. Scardelletti, 01-417), but if it adheres to the intervention requirement the rule should be changed. The intervention requirement is inapposite: the class member is a party in the sense of being bound by res judicata, and is not seeking to participate in trial. And this is a trap for the unwary, particularly for the pro se objector, without establishing any but paperwork benefits. It is possible that this is a question for the Appellate Rules; the Advisory Committees may want to work that out between themselves. The Note, finally, refers to Rule 11 sanctions; that should be deleted entirely, for it will chill participation by objectors.

The written statement, 01-CV-043, **(1)** disagrees with the Note statement that the need to support objectors may be reduced when there is an opportunity to opt out of the settlement. The right to adequate representation is independent of an opt-out opportunity. **(2)** "Finally, we are dismayed about the way in which the Committee Note discusses the use of objections to exert improper influence in class action settlements." The problem of exerting improper "hold-up" strategic pressure can be addressed by requiring full disclosure of all deals with objectors and approval by the court. That approach does not disarm objectors. **(3)** The Note also seems

to give credence to complaints about "professional objectors"; this suggestion is unfounded. There is nothing wrong with a lawyer making a living by representing objectors – the only private practitioner we know of who frequently appears has made meritorious objections in many cases. This reference should be deleted. (e)(4)(B) states the proper approach. **(4)** Objectors and everyone else are subject to Rule 11. Objectors are no more prone to violate Rule 11 than anyone else; indeed close-to-the-line conduct appears more often among settling parties and their counsel. **(5)** The (e)(4)(B) requirement that the court approve any deal with an objector "must be strengthened to have its desired effect." The rule should explicitly require that all withdrawals and related agreements be submitted on the record, so that class members can comment. **(6)** The Note suggests that there is little need for concern if an objector settles on terms that reflect factors distinguishing the objector from class members. It should say that this situation will be very rare, lest the extortion flourish. The settlement itself should fairly resolve differences among class members who are not similarly situated. And in (b)(3) cases, the right to opt out affords protection. **(7)** "Finally * * * the failure of * * * (e)(4)(B) to apply to appellate proceedings is a serious error, which could render it nearly meaningless." The Duhaime case cited in the Note involved a buy-off on appeal. There is no rule requiring disclosure to the court of appeals, so no basis for the Note's suggestion that the court of appeals could look into the deal.

Appendix C to the written statement is a November 23, 1999 letter to Hon. Anthony J. Scirica and Hon. Paul V. Niemeyer. The letter urges adoption of provisions requiring disclosure of – and court approval for – all "side agreements." "In our experience, the practice of paying objectors to go away, without disclosure or approval, has become commonplace." Such payments may be viewed as "bribes" paid by defendants, "extortion" practiced by individual class-member objectors, or both. They are improper for several reasons. They create a de facto method of opting out of the class. They defeat the purpose of achieving like treatment for similarly situated class members. They are available to "lawyers and clients who know how to game the system." Requiring disclosure and approval will improve the objection process.

Leslie Brueckner, Esq., D.C. Hearing Written Statement 01-CV-020: **(1)** (e)(4)(A) restates existing law and is appropriate. **(2)** But the Note suggestion that there is less need to support objectors if there is a settlement opt-out should be deleted. It is difficult for class members to understand the terms of a proposed settlement, much less the risks of litigation. The opt-out provides scant protection, particularly in small-claims cases. Objectors often will be the only means to expose the weaknesses of the settlement. **(3)** The Note also refers to Rule 11; this could chill willingness to object. Objectors are too important to the process to deter in this way. **(4)** (e)(4)(B) addresses the important need to require disclosure of "side deals" made to persuade objectors to withdraw, and to give courts authority to disapprove these deals. That can

happen only if the court is informed about the deals. The deals may provide important information about conflicts within the class or weaknesses in the settlement. Some side deals are proper – as the Note says, the objector may be in a position different from other class members. But other deals reveal the strategic value of objections, or an attempt by the settling parties to purchase silence. The Note, further, seems to imply that the court can require an objector to persist with the objection unwillingly. "This, of course, is not and cannot be the law." The provision should be rewritten: "A class member who seeks to withdraw, or declines to pursue, an objection to final approval of a settlement must provide the court with a copy of any agreement(s) made in connection therewith, and may retain any benefits provided in such agreement(s) only with the court's approval."

Michael Nelson, Esq., D.C. Hearing Written Statement 01-CV-021: An objector may use discovery in the settlement proceeding to further goals in an overlapping state action. "[W]here a federal court provides the settlement objector with the right to discovery, it should also have the authority to limit that objector's ability to pursue similar discovery in parallel state class actions."

Peter J. Ausili, Esq., E.D.N.Y. Civil Litigation Committee, D.C. Hearing 208: Expressed concerns about the standards for discovery by objectors, including the reference to a strong preliminary showing of collusion and other improper balance. And the provision requiring approval before objections are withdrawn is uncalled for. Courts can deal appropriately with these matters now. (The written statement, 01-CV-056, adds that the broad grant of discovery will "promote delay, add to cost and encourage strategic behavior.")

David E. Romine, Esq., D.C. Hearing 251, 260-261: The objector language in the Note is troubling because it suggests that there should be more objector discovery than current law provides. If indeed the Note is intended to change the law, it is unwise – greater objector discovery would only increase costs and delay.

Patrick Lysaught, Esq., for Defense Research Institute, 01-CV-033, 034, 046, 047: (1) As to (e)(4)(A), the Note should make it clear that a strong preliminary showing must be made to justify discovery into the negotiation process. It also should make it clear that there must be a prima facie showing of a good-faith basis for objecting before allowing "new" discovery that goes beyond access to discovery materials already produced in this or related litigation. And guidelines should be provided for the court and objectors as to the "proper bases and criteria for asserting appropriate objections." Although objections should be encouraged, not discouraged, it is important "to ferret out in a cogent, rational and understandable way unfounded objections at an early stage." (2) As to (e)(4)(B), the Rule does not – and cannot – deal effectively with potential objectors who are bought off before any objection is filed, nor with objectors who simply fail to pursue an objection once made. Again, there is no guidance as to what constitutes a proper objection. The Note should provide guidance as to what is a proper basis for objection and what kind of prima

facie supporting evidence is sufficient. It might be better to require automatic disclosure by all parties to a class settlement, including class members, as to any premium derived through separate negotiations that is different from the benefits provided other class members.

Professor Charles Silver, 01-CV-048: The Note paragraph on discovery by objectors "is highly dangerous and should be deleted." A class member with a large claim has a sufficient incentive to review all the discovery or take new discovery, but such a person can self-protect by opting out. A class member with a small claim who demands to see extensive discovery documents and to depose everyone "is acting irrationally and probably is an extortion artist." The suggestion that discovery might be tied to a showing of collusion "is objectionable because all settlements are collusive." And the note on objector fees is dangerous, especially in referring to changes in the settlement that benefit the class. "The standard extortionist tactic is to threaten to appeal unless class counsel cuts the fee and to request a portion of the fee reduction as compensation." At most, an objector should win a fee only for wringing extra dollars out of the defendant, and even that is dangerous because it will lead defendants to hold back in the initial settlement agreement.

Court Advisory Comm., S.D.Ga., 01-CV-053: It is unnecessary to require court approval to withdraw an objection. The court is free to inquire as to any accommodation that may have been made with the objector, and to determine whether any action was taken to the prejudice of the class.

Allen D. Black, Esq., 01-CV-064: "Strategy" is a good thing. The Note should not refer to "strategic" objectors; it should point out directly "that an objection may have practical or 'blackmail' force far beyond its merits, if any."

ABA Antitrust Law and Litigation Sections, 01-CV-69: "We favor these proposals."

Association of the Bar of the City of New York, 01-CV-071: Attaches a September 19, 2000 letter that urges deletion of a draft rule provision providing that mandatory discovery be available to objectors. There is a growing entrepreneurial use of objections by professional objectors. Mandatory discovery is "a tool far in excess of what they already possess and well beyond the course of prudence."

Joseph L.S. St.Amant, Esq., 01-CV-075: (This comment is summarized more extensively with the general comments.) The Note to 23(e) should discuss application of the rule — if it is to have any or not — to cases on appeal. "The most pressing problem is whether appeals from decisions denying certification can be settled on an individual basis without court approval."

National Assn. of Protection & Advocacy Systems, 01-CV-077: The Committee Note may chill desirable objections by saying that courts should be vigilant to avoid encouraging unfounded objections and

that Rule 11 sanctions are available. "The very mention of Rule 11 will likely chill the willingness of class members to lodge objections * * *." "P&As consider it part of their federal mandate to protect the rights of persons with disabilities to challenge the adequacy of proposed nationwide class action settlements." Many settlements "routinely fail to include provisions representative of the various classes or types of disabilities."

National Treasury Employees Union, 01-CV-078: "Requiring court approval for withdrawal of all objections seems excessively rigid." The purpose seems to be to monitor changes in the settlement; that can be served by requiring approval only when withdrawal is conditioned on modification of the settlement.

Mehri & Skalet, PLLC, 01-CV-083: "We agree with the discussion in the proposed Notes regarding objectors, including the problem of objectors acting to obstruct beneficial relief to the class. We particularly agree with the requirement that an objector purporting to act on behalf of the class be held to the same fiduciary standard as a class representative."

Beverly C. Moore, Jr., Esq., 01-CV-083: "As long as an objector is a member of the class and thus has standing, he should be allowed to object and appeal." Legitimate objectors face real problems. Even plaintiffs' counsel object to objector discovery. The filing of settlement papers and fee petitions is orchestrated so that there is not adequate time to object. The problems said to be posed by professional objectors are not impressive. Class counsel in competing class actions are a frequent source of objections; their objections often are legitimate challenges to a low-ball settlement, but too often are rejected.

Prof. Susan P. Koniak, 01-CV-086: (1) It has been suggested that an absent class member can be precluded from collateral attack on a class-action settlement and judgment if another class member objected. "The idea that 'objectors' who are not required to meet any of Rule 23(a)'s requirements are somehow able to bind other absentees should be clearly and firmly rejected in the advisory committee's notes." (2) "The fairness hearing is now an unregulated arena." Do settlers have a right to discovery? To be served with all relevant documents in the case, including side deals? Can an objector call witnesses? Cross-examine witnesses? Must testimony or affidavits be presented to support an objection? How do pro se objectors participate? "Perhaps the Rule need not address all these questions." (3) Some objectors appear only to "get[] a payment from the settling parties to go away. Those payments should be outlawed." And objectors should have to explain any withdrawal of objections. Side deals should have to be disclosed, both at the trial stage and at the appellate stage. But the Committee Note should not refer to objectors who are out for personal gain. Objectors are no more likely to abuse the process than professional class-action lawyers or defense counsel. And any reference to Rule 11 sanctions should be removed from the Note. Rule 11 sanctions are less deserved for objecting counsel than for others: "No other group of lawyers are expected to operate with no

procedural rules to help them get the information they need to function properly and no rules to delineate when, how and to what extent they are entitled to participate or to complain about not being allowed to participate." (4) The Committee Note recognizes the important contributions of objectors. "But nice words are no substitute for procedure." Rule 23 should establish "some framework for the procedure to be followed in fairness hearings with particular attention to the participation of objectors."

NASCAT and Committee To Support the Antitrust Laws, 01-CV-093: The published proposal is better than earlier draft rules that spoke to discovery for objectors. But the Note states that an objector can obtain discovery by showing reason to doubt the reasonableness of a proposed settlement. Skillful counsel often can do that. An objector should be required to show "both a strong reasonable basis to doubt the reasonableness of a proposed settlement and that such doubt cannot be resolved on the record before the court." The same showing should be required to have access to discovery already had in the litigation. The Note suggests that the parties may provide such access; this expression may be read to recommend that discovery materials be provided in the ordinary course. But routine access to discovery in the class action may impose cost and delay, particularly in complex cases with hundreds of thousands of pages of documents. There also may be serious confidentiality concerns. This suggestion should be deleted from the Note.

David J. Peill, Student, 01-CV-094: Why have different standards for discovery in connection with the reasonableness of settlement terms and discovery into the settlement-negotiation process? What is a "strong preliminary showing"? If the court has enough information to determine whether the settlement is fair, reasonable, and adequate, it should have enough information so that there is no need for discovery by objectors. And the reference to Rule 11 sanctions in the Note should not be at the expense of inherent court powers that "are more effective in dealing with abusive objectors."

Steven P. Gregory, Esq., 01-CV-096: The Note sets too low a standard for discovery by an objector. Objections, even frivolous objections, can cause unnecessary delay in awarding benefits to class members. "A better approach might be to require a 'compelling reason' rather than simply a 'reason.'"

Settlement Classes

Conference: The proposals fail to address settlement classes

Conference: Express provision should be made for settlement classes. "They are useful for the end game." Asbestos litigation will go on for another 20 years because the settlement-class effort was scuttled by the courts.

Conference: The Committee Note to draft 23(e) assumes the certification of settlement classes. "They cannot be done any longer."

Conference: It is amazing that overlapping class proposals have been considered, even in a tentative way, without also including a settlement-class proposal.

Conference: There should be a settlement-class proposal.

Conference: Some members of Congress view Rule 23 as an end-run around Congress. The settlement class "is an entire agency. Amchem was dead on."

Conference: Amchem is consistent with smaller, cohesive settlement class. "They're here, they exist. They're tough to draft." It remains difficult to understand what Amchem meant in saying that settlement can be taken into account.

Conference: The problem with the settlement class is that it cannot be tried, so there is no constraint arising from the alternative prospect of litigation.

Conference: Judges cannot solve all problems. Settlement classes "overstrain" the Enabling Act. "We used to take seriously the ideas of self-government and jury trial in civil cases. Settlement classes disregard these ideas."

Conference: The Rule 23(e) Committee Notes imply that there is such a thing as a settlement class; "not everyone agrees."

Mary E. Alexander, Esq., Statement for S-F: ATLA policy expresses deep concern over adjudication of the rights of future claimants through settlement-only classes.

James M. Finberg, S-F Hearing 103-104, 106-107: Ortiz is based on due process; it applies to state courts equally with federal courts. There should not be any difference in the ability to settle whether the action is in state court or federal. Probably there are more objections to settlements now than formerly. It is clear that a class can settle claims that are in the exclusive jurisdiction of another court, so global settlements can still be reached in state or federal courts. There is more attention paid to sub-classing and making sure there is a representative who would have standing to allege the claim of each category of persons involved. But I do not work with cases that involve future damages; they may present greater difficulties.

Anna Richo, Esq., S-F Hearing 138-139: Rule 23 should be amended to require opt-in for trial of individual cases, or better to eliminate class certification for trial purposes for any personal injury claim, with the exception of claims arising out of mass disasters. Certification of a dispersed mass tort class for settlement, on the other hand, would be desirable. There should be a separate mass-tort settlement class rule.

John Beisner, Esq., D.C. Hearing Written Statement: pp. 15-18 suggest creation of a distinct certification standard for proposed settlement classes. The proposal is presented as modest: there is no need to address futures claims, nor to revisit "limited fund" classes. One benefit would be to stop the tendency of some courts to cite settlement class certifications as precedent for certification of a litigation class, even though "the level of debate is quite different." The preoccupation with class certification prerequisites is distracting attention from the primary line of investigation, which should be whether the proposed settlement is fair to all purported class members, whether there is a risk of collusion, or a risk that some individuals will gain benefits at the expense of other class members. One source of the problem is that the provisions of Rule 23(a) and (b) are designed to protect defendants as well as plaintiff class members. Commonality, typicality, predominance, and superiority protect defendants against attempts to rely on class-wide proof when the law requires individualized proofs of claim or defense. A settlement is different because the defendant has agreed to a conditional surrender of the right to insist on individual proofs of defense or individual proofs of injury and damages. When individualized proofs are required, a litigation class should not be certified. The variability of plaintiffs' damages should not be subsumed into a litigation class – although, perversely, it may be – but when there is a settlement, the inquiry should be whether the proposed settlement presents "a fair approach to dealing with the fact that the fair value of the unnamed class members' claims may vary significantly?" The rule should require that the settlement class have sufficient unity to make it fair to bind absent class members. But the predominance test should be qualified, looking to ensure that class members are afforded due process, "taking full account of the fact that as part of the proposed settlement, the defendants are waiving the due process protections that they would be afforded under a non-settlement class certification analysis."

Committee on Fed. Civ. P., Amer. Coll. Trial Lawyers, 01-CV-055: Considers (e)(1) salutary, and "would welcome the opportunity to review a proposal that addresses settlement classes separately." Is "open to the prospect of allowing settlement classes that do not necessarily satisfy all of the criteria of litigating classes."

Summary of Comments & Testimony: Rule 23(e)(3) 2001

Conference: The stronger alternative is better.

Conference: It would be better to provide that a (b)(3) class member always can opt out of a settlement.

Conference: Knowledge of a settlement provides a better basis for deciding whether to opt out. But we should not allow opt-out from every (b)(3) settlement. The first alternative, which presumes there should be an opt-out, will come to require opt-out. The second alternative, cast in neutral terms, is better. It would be still better to address the issue only in the Note. Notice is expensive; if it is delivered by TV and national print media, it can cost ten million dollars or more. "The class action is an attorney vehicle; the idea that people worry about it is a dream." What is important is notice to lawyers, not class members. Opt-out campaigns "are political wars." Propaganda is unfurled on all sides. The fen-phen settlement has opt-out opportunities "every time you turned around," but few defendants can afford to settle on terms that offer so low a level of peace.

Conference: Before settlement, it's "a pig in a poke." The ordinary class member does not have enough information to determine whether to request exclusion. A reasonable opt-out decision can be made only when the terms of settlement are known. It would be better to allow the opportunity in all cases.

Conference: The first alternative is better. It does have an escape clause. The class may have had notice of proposed settlement terms during the original opt-out period, even though there was not yet a formal submission for approval. But this first alternative "maximizes consumer choice" in more general cases. Notice could be more modest. It is better to have this in the text of the rule, for the benefit of judges who are "new to class actions."

Conference: The first alternative is dangerously close to one-way intervention. The "good cause" test for denying opt-out is very vague; to the extent that it turns on the fairness of the settlement, the court should approve only a fair settlement in any event. If settlement terms afford an opportunity to opt out, that is one factor to consider in favor of approval; that is as far as this should go. And the Note should say clearly that informative notice is far more important at the time of settlement than at the beginning of the action.

Conference: The diet drugs litigation allowed four opt-out events for each class member. "At least one informed opt-out should be allowed; usually it is sufficient to provide this at the time of settlement."

Conference: The time of the opt-out is important. In a mass tort, probably it is sufficient to provide an opt out when the aggregate settlement terms are known. That is not likely to be a problem that seriously impedes settlement. It would be possible to defer the opt-out until the individual class member knows what he is

going to get under the settlement, but that is probably wrong. It would destroy most mass-tort settlements if latent-injury class members were allowed to decide to opt out "23 years later" when injury becomes manifest.

Conference: The back-end opt-out may be important in mass torts; indeed it may be that a class is certifiable only if a back-end opt-out is provided. The diet drug settlement was done under pressure that improved the settlement because of the higher legal standards that flowed from the Amchem decision. But that is not what 23(e)(3) proposes. (It was rejoined that it is dangerous to think of opt-out only in mass-tort terms.)

Conference: The settlement opt-out would apply to antitrust and securities classes. There is a history of successful settlements in these areas without opt-outs. It is a mistake to write a general rule that applies to all types of class actions. Indeed it might make sense to deny any opt-out opportunity at any time from a class that deals with small claims that would not support individual litigation.

Conference: These considerations support the second alternative as the better option. Settlement opt-out makes sense only in some cases. One problem is that the money spent on notice comes out of actual class relief. The Committee Note should describe "levels of notice." In some cases, it should suffice to publish notice in the manner generally used for legal notices. Often the "mass buy" on television and in newspapers of general circulation is not warranted. Notice to attorneys should be provided.

Conference: What needs to be fixed? Mass-tort classes negotiate opt-outs; it is proper for the Note to treat this as a factor bearing on fairness. There may be an issue in a small fraction of cases where the notice is published early and the opt-out period expires.

Conference: The problem of early notice and expiration of the opt-out period could be solved by deferring the first notice and opt-out period until there is a settlement agreement.

Conference: The need for fairness to class members is adequately protected by judicial review.

Conference: When the class is heterogeneous, it is not possible to shape a settlement that is fair to all class members. Notice at the time of class certification will be used to lock class members in. There is no problem in securities litigation because for years the practice has been to seek certification at the same time as a settlement is presented. If certification and settlement are separated, the expensive notice should be deferred to the time of settlement.

Conference: People should not be asked to decide whether to request exclusion until they know what they are going to get, at least in personal-injury cases. Notice at the time of the "aggregate agreement" is not enough. The total available in the Agent Orange settlement sounded like a lot at the time, but an intelligent opt-

out choice could not be made on the basis of knowing that alone.

Conference: Multiple opt-outs often are negotiated in mass tort settlements, and such terms may indeed be required. But there is no need for a rule to accomplish this. But for securities and antitrust cases, a settlement opt out turns the rule on its head. Class members are told at the time of certification that they will be bound unless they opt out. If you allow an opt out on settlement, why not also after granting a motion to dismiss for failure to state a claim, or after granting summary judgment? Indeed, why not after trial? The settlement opt out interferes with negotiation settlements. Adequate protection can be found in the negotiation process.

Conference: The settlement opt out became increasingly attractive to the Advisory Committee as it struggled with proposals to enhance support for objectors. The settlement opt out is a lot better than fueling objections to every settlement. But the Note should be revised to make it clear that settlements are favored; as presently drafted, it seems to have a hostile tone.

Conference: From the defendant's perspective, there is a tension between the ability to settle and a class member's ability to base an opt-out decision on meaningful information. A defendant can negotiate a "walk-away," but knows that if the settlement sticks there will be some opt-outs who must be compensated and who will treat the settlement terms as the floor for bargaining. The second alternative is more flexible and thus more sensible, but it too will make settlement more difficult.

Conference: Concern about notice costs is a red herring. Notice of settlement is required today. The settlement opt out simply requires that one more item be included in the notice. The first alternative is better; indeed, it might be better to adopt an even stronger presumption in favor of opt out. The defendant's path to global peace is made more difficult, but informed choice by class members is more important.

Conference: But the notice will be more complex and thus more expensive if it includes a settlement opt out.

Conference: If we are precluding substantial damage claims we should have good notice.

Conference: The "pig-in-a-poke" problem is most significant with small-claims classes. Class members have no stake at the beginning. The opt-out could lead to better recovery in another class; even apart from that, a 20% or 40% opt-out rate would tell the court something. The opt out is useful.

Conference: Why do we need the first opt out, if the limitations period is extended to the second opt out ?

Conference: The second notice may be more effective. The IOLTA cases say that clients have a property interest in pennies; so class members have a property interest in small claims. Those who want global peace have an interest in effective notice. This helps

ensure that settlement is adequate for the absentees. The first alternative, favoring the opt out, "is a big improvement."

Conference: The idea of a court-appointed objector "is horrible. Any alternative is better." The best approach is to list an opt-out alternative provided by the settlement itself as a factor favoring fairness. The next-best approach is the second settlement opt-out alternative.

Conference: The only real choice is between the two settlement opt-out alternatives. The court-appointed objector system would degenerate into a "judge's buddy" system or a civil-service bureaucracy. "Market forces are better." Perhaps the first alternative should be softened: a settlement opt out is required "unless the court finds that a second opportunity is not required on the facts of the case." This would be stronger, and better, than the second alternative.

Conference: The parties should be fully informed in connection with settlement, but opt out does not follow. Defendants should be able to achieve global peace. Is unfairness to class members so great an evil as to require the opt out? "I do not know the answer."

Conference: (Several views in a single dialogue:) A back-end opt out is not likely to be provided in securities or antitrust cases, but can a mass-tort settlement be approved without one? The risk of latent injury is a real problem. But if injury is apparent at the time of settlement, an informed initial opportunity to opt out after settlement terms are known suffices. Asbestos should not be used as an example for all cases. In many cases "the biological clock ticks faster" – it will be two years, or four, to identify all "downstream claims. Defendants can deal with this kind of "extended global peace." The back-end opt out can be worked out. In a large heterogeneous mass tort, the back-end opt out "can address the constitutional needs." But if the class is more cohesive, settlement without a back-end opt out may be appropriate. It would be a mistake to require a back-end opt out in all mass torts; if the disease affects a finite population and its progression is known, back-end opt out may not be needed.

Conference: Settlement opt out may cause more problems than it is worth.

Conference: The settlement opt out might be reduced to a factor considered in evaluating fairness, but perhaps a compromise version could be retained in the Rule.

Conference: It does not make sense to go forward with the settlement opt-out.

Conference: Settlement opt-out is a bad idea; "it almost gets into the substance of the settlement."

Conference: The settlement opt-out is a good idea. It legitimates the decision. Rule 23(b)(3) was written for small-stakes cases. If it is used for cases that involve significant individual claims, class members should know what is at stake before being asked to

decide whether to opt out. There should not be an absolute right to opt out. "But a willing seller is needed."

Michael J. Stortz, Esq., Statement for S.F Hearing: The second alternative "properly takes a neutral position, leaving the issue of a second opt-out to the trial court's discretion." The first alternative "does not take into account the myriad circumstances in which a settlement on behalf of the class may be reached. Practice under the new Rule 23(e) should be permitted to develop * * *."

Barry R. Himmelstein, Esq., S.F. Hearing 24-: Either alternative is suitable. "I prefer to leave things to judicial discretion when there is a choice." Settlements can be done with a settlement opt out, but the more usual occurrence is that settlement and certification occur at the same time so the first opt-out opportunity remains available. The second opt-out opportunity is "just fine. I like to give people the option to stay in or get out. I'm not trying to hold them in against their will. Relatively few people generally do opt out unless they have serious personal injuries and I have questions about whether class certification is appropriate for those kinds of claims anyway."

Mary E. Alexander, Esq., S-F Hearing 65-: ATLA supports Alternative 2 settlement opt outs. The opt out can be difficult for practitioners on both sides, but "litigants' choice is most more to [her written statement, 01-CV-016, says "paramount to"] administrative convenience and the management of the litigation." (Her written statement notes concern that class-action settlements do not afford class members "real choice as to whether to accept a settlement.")

Gerson Smoger, Esq., S-F Hearing 91: For ATLA. It is terribly unfair to have the only opportunity occur before settlement of a (b)(3) class. "Nobody attends to it. Nobody looks at it." Most people do not understand what the notice means, and there is no reward even in seeking out your local lawyer for an explanation. Often I have people come to me after the class is closed and a settlement is effectuated, "and now they have no choice and they disagree with the settlement. They want to have their day in court. They want to be able to choose their own lawyer, but they are foreclosed." We support Alternative 2. And we must be careful to protect the small-claim class "because those are the essence of the purpose of this system."

Anna Richo, Esq., S-F Hearing 138: The opt-out option on settlement is appropriate.

Jocelyn D. Larkin, Esq., S-F Hearing 146: The Impact Fund welcomes a number of the proposals, including "the option for second notices and opt-out. These are already part of our practice for the post part. We understand them."

Alfred W. Cortese, Jr., Esq., S-F Hearing 163 ff: It would be better to have opt in for trial, the way it was before we had opt-out settlements. We should be weaned from settling these cases because they just get worse and worse. Amchem and Ortiz have not

made a difference: "If you put enough money on the table, somebody is going to find a way" to settle. The second opt out, however, is the more benign of these proposals.

John Beisner, Esq., D.C. Hearing Written Statement: "[T]here are valid arguments on both sides of the debate regarding the merits of this amendment." If it is to be adopted, the second alternative is better.

Prof. Owen M. Fiss, D.C. Hearing 46-57: Settlement is troubling. The representational relationship does not rest on actual consent. Settlement is a contract. "People do not enter contracts by simply not responding to a notice. People are not bound by contracts simply because a number of people, even same members of the class, have entered a contract." Settlement should bind only class members who opt into the class. The practical consequences would be to "put a lot of settlements off the board." But "the requirements for procedural justice gives us no alternative." The alternative proposed in (e)(3) should be made mandatory, and should apply to all forms of class actions. (In response to questions, suggested that it might be possible to allow settlement without the opt-in limit, and perhaps even without allowing opt out, if the interests of class members are "so identical and so de minimis" as to justify binding them.)

His written statement, with John Bronsteen, adds: "If settlements were confined to those who opt in, then plaintiffs would lose their incentive to bring class lawsuits that are unlikely to prevail at trial."

Prof. Judith Resnik, D.C. Hearing Written Statement 01-CV-044: "[I]t is at settlement that the question of the remedy becomes clear, and it is at settlement that the decision need be made about whether to permit opt outs."

Thomas Y. Allman, Esq., D.C. Hearing 113-114: Agrees with Professor Fiss. It is not clear that an opt-in regime for settlements would destroy the ability to settle, but assuming it would, "[t]hat would be a good result." The suggestion should, however, extend to trial as well: a class should include only those who opt in. (His written statement finds the second alternative formulation of (e)(3) "more appropriate." A settlement opt out is not needed if settlement is reached after trial on the merits; it is sound if settlement is reached before there has been significant discovery on the merits.)

Brian Wolfman, Esq., D.C. Hearing 116 ff: We need pay more attention to the characteristics that distinguish class actions from bipolar litigation. Clients cannot be expected to monitor the work of class lawyers, and lawyers' interests are not naturally aligned with class-member interests. Expanded opt-out rights enhance members' abilities to monitor their lawyers' work. In addition, the prospect of opt outs will encourage the parties to negotiate a settlement more favorable to class members. Notification at the certification stage is not much help. But notice at the time of settlement can work. (The written statement,

01-CV-043, strongly agrees with Alternative 1. Notice of settlement is required in any event, so notice cost objections are reduced on that score. This is not the occasion to reconsider the question whether individual notice should be required for all class members when individual claims are small.)

Lewis H. Goldfarb, Esq., D.C. Hearing 134: The Committee should consider opt-in rules for the classes where there are no real plaintiffs involved in the litigation. Abuses through such actions are "a serious problem for industry."

Prof. Ian Gallacher, D.C. Hearing 141-146: All (b)(3) classes should be converted to opt in. This is better seen as a joinder device than as a tool of social policy. In practice, virtually all of these actions require a plaintiff to opt in by mailing materials to indicate participation in a class remedy, or by using a coupon that has been mailed out. There is no showing that it is too difficult for holders of small claims to bring suit. There are many more lawyers available today than in 1966, and they are ready and capable of bringing small claims in small claims courts. More importantly, the fact that people do not bring small claims does not show an incapacity to act; we often see that people decline to participate in class-action judgments even when little effort is required. Nor need we worry about one-way intervention; setting a time limit to intervene is sufficient. (His written statement, 01-CV-037, adds that the reasons for adopting an opt-out rule in 1966 were "uncomfortably paternalistic" and seem to transcend Enabling Act boundaries by making it easier for "one group to assert claims." It is asserted by plaintiffs that (b)(3) classes are a tool of social policy to enforce ethical behavior by business. Rule 23's function as a joinder rule is undermined by the opt-out approach. Opt-in classes under the FLSA, or the 100-member signature requirement for Magnusson-Moss Act classes, show that opt in is not necessary. Class members may be harmed by opt out, being bound by inadequate judgments. Opt in also avoids the problems that arise from tolling state statutes of limitations for non-federal claims.)

Leslie Brueckner, Esq., D.C. Hearing 160-161: Wholeheartedly endorses the second opt out, whichever provision is adopted. Notice costs are no deterrent — there must be notice of the settlement anyway. And there is not likely to be a significant deterrent to settlement: defendants continually tell us that there is a hydraulic pressure to settle. The incentives to settle are sufficient. (The Written statement, 01-CV-020, is more forceful. The First Alternative is better, but there should be an unconditional right to opt out of a settlement; there should be no "good cause" exception. The Note links the good-cause determination to the adequacy of the settlement. The court's appraisal of the settlement should not override the preference of class members to pursue individual relief; there are due process concerns about forcing an individual to accept a settlement. The opt out will not increase notice costs; notice of the settlement must be given in any event. Finally, the Note suggests that an opt-out opportunity may reduce the need to provide procedural

support for objectors. This language should be deleted. Objectors are important, indeed often crucial to settlement review.)

Michael Nelson, Esq., D.C. Hearing Written Statement 01-CV-021: Prefers the second alternative. The first "fails to account for the many circumstances under which settlement may take place."

David Snyder, Esq., and Kenneth A. Stoller, Esq., D.C. Hearing 174: Prefer the second alternative. The written statement, 01-CV-022, "finds merits in the competing arguments" whether there should be any second opt out. If there is, it is uncertain which alternative will provide maximum protection to both plaintiffs and defendants. As a general matter, insurers require the earliest possible sense of class size in order to establish appropriate claim reserves.

Robert Scott, Esq., Lawyers for Civil Justice, D.C. Hearing Written Statement 01-CV-038: (b)(3) should be converted to opt-in procedure, or to require that the class lawyer obtain written authorization from each putative class member before filing an class action. "The sorry experience with class actions since 1966, particularly in the last ten years, has amply demonstrated the need for this Committee to urge Congress to return the legal system to the resolution of justiciable disputes among real parties in interest who care enough to affirmatively elect to be included in the litigation." In addition, there should be a mechanism for opt-out settlements "by creating a settlement device or 'bill of peace' to allow defendants to invoke a court process for consolidating all litigation and settling all claims."

Stephanie A. Middleton, Esq., D.C. Hearing Written Statement 01-CV-032: The second opt out is troubling "because it interferes with a defendant's ability to 'buy peace'and a plaintiff who does not 'opt out' in the beginning should have to live with the decisions made by his attorneys."

Peter J. Ausili, Esq., E.D.N.Y. Civil Justice Committee, D.C. Hearing 209: The second opt out has little value. A small claim provides little incentive to opt out. A person with a large claim should investigate and determine whether to opt out at the first opportunity. In addition, the rule does not address the preclusive effect of rulings made after expiration of the initial opt out period and the time of the later opt out. (The written statement, 01-CV-056, adds that a settlement opt out would "simply shift the balance of power away from the class representative and to objectors.")

Walter J. Andrews, Esq., D.C. Hearing 284-286: The possibility of opt-outs makes settlement more difficult. Plaintiffs should not have a second opportunity to opt out: this allows them to litigate once, and then a second time if not satisfied with the class-action resolution. This will have a particularly adverse impact on insurers by "introduc[ing] an expensive level of volatility and unpredictability into the establishment of reserves" for class actions.

Bruce Alexander, Esq., D.C. Hearing 310 ff. and Written Statement,

01-CV-041: A second opt out "breeds laziness and free rider issues." It encourages class counsel to communicate even less with class members. The unintended effect will be even less interest by the litigants in the litigation. Class members who do not opt out at the first opportunity can protect their interests by objecting to the settlement. It would be a good idea to substitute an opt-in system for the present opt-out system. With an opt-in class, you know what is really at stake. Experience shows that many class members, when they find out about the class, resent it – they find the supposed benefits undesirable, or find the process obnoxious.

Hon. William Alsup, 01-CV-04: "I wholeheartedly support the proposed Rule 23 revisions. I vote for the 'good cause' version of the settlement opt-out provision."

Linda A. Willett, Esq., 01-CV-028: The underlying structural defects of Rule 23 should be dealt with by requiring "that the default mechanism of all 23(b)(3) class actions be 'opt-in' and that a statutory mechanism be created that would allow for strictly regulated 'opt-out' settlements."

Patrick Lysaught, Esq., for Defense Research Institute, 01-CV-033, 034, 046, 047: Strongly opposes; the second alternative is less harmful if any is to be adopted. Limiting the second opt out to (b)(3) classes "undermines the philosophical underpinnings allegedly supporting the need for a second opt-out." Just as members of a (b)(1) or (b)(2) class, members of a (b)(3) class are protected by the opportunities to object to class definition, class representation, and the terms of settlement. So too they are protected by the requirement of court approval after careful judicial inquiry. The second opt out could be the death knell of settlement. Those who opt out will treat the settlement as the starting point for individual negotiations. This procedure is unfair: it allows class members deliberately to remain in the class, examine the terms of the settlement, and then choose to opt out to gain the advantages of the settlement as leverage for their own claims.

Professor Charles Silver, 01-CV-048: The p 64 comment that class members may not understand the terms of settlement should be dealt with by making easy education possible, as a website or phone bank; encouraging objections is not desirable, particularly when a small-claims class is likely to generate only strategic objections.

Sheila Carmody, Esq., 01-CV-050: It is not unfair to require persons who claim to have been injured to take an affirmative step. The Committee should recommend "that the default mechanism of 23(b)(3) actions be opt-in."

Court Advisory Comm., S.D.Ga., 01-CV-053: Favors alternative two; flexibility is preferred.

Committee on Fed. Civ.P., Amer. Coll. Trial Lawyers, 01-CV-055: prefers Alternative 2. A presumption, subject to defeat for good cause, is not needed. The proximity of prior notice, the size of the settlement, or other circumstances may make a second notice not

desirable. There is no need to litigate "good cause." But in other circumstances a second notice may be desirable — "for example, the parties may urge a second notice to minimize the number of objectors."

Federal Magistrate Judges Assn., 01-CV-057: Supports Alternative 1. it is "preferable to Alternative 2 which is more permissive by its terms and fails to provide the court with the discrete guidelines furnished by Alternative 1."

Exxon Mobil Corp., 01-CV-059: Opposes (e)(3). It will seriously erode one of the few benefits of (b)(3) class litigation: "resolution of the claims on a broad class-wide basis." After expiration of the first opt-out period, the defendant will know who has opted out and can estimate its potential exposure outside the class action. If a settlement opt out is permitted, unnecessary uncertainty is created. Nor is there any reason to give class members a second opportunity to opt out. It is easy to envision opt-outs organized by counsel who were unsuccessful in seeking appointment as class counsel; the result may be unfair bargaining advantages for the settlement opt-outs, or settlements that are unfair to them in individual proceedings because class-court approval is not required. But if there is to be an (e)(3), the second alternative is preferred.

Allen D. Black, Esq., 01-CV-064: On p 63 it is pretentious to speak of a decision "confided" to the judge. Say "committed" or "entrusted."

Equal Employment Advisory Council, 01-CV-065: Association members employ more than 20,000,000 workers in the United States. The second opt-out proposal is addressed in terms that seem to say that the purpose of the first opportunity to request exclusion is to afford a binding choice whether to remain in the class and accept the outcome. A second notice serves no purpose, unless in special circumstances such as fraud or a natural disaster it is reasonable to believe that class members never got the first notice.

Keith L. Johnson, Esq., State of Wisconsin Investment Bd., 01-CV-066: The first alternative is better. The settlement opt out is important; at the time of the first opportunity, class members "usually do not have enough information * * * to know whether the class representative and class counsel will pursue the case to a satisfactory conclusion." The mere existence of a right to opt out will deter inadequate settlements. The second alternative is inferior because the parties — who commonly draft a proposed approval order — will draft an order that does not allow opt out. "[I]n order to encourage a practice that the parties will usually disfavor, the rule should not merely be neutral on this issue."

Alliance of American Insurers, 01-CV-068: Opposes the second opt out because it "necessarily increases the cost of class action litigation and also serves to prolong the litigation." If anything is to be done, Alternative 2 is better "since it is more neutral * * * and does not express a preference for a second opt-out opportunity."

ABA Antitrust Law and Litigation Sections, 01-CV-69: Opposes both alternatives. Begins by recognizing that this proposal has generated a split of opinion, and that the split does not divide along plaintiff-defendant lines. The purpose to advance informed opt-out decisions and enhance fairness is laudable. But "the proposal ignores both the theory and policy of class representation as well as significant problems * * *." The Note recognizes that a settlement opt out is not likely to have real value to class members whose small claims do not support individual litigation. As to theory, representation extends to all phases of the litigation, including settlement. The initial notice should make it clear that settlement is one possible outcome. There is no distinction between resolution by settlement and resolution by judgment for purposes of a second opt out. A settlement out out "demeans the meaningfulness of the first opt-out right as an exercise of the class member's free will." Further, the efficacy of class actions will be undermined. Class members with larger individual claims frequently are represented by counsel, who will seek to take a free ride on the efforts of class counsel in discovery and motion practice, and then opt out; if they cannot opt out, they will have an incentive to object vigorously to an inadequate settlement, enhancing the settlement for all class members. Allowing an opt out, on the other hand, may drive down the value of the class settlement in the expectation "that large individual purchasers will more often than not opt out once the class sets the settlement floor." Finally, the amendment fails to address the issue-preclusion effects of rulings made between the initial class certification and the exercise of the second opt out. Alternative 2 may "lead to the expedient of ordering a second opt-out opportunity as a makeshift solution to a questionably adequate settlement." Nor is even Alternative 2 necessary to support negotiation of settlements on terms that authorize opt outs. The recent diet drugs settlement allowed a different form of opt out, to be exercised in the future on the basis of changes in a class member's physical condition; that illustrates that power is there now.

Association of the Bar of the City of New York, 01-CV-071: This amendment does little to alter current practice. Today it is common to find class notices sent out contemporaneously with settlement notices; most class members have an opportunity to opt out after settlement terms are known. Alternative 2 is the better choice; it allows for case-by-case analysis. The good cause requirement in Alternative 1 will generate needless litigation.

Civil Division, U.S. Department of Justice, 01-CV-073: Does not support a second opt-out. This would diminish a defendant's incentive to seek peace through settlement; litigating to judgment would give preclusion. "[E]ffective negotiations can only proceed based on a reasonable expectation that the composition of the class will not change prior to entry and approval of the settlement." The fact that settlements often are negotiated before class certification is not relevant, because in that setting the defendant has no reasonable expectation as to which class members

would be bound by the settlement. Once the opt-out period has expired, on the other hand, "the settling defendant has a valid expectation that all members of the class are bound." The possibility of negotiating terms that allow the defendant to withdraw if the number of opt-outs exceeds a stated threshold is not much help; it may be difficult to reach such an agreement. It also will be difficult for class counsel to negotiate a settlement in face of the potential for sizeable opt-outs. But if an opt out is adopted, the second alternative is better. It would be still better to require the proponent of an opt out to show good cause.

Prof. Martin H. Redish, for Lawyers for Civil Justice, 01-CV-074: Urges abandonment of the opt-out provision for (b)(3) classes, in favor of establishing an opt-in procedure. The core of the argument is that legislatures – both Congress and state legislatures – make conscious choices about enforcement mechanisms when establishing rights. Public enforcement means may be chosen. Private enforcement means may be chosen. The choice has a great impact on the substantive right underlying the remedy. A choice of private enforcement is politically more attractive: it is presented as a means of providing compensation to individuals who believe that compensation is sufficiently important to justify litigating to win compensation. "Under a purely private, incentive-based remedial model * * * the legislature's primary goal must be assumed to be compensatory, rather than behavior-changing, since pursuant to this framework, government exercises no control over the decisions of private victims to sue * * *." The advancement of the public interest is subordinate to the primary goal of victim compensation. But the (b)(3) opt-out model, because of inertia, transforms the private remedy into a "bounty hunter" model. The bounty-hunter model relies on the economic incentives of attorneys, not victims, "without regard to the goal of vindicating individual plaintiffs' rights." The effect is illustrated by the numerous "coupon" settlements. The result is similar in many ways to a "purely public-regarding enforcement mechanism," akin to a qui tam action. As a matter of legislative policy, the bounty-hunter model may at times be attractive. But it should not be accomplished by rulemaking. Whether or not this pervasive effect on substantive rights violates the Enabling Act, there is a tension that should be addressed by moving to an opt-in model. The opt-out model relies on a paternalistic view that may have been acceptable in 1966, but that is incompatible with fundamental notions of liberal democratic theory as we now understand it. It is highly unlikely that those who wrote the 1966 rule "ever envisioned the dramatically negative practical consequences to which that process has today given rise." And there is a tension with due process: the effect is to destroy an individual right because "another unrelated litigant has had the opportunity to litigate the same claim." The constructive consent reflected by failure to opt out is not sufficient to waive the constitutional right to be heard.

Special Committee on Federal Practice, Illinois Bar Assn., 01-CV-076: "A reasoned determination of the fairness of a class action settlement will take into account many factors." (Examples are

given, substantially parallel to the examples in the Committee Note.) "Alternative 1, providing for a presumption in favor of an opt-out opportunity, increases the probability for an individual member to assess the relevance of these factors * * *. The court * * * will unlikely possess the specific knowledge of the nature and extent of the individual circumstance of a member." Adoption of Alternative 1 "may also be a driving force for the settlement to be more inclusive, attending to the issues that may relate to certain subclasses of the class." Notice cost is not an issue since there must in any event be notice of the settlement. The overriding principle is that a class member should be able to review a settlement with personal counsel, preserving the right to seek individual redress if that seems better.

National Assn. of Protection & Advocacy Systems, 01-CV-077: Prefers the first alternative as "most protective of class members' interests." But the Committee should eliminate Note language that an opportunity to request exclusion may reduce the need to provide procedural support to objectors. Objectors often play a pivotal role in the settlement review process; member protection and advocacy systems have increasingly found that not only must they bring class actions, but they also must object to settlements that, focusing on only some types of disability, fail to provide adequate protection for persons with other disabilities.

Washington Legal Foundation, 01-CV-082: Supports the second alternative. A settlement opt out may be valuable, particularly where facts relevant to the opt-out decision come to light only after expiration of the initial opt-out opportunity. But there is no reason to create a presumption in favor of opt out. Opt out is desirable if a proposed settlement "creates a significant hardship for individual class members." But ordinarily the opportunity to object provides sufficient protection.

Mehri & Skalet, PLLC, 01-CV-083: The need for a settlement opt out "is certainly open to question, given the inherent power of the court to provide opt-out rights in appropriate cases or circumstances where opt-out rights are not specified." Exercise of this power is shown in some (b)(2) cases.

Prof. Susan P. Koniak, 01-CV-086: Rule 23 should provide "every absent class member * * * a right to opt-out of the settlement contract. Surely, there is no reason not to guarantee this to all (b)(3) class members and given that the categories of (b) are so porous, it is only fair that similar opt-out rights at the time of settlement be the default rule for all absent class members."

State Bar of California Committee on Federal Courts, 01-CV-089: Supports the first alternative. Class members may not have had the incentive to opt out before settlement terms are known. The first alternative "creates a stronger incentive for courts to review settlement terms carefully. In order to make a 'good cause' determination, a court will likely scrutinize settlement terms to assess whether they are fair to all class members. If the court is at all uncertain about terms, the court will likely permit the opt-

out * * *."

Committee on Rules, W.D.Mi., 01-CV-090: A settlement opt out undermines the class-action goal of judicial efficiency. The defendant "can ride the hope" that so many class members will opt out as to destroy the class by defeating numerosity. This hope may further encourage unsanctioned and improper communications by the defendant with class members. And "the amendment all but eviscerates the 'objection' process." A dissatisfied class member will exit, not object, depriving other class members of the benefit of the objections that would have been made were exit not possible.

David J. Piell, Student, 01-CV-094: The Note refers to classes certified for settlement. Amchem, and see Hanlon v. Chrysler, 9th Cir.1998, 150 F.3d 1011, make it clear that settlement classes cannot be certified. But Alternative 1 is superior. The right to opt out is essential once a settlement is proposed – that is the point of tolling the statute of limitations once a class action is filed. Class members should not be forced to guess whether counsel will adequately represent the class in settlement.

Robin F. Zwerling, Esq., 01-CV-095: (e)(3) must be amended or clarified to reflect the problem of sequential settlements with different defendants. The problem is illustrated by an action now pending on appeal in the 2d Circuit. Members of the class in an alleged $700 million ponzi scheme initiated parallel individual litigation but failed to opt out of the class. The class settled with an insurance company; the individual plaintiffs participated in distribution of that settlement. The class then settled with another defendant, an auditor. The individual plaintiffs objected to the settlement and sought to opt out of the class; the district court, invoking its original ruling that a plaintiff must opt out for all purposes or remain in the class for all purposes, refused to permit exclusion. It explained that a plaintiff should not be permitted to remain in the class as to defendants against whom her claims are relatively weak, while opting out to pursue relatively stronger claims against other defendants. That ruling is on appeal; the settling defendant has said that it will back out of the settlement if exclusion is allowed, arguing failure of an assumed condition precedent by material change in the class from whom it sought peace. To address this problem, the Committee should (1) adopt Alternative 2; (2) make it explicit that there is only one subsequent opportunity to opt out of a settlement, limited to the first settlement reached; and (3) make it explicit that selective opt-outs as to only one defendant are not permissible.

Prof. Howard M. Erichson, 01-CV-097: Alternative 1 is better. There are some risks in the settlement opt out, including the risk that a lawyer with a large number of individual clients will threaten to opt them out to win leverage to benefit them at the expense of other class members. Defense interests are likely to oppose this provision because it gives plaintiffs another bargaining chip. "But the benefits strongly outweigh the risks." The opt-out opportunity protects against collusive or inadequate settlements that protect defendants and enrich class counsel at the

expense of the class.

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~~with the policies underlying the class action rules); *In re Agent Orange Product Liability Litigation*, 800 F.2d 14, 19 (2d Cir. 1986) ("the traditional rules that have been developed in the course of attorneys' representation of the interests of clients outside the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation"); *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 164 (3d Cir. 1984) (Adams, J., concurring); see also *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) ("when a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class to rest exclusively with the named plaintiffs").~~

~~Class representatives may or may not have a preexisting attorney-client relationship with class counsel, but a~~Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel~~, who is appointed by the court~~. ~~See *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078-79 (2d Cir. 1995).~~ In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must ~~has the obligation to~~ determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole. ~~Approval of such a settlement, of course, depends on the court's review under Rule 23(e).~~

~~Until appointment as class counsel, an attorney does not represent the class in a way that makes the attorney's actions legally binding on class members. Counsel who have established an attorney-client relationship with certain class members, and those who have been appointed lead or liaison counsel as noted above, may have authority to take certain actions on behalf of some class members, but authority to act officially in a way that will legally bind the class can only be created by appointment as class counsel.~~

~~Before certification, counsel may undertake actions tentatively on behalf of the class. One frequent example is discussion of possible settlement of the action by counsel before the class is certified. Such pre-certification activities anticipate later appointment as class counsel, and by later applying for such appointment counsel is representing to the court that the activities were undertaken in the best interests of the class. By presenting such a pre-certification settlement for approval under Rule 23(e) and seeking appointment as class counsel, for example, counsel represents that the settlement provisions are fair, reasonable, and adequate for the class.~~

Paragraph (1)(C) ~~Paragraph (2)(B)~~ articulates the basic responsibility of the court ~~in selecting class counsel --~~ to appoint class counsel ~~an attorney~~ who will provide ~~assure~~ the adequate representation called for by paragraph (1)(B). It identifies ~~three~~ criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court's duty, the listing also informs counsel seeking appointment about the topics that should be addressed in an application for appointment or ~~on which they need to inform the court. As indicated above, this information may be included~~ in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (1)(C)~~(2)(B)~~ or about any other relevant topic. For example, the court may direct applicants ~~counsel seeking appointment as class counsel~~ to inform the court concerning any agreements ~~they have made~~ about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate how ~~whether they represent parties or a class in~~ parallel litigation ~~that~~ might be coordinated or consolidated with the action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. ~~As adoption of Rule 23(h) recognizes, a~~Attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique ~~for dealing with these issues~~. Paragraph (2)(D~~C~~) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful ~~in selecting class counsel or to provide criteria for an order under paragraph (2)(C)~~, the court need not consider it in all class actions. ~~But the topic is mentioned in the rule because of its frequent importance, and courts should be alert to whether it is useful to direct counsel to provide such information.~~

Some information relevant to class counsel appointment may involve matters that include adversary preparation in a way that should be shielded from disclosure to other parties. An appropriate protective order may be necessary to preserve confidentiality. ~~Full reports on a number of the subjects that are to be covered in counsel's submissions to the court may often reveal information that should not be available to the class opponent or to other parties. Examples include the work counsel has done in identifying potential claims, the resources counsel will commit to representing the class, and proposed terms for attorney fees. In order to safeguard this confidential information, the court may direct that these disclosures be made~~

~~adequate record of the basis for their decisions regarding selection of class counsel.~~

(g) Class Counsel.[6]

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

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

(C) In appointing class counsel, the court

(i) must consider:

- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law,
- the work counsel has done in identifying or investigating potential claims in the action; and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to

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[6] The following is a clean copy of Rule 23(g) and the Committee Note as proposed.

provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim class counsel before determining whether to certify the action as a class action.

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

(C) If more than one applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

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

Committee Note

Subdivision (g). Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process. In the future, Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the class certification process. This subdivision recognizes the

importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. The procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. The new subdivision also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

Paragraph (1) sets out the basic requirement that class counsel be appointed if a class is certified and articulates the obligation of class counsel to represent the interests of the class, as opposed to the potentially conflicting interests of individual class members. It also sets out the factors the court should consider in assessing proposed class counsel.

Paragraph (1)(A) requires that the court appoint class counsel to represent the class. Class counsel must be appointed for all classes, including each subclass that the court certifies to represent divergent interests.

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

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients. Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole.

Paragraph (1)(C) articulates the basic responsibility of the court to appoint class counsel who will provide the adequate representation called for by paragraph (1)(B). It identifies criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court's duty, the listing also informs counsel seeking appointment about the topics that should be addressed in the

application for appointment or in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (1)(C) or about any other relevant topic. For example, the court may direct applicants to inform the court concerning any agreements about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court might also direct that potential class counsel indicate how parallel litigation might be coordinated or consolidated with the action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. Attorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique. Paragraph (2)(D) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful, the court need not consider it in all class actions.

Some information relevant to class counsel appointment may involve matters that include adversary preparation in a way that should be shielded from disclosure to other parties. An appropriate protective order may be necessary to preserve confidentiality.

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. Unlike the multiple application situation governed by Rule 23(g)(2)(C), the goal in cases in which there is one applicant is to ensure adequate representation for the class. The resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration to lawyers with the greatest resources.

If, after review of all applicants, the court concludes that none would be satisfactory class counsel, it may deny class certification, reject all applications, recommend that an application be modified, invite new applications, or make any other appropriate order regarding selection and appointment of class counsel.

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it provides the framework for appointment of class counsel in all class actions. In cases in which there is one applicant, the court's task is limited to

ensuring that the applicant is adequate under the criteria specified in Rule 23(g)(1)(C). For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (g)(1)(C) is included.

In some instances, there will be multiple applicants for appointment as class counsel, and paragraph (2)(B) permits the court to defer appointment for a reasonable time to allow additional applications. Other applicants ordinarily would file a formal application detailing their suitability for the position. If there are multiple applicants, paragraph (2)(C) directs the court to select the applicant best able to represent the interests of the class.

In a plaintiff class action the court would ordinarily appoint as class counsel only an attorney or attorneys who have sought appointment. Different considerations may apply in defendant class actions.

The rule states that the court should appoint "class counsel." In many instances, the applicant will be an individual attorney. In other cases, however, an entire firm, or perhaps numerous attorneys who are not otherwise affiliated but are collaborating on the action will apply. No rule of thumb exists to determine when such arrangements are appropriate; the court should be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure.

Paragraph (2)(A) authorizes the court to designate interim class counsel during the pre-certification period in order to protect the interests of the putative class. Rule 23(b)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class certification, however, it will usually be important for an attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before certification. Current practice recognizes the practical necessity that counsel who file a class action manage the litigation during the period required to reach a certification determination. Paragraph 2(A) provides for formal designation of interim class counsel, although failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim class counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement that is fair, reasonable, and adequate for the class.

Paragraph (2)(B) provides that the court may allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating competing applications in such a case is to afford the best possible representation for the class. Another possible reason for deferring appointment would be that the initial applicant was found inadequate, but it seems appropriate to permit additional applications rather than deny class certification.

Paragraph (2)(C) directs the court to select the class counsel best able to represent the interests of the class if there are multiple applicants. This decision should be made using the factors outlined in paragraph (1)(C), but in the multiple applicant situation the court is to go beyond scrutinizing the adequacy of counsel and make a comparison of the strengths of the various applicants. As with the decision whether to appoint the sole applicant for the position, no single factor should be dispositive in selecting class counsel in cases in which there are multiple applicants. The fact that a given attorney filed the instant action, for example, might not weigh heavily in the decision if that lawyer had not done significant work identifying or investigating claims. Depending on the nature of the case, one important consideration might be the applicant's relationship with the proposed class representative.

Paragraph (2)(D) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action, to facilitate the court's later determination of a reasonable attorney fee.

New Rule 23(h)

(h) Attorney Fees Award.[7] In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set ~~directed~~ by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed ~~given~~ to ~~all~~ class members in a reasonable manner.

(2) Objections to Motion. A class member or a party from whom payment is sought may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

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[7] The only proposed changes to Rule 23(h) as published are in Rule 23(h)(1). They are indicated by double underlining for added language and overstriking for deleted language. Because there are few changes, this memorandum does not include a clean version of the proposed rule, as it does for Rule 23(g).

Committee Note[8]

Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. ~~See RAND Institute for Civil Justice, *Class Action Dilemmas, Executive Summary* 24 (1999) (stating that "what judges do is the key to determining the benefit-cost ratio" in class actions, and that salutary results followed when judges "took responsibility for determining attorney fees").~~ Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision ~~provides a framework for fee awards in class actions. It~~ is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action. ~~In cases subject to court approval under Rule 23(e), that review process would ordinarily proceed in tandem with consideration of class counsel's fee motion.~~

Subdivision (h) applies to "an action certified as a class action." This ~~is intended to~~ includes cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, ~~As noted below, in these situations the~~ notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself. ~~Deferring the filing of class counsel's fee motion until after the Rule 23(e) review is completed would therefore usually be wasteful.~~

This subdivision does not undertake to create ~~any~~ new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed ~~sought appointment as~~ class counsel ~~but were not appointed~~, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. ~~See, e.g., *Gottlieb v. Barry*, 43 F.3d~~

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[8] A clean copy of the Note appears at the end.

~~474 (10th Cir. 1994) (fee award to objectors who brought about reduction in fee awarded from settlement fund); *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974) (objectors entitled to attorney fees for improving settlement).~~ Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes. ~~See, e.g., 7B C. Wright, A. Miller & M. Kane, Fed. Prac. & Pro. § 1803 at 507-08.~~ Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. ~~See generally A. Hirsch & D. Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* (Fed. Jud. Ctr. 1994).~~ In particular, there is some variation among courts about whether in "common fund" cases the court should use the lodestar or a percentage method of determining what fee is reasonable. ~~See *Powers v. Eichan*, 229 F.3d 1249 (9th Cir. 2000) (district court did not abuse its discretion by using percentage method); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000) (in common fund cases the district court may use either the lodestar or the percentage approach); *Johnson v. Comerica Mortgage Corp.*, 83 F.3d 241, 244-46 (8th Cir. 1996) (district court has discretion to select either percentage or lodestar approach); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991) (percentage approach is supported by "better reasoned" authority). Ultimately the courts may conclude that a combination of methods -- lodestar and percentage -- should be employed in a blended manner to provide the best possible assessment of a reasonable fee.~~ The rule does not attempt to resolve the question whether the lodestar or percentage approach~~, or some blending of the two,~~ should be viewed as preferable~~, leaving that evolving determination to the courts~~.

Active judicial involvement in measuring fee awards is singularly important to the healthy operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court's responsibility. ~~Although the rule does not attempt to supplant caselaw developments on fee measurement, it is premised on the singular importance of judicial review of fee awards to the healthy operation of the class action process. Ultimately the class action is a creation of equity for which the courts bear a special responsibility. See 7B Fed. Prac. & Pro. § 1803 at 494 ("The court's authority to reimburse the parties stems from the fact that the class action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts.").~~ "In a class action, whether the attorneys' fees come from a common fund or are otherwise paid,

the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper." *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328 (9th Cir. 1999); ~~see also *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 730 (3d Cir. 2001) (referring to "the special position of the courts in connection with class action settlements and attorneys' fee awards"). Accordingly, "a thorough review of fee applications is required in all class action settlements." *In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation*, 55 F.3d 768, 819 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995). Indeed, improved judicial shouldering of this responsibility may be a key element in improving the class action process. See RAND, *Class Action Dilemmas*, supra, at 33 ("The single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society.").~~ Even in the absence of objections, the court bears this responsibility.[9]

Courts discharging this responsibility have looked to ~~focused on~~ a variety of factors. ~~Indeed, in many circuits there is already a recognized list of factors the district courts are to address in deciding fee motions. Without attempting to list all that properly might be considered, it may be helpful to identify some that are often important in class actions.~~

One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. ~~See RAND, *Class Action Dilemmas*, supra, at 34-35.~~ The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the

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[9] This sentence moves a thought that previously appeared in a later paragraph that has been deleted.

class. ~~"Coupon" settlements may call for careful scrutiny to verify the actual value to class members of the resulting coupons. If there is no secondary market for coupons, and if there are significant limitations on using them, a substantial discount may be appropriate. It may be that only unusual circumstances would make it appropriate to value the settlement as the sum of the face value of all coupons.~~ On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or declaratory relief").

~~Courts also regularly consider the time counsel reasonably expended on the action -- the lodestar analysis. Even a court that initially uses a percentage approach might well choose to "cross-check" that initial determination with consideration of the time needed for the action. Similarly, a court that begins with a lodestar approach may also emphasize the results obtained in deciding whether the resulting lodestar figure would be a reasonable award. The attorney work to be considered under this factor would include pre-appointment efforts of attorneys appointed as class counsel. This analysis would ordinarily also take account of the professional quality of the representation.~~

~~Any objections submitted pursuant to paragraph (2) should also be considered. Often these objections would shed light on topics addressed by the other factors. Sometimes objectors will provide additional information to the court. Owing to the court's special duty for supervising fee awards in class actions, however, it has been held that the absence of objections does not relieve the court of its responsibility for scrutinizing the fee motion.[10] See *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328-29 (9th Cir. 1999) ("This duty of the court exists independently of any objection.").~~

~~The risks borne by class counsel are also often considered in setting an appropriate fee in common fund cases. In some cases, the probability of a successful result may be very high, making any enhancement of the fee on this ground inappropriate. But when there is a significant risk of nonrecovery, that factor has sometimes been important in determining the fee, or in~~

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[10] This thought has been moved to an earlier paragraph.

~~interpreting the lodestar as a cross-check on the fee determined by the percentage method.~~

Any ~~terms proposed by counsel in seeking appointment as class counsel, and any~~ directions or orders made by the court in connection with appointing class counsel~~,~~ under Rule 23(g) should ~~also~~ weigh heavily in making a fee award ~~on an eventual fee award. The process of appointing class counsel under Rule 23(g) contemplates that these topics will often be considered at that point, and the resulting directives should provide a starting point for fee motions~~ under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: "If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made." The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. "Side agreements" regarding fees provide at least perspective pertinent to an appropriate fee award ~~other factors such as the contingency of the representation and financial risks borne by class counsel. These agreements may sometimes indicate that others are reaping a windfall due to a substantial award while class counsel are not significantly compensated for their efforts. If that appears to be true, the court may have authority to make appropriate adjustments~~.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. ~~The court-awarded fee will often not be the only fee earned by class counsel or by other attorneys in connection with the action. Class counsel may have fee agreements with individual class members, while other class members may have fee agreements with their own lawyers.~~ In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments in the class fee award were necessary as a result. ~~In other circumstances, the court might determine that fees called for by contracts between class members and other lawyers would either deplete the funds remaining to pay class counsel, or deplete the net proceeds for class members, in ways that call for adjustment.~~

~~Courts have also referred to the awards in similar cases for aid in determining a reasonable fee award. See, e.g., *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 737-38 (3d Cir.~~

~~2001) (including chart of attorney fee awards in cases in which the common fund exceeded $100 million).~~

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. ~~These charges can sometimes be considerable. They may often be suitable for initial prospective regulation through~~ If costs were addressed in the order appointing class counsel~~. *See* Rule 23(g)(2)(C). If so~~, those directives should be a presumptive starting point in determining what is an appropriate award. ~~In any event, the court ought only authorize payment of nontaxable costs that are reasonable.~~

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4. ~~but~~ Oowing to the distinctive features of class action fee motions, however, the provisions of this subdivision control disposition of fee motions in class actions. ~~As noted above, this includes awards not only to class counsel, but to any other attorney who seeks an award for work in connection with the class action.~~

The court should direct when the fee motion must be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would ~~ordinarily~~ be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). ~~It may, however, be sensible in some such cases to defer filing of some supporting materials until a later date.~~ In cases litigated to judgment, the court might also order ~~want~~ class counsel's motion to be filed ~~on file~~ promptly so that notice to the class under this subdivision (h) can be given. ~~If other counsel will seek awards, a different schedule may be appropriate. For example, if fees are sought by an objector to the proposed settlement, or by an objector to a fee motion, it is important to allow sufficient time after the ruling on the objection for the fee motion to be filed.~~

Besides service of the motion on all parties, notice of class counsel's motion for attorney fees must be "directed to the class "in a reasonable manner." ~~is required with regard to class counsel's motion for attorney fees.~~ Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. ~~As noted above, i~~In cases in which settlement approval is contemplated under Rule 23(e), ~~the~~ notice of ~~regarding~~ class counsel's fee motion should ~~ordinarily would~~ be combined with notice of the proposed settlement, and the provision regarding notice to the class is parallel to the requirements for notice

under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense ~~while assuring that a suitable proportion of class members are likely to be apprised of the fee motion~~.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties -- for example, nonsettling defendants -- may not object because they lack a ~~have no~~ sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. ~~, but it would usually be important to set one.~~ In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion. If a class member wishes to preserve the right to appeal should an objection be rejected, it may be necessary for the class member to seek to intervene in addition to objecting.[11] ~~For those purposes, an objection would ordinarily have to be made formally by filing in court, rather than by letter to counsel or the court.~~

The court may allow an objector discovery relevant to the objections. In determining whether to allow ~~such~~ discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. *See* Rule 26(b)(2). One factor in determining whether to authorize discovery is ~~would be~~ the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information. ~~Unlimited discovery is not a usual feature of fee disputes. See *In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litigation*, 56 F.3d 295, 303-04 (1st Cir. 1995).~~

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases. The form and extent of a hearing ~~, leaving the question whether to hold a hearing to~~ depend on the circumstances of the case. The rule does require ~~See *Sweeny v. Athens Regional Medical Ctr.*, 917 F.2d 1560, 1566 (11th Cir. 1990) ("[T]he more complex the disputed factual issues, the more necessary it is for the court to hold an evidentiary hearing."). In order to permit adequate appellate review, the court must make~~ findings and conclusions under Rule 52(a). ~~See *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 731 (3d Cir. 2001) ("the~~

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[11] This sentence may need to be revisited after the Supreme Court decides Devlin v. Scarledetti, No. 01-417, 122 S.Ct. 663 (cert. granted, Dec. 10, 2001, in Scarledetti v. Debarr, 265 F.3d 195 (4th Cir. 2001)).

~~cases make clear that reviewing courts retain an interest -- a most special and predominant interest -- in the fairness of class action settlements and attorneys' fee awards"); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 196 (3d Cir. 2000) ("it is incumbent upon a district court to make its reasoning and application of the fee-awards jurisprudence clear, so that we, as a reviewing court, have a sufficient basis to review for abuse of discretion").~~

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. ~~If a master is to be used to assist in resolving the basic question whether an award should be made to certain moving parties, the appointment must be made under Rule 53. If the court needs assistance in compiling or analyzing detailed data to determine a reasonable award, this option is available. *See* Report of the Federal Courts Study Committee 104 (1990) (recommending consideration of using magistrate judges or special masters as taxing masters).~~ In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process might ~~would~~ entail.

Committee Note

Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action.

Subdivision (h) applies to "an action certified as a class action." This includes cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement pursuant to review under Rule 23(e). When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself.

This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. In particular, there is some variation among courts about whether in "common fund" cases the court should use the lodestar or a percentage method of determining what fee is reasonable. The rule does not attempt to resolve the question whether the lodestar or percentage approach should be viewed as preferable.

Active judicial involvement in measuring fee awards is singularly important to the healthy operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court's reponsibility. "In a class action, whether the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper." *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328 (9th Cir. 1999). Even in the absence of objections, the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors. One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

At the same time, it is important to recognize that in some class actions the monetary relief obtained is not the sole determinant of an appropriate attorney fees award. Cf. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989) (cautioning in an individual case against an "undesirable emphasis" on "the importance of the recovery of damages in civil rights litigation" that might "shortchange efforts to seek effective injunctive or declaratory relief").

Any directions or orders made by the court in connection with appointing class counsel under Rule 23(g) should weigh heavily in making a fee award under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class

counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: "If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made." The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. "Side agreements" regarding fees provide at least perspective pertinent to an appropriate fee award.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments in the class fee award were necessary as a result.

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. If costs were addressed in the order appointing class counsel, those directives should be a presumptive starting point in determining what is an appropriate award.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4. Owing to the distinctive features of class action fee motions, however, the provisions of this subdivision control disposition of fee motions in class actions.

The court should direct when the fee motion must be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would be important to require the filing of at least the initial motion in time for inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). In cases litigated to judgment, the court might also order class counsel's motion to be filed promptly so that notice to the class under this subdivision (h) can be given.

Besides service of the motion on all parties, notice of class counsel's motion for attorney fees must be "directed to the class in a reasonable manner." Because members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances. In cases in which settlement approval is contemplated under Rule 23(e), notice of class counsel's fee motion should be combined with notice of the proposed settlement, and the provision

regarding notice to the class is parallel to the requirements for notice under Rule 23(e). In adjudicated class actions, the court may calibrate the notice to avoid undue expense.

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties -- for example, nonsettling defendants -- may not object because they lack a sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. In setting the date objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion. If a class member wishes to preserve the right to appeal should an objection be rejected, it may be necessary for the class member to seek to intervene in addition to objecting.

The court may allow an objector discovery relevant to the objections. In determining whether to allow discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. *See* Rule 26(b)(2). One factor in determining whether to authorize discovery is the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information.

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases. The form and extent of a hearing depend on the circumstances of the case. The rule does require findings and conclusions under Rule 52(a).

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process might entail.

5cii

Summary of Comments & Testimony on Proposed Rules 23(g) and (h)

Rule 23(g) -- in general

Conference: This is an extremely important and useful provision. It underscores the fiduciary obligation of counsel to the class, and the fiduciary obligation of the court to make sure that counsel discharge that duty.

Conference: Is there a danger here of emphasizing the judge's investment in the counsel selected? Will that affect the judge's attitude toward other things?

Conference: Maybe it would be better to have two judges involved, one to select counsel and the other to handle the case. At least, having somebody other than the assigned judge screen counsel for quality could be desirable.

Conference: Regarding the Committee Note, I have a real question whether it serves a purpose. Lawyers cannot find these notes. What real effect or value do they have? Is the Note as binding as the Rule?

Conference: West puts the Note right in the pamphlets with the rules. Justice Scalia's attitude toward this sort of material is not true of all judges. At the least, the Note serves an educational function.

Conference: As a judge, I look at the Notes all the time.

Conference: The Enabling Act authorizes adoption of rules, and says nothing about notes. A Note cannot be adopted or changed without a simultaneous amendment to the Rule, and even if one tried to change a Note without changing a Rule it would require going through the entire Enabling Act process.

Conference: The Rule 23(g) notion that the judge picks the class lawyer reflects what many judges do; it is important to say it in the rule. The actors who are not much regulated are the judges. The premise of Rule 23(g) is that there is not much client control. But the rule does not require a hearing or findings. There are other settings in which judges pick lawyers. For example, judges appoint counsel from a list or panel for impecunious criminal defendants. But the initial selection of eligible lawyers is not left up to individual judges.

Conference: The CJA approach raises difficulties. For one thing, these people generally have not been paid adequately. It would be a mistake to get the government into this.

Joseph Grundfest, S.F. Hg. (pp. 30-45) & 01-CV-009: I rise in favor of the appointment competition which tends to work very well in various aspects of our economy. What is needed is a

market check to achieve the benefits of competition in selection of counsel. An auction is only one method for doing so. Proposed Rule 23(g) recognizes that competition for appointment may be useful, and "has the far, far better of the argument" than the recent draft Third Circuit report. The "benchmark" of 25 to 30 percent simply is not relevant. It came from 19th century individual cases, and does not work here. "You are still paying a 19th century price given everything else that's happened in the world since then for a particular item?" Law firms are quite willing to work for much less than that amount, and there is no ground for saying that their results are "totally inferior." If I were writing the rules, I would be more aggressive than this proposal, particularly urging the use of market check mechanisms in selection and compensation of counsel. I think this approach applies across the board, even if that seems a bit "imperialistic." At least, this could be applied in consumer fraud actions, mass tort cases, and the like. But perhaps it would not work in civil rights cases. In any event, it would be important to limit consideration to "qualified counsel," so there should be a two-step process by which selection is done, looking first to quality screening and then to selection from among those left using market mechanisms.

Mary Alexander, S.F. Hg. (pp. 55-73) & 01-CV-016 (president-elect of ATLA, presenting its position): ATLA is wary of the notion of federal courts appointing class counsel. Litigants are entitled to retain their own counsel, and they should not have that right extinguished by a court order that effectively replaces their counsel with one or more attorneys they don't know. Absent evidence of unfitness that would justify limiting an attorney's right to practice, a litigant's choice of counsel should be left alone. It would also be wrong if this lawyer were selected by something like an auction method, giving the clients the lowest bidder in place of the lawyer they have selected. ATLA does support having judicial oversight, but is concerned about the low bidder phenomenon. Thus, having the judge scrutinize the background and experience of the lawyer is fine.

Gerson Smoger, S.F. Hg. (pp. 73-91): There is a risk of cronyism, or apparent cronyism, in having the judges appoint the lawyers. The ones that are likely chosen are lawyers familiar to the particular judge that has the power to make the appointment. Once the judge makes such a selection, it will be hard not to feel invested in the attorney's efforts (pp. 90-91).

John Frank, S.F. Hg. (pp. 92-97): The problem with these changes is that they introduce too many new decision points. Those, in turn, afford opportunities for counsel to wrangle, and then require judges to resolve the wrangling. I am not persuaded that the additional effort and cost that will result is justified by the advantages of the proposed amendments. A better solution to the problems of the contemporary class action would be to move

the (b)(3) class action out of the court system altogether and into some sort of administrative agency.

James Finberg, S.F. Hg. (pp. 104-05): Agrees with Prof. Grundfest that in securities litigation market forces can be extremely useful, in part because there is a good supply of qualified counsel there. In fact, in those cases classes have benefitted from getting a larger share of the payouts due to competition. In employment discrimination cases, however, these dynamics don't apply, and market forces don't work as well.

James Sturdevant, S.F. Hg. (pp. 120-29): The language of 23(g) is troubling in that it seems to encourage judges to foster competition for appointment as class counsel. In particular, the focus on the resources counsel will commit to the action seems to point in that direction. Where other firms have notice of the filing of a case, this may encourage the judge to invite other counsel to come in or to allow some sort of bidding process.

John Beisner, D.C. Hg. (pp. 7-21) & 01-CV-027: Clearly the provision on appointment of class counsel is appropriate to the extent that it confirms the authority of courts to deal with situations in which multiple counsel are attempting to represent the same classes. The need is less pronounced, however, where multiple counsel are not vying for the position of lead counsel, and the question is merely whether some other counsel should be brought in to replace the lawyers who initially filed the suit. Conceptually, the idea that the court would select plaintiffs' counsel in every case is troubling, and it might create an appearance that the court has a vested interest in ensuring that the selected plaintiffs' counsel succeed. The basic problem is that the process seems to contemplate that "trial courts would routinely recruit and select class counsel, possibly long the question whether a certifiable class even exists has been resolved." I am not in favor of having a court that basically has one class action before it with one counsel or group of counsel undertaking efforts to go out and find other counsel to handle the litigation.

Judith Resnik, D.C. Hg. (pp. 58-75) & 01-CV-044: "I agree with the Committee's decision to recognize the central role that judges now play in shaping the market of lawyering for aggregate litigation." But who rides herd on the judges as they perform this task? If one looks for precedents for the judge as employer, the ones that occur to me ar the hiring of magistrate judges, attorneys appointed under the CJA, and the selection of members for the committees in bankruptcy. These examples, particularly the bankruptcy one, illustrate the high potential risk of apparent or actual patronage activities by judges. Given the public criticism we've seen of the large sums paid lawyers in class actions, judges are at risk of having antagonism about these matters rub off on them.

Victor Schwartz, D.C. Hg. (pp. 76-63) & 01-CV-031: The adoption of Rule 23(g) might widen the gulf between how class actions are addressed in federal courts and the way in which they are handled in some state courts. State court rules don't usually give the judge this important power. And a few state court judges who have this power have not used it to help assure that class counsel are appointed on the basis of both merit and fair and open market competition.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: Rule 23(g)(1) restates nearly-universal practice without any significant modification. Rule 23(g)(2), however, goes beyond current practice and seems unwise to us. The "real meat of the Rule" is in the Note, and the committee might want to ask whether it wishes to promulgate a rule principally to inform the courts and the litigants of the views set out in the Note. We believe that some of the points in the Note should be incorporated in the rule.

Peter Ausili (E.D.N.Y. Comm. on Civ. Lit.), D.C. Hg. (pp. 203-18): The Committee was concerned about utilizing a bidding process and putting the judge in that particular role. It felt that it was early and unwise at this time for the court to adopt essentially a competitive bidding procedure for selection of the client's counsel.

David Romine, D.C. Hg. (pp. 242-62) & 01-CV--49: The amendment adds procedural steps to class actions that require findings and increase the occasions for judicial activity. This is a cost that should be taken into account.

Ira Rheingold (Exec. Director, Nat. Assoc. of Consumer Advocates), D.C. Hg. (pp. 262-76) & 01-CV-062: NACA considers Rule 23(g) probably the most problematic of the proposed rule changes. Although we welcome anything that ensures that consumers obtain competent and able class counsel, we are concerned that the proposal appears unnecessary and unlikely to improve things. In effect, the rule moves toward the idea of auction or having judges choose the attorney. This will have a chilling effect on having cases brought. It will be "virtually a wide open invitation to law firms who have nothing to do with the development of the case to step forward and claim to be more appropriate counsel by virtue of prior experience." The protection that litigation provides to consumers is due largely to the new theories developed by creative lawyers, but the new rule will discourage such attorneys from pursuing their theories because somebody else may commandeer the case. There could be a "feeding frenzy" and it will lead to "cherry picking." The proposal would be all right if there are genuinely competing counsel, but if there is just one lawyer and nobody else has come forward, the court should only analyze the adequacy of that lawyer and not look to a competitive situation.

Walter Andrews, D.C. Hg. (pp. 276-93) & 01-CV-036: The appointment rule is a good idea, but only when there is genuine competition for the position. Otherwise, it may have a negative effect on case management and efficiency and seems unnecessary.

Hon. William Alsup (N.D. Cal.), 01-CV-004: Having worked hard on at least six class actions over the last 26 months of my tenure as a district judge, I wholeheartedly support the proposed Rule 23 revisions.

American Insurance Association, 01-CV-022: AIA finds merit in the competing arguments as to whether courts should encourage a competitive appointment process for all class actions (which might ensure more reasonable fee arrangements), or only for potential conflict situations (e.g., existing competition for leadership among multiple counsel to represent the same classes). Regardless of which proposal is adopted, AIA believes that the amendments should provide guidance as to how counsel "vacancies" will be advertised, and how the costs will be borne.

Patrick Lysaught (Defense Research Inst.) 01-CV-033, 01-CV-034,01-CV-046,01-CV-047: The proposed rule makes sense in that it is inconceivable that a class can exist, discovery can be pursued, the matter tried, a settlement negotiated, and the objectives of the case generally pursued unless and until there is an attorney or law firm appointed to represent the interest of the class members.

Prof. Charles Silver, 01-CV-048: I am strongly opposed to any effort to foster competition for class counsel, for there really is no analogue in the private market. Rule 23 should instead attempt to promote a referral market in class actions by encouraging deficient lawyers to transfer cases to better lawyers. Fee-sharing arrangements, or other agreements that foster this sort of activity, should be promoted.

David Hudson, Chair, Court Advisory Committee, U.S. Dist. Ct., S.D. Ga., 01-CV-053: The Committee opposes the proposed rule that would mandate the trial court to appoint class counsel in every case. There is no need to mandate court involvement in the relationship between the named plaintiffs and their counsel who file the case. The proper role for the court is as now provided in Rule 23(a)(4) to satisfy itself that "the representative party will fairly and adequately protect the interest of the class." Courts already take into account the factors listed in the proposed rule. The proposed rule is an invitation for ancillary proceedings between groups of lawyers seeking the trial court's appointment, and an apparently unnecessary restriction on the discretion of the court under current Rule 23(a)(4).

Gregory Joseph, Amer. Coll. of Trial Lawyers Comm. on Federal Civil Procedure, 01-CV-055: We are aware that the proposed

amendment to Rule 23(g) is consistent with the use of auctions, and express no view on the auction mechanism but do agree that Rule 23 should be broad enough to encompass it.

Edwin Wesely, Chair, Comm. on Civil Lit., E.D.N.Y., 01-CV-056: The Committee opposes this provision. Unlike most of the Rule 23 changes, this would effect significant changes in class action practice and represents a definite tilt toward selection of class counsel through competitive bidding. The Committee believes that approach is unwise for several reasons. It is premature for the drafters to endorse the activist bidding model embraced by Judge Kaplan in In re Auction House Antitrust Litig., 197 F.R.D. 71 (S.D.N.Y. 2000). The bidding model could create conflicts of interest for the court by thrusting upon it an inappropriate mixture of roles -- neutral arbiter on the one hand and litigation strategist on the other hand.

Federal Magistrate Judges Assoc. Standing Rules Committee, 01-CV-057: The FMJA Rules Committee supports the proposed changes to Rule 23.

David Rubenstein, President, Virginia Project for Social Policy and Law, Inc., 01-CV-063: Opposes the Rule 23(g) proposal. It is totally unworkable to have the court appoint counsel, for no attorney or firm will go to the trouble to develop a class action if there is a significant chance that the court will not appoint him or her class counsel. Worthy cases involving possible injuries to the public therefore will not be developed or filed. The present rule, which allows the court to decline to certify the class if it has doubts about counsel's adequacy, is sufficient. In addition, because class counsel may not have a preexisting relationship with the class plaintiffs, this proposal interferes with the attorney-client relationship. The class plaintiffs may even disapprove of the court's choice, and this would jeopardize the ability of the class action "team" (lawyers and plaintiffs) to work best in combination for the protection of the class. Moreover, the court will be in the business of "bidding" cases in seeking the appointment of class counsel. This will put the court in the position of evaluating the abilities of one attorney or firm against another. The court will have to consider the merits of the case and other difficulties in its litigation, before any motion to certify is filed, based on "bids" submitted by some firms who have not been connected with the filing of the action. By selecting the firm appointed as class counsel, the court is not only certifying that counsel is adequate, as required under the current rule, but also that it is best suited to handle the case, even though the court cannot fully understand the case at this early stage of the litigation. The court should not interfere with the work of putative class action attorneys, or with their relations with their clients, and should not be in a position of asserting that one firm is best to handle a case without a full review of the

claims and assessment of the case.

Allen Black, 01-CV-064: In general, I support an amendment to address the appointment of class counsel in Rule 23. I also support the notion that price should be one among many factors considered by the court in appointing class counsel (and not the primary factor).

Thomas Moreland, A.B.C.N.Y. Federal Courts Committee, 01-CV-071: We believe that this proposed rule would unnecessarily interfere with the attorney-client relationship. Counsel who had no role in the investigation or initiation of the case could seek to impose themselves upon a representative plaintiff or class simply because they have prior experience in handling class actions and the ability to devote significant resources to the case. This procedure can therefore go beyond any current rule. In most cases, selection of counsel should be made in the first instance by the plaintiff who has developed a relationship with counsel. There is nothing more central to the adversary process than this relationship.

Robert McCallum, Jr., U.S. Dep't of Justice, 01-CV-073: The Department supports the Committee's Conclusion that the amended Rule should describe the role of class counsel and procedures for resolving attorney fee awards.

Washington Legal Foundation, 01-CV-082: WLF has no objections to Rule 23(g). It might actually represent a slight improvement in the way federal class actions are litigated.

ABA Sections of Antitrust Law and of Litigation, 01-CV-069: The provisions concerning appointment of counsel are the most controversial amendments proposed for Rule 23. Nonetheless, on balance we believe that the district courts must have a role in the appointment of counsel for a putative class, and that the rules should provide guidance on how district courts are to perform that role. We agree that the courts owe a duty to the members of the classes that they have created to police this atypical attorney-client relationship to ensure that class counsel "fairly and adequately represent the interests of the class." For this reason, we support the proposal to add Rule 23(g)(1). But we have not reached consensus on Rule 23(g)(2). We note the apparent emphasis on the proposed terms for cost and attorney fee awards in the procedure for selecting counsel. The Note predicts that information about costs and fees will "frequently" be useful to the court. We are concerned that district courts may read the proposed rule and Note together as endorsing auctions as the preferred or only method for selecting class counsel. But the best analysis of the auction process -- the Third Circuit Task Force report -- recommends that bidding should be not be used in the typical case.

Alliance of American Insurers, 01-CV-068: The Alliance supports adoption of Rule 23(g) because it might cause competing plaintiffs' counsel to fight matters out between themselves and the judge, rather than putting defendants in the middle.

Nat. Ass'n of Protection & Advocacy Systems, 01-CV-077: NAPAS strenuously objects to the attorney appointment rule. The proposed rule creates an application process which invites competition in every single class action. Although this may have merit in some areas such as product liability or securities, it invites disaster in the context of civil rights class action litigation. Except for a few notable large Title VII employment discrimination class actions, civil rights litigation is generally brought by small practitioners, legal service organizations or public interest law firms. In a competitive process, such small firms will undoubtedly lose out to larger firms which generally will have available more extensive resources to commit to the case. This will lead to something like ambulance chasing and cause a "radical change." Unscrupulous counsel in search of a share of the damages pot need only wait in the wings to learn of the class action, and then file an application to serve as class counsel. Theoretically, the courts could scrutinize such applications, but this would not improve the quality of class counsel in class actions.

National Treasury Employees Union, 01-CV-078: The rule seeks to promote competitive applications, particularly in proposed Rule 26(b)(2)(A). This would subject counsel to a pure bidding process that will sometimes lead to selection of poor class counsel based on the lowest bid rather than on more dispositive factors. The most important and necessary aspect is that counsel be able to fairly and adequately protect the interests of the class. Appointment of class counsel based on the lowest bid will not always foster this purpose, as appointed counsel could then have an incentive to settle the case as quickly as possible, perhaps on less favorable terms than could otherwise be obtained. Having the judge approve the fee award adequately protects against excessive fees.

David Williams, 01-CV-079: Requiring that the courts always appoint class counsel may be an unwise nationwide experiment. Courts can already choose class counsel when there are multiple counsel pursuing the same or parallel actions. The amendment would go beyond that and require that the court always appoint class counsel. It is suggested that various counsel should bid for the case, but there are no objective criteria for determining the winning bids, or other procedures to dilute the judge's personal preferences. This may create an appearance of patronage. Also, the rule should require that the order appointing class counsel include provision for the compensation of the filing attorneys if they are not appointed class counsel. Otherwise, they are expected to undertake the substantial work of

investigating and filing the suit without any provision for payment.

Mehri & Skalet, 01-CV-083: The Committee may be acting appropriately in codifying existing law, but it is creating serious potential problems when it seeks to go beyond current law and practice. The rule's proposed requirement that class counsel fairly and adequately represent the class, and criteria for selection of counsel, are appropriate codifications of the implicit authority courts have to protect the interests of the class. The Note also provides a sound explanation of the role of class counsel and class counsel's relationship to class members. The problem comes in the Committee's apparent enthusiasm for, and encouragement of, competition for class counsel, and the use of competitive bidding. When one attorney puts time and money into developing a case, another could often offer a cheaper "rate" because he or she would be able to avoid these up front costs.

Federal Trade Commission, 01-CV-085: Rule 23(g)(2) recognizes the possibility of competition for class counsel. The Commission supports this provision and believes that competition should be encouraged whenever appropriate. Competition enhances the incentives of class counsel to obtain the best possible outcome for injured class members, and is also likely to encourage class counsel to offer more favorable fee arrangements. We recommend that reference to use of a competitive application process be moved from the Note to a similar exhortation in the text of the rule.

W.D. Mich. Committee on Rules of Practice, 01-CV-090: "[T]he introduction of a class counsel appointment process for all class actions equates the appointment of the counsel to a barnyard auction that invites a parade of horribles and in the process will further erode the integrity of the legal profession in the eyes of the public to be served." The current method of choosing the class lawyer is not broken, and the amendment proposes instead a "best bid" concept that will reflect poorly on a profession already under fire. It creates an auctioneer atmosphere and lets the judge exercise his discretion to choose among the lawyers in appointing class counsel. This could lead to arbitrary appointments that will produce yet another topic for appellate review. It will also interfere with the ability of the victimized class representative to select counsel of his or her choice, subject only to a determination by the court that counsel is suitable to represent the other members of the class. The result will be to deter lawyers who are not "big players" in class action practice from offering representation to victimized plaintiffs.

Lawyers' Committee for Civil Rights Under Law (and 16 other groups), 01-CV-091: This proposal for having the court appoint class counsel in every case is unwarranted and will have the

inevitable effect of deterring attorneys from considering the investigation and commencement of class actions where that substantial investment of time and resources could be forfeited to a late arriving contestant for the position of class counsel. (Note that, at p. 19, the statement also observes that "[c]ivil rights enforcement cases do not, for the most part, present an economically appetizing opportunity for lawyers," and cites "the general absence of economic competition among lawyers for the opportunity to prosecute civil rights class actions.") This proposal will intrude into the attorney-client relationship and create additional proceedings that will delay certification and the resolution of the merits. The reference to consideration of fees in connection with appointment introduces the suggestion that it could be made on the basis of the "lowest bidder," a result that will surely be sought by defendants in fee-shifting cases. The existing standards under Rule 23(a)(4) that look to the qualification of counsel in determining adequacy of representation are sufficient.

Nat. Assoc. of Securities & Commer. Law Attys & Comm. to Support the Antitrust Laws, 01-CV-093: This proposal seeks to graft onto the rest of class actions jurisprudence a practice that is fundamentally at odds with the "empowered plaintiff" model Congress embraced in the PSLRA. Indeed, the proposal does not even refer to the plaintiff, let alone assign him or her any role in retention of counsel or management of the litigation. The Note also says that attorneys who have not even filed a case on behalf of any plaintiff may make an application to be appointed lead counsel, and that class counsel should report to the court, not the class representative. This can be seen as a radical departure from the traditional role and responsibilities of the court. It is dubious whether judges should be making such judgments for the class, as opposed to protecting against bad decisions on such matters. Rather than risking distorting the separate roles played by the court and other fiduciaries, it might be better to find out if a rule can be designed for all class actions that would focus on the attributes of the plaintiff. Leaving things to the judge invites favoritism by the court, for judges may in some instances tend to favor firms with which they are familiar. By asking the judge to attend to such things as whether there is overstaffing, the rule asks the judge to become involved in strategic decisions commonly made by plaintiffs and their counsel. This invites "the type of bureaucratic micro-management of markets that have given command economies a bad name." Although the Note is silent on the merits of attorney auctions, given the structure of the proposed rule the issue whether those would be a healthy development cannot be so neatly sidestepped.

David Piell, 01-CV-094: Proposed Rule 23(g) is making a rule out of something judges can already do. While the bidding system has worked for some of the judges who have tried it, inclusion in the

rule, optional as it may be, will no doubt increase the pressure on judges to use that approach. Nowhere in the rule or comments does it state how the instigating attorney is to be compensated for investigation expenses and other costs incurred up to the point where other class counsel is selected. The solution to this problem -- having successful counsel pay reasonable fees and expenses after winning the bidding process -- is also problematic for it would create additional champerty.

Steven Gregory, 01-CV-096: Rule 23(g) would serve to enhance the reputations of, and enrich, large national class-action law firms while chilling the ability of smaller law firms to file and prosecute class action cases. It would thereby reduce the pool of qualified, experienced, and competent class counsel in the U.S. "It shocks me that such a radical change in Rule 23 would be considered by the committee as it runs directly counter to the egalitarian spirit of government in the United States." Moreover, the rule could leave the plaintiff represented by a lawyer who is a stranger.

Prof. Howard Erichson, 01-CV-097: This is "a modest package of proposals." But I worry that this proposal assumes a certain model of class litigation, typical of securities, mass torts, and other high-stakes litigation, in which the potential rewards generate duplicative or overlapping class actions with plenty of interested lawyers. Faced with multiple firms seeking to represent essentially the same class, a court naturally must appoint lead counsel for the class. Surely there are class actions in which the monetary stakes are not so high, for example in civil rights or other areas of public interest litigation. If a single class action is filed by a class representative and his or her lawyer or public interest organization, rather than competing class actions filed by multiple firms, the court's role should be to assess the adequacy of both the class representative and class counsel in deciding whether to certify the class. I do not see the advantage of codifying judicial appointment of counsel as part of basic class action procedure applicable whether or not there are competing class actions. I worry that proposed Rule 23(g) would encourage courts to seek counsel applications even in cases where justice would be better served with a simple determination of adequacy. My objection is not to the word "appoint" but rather to the implicit expectation that in every class action judges will take open applications for the role of class counsel. The rule could instead require a court to appoint class counsel in every case, so long as it makes clear that in the non-multiple class action scenario the appointment process should generally be limited to an assessment of counsel's adequacy under Rule 23(a)(4).

Assoc. of Trial Lawyers of America, 01-CV-098: ATLA supports healthy competition in legal services, but it is important that a small group of law firms not come to dominate class action

practice in the federal courts. The rule poses dangers. Overly aggressive competition for class counsel appointment can work to the detriment of the class. Lawyers may seek to "poach" cases initially investigated, researched and filed by other attorneys. Something like that can happen today, but the rule would seem to encourage it. There is also a risk of collusion; the defendant may encourage more tractable lawyers to apply for the class counsel position. A third danger is favoritism; lawyers who frequently handle class actions could seek to develop relationships with judges which would position them to receive appointments for which they were not well-suited. Auctions, in particular, pose considerable risks.

Rule 23(g)(1)(A)

Conference: The exclusion of cases in which a statute provides otherwise is not needed. There is no conflict between Rule 23 and the PSLRA. Under the statute, the lead plaintiff nominates class counsel, but appointment is by the court and consistent with the requirements of Rule 23. If there is a difference between the statute and the proposed amendment to the rule, it is that the rule provides a different time line in (2)(A).

Conference: The Note uses the term "lead counsel" for designations before class certification. In some ways, the Note seems to refer to "temporary" or "interim" class counsel, which is not exactly the same. So with "liaison counsel," another term used in the Note. It is important to be careful about terms. Perhaps the term "class counsel" should be defined more precisely in the Note.

Conference: There is an interrelation between the Manual for Complex Litigation and this proposed rule. Nothing in the Manual really defines lead or liaison counsel. Practitioners know what these terms mean.

Conference: Counsel may also organize using an "executive committee," and courts will usually accept a lot of leeway in describing leadership arrangements. This is important; the politics of the class-action bar are involved.

Conference: For these purposes, lead and liaison counsel are just subsets of class counsel, perhaps with different responsibilities. There is often a blending of types of cases, with MDL cases, individual mass tort claims, and class actions all gathered together.

Conference: Another term that has been used to cover all these situations is "common benefit lawyer."

Conference: The court's role is less important when there is a potentially "empowered plaintiff" to take real responsibility for the selection of counsel. The PSLRA learning is that entities like institutional investors can be trusted to do a good job. But that would not be true in mass tort cases.

Conference: This question of "empowered plaintiff" focuses in part on the exclusion in the rule for cases in which a statute directs otherwise. Antitrust, intellectual property, and other types of cases hold potential for action by an empowered plaintiff. But in consumer and mass tort cases, that would not be so. This is where the factor of client input can be considered.

Conference: In the real world, you could say there are

sophisticated players out there in many areas. For example, there are consumer groups. I don't believe that an injured plaintiff has to choose class counsel. Leave it to the judge. Even in the securities class action situation, what really happens is that attorneys hustle state attorneys general and pension funds. With consumers, one could round up thousands of them to aggregate the largest group and get the lead position.

Norman Chachkin (NAACP), D.C. Hg. (pp. 84-104) & 01-CV-051: For civil rights and employment discrimination suits, this additional step is unnecessary and creates a disincentive to pursue class discovery and the risk of inappropriate interference by the court (and possibly defense counsel) with the selection of plaintiffs' counsel.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: Because Rule 23(g)(1) really adds little to current practice, we question the need for it. The Note, however, says that class counsel must be appointed for each subclass when the court subclasses. That should be in the rule itself; unfortunately, courts do not routinely appoint separate sub-class counsel, and when they do they don't insist that counsel for the different sub-classes be truly independent of each other.

Rule 23(g)(1)(B)

Conference: There are state rules of professional responsibility that address questions of proper fees, fiduciary duties to clients, and selection of counsel. Rule 23(g) may depart from some of these rules in some ways. There is a sense in which the rule creates a separate track for class counsel.

Conference: The invocation of a duty to the class as a whole is sufficient to draw attention to the need to scrutinize the arrangements made by class counsel.

Conference: The discussion of the relationship with ordinary professional responsibility directives is a bit troubling. It is not clear what should be done about conflicts of interest.

Conference: The draft rule does not address conflicts of interest. The Note is not clear, and perhaps the Committee should figure out whether it means to tolerate conflicts of interest that would otherwise require disqualification.

Conference: The Note statement is important and should be retained. It provides a good discussion, and the cases discussed show why analysis of conflicts cannot be exactly the same in class actions as in other cases.

Conference: It is dangerous to say, as the Note does, that individual class members cannot insist on the "complete fealty" of class counsel. The Note should say instead that the duty is owed to the entire class, not to individual class members.

Mary Alexander, S.F. Hg. (pp. 55-73) & 01-CV-016 (president-elect of ATLA, presenting its position): We support the notion that class action counsel must adequately and fairly represent the interests of the class, but emphasize that individual interests are paramount. The federal courts should not, however, intrude into the area of attorney discipline, which belongs with the state court.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: Here again, the rule itself states a noncontroversial and accepted proposition, so that there seems no reason to adopt it. The key point is the Note, which explains that counsel's duties run to the class as a whole, not to the class representatives. The observation that the class representative cannot approve or disapprove a settlement should be in the rule, along perhaps with the statement that the representative cannot "fire" class counsel.

Leslie Brueckner (TLPJ), D.C. Hg. (pp. 148-61) & 01-CV-020: TLPJ has no objection to Rule 23(g)(1), which merely codifies the courts' current authority to appoint class counsel at the time of

class certification and class counsel's existing obligation to fairly and adequately represent the interests of the class.

Prof. Charles Silver, 01-CV-048: This relies on a dangerous fiction. A class has no interest apart from the interests of individual class members. I do not see the point of pretending otherwise. If what is meant is that class counsel should pursue the shared interest in maximizing claim values, than the Note should say that. The lawyer cannot represent the "best interests of the class." All that should be done is to make the point that the usual conflict of interest rules do not apply to class counsel, who must instead be governed by due process principles that allow many trade-offs.

Allen Black, 01-CV-064: The discussion starting at the bottom of page 72 and going over page 73 of the Note concerning the relationship between class counsel and absent class members is very important, and should be kept in the Note as the revision process goes forward.

Keith Johnson, Chief Legal Counsel, St. of Wis. Invest. Bd., 01-CV-066: Establishing an explicit standard that class counsel must fairly and adequately represent the class is a positive step. SWIB strongly supports this provision, which will underscore the fiduciary obligations that class counsel owe to the class.

David Williams, 01-CV-079: The proposed rule sets an improperly low floor as to the obligation of class counsel. It echoes the standard for judging whether a class action settlement is within the bounds of reasonableness. Shouldn't representation of a class be better than merely "fair and adequate"?

Rule 23(g)(2)(A)

Conference: The question of timing seems key, but there is really no problem. You can have class counsel before class certification. You can also have the court appoint, or the court designate, lead counsel during that pre-certification period. The key point is that there must be somebody recognized as authorized to do the job that needs to be done before certification. The court should appoint lead or liaison counsel as soon as possible, but usually that can be resolved by agreement of the attorneys and the court need not tarry long over the question. Perhaps it would be best to recognize a position of "interim class counsel."

Conference: The rule should include the statement on page 74 of the Note that counsel appointed as lead counsel before class certification has preliminary authority to act for the class, even if not to bind the class.

Jocelyn Larkin (the Impact Fund), S.F. Hg. (pp. 139-56) & 01-CV-012: Under the proposed rule, the lawyer who files the case cannot act on behalf of the class without an order from the court. This will invite defendants to communicate improperly with class members because they are not represented by counsel, and will cause a three to six-month delay before counsel can start doing class certification discovery.

John Beisner, D.C. Hg. (pp. 7-21) & 01-CV-027: If this amendment is adopted, the rule needs to be clearer on the timing question, with more precise guidance about when counsel appointments should be made. Either the appointment should occur near the outset of the litigation or it should occur at the time the class is certified. The appointment should not be made in the middle of the class certification process.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: The Note says that ordinarily the court "should" allow a reasonable time for applications. This is odd. Since the rule is entirely discretionary, it is peculiar for the Note to adopt a tone of command. Then the Note says this normal attitude should not prevail when there is already a settlement at the time the case is settled. If competition is the goal, this seems backward. If there is ever a case where it makes sense to allow competing counsel to try to show that they can get better results, the one in which the lawyers who filed the case have already made a deal with the defendants seems to be the prototype. The suggestion that auctions may be advisable is too open-ended and premature. Auctions make sense only in a relatively few cases; usually the lawyers don't know enough to bid intelligently. Moreover, the Committee should give weight to the Third Circuit Task Force report on the advisability of auctions.

David Romine, D.C. Hg. (pp. 242-62) & 01-CV-49: Appointment of class counsel should be done much earlier than the time of class certification because you need class counsel to represent the class at the time they're getting the discovery to put together the class certification motion. In the MDL setting, this has worked under various titles -- lead counsel, class counsel, liaison counsel -- and everybody knows what's going on. Something like that is necessary so that person or firm can coordinate the discovery that's needed for certification. Once that is done, moreover, there should not be a two-step approach in which the question of appointment of class counsel is reopened later. The initial appointment should be final.

Ira Rheingold (Exec. Director, Nat. Assoc. of Consumer Advocates), D.C. Hg. (pp. 262-76): There is a danger in moving toward formalizing the way in which the selection of class counsel is done at an early point. Usually as things are done now the lead attorney is called putative class counsel or lead counsel, and the case simply moves forward.

Walter Andrews, D.C. Hg. (pp. 276-93) & 01-CV-036: The provision on appointment of counsel is a good idea, but the appointment should be done only at the time of class certification. To appoint class counsel at the outset of the litigation or during the limited certification discovery period would unnecessarily impose on defendants the burden of dealing with and responding to shifting certification theories and discovery requests. This is consistent with good case management practices. There should be no problem with defendants saying that discovery is limited to the named plaintiff until the case is certified unless counsel are designated "class counsel." Usually courts are pretty open about formal recognition of the plaintiffs' lawyer during the pre-certification situation.

Patrick Lysaught (Defense Research Inst.) 01-CV-033, 01-CV-034,01-CV-046,01-CV-047: It is important to recognize the need to designate a lawyer to act on behalf of the class before certification is decided. Class certification is a critical part of the process, and it more often than not makes sense to appoint counsel to manage the issues on behalf of the proposed class as lead counsel or "conditional class counsel." It should be made clear that the rule does not mean that class counsel is to be selected only after certification of the class. In most cases, appointment for some purposes needs to be made so that discovery and other precertification issues can be managed. A two-step process for appointment may be the best approach, and the Note should more clearly reflect this administrative need.

Prof. Charles Silver, 01-CV-048: "I strongly dissent from this proposal to 'allow a reasonable period after the commencement of the action for attorneys seeking appointment as class counsel to apply.' Anything this proposal might accomplish could be handled

better by encouraging attorneys to refer class actions to better lawyers or to bring better lawyers into these cases."

Allen Black, 01-CV-064: As a practical matter, class or lead counsel must be appointed well before class certification in order to coordinate strategy, discovery, briefing, and argument of the class certification motion. That can be the most important aspect of the litigation from the perspective of the class. One way to make this clear is to add the following to Rule 23(g)(2)(A): "As soon as practicable after the commencement of an action pleaded as a class action, the court shall appoint class counsel to manage the litigation on behalf of the putative class." If that were done, the Note should explain that "as soon as practicable" is intended to allow sufficient time (a) to see what other similar or overlapping actions may be filed, and for action by the JPML if appropriate, and (b) to allow attorneys seeking appointment as class counsel to apply. Another way to deal with the problem would be to say in Rule 23(g)(2)(A) that the court should deal with the appointment of class counsel at an early conference under Rule 16. I do not like the example given at p. 76 of the Note about when the court should not defer appointment of class counsel for time for competing applicants. In my view, the circumstances described -- where one plaintiff's lawyer has negotiated a settlement so quickly as to have something in place prior to the counsel appointment process -- is inherently suspicious as a possibly sweetheart deal. In that sort of situation, the court should want to get the views of competing counsel before acting.

Thomas Moreland, A.B.C.N.Y. Federal Courts Committee, 01-CV-071: Many of the factors enumerated in the proposed rule already are factors which the courts must consider in deciding motions for class certification. But the proposed rule contemplates that courts must evaluate some of these issues prior to the motion for class certification. For example, the requirement that the court entertain applications to be class counsel within "a reasonable period after the commencement of the action" certainly would mandate selection of class counsel prior to the filing of a motion for class certification. Accordingly, the court would be forced to determine who appropriate class counsel is before any discovery on certification. Such a procedure would deny the court a full record and could foreclose an argument by defense counsel that class certification should be denied due to the inadequacy of class counsel.

ABA Sections of Antitrust Law and of Litigation, 01-CV-069: The proposed rule is inappropriately silent on the timing of the appointment procedure. The Note compounds the problem, implying that the appointment should occur at certification. Counsel competing to be class counsel cannot be expected to cooperate in the class certification proceedings. The language in the Note about interim designation of lead counsel seems

destined to add another layer of delay in an already complex process. Modification of this provision, perhaps as part of an expansion of Rule 23(c)(1) to require a pre-certification scheduling order, is necessary to clarify that if an appointment procedure is deemed appropriate, then it should occur first and quickly so that plaintiff counsel is appointed to handle the case. In the civil rights arena particularly, class action practitioners on the plaintiff side express well-founded concerns about the inevitable delay that will result from the application procedure, even when there are no competing applications. These practitioners correctly point out that in all but the largest civil rights cases, the issue typically is too few lawyers seeking to become class counsel, not too many of them. There is also a significant chance that satellite litigation over counsel appointment will exacerbate the delay and divert resources that would benefit the class more if instead devoted to prosecuting the case. The proposed Note indicating that the appointment of counsel would ordinarily be subject to an appeal under Rule 23(f) heightens these practitioners' concerns. We suggest that the rule give the district court discretion to dispense with the application procedure altogether in appropriate cases. As the Note is now written, it appears to limit the occasions on which a district court should forgo the application process to cases in which a proposed settlement has been negotiated prior to the filing of the action. We believe that an application procedure is unnecessary in cases in which it is unlikely that there would be competing applicants to serve as putative class counsel, such as civil rights cases seeking primarily injunctive and declaratory relief. The urgency of the relief sought should also be a factor in determining whether to dispense with the application process to avoid delaying the progress of the action.

David Piell, 01-CV-094: There are severe timing problems. The Note says that usually the court should defer selecting class counsel until there is time to apply, but adds that this need not be done if the parties have already reached a settlement. That is the worst time to protect against competition. "Defendants never settle for a reasonable amount prior to filing of the action, let alone certification of a class." Moreover, accepting applications for the class counsel position during the pendency of the class certification motion would be a waste of the court's time since we don't know then whether the class will be certified. Potential applicants then have no idea of the class's size and other requirements, and they will accordingly be prone to place bids high enough to prevent them from losing money in all but the rarest of cases.

Rule 23(g)(2)(B)

Conference: There is nothing wrong with the specified criteria, and they do provide guidance. But the list might be too confining. For example, it might also include absence of conflicts, the existence of side agreements, the relationships counsel have with class members and possible conflicts that could result from those. For instance, the problem of "play to pay" may be important when potential lead plaintiffs hold political office. Because no list can do it all, it probably would be better to make a more general statement in the rule saying that the court should ensure that class counsel can fairly and adequately represent the class.

Conference: I'm opposed to specificity. This is like the Sentencing Guidelines. The class is like a ward of the court, and the rule should not confine judges.

Conference: The attempt to identify specific factors may unduly emphasize those factors. There should be room for the law to grow. The factors that are important depend partly on the type of case that is involved. Focusing on fee arrangements and experience are more important in some areas than others. "Client empowerment" is also important.

Conference: The draft has advantages. Not all judges have lots of class-action experience, and an essentially standardless rule would not provide assistance or guidance to them. Perhaps it would be better to add more factors, such as the "expertise" of the applicant, the absence of conflicts, and fee arrangements.

Conference: An appellate court judge asked whether the draft rule is written to be enforced by appellate courts. The authorization to consider whatever other topics seem important provides authority that would be hard to police on appeal. The more specific the rule, the more it might be invoked on appeal. It is not clear if the relationship between appointment and class certification would support an appeal of the appointment issue alone, and it does not seem likely that the courts of appeals will be eager to review orders appointing class counsel.

Conference: Regarding the choice between the Rule and the Note for given topics, it is troubling that sometimes courts don't fully explain their selection of class counsel. Perhaps the Rule should require findings, and the Note should mention the types of topics that might be addressed in findings.

Conference: The last sentence on p. 80 says that the district court should ensure that there is an adequate record of the basis for the selection of class counsel. That should be moved into the rule.

Conference: If there is concern about putting a wedge between client and counsel, is that different from the determination under Rule 23(a)(4) that a given proposed class representative is not satisfactory because counsel has drawbacks? Won't that also drive a wedge between counsel and client? Is the amendment meant to divide the inquiry, so that (a)(4) looks at the client and (g) the attorney? Then does this magnify the risk of this sort of wedge?

Conference: Regarding consortiums of counsel, the question looks to the same issue whether the objective is to select "adequate" counsel or "the best" attorneys. If some lawyer is selected, why should that lawyer be forbidden to farm out work in a responsible way? It is impracticable to rule out the possibility of consortium activity. Requiring that each lawyer be individually appointed creates risks. Even ruling a consortium out may simply push the arrangement under ground, as the lawyers "make deals" anyway.

Conference: Often there will be chaos on the plaintiffs' side unless there is a consortium. The plaintiffs' bar has become much more sophisticated at working out these issues, and so have judges. There never is a real problem of involving too many lawyers, because the judge can control it later by rationing attorney fees. The newcomer or "little guy" therefore gets a chance.

Conference: In the real world, the consortium issue never presents a problem. There is plenty in the Manual for Complex Litigation to provide direction for the court on these matters.

Conference: Side agreements are an important factor, but it should not be in the rule as a mandatory criterion. Caselaw will adequately cover these issues.

Conference: There is a need to encourage lawyers who have clients to take them to lawyers who are best able to represent them. It is important to ensure therefore that the class is represented by good lawyers, who can bear the risk of investing heavily in developing a case that may fizzle out.

Conference: This attorney's experience from the defense side with over 200 class actions in the last two years alone has failed to show even one in which a client sought out class-action counsel. There are two worlds of class actions. One involves claims with real clients who actually oversee the litigation. But matters are different in the other world, from which these 200 cases were drawn. These cases are developed by lawyers, sometimes working in teams. They may even have a syndicate agreement. He has seen one that designated two lawyer members of the group as responsible for hiring clients. Part of the problem in this world is that there is no real client.

Conference: The requirement of making findings and conclusions should apply both in Rule 23(g) and Rule 23(h) (which does have such a requirement).

Barry Himmelstein, S.F. Hg. (pp.15-30) & 01-CV-008: In assessing the resources that proposed class counsel will commit to the action, it is important to appreciate that the economics are vastly different for plaintiff and defense lawyers. Often defendants are represented by several law firms that have hundreds of lawyers each, billing monthly and being paid regularly. Our firm, at 64 lawyers, is one of the largest plaintiffs' class action firms in the nation, but as a defense firm it would be considered small. The court should be on the alert to whether the firm seeking appointment has committed too much to the suit. "A firm that must commit too much of its resources to a single case in order to staff it properly cannot afford *not* to settle it -- a fact not lost on defense counsel." Counsel should therefore be free to associate other counsel. Flexibility is important, and even if a single firm is appointed after competition for the position the court should not necessarily look askance at cooperation among those who formerly competed for the position. The Note is not insensitive to these concerns, but could stand to be amplified on these points.

Mary Alexander, S.F. Hg. (pp. 55-73) & 01-CV-016 (president-elect of ATLA, presenting its position): The selection of the attorney for the class should not be influenced by the fee-related matters alluded to in proposed 23(b)(2)(B) and (C). The critical thing is that parties are represented by lawyers whom they know and trust.

James Finberg, S.F. Hg. (pp. 104-05): In employment discrimination cases, the amount of pre-filing work that is involved means that lawyers will insist on more security that they will indeed have a role in the case than in securities litigation. For example, in the Home Depot gender discrimination case on which he worked, his firm sent legal assistants to hundreds of stores to take counts of what gender workers were and what positions they held. They also interviewed hundreds of witnesses before filing the case. Throwing that type of case open to auction might discourage people from putting that type of investment up front. That is particularly significant because there are fewer qualified firms for that sort of case than in the securities area, so there is simply less of a market.

James Sturdevant, S.F. Hg. (pp. 120-29): The appointment criteria could deter the filing of statewide or nationwide consumer class actions by small firms, particularly those without "overwhelming resources to handle cases." The problem is that at some stage the judge will inquire into the resources and, possibly, invite some sort of bidding process. Then a relative handful of firms in the country will bid, and they will get the

cases. Small firms, individual practitioners, and public interest organizations will not have the same incentive to spend the time needed to develop these cases. Judges now inquire into the things listed in proposed (g), and the process already works well without an amendment. The problem comes from the mandatory requirement for the court to consider the resources the attorneys will commit to the case. This requirement can cause serious difficulties in certain types of cases. The current treatment under Rule 23(a)(4) is sufficient. Using the word "must" in proposed (g)(2)(B) creates something different that can cause a problem.

Jocelyn Larkin (the Impact Fund), S.F. Hg. (pp. 139-56) & 01-Cv-012: Based on her experience at the Impact Fund talking to civil rights lawyers from across the country, adequate resources is the number one problem faced by civil rights practitioners. The Fund makes grants that average about $10,000 to support this litigation, but that does not remove the concern. There is no other organization that does the same sort of thing as the Fund. Often those who apply for grants are trying to scrape together $100,000 needed to cover deposition costs and experts. Mr. Sturdevant covered points that concern her. From her standpoint, the current system, keyed to (a)(4), works fine. The proposed rule invites competition and creates the risk that somebody new will step up and claim the fruits of years and years of labor. Even more important, it will threaten to disrupt attorney-client relationships that have developed over years. The trust between clients and lawyers is critical in these cases, for civil rights plaintiffs will not sue unless they really trust their lawyers. In one recent gender discrimination case, for example, a group of class representatives came to the Fund because the lawyers had negotiated what they thought was a bad settlement. The Fund agreed and was able to substitute in as class counsel. The class representatives there had a very strong interest in what was going on in the litigation and let the Fund know when the lawyers were not doing a good job.

Bill Lann Lee, D.C. Hg. (pp. 21-40) & 01-CV-024: Rather than requiring notice of class certification in (b)(2) class actions, the Committee should reflect on the possibility that the interest in better informing the class may be advanced through proposed Rule 23(g). The rule authorizes a court to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." This might be a place to include in the Note discussion of the issue of communications with the class, but stressing the need in some cases to ensure possible participation in the case by class members.

Judith Resnik, D.C. Hg. (pp. 58-75) & 01-CV-044: Not all class actions require displacement of litigant choice. The way the rule is currently drafted, it totally ignores that there may be an identifiable plaintiff who has walked into the court with a

lawyer, and that no other lawyer is interested in getting near the case. So there should be a presumption in favor of the attorney-client relationship at least in cases of that sort. Perhaps a paradigm of that sort of thing occurs when a public interest organization represents a class concerned about certain matters of common interest. In that sort of case, scrutiny under the current approach using Rule 23(a)(4) should suffice. More generally, litigants should be involved in the selection of the lawyer. The "empowered client" model of the PSLRA may not be a useful transplant in many cases, but thinking about clients is more than appropriate. The rule should require inquiry into what class members want in the way of a lawyer. And the question of fees should be built into the selection process.

Norman Chachkin (NAACP), D.C. Hg. (pp. 84-104) & 01-CV-051: There should be deference to the choice of class counsel made by the class representatives, and also to the work done by counsel in preparing for class certification. But the rule doesn't give any weight to the established relationship between counsel who file the suit and the representative plaintiffs. The Note even says that counsel can't act on behalf of the class until being appointed. This will lead defense counsel to say that discovery must be limited to the circumstances of the named representatives rather than the other class members. Defense counsel might also try to prompt other lawyers to come in and seek to represent the class. "Nor is there anything in the proposed rule that would prevent a district court from selecting counsel other than the filing counsel because of perceived superior trial or settlement experience in complex litigation."

Thomas Allman, D.C. Hg. (pp. 104-115) & 01-CV-026: The proposed rule seems flexible enough to allow for further development of principles to guide appointment. I suggest that one of the criteria for the selection process would be creativity in coordination with overlapping or competing state-court class actions.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: This rule adds something by strongly suggesting that the courts should be more active than they are at present in encouraging bidding for the position of class counsel, either by adoption of a formal bidding process or by encouraging lawyers to file motions seeking appointment even though they did not file the case originally. But the provision is too vague. It does not say whether courts should conduct an auction, or whether the competing lawyers must have class members of clients to qualify. It also does not say what happens to lawyers who filed the case if they are not appointed to represent the class. Unless that point is addressed, it appears that the court may simply "dump" the lawyers who originally filed the case even though their work might have gotten the case going in important ways. Accordingly, the rule should provide that the initiating lawyer should be paid

a fee if the case settles or succeeds after judgment. The Note says that the court may consider side agreements regarding fees, but that is not required. We believe that knowledge of such agreements is critical to an understanding of whether the class will be adequately represented. The cases are split on whether such side agreements must be disclosed in all cases. Although there may be reason to keep such agreements confidential early in the case, at some point (and certainly at the time of settlement), that information must be made public.

Leslie Brueckner (TLPJ), D.C. Hg. (pp. 148-61) & 01-CV-020: TLPJ objects to the appointment procedure because it would interfere with attorney-client relations and could result in increasing monopolization of the class action bar and less innovative litigation by smaller practitioners. The rule appears to authorize a court to appoint as class counsel any lawyer it chooses, without regard to whether the lawyer represents any individual clients. There is simply no justification for auctioning off the role of class counsel to another set of attorneys who had nothing to do with putting the case together and had no prior relationship with the clients who decided to bring the litigation in the first place. The mere risk that an auction might occur may be sufficient to deter small practitioners from taking these cases. Part of her job as a TLPJ staff attorney is to recruit lawyers from across the country to take cases, and she has experience with how they approach the issue of cost when deciding whether to take cases. The emphasis on counsel's experience in handling class actions and the resources committed to the case would work against small or relatively new practitioners. Even the prospect of litigating the class counsel appointment issue would deter prospective counsel. If small practitioners are pushed out of the class action field, fewer innovative actions will be brought. Existing law adequately ensures that the class is properly represented.

David Romine, D.C. Hg. (pp. 242-62) & 01-CV-49: We typically have an attorney-client relationship with the plaintiff when we file a case, and it's troubling to me that some other law firm that does not have a relationship with this person could come along and take that away.

Ira Rheingold (Exec. Director, Nat. Assoc. of Consumer Advocates), D.C. Hg. (pp. 262-76): It is little solace to attorneys contemplating taking innovative consumer litigation to know that one factor -- and the second one, at that -- is the work the individual put into investigating the claim in this case.

Prof. Charles Silver, 01-CV-048: "There should be no investigation into the 'resources counsel will commit to representing the class.' Instead, class counsel should have to demonstrate the financial ability to bear a threshold level of

out-of-pocket expenses, e.g., $250,000. Important evidence of this would be the fact of having spent at least this much in a prior litigation."

Patrick Lysaught (Defense Research Inst.) 01-CV-033, 01-CV-034,01-CV-046,01-CV-047: The potential downside of this rule is that courts may exclude from consideration as class counsel attorneys who initiated the proceedings but who do not have the experience, reputation or clout that a small group of plaintiffs class action lawyers seem to possess. That could well lead to domination of class actions by a limited group of lawyers who, while they may have significant experience in class actions, did not uncover and initiate the claim. The development work that precedes the filing of the initial case should be accorded significant weight in selection of counsel for the class. Appointment should not become either a bidding or beauty contest unrelated to the interests of the class. The perception and very real possibility that class action litigation will be controlled by a few national firms who swoop in and offer their experience as class counsel should be avoided. Greater weight should be accorded to the second factor. The first and third seem to favor the limited group of prominent plaintiff class action firms. One approach would be to create a presumption that the attorney who investigated the underlying facts and initiated the class action should be class counsel, unless there is a showing that this lawyer cannot adequately represent the class.

Gregory Joseph, Amer. Coll. of Trial Lawyers Comm. on Federal Civil Procedure, 01-CV-055: The Committee generally views this proposal favorably. It is concerned, however, that the appointment procedure set forth may contemplate receipt by the judge of ex parte submissions by plaintiffs' counsel that attempt, subtly or otherwise, to spin the merits of the case. Ex parte submissions should not address the merits, except to the extent that is unavoidable. In that event, the court should be encouraged to view the merits submissions with appropriate skepticism. We recommend that, as a matter of principle, only those portions of ex parte submissions that need remain under seal should remain sealed. In our view, any portions of such submissions that address the merits ordinarily would not fall in that category.

Allen Black, 01-CV-064: As presently drafted, the proposed rule would eliminate from consideration any attorney seeking appointment as class counsel who had not previously had appropriate experience. Because the rule as drafted is mandatory, the court would have no choice but to refuse to appoint a "first timer" as class counsel. This is bad policy. A lawyer who is an expert in a substantive field might nevertheless never have handled a class action. If the rule were to focus on "ability" rather than "experience," this problem would be solved. In addition, I think that the Note at p. 79 should add something

like the following: "A small firm may be able to organize a consortium of cooperating firms in such a way as to staff the case adequately."

Keith Johnson, Chief Legal Counsel, St. of Wis. Invest. Bd., 01-CV-066: The addition of Rule 23(g)(2)(B) is a positive development. SWIB applauds the authority of courts to direct potential counsel to propose terms for attorney fees and costs, and the reference in the Note to the risk of overstaffing and ungainly counsel structure, the recognition in the Note that competing counsel may join forces to avoid competition rather than to provide needed staffing, the suggestion that the court may require firms to apply separately for the lead counsel role, and the authority of the court to include provisions regarding fees in the order appointing counsel. Because fees are so important, however, we think that considering them should be mandatory rather than optional. In addition, we think that reference to the problem of "pay to play" -- campaign contributions or other financial conflicts that might affect a class representative's selection of counsel -- should be given more specific recognition. The rule and Note do not do enough to recognize the role that the class representative should play in selecting the class lawyer. Some class representatives will engage in a process like any other clients to make a responsible selection, and courts should refrain from unnecessarily interfering with a healthy attorney-client relationship lest they undermine the lead plaintiff's ability to work well with and effective manage lead counsel. When the class representative has made a responsible choice of class counsel, the courts should defer to that choice.

ABA Sections of Antitrust Law and of Litigation, 01-CV-069: Plaintiff lawyers are understandably concerned about a rule that would permit a court to take a case away from them even though they have invested considerable time and resources to investigate and develop the case. If too many plaintiff lawyers had too many cases taken away from them, the private attorney general function would be seriously undermined. In addition, civil rights practitioners correctly point out that the factors set forth in proposed Rule 23(g)(2)(B) do not require consideration of the existing attorney-client relationship between the filing plaintiff's lawyer and the putative class representatives. Often the named plaintiff is willing to serve as a class representative only because of his or her trust in the lawyer bringing the action. We urge the Committee to add another factor that must be considered -- the existing attorney-client relationship between the putative class representatives and the lawyer who filed the action. On the flip side, defense counsel are understandably concerned that the district judge who delves into the specifics of a case sufficiently to make an informed decision about the appointment of class counsel inevitably will be invested in his or her choice. Some of the references in the Note to ongoing

monitoring and ex parte and perhaps sealed communications that could occur between chosen class counsel and the district court are "truly frightening to defendants and their counsel." We believe that these references in the Notes must be deleted because of the unacceptable appearance of partiality such communications will created. We also suggest that the Note be modified to include instead a strong admonition about the need to avoid any actions that might create an appearance of partiality. In many cases, an application procedure will result in healthy competition among candidates wanting to serve as class counsel. We agree that fees and costs properly may be considered during the appointment process in some cases, and recognize that the proposed amendment provides flexibility for the courts to consider the compensation issue. But we suggest that the Note make it clear that the fee structure is only one of the many factors to consider in naming class counsel, and that the primary standard is fair and adequate representation of the class.

Nat. Ass'n of Protection & Advocacy Systems, 01-CV-077: In civil rights actions, it is imperative that class counsel have a close relationship of trust with both the representative plaintiffs and the protected class affected by the lawsuit. Only with counsel familiar with the needs of the protected class can we ensure the drafting of fair and adequate settlements detailing appropriate injunctive relief necessary to remedy civil rights violations. But the application procedure could mean that the individuals who retained counsel to file a class action would find themselves represented by someone entirely different. Counsel competition will deter the small practitioner who, although extremely knowledgeable in the substantive area of the law, may lack the class action experience or resources to qualify under the factors enumerated in the proposed rule. The prospect of litigating the class counsel issue will pose yet another financial barrier that may deter smaller firms from pursuing civil rights class actions. Under existing law, the court is adequately equipped to scrutinize class counsel. Creating the proposed selection procedure invites abuse.

National Treasury Employees Union, 01-CV-078: Two additional factors should also be considered. The first is counsel's relationship to the class. The second is counsel's familiarity with the particular subject matter of the litigation. For example, union attorneys should be given special consideration for representing their members in class actions because they have a strong incentive for securing a good result for the class given their on-going relationship with the class members.

Mehri & Skalet, 01-CV-083: The proposed rule's criteria for selection of class counsel are appropriate codifications of the implicit authority courts have used to protect the interests of the class.

Beverly Moore, 01-CV-084: The most troublesome situation is where some small, young, but innovative firm has spent much time and money developing a new case, only to find itself ousted by a larger and wealthier firm with a longer track record. The number of times a firm has previously been lead or co-lead counsel will give it an experience leg up in the next lead counsel battle. This will foster an existing trend toward concentration of firms doing this work that could become a permanent feature of class action practice if "lead counsel" becomes a normal thing.

Lawyers' Committee for Civil Rights Under Law (and 16 other groups), 01-CV-091: It is not proper that the choice of counsel can be made without respect to the choice or desires of the representative parties who have taken on the burdens of class litigation, and have sought out and engaged counsel based on the objectives they seek in the litigation and the type of representation and services they expect for the class. Substituting a focus on financial arrangements is not proper.

David Piell, 01-CV-094: There are many unanswered questions. For instance, what role do defense counsel have in advising the court on an applicant's qualifications to be class counsel? What power does a court have to investigate the qualifications of counsel beyond the representations made to it by each applicant? These questions need to be answered before any rule is promulgated. Regarding the factor that looks to counsel's commitment of resources, how can that take account of the possibility that the court will redefine the class during the litigation? And how is counsel to address this question? Perhaps counsel should indicate the percentage of office resources that will be committed, or the number of attorney hours per month. Whatever the answer, this criterion has the effect of freezing out firms not already wealthy from class action practice. The Note says that the court can order a consortium of attorneys to file separate applications. This discriminates against small firms who pool resources to handle these cases. The Committee should consider "the scenario where the consortium of attorneys attempts to circumvent a court order prohibiting consortium bids by forming a firm that only handles this case." On the factor looking to work developing this case, how much weight should the court give to this in selecting counsel? "The Committee needs to recognize the reality that attorneys are usually the ones deciding to pursue claims as a class. Clients do not walk into the attorney's office and say 'I want to file a class action, so that I'll have no control over the litigation, and so that your goal will not be maximizing my recovery but the class's.'"

Rule 23(g)(2)(C)

Conference: It is important not to separate the appointment of class counsel from the fee arrangements, especially in (b)(3) common-fund cases. In most cases for damages, the total recovery is essentially split somehow between class and counsel. Fee terms are therefore central, and should be considered and discussed in every case.

Conference: There is a lot of controversy about whether fees should be made a part of the selection process or otherwise considered ex ante. The Third Circuit Task Force Draft Report recognizes some of these tensions. There is room for continuing development; it is too early to bind judges by a rule. Often the judge will confront problems in trying to compare fee arrangements at the outset. But in some cases this activity is important to selecting class counsel. This can be discussed in the Note without putting it into the rule as a mandatory selection criterion.

Conference: Fees should turn on results, not an auction. In an auction, many foolish bids will be made. Lawyers need to make an in camera presentation to the judge in a bidding process. That can be unfair to the defendant.

Conference: The selection should not go to the law bidder, and beauty contests can favor those who can't or don't carry out their impressive representations. There's always somebody who will promise to do good work for less. Judges can too easily read the permissive "may" in a rule as "must."

Conference: As a federal judge, I have "less confidence in the omniscience of federal judges." Making bidding the cornerstone or critical is a mistake. This rule is supposed to be universal, and to apply to class actions that are quite dissimilar to each other. Indeed, many of the considerations expressed in the Note apply equally to securities fraud actions governed by the PSLRA. The Note should make it clear that the same factors weigh in approving the lead plaintiff's choice of counsel under that Act. We should avoid the particulars in the text of the Federal Rules; they belong better in the Note. Those are helpful to both judges and lawyers.

Conference: I suggest that (C) be made mandatory. In ordinary practice, that is essentially what's done with individual representation. The lawyer doesn't tell the client that the fee will be worked out later. Why not do the same in class actions?

Conference: Class counsel have an interest in appointment on terms that set fees in advance. On the defense side, there are beauty contests as well. Why not recognize that clients can and do compare lawyers, and often rely heavily on fee terms once

those deemed not good enough are screened out?

Conference: There will be collusion among plaintiff attorneys to avoid beauty contests. Any up-front fee negotiation must contemplate the possibility of back-end revision depending on how events play out.

Conference: Regarding the Note material on monitoring of counsel by the court (pp. 79-80), the Rule and Note are just fine. Periodic reports to the court are possible, but the utility of this activity may vary widely from case to case. Being more specific here would be futile.

Conference: I would distinguish monitoring fees and monitoring lawyering activity. Clearly the PSLRA contemplates monitoring but that is usually to be done by the empowered lead plaintiff.

Conference: Why is the court monitoring only plaintiff's lawyers? Who is monitoring defendant's lawyers? That often drives what plaintiff counsel must do. A sufficient measure of judicial oversight should result from the monitoring that is implicit in Rule 16 supervision of the case, and that applies to all the players.

Conference: Fee setting after the fact is very difficult; it takes a lot of time. We should regulate it in advance to reduce the amount of time required later. We do not want an impression of lawyers fixing fees. For better or worse, "judges are not identified with money." We need the insulation of a rule that gives more guidance: (1) Class action appointment should be in one rule. (2) This rule should cover class-action counsel, and also common-benefit attorneys, lead counsel, and any attorney who confers benefits on the class. (3) Some information about fees should be included in the appointment process to make the after-the-fact chore easier. The judge could require counsel to use computer data-basing whenever fees will be calculated using a lodestar. (4) A schedule for expenses could be set, perhaps by the A.O. as a general matter, regulating such things as fees for copying, hotel charges, and the like. (5) The text of the rule should take account of client concerns; the judge should be described as a fiduciary for the class.

Barry Himmelstein, S.F. Hg. (pp. 15-30) & 01-CV-008: The qualitative aspect of selecting class counsel is really more important than the percentage fee that's awarded. With different lawyers you can end up with a wildly different result; one will get a $100 million settlement, and the other a $25 million settlement. Once a percentage is set at the beginning, however, the court should simply award it at the end, and if the plaintiffs' lawyers get a lot of money that is fine.

Joseph Grundfest, S.F. Hg. (pp. 30-45) & 01-CV-009: Recent

experiences in which lead plaintiffs negotiate rates, or in which judges have used auctions, show that the rate that actually obtains is well below the "normal" 30% figure that we hear about. At the end of the case, the courts have an incentive to clear their dockets and not to inquire too deeply into a matter to which no objection has been raised. The best thing would be to have competition at the outset and determine a percentage fee at that point. The court would retain authority to alter the fee at the end, but that authority should not be used very often. The "benchmark" is outdated, and "it's very important to break the back of the benchmark." Maybe, after we have more experience, we will come to a new benchmark. Even if the case "hits gold instead of bedrock," the strong presumption should be against changing the fee later.

James Sturdevant, S.F. Hg. (pp. 120-29): If in a consumer case, the firm that filed the case responds to a request from the court to forecast or estimate fees by saying that it cannot confidently do so, that might prompt a bidding situation. That would be undesirable and a deterrent to firms to take cases in the first instance.

Judith Resnik, D.C. Hg. (pp. 58-75) & 01-CV-044: If the court is to function as a surrogate client, it is odd that consideration of fee arrangements at the appointment stage is not mandatory. At least, arrangements could be considered for recording of the costs and hours from the outset that would facilitate the task of later reviewing them, should that become necessary. The A.O. could develop schedules of appropriate charges for various kinds of expenses that could be implemented from the outset. Perhaps the schedules that apply to judges when they travel would be a good starting point. The same sort of thing could be done for photocopy costs and the like. In addition, the rule should take on assessing litigants for ongoing costs and the question of when lawyers are paid, and the assumption that the lawyers are paid in full, possibly before the class collects most of what it is to receive, should be examined.

Prof. Charles Silver, 01-CV-048: "The proposal to set fees early is excellent. I have argued for this in published works and have convinced five Texas state court judges to do this." The object when setting fees should be to mimic the market. Rather than simply having judges "direct counsel to propose terms," the Note should give concrete guidance as to the evidence needed to show that requested terms are reasonable. This should include empirical studies of fees paid in similar cases pursuant to fee agreements."

Rule 23(h) -- in general

Conference: This is a valuable tool. In a sense, the rule is a vehicle for the Note. It recognizes that there may be fee awards to lawyers other than class counsel, including an unsuccessful rival for appointment as class counsel or an objector to a settlement or attorney fee motion. This simple rule will allow the Note material to become part of the federal jurisprudence. All judges will have the Note, and it will promote uniformity. At the same time, some of the Notes are too long, and there is a risk in citing cases.

Conference: The draft is a "great step forward." It is important to have a rule. For new practitioners, and even for established practitioners, the rules should reflect where we are now in practice, and provide a foundation for the next few years of growth.

Conference: It is appropriate to address fee awards in the rule because the fee decision is the most important decision the judge makes in most class actions. Federal courts in general are moving toward appropriate resolutions, but state courts are not. The federal rules can help state courts, and slow the present rush of counsel to file in state courts "for clear sailing on fees."

Conference: I have "no objection to having a rule like this in general." Indeed, I was surprised to discover that Rule 23 does not already include such provisions. Courts generally know what to do, but codification is o.k. The abuses that have been seen, particularly in state courts, are being addressed. But the rule should not include language that will interfere with victims' access to the courts. Free access to court remedies "is one of the things that make our country great." This rule has aspects in the Note that don't adequately acknowledge the risks associated with taking cases like these. The comment in the Note on page 88 that the risks borne by class counsel are "often considered" is not strong enough. They should always be relevant. Why does the rule say that the court "may" award a reasonable fee? It should say that the court "must" do so. The language about a "windfall" for counsel is unjustified. The client can have a windfall if the lawyer is underpaid. Certainly anything less than 15% is a windfall to the client.

Conference: Rule 23(h) serves a real need. The defendant does not care what the class lawyer gets. It wants a package that achieves maximum res judicata, and is focused on the overall cost of that package. The judge should focus on what the package is worth to the class and to society. Maybe some claims present high risk, but that's because the lawyers make up claims out of whole cloth. Even then, the risk of complete loss is minimized by lawyers who file 20 or 30 actions. In this context, it is

proper to say that the court "may," not "must," award a reasonable fee.

Conference: These comments show how difficult the Committee's task really is. There is no one size that fits all class actions, and each of the foregoing perspectives is legitimate to some extent, and in regard to some class actions. The current draft "is unexceptionable." It does a necessary job in a straightforward form. The references in the Note to equity are troubling, however; the length of the chancellor's foot should not make a difference. The reality is that it is "just not possible" for the judge to determine the adequacy of a fee request in retrospect; that is one of the things that has driven the exploration of auction methods. Rule 23(h) is well-crafted, although the Note might be shortened a bit. One difficulty is the suggestion at pp. 83-84 of the Note that an award may be made for benefits conferred on the class by an unsuccessful rival for appointment as class counsel. The unsuccessful applicant knowingly ran a risk, and it is rare for an unsuccessful applicant to contribute to a successful result. Finally, it is a fiction to think that the one-third percentage fee is the norm. That share is drawn from ancient origins in representation of individual plaintiffs in personal-injury litigation. There is no reason to suppose that it should apply in the quite different setting of contemporary class actions.

Conference: It is difficult to know what percentage is appropriate, and particularly when there is important equitable relief. A lodestar analysis may not suffice, however, when there is significant risk, for that should be compensated. But the lodestar should not be used if it encourages elaborate structural relief that is in fact worth little to the class.

Conference: The Supreme Court has ruled that on occasion the attorney fee can exceed the dollar amount recovered; "you cannot commodify value." There is a social utility to enforcing the law.

Conference: The RAND study found cases in which injunctive relief was assigned a dollar value after a presentation. In one case, fees were based in large part on the value of the injunction obtained in the case.

Conference: In injunction cases, the defendant does not provide adversariness on attorney fees. The incentives are the same as in damages actions; the defendant trades off agreement on fees for a less effective and less costly injunction. Also, the market referent here is misleading. There is actually no market; it was created by litigation. The basic question is to get a proper assessment of the real risks confronted by the attorney.

Conference: The argument that the judge has a "fiduciary" duty

to the class is troubling. The judge who manages a class action is not a fiduciary, but a judge. The proposed Note does not suggest such a duty of the judge, and it should not. The judge's duty is to be a judge -- to try to assure that counsel fulfills the fiduciary role. Fees create a conflict between counsel and the class, and the judge has a judicial responsibility, not a fiduciary responsibility, to determine a reasonable fee.

Conference: "Fiduciary" is not the right term. But the judge does have an obligation to see that the fee is fair.

Barry Himmelstein, S.F. Hg. (pp. 15-30) & 01-CV-008: The Note (see p. 89) should not say that, if the judge concludes in hindsight that this was a very strong case, therefore there was a low risk of failure and the attorneys should not be paid well for their effort and risk. If the fee is measured by the lodestar method, there should nonetheless be the possibility of enhancement, although in that sort of case a percentage approach could be employed without concern about enhancement. Lawyers who take big risks, as our firm does, should be rewarded. "If the partners in my firm aren't making more than the partners in a big defense firm, something is wrong because they are not taking these chances." Multipliers serve to compensate for delays in payment, as well as risks of nonpayment. They are needed.

Mary Alexander, S.F. Hg. (pp. 55-73) & 01-CV-016 (president-elect of ATLA, presenting its position): We support the judicial review of attorney fees as a means of assuring that each class members receives value for the work performed. Hardly anyone can object to the concept that fees should be reasonable, or the court's inherent authority over fees.

John Beisner, D.C. Hg. (pp. 7-21) & 01-CV-027: The amendment appears to confirm current best practices. As presently drafted, however, it could effect some unintended changes. The Note stresses that the rule does not undertake to create any new grounds for an award of attorney fees, but it should be more emphatic on this point. The Note should stress that it is not intended to effect any change in attorney fee availability or amounts, perhaps by referencing recent decisions against awards.

Victor Schwartz, D.C. Hg. (pp. 76-63 & 01-CV-031: I favor the proposal to ensure that there's more scrutiny of attorney fees. There have been too many situations in which the class members got little or nothing and the attorneys got a great deal. There is little doubt, however, that the adopting of this rule will provide further incentives for some plaintiffs' lawyers with interstate class actions to do everything possible to keep their cases in state courts. They will want to avoid this rule.

Norman Chachkin (NAACP), D.C. Hg. (pp. 84-104) & 01-CV-051: There is no good reason for a rule such as this in civil rights and

employment discrimination cases, for in those cases the fee is awarded under a fee-shifting statute pursuant to the lodestar approach. But the adoption of a rule suggests that there should be a change in practice, and there is no reason for one.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: Although proposed Rule 23(h) largely codifies current practice, we believe that it will benefit class members, particularly if modified as we suggest. At the outset, we think that the phrase "or by agreement of the parties" should be deleted as unnecessary and potentially misleading. One of the exceptions to the American Rule is that there can be a fee award if the parties so agree, so saying that an award is "authorized by law" is sufficient. If the rule remains as currently written, courts may infer that the contractual basis for an award is entitled to special deference, and that they should simply award the amount the parties agreed to without further inquiry. We have seen class counsel argue that, where there is a fee agreement with the defendant, there is no basis for the court to scrutinize the fees. Courts have rejected such arguments, but the arguments persist. The Note says that all agreements are subject to scrutiny, but that "weight" can be given to a defendant's agreement not to challenge a fee up to a certain sum. Because the defendant is normally indifferent to the amount of the fee, no weight should be given to its indifference. Similarly, counsel's agreement on fees with the named plaintiff should not matter. Whether or not the named plaintiff has agreed to a one-third fee has no bearing on the proper fee for class counsel. (A different situation is presented under the PSLRA, which operates on a congressional assumption of an "empowered plaintiff.") The long discussion of fee determination principles in the Note is untethered to any provision in the rule; unless the principles are themselves to be included in the rule, they should perhaps be removed from the Note. For example, the Note says that the fee award should be tied to the actual relief provided to class members. If that is the Committee's position, it should be in the rule, as it is incorporated into the PSLRA. Similarly, the rule could direct that a portion of the payment to counsel be held back pending completion of the claims procedure to ensure attention to the fairness and efficacy of that procedure. On coupons, the disapproval of coupons for which there is no secondary market should be made stronger. Perhaps the focus, at least in percentage fee terms, should be on the value of the coupons actually redeemed or used. That would deter counsel from accepting a settlement in which coupons of minimal value are put up by defendant.

Hon. William Alsup (N.D. Cal.), 01-CV-004: Having worked hard on at least six class actions over the last 26 months of my tenure as a district judge, I wholeheartedly support the proposed Rule 23 revisions.

American Insurance Association, 01-CV-022: AIA agrees with the proposal for requiring motions for attorney fee awards and permitting objections and hearings. These practices should result in more clearly justified fee requests.

Patrick Lysaught (Defense Research Inst.) 01-CV-033, 01-CV-034,01-CV-046,01-CV-047: DRI supports the proposed addition of Rule 23(h), but only if it is made clear that the rule does not expand the availability of attorney fees and that it is not intended to overturn appellate decisions taking a hard line on when such fees may be recovered. The Note should be expanded to recognize those decisions.

Prof. Charles Silver, 01-CV-048: The Committee has "wimped out" on the fee formula. "Everyone knows that the lodestar method is an inferior fee formula and should be abandoned in cases where the percentage method can be applied. . . . [I]t violates the Due Process Clause to use the lodestar when the percentage approach is available." The Committee should help the lodestar into its grave. The percentage approach should be endorsed and followed. Once the fee is set, it should be enforced even if the recovery is unusually large. Re-bargaining the fee on the back end should never occur. Also, using the word "reasonable" in Rule 23 is dubious because when Congress has used it in fee-shifting statutes it has been taken to mean use of the lodestar. If this word is used, "there must be an express disavowal of any intention of following Congress' lead. I would simply strike the word."

David Hudson, Chair, Court Advisory Committee, U.S. Dist. Ct., S.D. Ga., 01-CV-053: It is the experience of this Committee that all class action cases in which attorney fees are awarded required without exception notice to the class, a hearing, and approval by the court. In the event the Rules Committee is aware of some practice in federal court where this is not required, then perhaps addressing these requirements in the proposed new rule is warranted.

Gregory Joseph, Amer. Coll. of Trial Lawyers Comm. on Federal Civil Procedure, 01-CV-055: The Committee believes that the proposed amendment to Rule 23(h) is sound. We note that the introductory language refers to an award of fees pursuant to "agreement of the parties." Since any award of fees must be "authorized by law," the disjunctive reference could be deleted as superfluous. Otherwise, the right to object might be construed as permitting the party to renege on an agreement to pay a certain fee, or at least not to object to an award up to a certain amount.

Edwin Wesely, Chair, Comm. on Civil Lit., E.D.N.Y., 01-CV-056: The Committee acknowledges that the courts have a special obligation in reviewing and administering fee requests. However,

this text, to the extent it embraces the lodestar and percentage of recovery methods for awarding fees, is largely a restatement of present practice and hence unnecessary. To the extent the rules authorizes fee awards based solely on competitive bidding, the Committee is uncomfortable. The Note appears substantive. There should not be an attempt to effect procedural changes through the Note rather than the rules themselves.

Federal Magistrate Judges Assoc. Standing Rules Committee, 01-CV-057: The FMJA Rules Committee supports the proposed changes to Rule 23.

Allen Black, 01-CV-064: I support the notion of including within Rule 23 a provision dealing with the award of attorney fees. But the rule should say that the court "shall" award a reasonable fee, not just that it "may" do so. The rule as drafted seems to leave it within the court's discretion not to award a reasonable fee. "We have seen a number of appellate decisions reversing such actions by district courts." In addition, I would add the following regarding coupon settlements: "If the class is made up of distributors who buy products from the defendants routinely on an on-going basis, the coupons may be of real value to the class." On p. 88, the second full paragraph says that a significant risk of non-recovery has "sometimes" been important in determining the fee. I think it would be fairer to say that the risk factor has "almost always" been important.

Jeffrey Norris, President, Equal Employment Advisory Council, 01-CV-065: EEAC supports the increased judicial supervision over attorney fee awards and costs to counsel. Although the proposed rule does not establish any new rules for awarding attorney fees and costs, its inclusion in the class action rule reinforces the significant role the court has in overseeing such awards. One thing that should be emphasized is focusing on the actual benefits to the class resulting from settlements. Agreements that call for future payments or coupons or other nonmonetary benefits may not actually result in significant actual benefits to class members.

Robert McCallum, Jr., U.S. Dep't of Justice, 01-CV-073: The Department supports the Committee's conclusion that the amended Rule should describe the role of class counsel and procedures for resolving attorney fee awards.

Washington Legal Foundation, 01-CV-082: WLF supports each of the specific provisions of proposed Rule 23(h). It applauds the notion that notice of the fee request must accompany any notice of a proposed settlement. The rule will increase significantly the likelihood that class members will learn of the requested fee and thus be in a position to object if they so desire.

ABA Sections of Antitrust Law and of Litigation, 01-CV-069: We

support the proposed amendment, and believe its adoption will be an important step toward improving public confidence in the judicial process with respect to class actions. The Committee chose the right course in not attempting by rule to resolve the current circuit court split between the percentage-of-the-fund method and the lodestar method for determining class action attorney fees. There is too often a perception under current practice in settled class actions that the court accepts the agreement of the parties regarding the amount of class counsel's fee without examining whether the fee is commensurate with the benefit provided to the class. Whether or not that perception is accurate, we believe a rule amendment mandating careful judicial scrutiny of all fee applications in class actions will lead to greater public confidence in the judicial process, and also prevent some of the perceived abuses. Although no measuring system is perfect, the Note sets out appropriate factors for the district court to consider and gives the district court sufficient leeway to fashion fair and equitable awards. We agree with the Committee on the "singular importance of judicial review of fee awards to the healthy operation of the class action process." The straightforward provisions of proposed Rule 23(h) appear well designed to facilitate such judicial review.

Federal Trade Commission, 01-CV-085: The Commission supports the inclusion of this provision in Rule 23 and believes that requiring formal findings of fact and conclusions of law, as well as the overall encouragement of close judicial scrutiny of fee petitions, will ensure that appropriate fees are awarded. We urge the Committee to consider including language in the Note specifically pointing to the existence of previous or parallel government actions as a factor to be considered in assessing the reasonableness of a fee request. In light of the substantial work often undertaken by the government in prosecuting a case, some courts have already held that the existence of a related government action is a factor that may properly be considered in reducing class counsel's fee. The existence of government involvement also bears on other factors considered, such as the level of risk shouldered by counsel. In two recent class actions that built on FTC enforcement actions, the Commission opposed class counsel's fee petitions as unreasonably high.

Prof. Susan Koniak, 01-CV-086: Currently, courts often measure the attorney's fee in light of a fund designated for the class that will not, in large measure, actually be paid to the class members. After a claims procedure of some sort, much of the money actually returns to the defendant's coffers. When the settlement provides that defendant gets back money not claimed by the class, class counsel's fees should be calculated by the amount actually received by the class, not the illusory larger "recovery." The fact this would delay the award to counsel is not important; why shouldn't the lawyers wait for their money until the class members get theirs? The alternative of relying

on expert forecasts on the level of claiming activity should be discouraged in the rule.

Lawyers' Committee for Civil Rights Under Law (and 16 other groups), 01-CV-091: This rule is unnecessary in light of the provisions of Rule 54(d)(2). The only substantial addition it makes appears to be the requirement that notice of the fee motion be given. That is not a good change. Although the proposed rule appears only to establish a procedure for the determination of fees and costs, the note speaks more directly to the substantive standards regarding determinations of the merits of fee applications. The Note should not be used for expressions of substantive legal standards, and it should be deleted.

David Piell, 01-CV-094: The introduction of Rule 23(h) at the same time as Rule 23(g) seems to obliterate the latter. Why should the court bother with the task of bidding for class counsel, and what meaning does the bid have, if at the conclusion the court is going to reevaluate the value of counsel's work and determine the appropriate fee using hindsight? The Note is problematic on fee measurement. The lodestar should not be used as a cross-check on the percentage measurement. The only reason for using the lodestar is to avoid an unreasonably low fee for counsel. An individual plaintiff could not opt for hourly billing after seeing what the percentage approach will yield for counsel, and neither should a class get that option. "While to the lay observer, class counsel's fee award is excessive, the average person does not understand that class litigation takes years of work, that class counsel has to advance all the costs of litigation, and that often multiple competing class actions against the same defendant(s) same issue will be occurring. The result of this last consideration being that class counsel can have the misfortune of losing their investment in the class action because another firm was willing to settle for less."

Prof. Howard Erichson, 01-CV-097: The provisions on attorneys' fees are appropriate, and it makes sense to include them in Rule 23. Perhaps the Note should emphasize the problems created by the use of the lodestar rather than percentage fees, particularly is encouragement of overstaffing with unwieldy conglomerations of lawyers.

Rule 23(h)(1)

Conference: The principal problem now is that there is no adequate basis for objectors to know the basis of the fee application in time to object. The time periods for disclosure and objecting often make informed objections impossible. The net recovery by the class is important. The amount requested should be in the notice to the class. The application should be available to class members for at least 30 days. A lot of money is involved, and the application may present complex issues. Often an objector has to fight counsel to get the documents. Any side deals should be disclosed in the fee application.

Conference: An aggressive attitude toward disclosure and scrutiny of side agreements is not warranted. In a Wall Street firm, the "rainmaker" lawyer shares in the profits, even without doing the main legal work, as a recognition of the importance of the job of getting the legal work. So here, the lawyer who initially gets the case may take it to a class-action firm. That firm cannot know at the outset how much time the case will take, or the risks involved. Some things are quite independent of the rational disposition of the case. For example, if the defendant simply has cash-flow problems, it may not be able to settle at the time. Substantive law may change, making the case harder to win.

Conference: There is no real problem with disclosure of side agreements. Often these are buy-off deals with objectors. None of the possibly valid fee-sharing issues suggested by an analogy to the rainmaker in a law firm applies there.

Conference: Side agreements are a problem. If the total fee is to a consortium and is reasonable, perhaps the court need not be concerned with the division within the group. There may be some "hard stuff" going on within the consortium, but the judge would be well advised to stay out of it.

Conference: If the fee basis is the lodestar, the judge should know about the side agreements. Even if a percentage fee is used, that need exists if the lodestar is used as a cross-check.

Conference: There are concerns about the nature of the notice of the fee motion to the class members, and the cost that will result from having to give this notice.

Victor Schwartz, D.C. Hg. (pp. 76-63) & 01-CV-031: It is of paramount importance to notify the class members about fee hearings so that they may be informed before the class attorneys' fees are set in cement.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: We agree with the thrust of this subsection because it

explicitly requires that fees be sought by motion and that the class members be notified. We find the reference to Rule 54(d)(2) a bit curious, since we almost never see that rule invoked except in statutory fee-shifting cases. In any event, Rule 54(d)(2) cannot apply to class actions in all respects. For example, the 14-day deadline serves no purpose in the class action context. In order to avoid possible confusion, the rule should say that the time limit of Rule 54(d)(2)(B) does not apply. In addition, the Committee should explain why the rule incorporates Rule 54(d)(2). Regarding notice, we think that the full motion for fees should be served on all absentees who have entered an appearance through counsel or otherwise. In our experience, class counsel often resist providing this information to potential objectors.

Leslie Brueckner (TLPJ), D.C. Hg. (pp. 148-61) & 01-CV-020: TLPJ urges the Committee to eliminate the requirement that notice be given to the class with regard to the attorney fee motion. We have no problem with the requirement that the motion be served on the parties. But the provision could be read to require that all class members must be served with a copy of the motion. The motions are often not filed with the court until some time after the notice of proposed settlement is given to the class, and a separate notice would therefore be required, although there would usually not be too much problem when the notice can be included with the Rule 23(e) notice to the class. But having a potentially double round of notice would be undesirable. This could have a huge negative impact on civil rights cases and consumer cases. In litigated cases, this would require an additional notice, but if the cost of giving notice were itself a recoverable cost that would remove some of the possible deterrent effect of having to give the notice since it would only be required when the case was won and a fee award almost certain. But to take comfort in that, the witness would want the rule to say that the costs of giving notice to the class would be taxable as costs. Moreover, the requirement of notice actually is harmful to the class if the cost of giving notice must be deducted from the recovery for the class.

Allen Black, 01-CV-064: I am not sure why Rule 23(h)(1) is drafted so as to import explicitly all the procedural and other baggage of Rule 54(d), only to disclaim applicability of some of the baggage in the very next words of the rule. These proceedings strike me as sufficiently different from Rule 54(d) proceedings to be treated without reference to that rule.

Keith Johnson, Chief Legal Counsel, St. of Wis. Invest. Bd., 01-CV-066: SWIB strongly supports Rule 23(h)(1) in its entirety. All of the items covered by the proposed rule are critical to obtaining fair fee awards. Given the conflicting interests of class counsel and class members when it comes to fee awards, these processes are of the utmost importance to ensure that fee

awards are fair and are considered in light of full scrutiny by class members. Indeed, the proposed rule does not go far enough. Most settlement notices do not provide meaningful information about fee awards, but only provide the maximum amount the parties have agreed to submit to the court without opposition from the defendant. Class members can be protected from excessive fee awards only by meaningful disclosure. Information about the proposed fee award and about counsel's effort to earn it is critical to class members' ability to assess fee petitions. In many cases, counsel's detailed submissions to the court regarding fees are not made until after the deadline for class members to opt out or to object. Thus, they cannot obtain timely information that would indicate whether the fee award is justified. The rule and Note do not address this. We urge the Committee to review the rule and require that the papers in support of the fee award be filed at least ten days before the deadline for objections and opting out.

Washington Legal Foundation, 01-CV-082: WLF recommends that the rule provide for notice of the motion at least 60 days in advance of the proposed hearing. WLF's experience is that the norm is to provide very little advance notice of fee hearings. Mandatory 60-day advance notice should eliminate this problem yet will impose minimal hardship on the attorneys seeking a fee award.

ABA Sections of Antitrust Law and of Litigation, 01-CV-069: The provisions regarding notice and the right to object bolster the rule's function in raising public confidence regarding the award of class action attorney fees. Particularly when class actions are settled, class counsel and the defendant are not adversaries with respect to the fee application. The requirement of notice will facilitate the adversary process by providing class members with the information they need to determine whether they believe the fee sought is reasonable in terms of the benefit obtained for them.

Alliance of American Insurers, 01-CV-068: The Alliance opposes the requirement that notice be provided to class members regarding attorney fee motions by class counsel because this would result in greater administrative expenses in defending class action litigation. It is unclear whether the notice envisioned would be part of the settlement notice or whether it would be a separate notice. It is unclear what, if any, benefit would be derived by disclosing counsel fees to the class members. The Alliance believes that a thorough and comprehensive examination of counsel fees by the court would achieve the goal of protecting class members. An acceptable alternative, however, would be for the proceedings regarding fee awards to take place after settlement, with any expenses associated with the required notice borne by the plaintiffs.

National Treasury Employees Union, 01-CV-078: The proposed rule

regarding notice of the fee motion does not recognize that attorney fees may be provided for in the settlement agreement itself. The motion for approval of the settlement should be deemed to satisfy the notice requirement. Requiring a separate notice for the fee motion is wasteful.

David Williams, 01-CV-079: The amendment's premise -- that class members always have an interest in the fee arrangements -- is incorrect. That interest may exist when payment is from a common fund, but it does not always exist. Yet the notice requirement is premised on class members' supposed universal interest in the fee award. Cases in which the class members do not have any such interest include (a) those in which judgment has already been obtained in favor of the class and class counsel are to be paid under a fee-shifting statute, (b) cases that settle, with fee issues reserved for later, separate treatment, and (c) cases in which the fee methodology has already been pre-determined under new Rule 23(g). If the parties are capable of settling these fee claims, why require the court to determine the fee? Notices to the class in such instances will create more confusion than benefit.

W.D. Mich. Committee on Rules of Practice, 01-CV-090: The amendments in this area are simply unnecessary. Details about the nature of the attorney fees being sought can be incorporated in the notices sent to class members under the other provisions of Rule 23. Introducing an entirely separate notice procedure for approving attorney fees creates delay and redundancy that is both expensive and inefficient.

Lawyers' Committee for Civil Rights Under Law (and 16 other groups), 01-CV-091): The mandatory notice of to the class regarding the fee motion imposes yet another unnecessary and unjustified burden in civil rights class actions. Most civil rights class actions are maintained under federal statutes that provide for judicial awards of fees to prevailing plaintiffs from the adverse party. As a consequence, the fees don't diminish the recovery for the class and notice to class members would serve no purpose. To the extent that attorney fees are included in a proposed settlement, the interests of class members in the fee amount are adequately served through notice of the proposed settlement and the opportunity to object to it. But attorney fee proceedings in civil rights class actions often occur after the approval of the settlement, and requiring a notice then serves no legitimate interest.

Rule 23(h)(2)

Conference: There should be an opportunity for discovery for objectors. The rule has evolved from a draft that required a hearing to the present proposal that only permits a hearing. It would be better to say something to the effect that the court "shall ordinarily" have a hearing. It is too easy to shovel these issues under the rug without a hearing.

Conference: In one case in the RAND study, after objectors appeared to oppose the amount agreed to be paid the lawyers, much more of the benefits of the deal were shifted from the class attorneys to the class.

Conference: Why should class members get to object when the fee is not coming out of a common fund? That would seem none of their business.

Barry Himmelstein, S.F. Hg. (pp. 15-30) & 01-CV-008: On the question whether discovery should be available to those who object to fees, it makes sense to say (as the Note does) that the completeness of the fee motion is a factor to be considered in deciding whether to order discovery. But that determination should be made with regard to the method of determining fees that the court will be employing. If it is the percentage method, that would have a great bearing on whether discovery would be authorized. Even if the lodestar were used as a cross-check in such a case, the level of detail that would be needed for that cross-check purpose would not be as great as would be needed if the lodestar were the main method of setting the fee.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: This provision is a positive addition to the rule because it underscores that all class members have an interest in any fee request, whether made by class counsel or the objector's counsel, or whether the fee is nominally "separate" from the relief to be accorded the class in a settlement. The Note raises some concerns. Regarding pro se objectors, who often are not familiar with technical procedures, it should say that their objections must be accepted even if they are submitted in an informal format, and that class counsel are responsible for seeing that they are filed. We suggest the following language: "For these purposes, an objector represented by counsel would ordinarily have to file a formal objection with the clerk of court, rather than by letter to counsel or the court. For objectors not represented by counsel, those less formal means will suffice." We also agree that the need for discovery depends largely on how fully fee-seeking counsel have ben in disclosing relevant information. Fee-sharing arrangements among counsel, "clear sailing" arrangements with the defendant, and arrangements for payments to named plaintiffs should be disclosed in all cases, however.

Gregory Joseph, Amer. Coll. of Trial Lawyers Comm. on Federal Civil Procedure, 01-CV-055: The opportunity for a party from whom payment is sought to object might invite improper behavior in cases in which a party has agreed not to object, or at least not to object up to a certain amount. Could the permissive "may" in subpart (2) trump the agreement even though the rule itself says that an award can be premised on an "agreement of the parties"?

Prof. Charles Silver, 01-CV-048: "Fee objections are pointless. When fees are handled right to start with, their only purpose is to enrich strategic objectors who threaten to 'hold up' settlements by appealing unless they are paid to disappear." The Committee should not carve an objector's rights to fees in stone. The standard extortionist tactic is to threaten to appeal unless class counsel cuts the fee and to request a portion of the fee reduction as compensation. That should never be sufficient to justify fees for objectors. They should only be compensating for wringing more from defendants.

Keith Johnson, Chief Legal Counsel, St. of Wis. Invest. Bd., 01-CV-066: SWIB applauds the Committee's recognition that it may be appropriate to award fees to counsel whose work produced a beneficial result for the class, including attorneys who represented objectors that improved the settlement or reduced the fee award. Only by making it possible for objectors to recover the costs of their efforts can we overcome the strong disincentive for class members to speak up in opposition to excessive fees or inadequate settlements.

Washington Legal Foundation, 01-CV-082: WLF sees no reason to require class members to seek to intervene in order to preserve the right to appeal a fee award. Unless class members are allowed to appeal fee awards, there may be nobody to appeal unjust fee awards.

ABA Sections of Antitrust Law and of Litigation, 01-CV-069: The right to object bolsters the rule's function in raising public confidence. It will help present the issue to the court in the adversary context our justice system has typically regarded as optimal. By the time a settlement is proposed, class counsel and the defendant are not really adversaries on the fee application.

Alliance of American Insurers, 01-CV-068: The Alliance supports the provision allowing objections by any class member or party from whom payment is sought.

National Treasury Employees Union, 01-CV-078: Providing a right to object to the fee motion separate from the right to object to the terms of a proposed settlement does not seem warranted in all cases.

Rule 23(h)(3)

Conference: The rule requires findings on the fee motion, but not a hearing. We should use this rule to impose more regulation on district judges as they shop for, and as they pay, class counsel.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: We support this provision. Although a hearing need not be held in every case, the court should hold a hearing at least in cases where a fee objection has been filed. The Note should stress the importance in the Rule 23(e) settlement context of combining into one hearing the court's consideration of the overall settlement and the fee request.

David Romine, D.C. Hg. (pp. 242-62) & 01-CV-49: This provision will burden courts. This is the only motion for which courts must make findings. That is an undue burden.

Keith Johnson, Chief Legal Counsel, St. of Wis. Invest. Bd., 01-CV-066: SWIB strongly supports the proposal to require that courts make findings in connection with the award of attorney fees, and supports inclusion in the Note of factors that courts should consider in assessing the reasonableness of fee awards.

ABA Sections of Antitrust Law and of Litigation, 01-CV-069: The requirement of specific findings on the reasonableness of the fee will provide for effective appellate review. Perhaps more importantly, such findings will provide a public education function in class action cases, which often are followed closely in the media. In those cases in which large fee awards relative to the benefit to individual class members are appropriate, written findings from the court awarding the fee will help to educate the public regarding why such a fee is appropriate in that particular case.

Alliance of American Insurers, 01-CV-068: The Alliance supports the requirement for findings under Rule 52(a) and for a hearing on the fee motion.

Rule 23(h)(4)

Conference: The Rule 23(h)(4) provision for reference to a special master is too broad. It refers to issues related to the amount of the award. It would be better to refer to the need for an accounting or a difficult computation, as the proposed Rule 53 revision at page 120 of the publication does.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: We oppose this provision concerning reference of the fee amount determination to magistrate judges or special masters. Except for the most mundane issues, it is important for the judge who handled the case to be fully involved in this activity. In settled cases, in particular, the determination of a proper fee is intimately tied to the assessment of the settlement.

REPORT TO BE DISTRIBUTED SEPARATELY

H.R. 860

"MULTIDISTRICT, MULTIPARTY, MULTIFORUM TRIAL JURISDICTION ACT OF 2001"

107TH CONGRESS
1ST SESSION

H. R. 860

IN THE SENATE OF THE UNITED STATES

MARCH 15, 2001

Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend title 28, United States Code, to allow a judge to whom a case is transferred to retain jurisdiction over certain multidistrict litigation cases for trial, and to provide for Federal jurisdiction of certain multiparty, multiforum civil actions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001".

SEC. 2. MULTIDISTRICT LITIGATION.

Section 1407 of title 28, United States Code, is amended—

(1) in the third sentence of subsection (a), by inserting "or ordered transferred to the transferee or other district under subsection (i)" after "terminated"; and

(2) by adding at the end the following new subsection:

"(i)(1) Subject to paragraph (2) and except as provided in subsection (j), any action transferred under this section by the panel may be transferred for trial purposes, by the judge or judges of the transferee district to whom the action was assigned, to the transferee or other district in the interest of justice and for the convenience of the parties and witnesses.

"(2) Any action transferred for trial purposes under paragraph (1) shall be remanded by the panel for the determination of compensatory damages to the district court from which it was transferred, unless the court to which

the action has been transferred for trial purposes also finds, for the convenience of the parties and witnesses and in the interests of justice, that the action should be retained for the determination of compensatory damages.".

SEC. 3. MULTIPARTY, MULTIFORUM JURISDICTION OF DISTRICT COURTS.

(a) BASIS OF JURISDICTION.—

(1) IN GENERAL.—Chapter 85 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1369. Multiparty, multiforum jurisdiction

"(a) IN GENERAL.—The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 25 natural persons have either died or incurred injury in the accident at a discrete location and, in the case of injury, the injury has resulted in damages which exceed $150,000 per person, exclusive of interest and costs, if—

"(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;

"(2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or

"(3) substantial parts of the accident took place in different States.

"(b) LIMITATION OF JURISDICTION OF DISTRICT COURTS.—The district court shall abstain from hearing any civil action described in subsection (a) in which—

"(1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and

"(2) the claims asserted will be governed primarily by the laws of that State.

"(c) SPECIAL RULES AND DEFINITIONS.—For purposes of this section—

"(1) minimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section 1603(a) of this title;

"(2) a corporation is deemed to be a citizen of any State, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to be a resident of

any State in which it is incorporated or licensed to do business or is doing business;

"(3) the term 'injury' means—

"(A) physical harm to a natural person; and

"(B) physical damage to or destruction of tangible property, but only if physical harm described in subparagraph (A) exists;

"(4) the term 'accident' means a sudden accident, or a natural event culminating in an accident, that results in death or injury incurred at a discrete location by at least 25 natural persons; and

"(5) the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

"(d) INTERVENING PARTIES.—In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

"(e) NOTIFICATION OF JUDICIAL PANEL ON MULTIDISTRICT LITIGATION.—A district court in which an action under this section is pending shall promptly notify

the judicial panel on multidistrict litigation of the pendency of the action.".

(2) CONFORMING AMENDMENT.—The table of sections at the beginning of chapter 85 of title 28, United States Code, is amended by adding at the end the following new item:

"1369 Multiparty, multiforum jurisdiction."

(b) VENUE.—Section 1391 of title 28, United States Code, is amended by adding at the end the following:

"(g) A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.".

(c) MULTIDISTRICT LITIGATION.—Section 1407 of title 28, United States Code, as amended by section 2 of this Act, is further amended by adding at the end the following:

"(j)(1) In actions transferred under this section when jurisdiction is or could have been based, in whole or in part, on section 1369 of this title, the transferee district court may, notwithstanding any other provision of this section, retain actions so transferred for the determination of liability and punitive damages. An action retained for the determination of liability shall be remanded to the district court from which the action was transferred, or to

the State court from which the action was removed, for the determination of damages, other than punitive damages, unless the court finds, for the convenience of parties and witnesses and in the interest of justice, that the action should be retained for the determination of damages.

"(2) Any remand under paragraph (1) shall not be effective until 60 days after the transferee court has issued an order determining liability and has certified its intention to remand some or all of the transferred actions for the determination of damages. An appeal with respect to the liability determination of the transferee court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the transferee court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

"(3) An appeal with respect to determination of punitive damages by the transferee court may be taken, during the 60-day period beginning on the date the order making the determination is issued, to the court of appeals with jurisdiction over the transferee court.

"(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

"(5) Nothing in this subsection shall restrict the authority of the transferee court to transfer or dismiss an action on the ground of inconvenient forum.".

(d) REMOVAL OF ACTIONS.—Section 1441 of title 28, United States Code, is amended—

(1) in subsection (e) by striking "(e) The court to which such civil action is removed" and inserting "(f) The court to which a civil action is removed under this section"; and

(2) by inserting after subsection (d) the following new subsection:

"(e)(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

"(A) the action could have been brought in a United States district court under section 1369 of this title; or

"(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district

court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

"(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

"(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its inten-

tion to remand the removed action for the determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

"(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

"(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

"(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.".

(e) SERVICE OF PROCESS.—

(1) OTHER THAN SUBPOENAS.—(A) Chapter 113 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1697. Service in multiparty, multiforum actions

"When the jurisdiction of the district court is based in whole or in part upon section 1369 of this title, process, other than subpoenas, may be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.".

(B) The table of sections at the beginning of chapter 113 of title 28, United States Code, is amended by adding at the end the following new item:

"1697. Service in multiparty, multiforum actions.".

(2) SERVICE OF SUBPOENAS.—(A) Chapter 117 of title 28, United States Code, is amended by adding at the end the following new section:

"§ 1785. Subpoenas in multiparty, multiforum actions

"When the jurisdiction of the district court is based in whole or in part upon section 1369 of this title, a subpoena for attendance at a hearing or trial may, if authorized by the court upon motion for good cause shown, and upon such terms and conditions as the court may impose, be served at any place within the United States, or anywhere outside the United States if otherwise permitted by law.".

(B) The table of sections at the beginning of chapter 117 of title 28, United States Code, is

amended by adding at the end the following new item:

"1785. Subpoenas in multiparty, multiforum actions.".

SEC. 4. EFFECTIVE DATE.

(a) SECTION 2.—The amendments made by section 2 shall apply to any civil action pending on or brought on or after the date of the enactment of this Act.

(b) SECTION 3.—The amendments made by section 3 shall apply to a civil action if the accident giving rise to the cause of action occurred on or after the 90th day after the date of the enactment of this Act.

Passed the House of Representatives March 14, 2001.

Attest: JEFF TRANDAHL,
Clerk.

LETTER OF MARCH 13, 2001, EXPRESSING JUDICIAL CONFERENCE

SUPPORT OF H.R. 860

"MULTIDISTRICT, MULTIPARTY, MULTIFORUM TRIAL JURISDICTION ACT OF 2001"

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

March 13, 2001

Honorable F. James Sensenbrenner, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-1306

Dear Mr. Chairman:

On behalf of the Judicial Conference of the United States, I write to express the support of the federal judiciary for H.R. 860, the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001." This bill was reported favorably on March 8, 2001, by the Committee you chair. H.R. 860 will facilitate the resolution of claims by citizens and improve the administration of justice.

Section 2 of the bill amends 28 U.S.C. § 1407, the multidistrict litigation statute, to allow a judge with a transferred case to retain it for trial or to transfer it to another district. Presently, section 1407(a) authorizes the Judicial Panel on Multidistrict Litigation to transfer civil actions pending in multiple federal judicial districts with common questions of fact "to any district for coordinated or consolidated pretrial proceedings." It also requires the Judicial Panel to remand any such action to the district court in which the action was filed at or before the conclusion of such pretrial proceedings, unless the action is terminated before then in the transferee court.

Although the federal courts had for nearly 30 years followed the practice of allowing a transferee court to invoke the venue transfer provision (28 U.S.C. § 1404(a)) and transfer the case to itself for trial purposes, the Supreme Court in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26 (1998), held that statutory authority did not exist for a district judge conducting pretrial proceedings to transfer a case to itself for trial. The Court noted that the proper venue for resolving the desirability of such self-transfer authority is "the floor of Congress."

A proposal to amend section 1407 in response to the *Lexecon* decision was approved by the Judicial Conference at its September 1998 session and is supported by the Judicial Panel on Multidistrict Litigation. As experience has shown, there is wisdom in permitting the judge who is familiar with the facts and parties and pretrial proceedings of a transferred case to retain the case for trial. Also, as with most federal civil actions, multidistrict litigation cases are typically resolved through settlement. Allowing the transferee judge to set a firm trial date promotes the resolution of these cases.

Section 3 of H.R. 860 adds a new section 1369 to title 28, United State Code, entitled "multiparty, multiforum jurisdiction." It essentially provides that the United States district courts shall have jurisdiction over any civil action that arises from a single accident or event in which at least 25 persons have died or been injured at a particular location, where any such injuries result in alleged damages exceeding $150,000 by each plaintiff and which involves minimal diversity between adverse parties. The legislation also requires that one defendant must reside in a state that is different from the location of the accident or the residence of any other defendant or that substantial parts of the event took place in different states. The transferee court would be authorized to determine issues of liability and punitive damages and would remand cases to the transferor court for determinations of compensatory damages, unless the court finds, for the convenience of parties and witnesses and in the interest of justice, that the action should be retained for the determination of damages. The district court, however, must abstain from hearing an action under the bill if a substantial majority of all plaintiffs are citizens of a single state of which the primary defendants are also citizens and the claims asserted will be governed primarily by the laws of that state.

Upon consideration of related proposals during the 100th Congress, the Judicial Conference in March 1988 approved in principle the creation of federal jurisdiction that would rely on minimal diversity to consolidate multiple litigation in state and federal courts of cases involving personal injury or property damage and arising out of a single event. The Conference endorsed the idea of redirecting diversity jurisdiction to serve a purpose that state courts are not able to serve, namely to facilitate the consolidation of scattered actions arising out of the same accident or event and thereby "to promote more expeditious and economical disposition of such litigation."

Today, the Judicial Panel on Multidistrict Litigation can transfer to one judge for pretrial proceedings those cases involving common questions of fact that are pending in federal courts throughout the country. 28 U.S.C. § 1407. Section 3 of H.R. 860 would expand federal jurisdiction by allowing state cases arising from a single event (such as a plane crash or hotel fire) to be brought into such process as a result of filing, removal, or intervention. Section 3 of the bill would avoid multiple trials on common issues, minimize litigation costs, and ensure that litigants are treated consistently and fairly. Thus, this legislation will promote the resolution of litigants' claims in these unique and related cases.

Thank you for taking prompt action on this important and necessary legislation. If you or your staff have any questions, please contact Mike Blommer, Assistant Director, Office of Legislative Affairs (202-502-1700).

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable John Conyers, Jr.
Honorable Howard Coble
Honorable Howard L. Berman

LETTER OF AUGUST 23, 1999, EXPRESSING JUDICIAL CONFERENCE

OPPOSITION OF H.R. 1875

"INTERSTATE CLASS ACTION JURISDICTION ACT OF 1999"

AND OPPOSITION OF S. 353

"CLASS ACTION FAIRNESS ACT OF 1999"

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

August 23, 1999

Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-1306

Dear Mr. Chairman:

On July 23, 1999, the Executive Committee of the Judicial Conference of the United States voted to express its opposition to the class action provisions in H.R. 1875 and S. 353, in their present form. The Executive Committee noted, among other things, its serious concern about the practical effect these bills would have on the caseload of the federal courts by shifting a significant number of class actions from the state to the federal courts. Concern was also expressed about the conflict between these provisions of the bills and long-recognized principles of federalism. The Executive Committee encouraged further deliberate study of the complicated issues raised by class action and mass-tort litigation.

On July 26th, this Judicial Conference position was transmitted to you and other members of the House Judiciary Committee in anticipation of the markup of H.R. 1875 that began the following day.[1] That letter also stated that a more detailed explanation of the position would be forthcoming. This letter provides a more complete explanation of both the federalism and workload concerns, following a brief description of the bill.

H.R. 1875, the "Interstate Class Action Jurisdiction Act of 1999," amends section 1332 of title 28, United States Code, to grant the United States district courts original jurisdiction over class actions having minimal diversity—where at least one plaintiff and one defendant are citizens of different states or nations. It precludes district courts from exercising jurisdiction over a class action if the action is: (1) an "intrastate case" (a case primarily governed by the laws of the state in which the action was filed and the substantial majority of the members of all proposed plaintiff classes are citizens of that state of which the primary defendants are also

[1]The House Judiciary Committee reported favorably H.R. 1875, as amended, on August 3, 1999. The changes made to the bill did not alter the provisions upon which the Judicial Conference position is based.

citizens); (2) a "limited scope case" (a case in which all claims aggregated do not exceed $1 million or where there are fewer than 100 members of the proposed plaintiff class); or (3) a "State action case" (a case in which the primary defendants are states, state officials, or other governmental entities against whom the district court may be foreclosed from ordering relief). Removal of class actions to federal court is permitted by any defendant without the consent of all defendants or by any plaintiff class member who is not a named or representative class member, without the consent of all members of such class. H.R. 1875 also excludes such class actions from the limitation, otherwise applicable to diversity cases, that prohibits removal more than one year after the commencement of the suit.[2]

The effect of the class action provisions of this bill would be to move virtually all class action litigation into the federal courts, thereby offending well-established principles of federalism. The state and federal courts in our country comprise an integrated system for the delivery of justice. State courts are courts of general jurisdiction and have traditionally adjudicated the vast majority of claims based on state law. They currently handle approximately 95% of the judicial caseload in our country. The courts of our federal system, on the other hand, are specialized courts of limited jurisdiction that are staffed and supported to function as such.

This bill focuses entirely on the litigation of state-created rights of action that presumptively belong in state courts. In expanding the scope of diversity jurisdiction, H.R. 1875 has no impact on the range of federal-law class actions that existing jurisdictional statutes have already made cognizable in federal court. Rather, the bill targets class actions involving claims that arise under the law of property, tort, contract, and state regulatory statutes—areas of law that have remained the province of state courts and legislatures in our federal system. In that system, state courts and legislatures enjoy presumptive competence, within constitutional limits, to fashion the rules of decision that will govern the resolution of state-created actions. Although federal courts may occasionally hear such claims in the exercise of diversity jurisdiction, such matters typically present no questions of federal law that implicate the expertise of the federal judiciary.

The federalization of class actions that would result from this legislation would not only deprive our integrated judicial system of the state court resources currently processing class actions pending there, it would also infringe upon the traditional authority of the states to manage their own judicial business. State legislatures and other rule-making bodies provide rules for the aggregation of state-law claims into class-wide litigation in order to achieve certain litigation economies of scale. By providing for class treatment, state policymakers express the view that the state's own resources can be best deployed not through repetitive and potentially duplicative

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[2]In addition, H.R. 1875 generally provides that the class action provisions do not apply to claims relating to certain securities and corporate governance activities.

individual litigation, but through some form of class treatment. The bill could deprive the state courts of the power to hear much of this class litigation and might well create incentives for plaintiffs who prefer a state forum to bring a series of individual claims. Such individual litigation might place a greater burden on the state courts and thwart the states' policies of more efficient disposition.

While it is difficult to predict with precision the impact that the federalization of class actions will have on the federal judicial system, one can predict with confidence that it will impose a very substantial burden. As of September 30, 1998, there were 3,114 class action civil cases pending in the United States district courts, up from 2,641 twelve months prior.[3] Statistics are not available indicating the number of class actions pending (or filed) in the state courts. An interim report of a pending study on class actions found, however, that more than half of the appellate decisions reported by LEXIS between July 1, 1995, and June 30, 1996, were from the state courts. *Preliminary Results of the RAND Litigation Study of Class Action Litigation* (1997) at 14.[4] If this finding reflects the distribution of class action cases today between the state and federal courts, the federalization of class actions holds the potential for increasing significantly the number of such cases currently being litigated in the federal system.

In order to appreciate how substantial that impact would be, it must also be understood that class action cases, by their nature, make extraordinary demands on judicial resources. A 1996 study by the Federal Judicial Center (FJC), for example, found that the median time from filing to disposition for class actions tends to be two to three times that of other civil cases. *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, Federal Judicial Center (1996) at 19. Moreover, the FJC report found that class action cases consume almost five times as much judicial time as the average civil case. *Id.* at 22-23. When the additional, burdensome litigation resulting from H.R. 1875 is added to the already overcrowded dockets of federal courts across our country, substantial backlogs and attendant delays can be expected.[5]

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[3]During the twelve-month period ending September 30, 1998, 1,881 class action cases were *filed* in federal court, up from 1,475 during the prior twelve months.

[4]The RAND Institute for Civil Justice is conducting a study of class action litigation, and its final report is anticipated this fall. The stated goals of that project are to: (1) provide a more detailed picture of the current class action landscape and suggest some implications of this landscape for rule changes; (2) describe current litigation practices and suggest some implications of these practices for rule changes; and (3) describe the specific and general consequences of class actions.

[5]The average weighted caseload per district judgeship (which is derived from a survey of the amount of judge time required by each type of case) has climbed 25% since 1991, from 386 to 484 (as of September 30, 1998). In addition, as of June 30, 1999, there were 19,112 civil cases pending three years or more in the district courts.

H.R. 1875 appears to be motivated by a desire to address abuses that have occurred on occasion in class action litigation (*e.g.*, collusive class certifications and settlements, modest awards for plaintiffs in conjunction with disproportionately large fees for attorneys, duplicative class action litigation, and forum shopping). The House Judiciary Committee heard anecdotal evidence of such abuses in a few state courts during its hearing on July 21, 1999. We do not discredit such evidence. Such abuses may occur in state courts, just as they unfortunately may occur from time to time in the federal system.

To the extent that there are abuses of class action processes, the states involved should be afforded a reasonable opportunity to take corrective measures. In fact, they have already begun to do so. For example, some of the anecdotal evidence heard by the Judiciary Committee concerned class action litigation in Alabama. The Supreme Court of Alabama has already responded, however, to specific problems in class certifications.[6] In addition, the Alabama State Legislature recently enacted a law that, among other things, tightens the requirements before a class may be certified and provides for interlocutory appellate review of certification decisions. (*See* Act 99-250, enacted May 25, 1999.)

Affording affected states an opportunity to take corrective measures would also have the benefit of providing Congress with an opportunity to determine whether the identified abuses reflect a systemic problem that warrants a national solution and to consider alternative measures, short of federalizing class actions. The final report of the RAND study of class actions will hopefully provide empirical data and analysis concerning the nature and extent of any problems. Based upon the limited empirical evidence now available, however, we are not persuaded that a *systemic* problem exists in class action litigation.

In addition, the federal judiciary is in the process of studying more generally the problems created by the aggregation of claims for litigation in the area of mass torts. The Mass Torts Working Group appointed by the Chief Justice in 1998 filed a report earlier this year that identifies the complex problems presented by the aggregation of large numbers of claims and catalogues the various solutions that have been suggested. That report is an immeasurably valuable resource for those studying class action litigation. It is anticipated that the work

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[6] *Ex parte* Green Tree Financial Corp., 723 So.2d 6 (Ala. 1998) (directing the trial court to vacate an order conditionally certifying a class because of the lack of evidence as to the issues of predominance and superiority under Rule 23(b)(3)); *Ex parte* Federal Express Corp., 718 So.2d 13 (Ala. 1998) (directing the trial court to vacate an order conditionally certifying a class action and to allow defendant time to undertake discovery before the court conducts an evidentiary hearing on request for class certification); *Ex parte* AmSouth Bancorporation, 717 So.2d 357 (Ala. 1998) (holding that the trial court abused its discretion in certifying the class); *Ex parte* First Nat'l Bank of Jasper, 717 So.2d 342 (Ala. 1997) (holding that the trial court's order of conditional certification failed to comply with Rule 23); and *Ex parte* Citicorp Acceptance Co., 715 So.2d 199 (Ala. 1997) (holding that the trial court improperly certified the class without first giving proper notice and that the prerequisites for class certification under Rule 23(a) had not been met).

reflected there will be carried forward by the relevant committees of the Judicial Conference or by an ad hoc committee created for that purpose. Whoever carries this work forward will stand ready to work with Congress in evaluation of the need for national action and in development of an alternative approach to handle the complicated issues raised by class action and mass tort litigation.

As the Judicial Conference has recognized, minimal diversity jurisdiction can be a useful approach in some contexts. The Conference has previously endorsed its use, for example, in streamlining the process for resolving multiple claims arising from single-event mass torts, like airplane crashes. Time-honored principles of federalism, however, counsel that access to the federal courts be expanded only where the expansion would serve a substantial federal interest and only where the parameters of the expansion have been carefully crafted to address the perceived problem without unnecessary adverse effects on state judicial processes. The class action provisions of H.R. 1875 fail to meet this standard. Even assuming that the limited evidence currently available warrants a conclusion that some federal action is warranted, the proposed federalization of class actions is not a remedy carefully tailored to address the identified abuses and carries a price tag entirely too high in terms of its potential adverse impact on both the federal and the state judicial systems.

The Judicial Conference would appreciate your consideration of its position opposing the class action provisions in H.R. 1875. We emphasize that we are not disputing the existence of significant problems of overreaching by a few state courts in some class actions. And we fully support the exploration of ways in which federal jurisdiction may wisely be extended to include some class actions that today cannot be brought in federal court. Further deliberate consideration is required to identify alternative approaches that will reduce the total costs borne by both federal and state courts and ensure the appropriate allocation of jurisdiction over class action litigation. The federal judiciary is available to explore with Congress less intrusive and burdensome approaches to address legitimate concerns identified with class action litigation. If you or your staff have any questions, please contact Michael W. Blommer, Assistant Director, Office of Legislative Affairs (202-502-1700).

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable John Conyers, Jr., Ranking Member
Members of the Committee on the Judiciary

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assistance for drug enforcement at the critical state and local level, including resources for state courts, public defenders and assigned counsel.

In Part II, see also Chapter 7, on the impact of various changes in sentencing law and procedure, and Chapter 8, § C.1.a, at p. 160, on increasing federal judicial resources for the war on drugs.

Part III contains additional material on this subject.

Dissenting statement of Mr. Dennis, in which Congressman Moorhead joins:

Drug abuse and drug trafficking are severely taxing the resources of many of our government institutions. Police, prosecutors, courts and prisons are hard pressed to satisfy the steadily increasing demands of a society facing this threat to its fundamental well-being. Our society is looking to its law enforcement agencies to be vigorous in bringing to justice those who are violating our drug laws, because the future of our nation is at stake.

The federal judiciary must not shrink from its critical responsibility to lobby for an adequate capacity in the federal courts to judge drug cases brought into the federal forum. The role of the federal courts is crucial to drug law enforcement, for without their authority federal law enforcement loses its nationwide subpoena power, its electronic surveillance authority, its contempt and immunity powers, and its forfeiture authority to name a few. The federal judiciary must not neglect assuming its share of the workload for fear that the federal judiciary will become too large. The state courts are not substitutes for the federal judiciary and tinkering with the budgets of federal and state law enforcement agencies will not change that reality.

The Federal Courts Study Committee should be recommending more federal judgeships to create a greater capacity in our federal judiciary to meet its responsibilities and leave the choice of forum to the prosecutors.

B. State and Federal Court Jurisdiction

1. Business to Allocate to State Courts

a. Congress should limit federal jurisdiction based on diversity of citizenship to complex multi-state litigation, interpleader, and suits involving aliens. At the least, it should effect changes to curtail the most obvious problems of the current jurisdiction.

Although unknown to the great majority of the United States population, federal diversity of citizenship jurisdiction is a major source of the federal courts' caseload. It accounts for:

- almost one of every four cases in the district courts,
- about one of every two civil trials,

- about one of every ten appeals, and
- more than one of every ten dollars in the federal judicial budget.

As currently codified in 28 U.S.C. § 1332, diversity jurisdiction essentially authorizes federal courts to decide cases that do not involve federal law if those cases are between citizens of different states or between United States citizens and aliens, and the amount in controversy is over $50,000. Federal jurisdiction is not exclusive in such cases, and federal courts apply state law.

Diversity jurisdiction has been controversial since the Constitution authorized it and the 1789 Judiciary Act first implemented it. Henry Friendly's seminal 1928 analysis documented its early justification: that state courts, many on short tethers to debtor-oriented state legislatures, would be unable to provide the legal stability necessary for commercial growth and might be prejudiced against out-of-state litigants. To limit federal court intrusion into everyday lawsuits, the first Congress established a jurisdictional minimum of $500. Federal court decisions in diversity cases provided a vital instrument of national development in the nineteenth century, fostering conditions that a young commercial republic needed for its growth. Much has changed since the republic was young. The state courts are fundamentally different organizations from those of earlier years, and the federal courts have a lot more to do. Diversity jurisdiction, though, is still with us, and still controversial among bench and bar. The committee's deliberations reflected that controversy.

After extensive discussion, a substantial majority of the committee strongly recommends that Congress eliminate this basis of federal jurisdiction, subject to certain narrowly defined exceptions. If Congress elects not to make this wholesale change, the committee recommends that it enact a variety of more modest restrictions. We believe that diversity jurisdiction should be virtually eliminated for two simple reasons: On the one hand, no other class of cases has a weaker claim on federal judicial resources. On the other hand, no other step will do anywhere nearly as much to reduce federal caseload pressures and contain the growth of the federal judiciary. Given all the demands on the federal courts, there is little reason to use them for contract disputes or automobile accident suits simply because the parties live across state boundaries—especially when litigants who do not live in different states must bring otherwise identical suits in state courts.

NEED FOR THE FEDERAL FORUM

The basic criterion for creating federal jurisdiction is that a particular kind of dispute needs a federal forum. Accordingly, we do not propose the

total elimination of diversity jurisdiction. Suits in which aliens are parties and suits of or in the nature of interpleader (e.g., when a stakeholder seeks to bring competing claimants into court to avoid inconsistent liabilities) also have special characteristics that support preserving the federal jurisdiction now available to them. Indeed, for such cases, minimal diversity—when any plaintiff is diverse from any defendant—should suffice. Later in this chapter, we also recommend that Congress make the federal forum more readily available in certain complex cases—some product liability litigation, for example—involving scattered events or parties and substantial claims by numerous plaintiffs. In such cases, the national reach of a federal court would enable a single forum to resolve disputes involving multiple parties from many states. And we discuss broadening federal jurisdiction in certain cases that present both federal and state claims, such as cases with pendent state law claims.

In most diversity cases, however, there is no substantial need for a federal forum. Federal courts offer no advantage over state courts in interpreting state law; quite the reverse. Federal rulings on state law issues have little precedential effect. Proponents of diversity jurisdiction say that these litigants need access to federal courts because of local bias in state courts. We concede that this may be a problem in some jurisdictions, but we do not regard it as a compelling justification for retaining diversity jurisdiction. After the Civil War, Congress required a showing of bias as a justification for removing diversity cases to federal court, but the 1948 revision of title 28 removed all references to such bias, finding them inappropriate and noting that the removal-for-bias provisions were seldom employed.

The current law already recognizes that diversity cases dissipate federal judicial resources—at least if the claim is for no more than $50,000. Diversity is one of the few areas in which Congress has retained a minimum jurisdictional amount-in-controversy requirement. This is a pragmatic but essentially arbitrary attempt to limit the diversion of federal courts from their primary role of litigating federal constitutional and statutory issues. Similarly, the well-established requirement for *complete* diversity—that all plaintiffs be citizens of different states from all defendants—has the effect of containing the excesses of diversity jurisdiction. But these attempts to confine diversity jurisdiction create their own problems, as parties seek to inflate their claims to come within the $50,000 minimum, split related cases between state and federal courts, or maneuver to defeat federal diversity jurisdiction.

RESOURCES

The problem is not merely that diversity cases misuse federal judicial resources. It is that they they misuse a lot of federal judicial resources. Since

the early 1970s, diversity cases have consistently constituted from 20 to 25 percent of the district court caseload and 10 to 15 percent of the appellate caseload. And the volume of filings understates diversity jurisdiction's impact. Diversity cases account for about half the civil trials in federal court, and they frequently generate complex procedural and jurisdictional problems, making them more time-consuming and expensive to process than similar claims in the state courts.

The cost of this jurisdiction is high. A study by the Federal Judicial Center estimated that adjudicating diversity cases in 1988 (when the jurisdictional minimum was $10,000) consumed the equivalent of the workload of 193 district judges and 22 court of appeals judges. Total costs to the federal court system, including juror fees and subsidiary costs, were estimated to be $131 million annually, more than one-tenth of the federal judicial budget.

STATE–FEDERAL FRICTION

Diversity is a source of friction between state and federal courts, particularly when a party commences an action based on diversity that is identical to an action pending in state court. Lack of consistency between federal interpretations of state law and subsequent pronouncements by a state's highest court can lead to contrary results in similar cases. Moreover, eliminating diversity jurisdiction will stimulate political pressure for state court reform.

STATE COURT CAPACITIES

State courts, of course, have serious problems themselves with growing caseloads. A National Center for State Courts study concludes, however, that total abolition of diversity jurisdiction would, on average, generate about eleven more cases for each state court judge of general jurisdiction, and, most important, suggests that these cases would generally be evenly distributed and so would not overwhelm courts in a few areas. In short, what is a heavy burden to the federal system would represent an insignificant addition to the work of most state courts because the state court system is so much larger in the aggregate than the federal court system. The Conference of Chief Justices has expressed the willingness of the state courts to accept responsibility for adjudication of this state law litigation. Should the state courts be concerned, however, we note that Congress has established the State Justice Institute and appropriated funds for it as a mechanism through which an examination of this subject could be made. If diversity jurisdiction is eliminated, in whole or in part, Congress could provide funds to the state judiciaries for a reasonable period to help them

adjust to the increased workload and absorb the cases that had been handled by the federal system.

A BACK-UP PROPOSAL

Should Congress decide not to effect the broad elimination of diversity that we recommend, we urge it to consider the following changes to remove the more extreme dysfunctions of the current jurisdiction. At a minimum, Congress should:

- prohibit plaintiffs from invoking diversity jurisdiction in their home states. The only colorable argument supporting diversity jurisdiction—fear of state court bias against out-of-state litigants—has no force when in-state plaintiffs invoke it.
- deem corporations to be citizens of every state in which they are licensed to do business. The same reason that justifies barring diversity jurisdiction to in-state plaintiffs justifies prohibiting it to corporations in places where they are licensed to do business.
- specify that the jurisdictional floor does not include non-economic damages, such as pain and suffering, punitive damages, mental anguish, and attorneys' fees, which litigants use to skirt the jurisdictional minimum.
- raise the jurisdictional minimum from $50,000 to $75,000 and index the new floor amount.

In Part II, see also Section B.2, at pp. 44–48, on business to allocate to federal courts.

Part III contains additional material on this subject.

Partially dissenting statement of Senator Grassley:

Senator Grassley is opposed to the complete abolition of diversity of citizenship jurisdiction but he supports some of the alternative proposals, such as barring the in-state plaintiff from invoking diversity, an increase in the minimum amount in controversy, and excluding non-economic damages from the decisional floor. He does not favor the proposal regarding corporate citizenship.

Dissenting statement of Mr. Harrell and Mrs. Motz:

Congress created diversity jurisdiction 200 years ago to avoid possible discrimination against out-of-state parties by providing a forum free of political influences and entanglements. A number of recent, well-publicized cases unquestionably demonstrate and affirm that diversity jurisdiction is still necessary to guard against this very problem,

whether the out-of-state party is a plaintiff or defendant. The availability of the alternative federal forum is often an important element of justice well worth its minor costs.

Moreover, experience shows that diversity jurisdiction, rather than being, as the report suggests, a "source of friction" between state and federal courts, is an important part of Our Federalism. Federal judges are kept abreast of state law and in touch with the real concerns of local citizens and businesses. Without diversity cases, the "cross-fertilization" and flow of ideas in each direction (e.g., the Federal Rules of Evidence, and of Civil and Criminal Procedure have drawn many changes over the years from state rules and many states have adopted changes originating in the federal rules) would undoubtedly diminish.

Further, the report's conclusion that diversity cases, which it describes as requiring "a lot" of time of the federal courts, can easily be shifted to state courts is, in our view, unrealistic. Although a majority of state chief justices have stated that they would not object to the abolition of diversity jurisdiction, if supplied with additional resources to handle those cases now tried in federal court, there is no assurance that they will ever be provided with these resources. Just as significantly, the majority of chief justices and other state court judges in the most populous states, like New York, which would feel the additional burden most keenly, vigorously oppose the shift of diversity cases to them. Because in a number of the state courts it takes five years or more to bring a case to trial, the effect of eliminating diversity jurisdiction would be less, rather than more, efficient administration of justice.

In our view, the recommendation to abolish diversity jurisdiction, which relies on statistics which concededly may be unreliable (see *infra* pp. 111–12, recommendation that the Judicial Conference adopt a reliable appellate caseload formula), vastly overstates the cost incurred by the federal courts in retaining diversity jurisdiction. However, whatever those costs are, they are not nearly significant enough to justify the abolition of diversity jurisdiction. Moreover, the "back-up proposal," which would make corporations citizens of every state in which they are licensed to do business, is not a limited alternative at all, but would abolish diversity for most corporations and is thus equally objectionable.

b. Congress should amend the Employee Retirement Income Security Act (ERISA) to forbid removal from state to federal court of cases in which the amount in controversy is less than $10,000.

ERISA provides benefits and protections with respect to employee benefit plans. Dissatisfied beneficiaries of pension and welfare plans may sue to enforce their rights in either state or federal court without regard to the amount in controversy. Where beneficiaries assert their rights in state court, however, defendants often remove the cases to federal court. Many of these removed cases involve claims for relatively small sums of money. Persons asserting small claims often have limited means, and removal of their cases may sometimes be a strategic maneuver to deprive plaintiffs of the opportunity to proceed in the local state courts where they filed their

suits. Thus we recommend that Congress allow removal of ERISA cases only when the amount of controversy exceeds $10,000.

We recommend, however, that Congress preserve plaintiffs' right to *sue* in federal court without regard to the amount in controversy, thus giving plaintiffs the unilateral option of suing in either state or federal court.

2. Business to Allocate to Federal Courts

Eliminating or substantially curtailing diversity of citizenship jurisdiction would provide added capacity to let federal courts resolve additional disputes when the unique characteristics of the federal courts are pertinent. A principal focus of the committee's work has been to preserve the ability of the federal courts to decide questions of federal law. Thus, several of our proposals—most prominently our recommendation for substantial elimination of diversity jurisdiction—will place more of the responsibility for deciding issues of state law in the state courts. But our concern is not simply with alleviating federal court workload. Federal courts are only part of our national judicial system, and their workload is only one piece in the mosaic of relevant concerns. Our overriding concern, rather, is promoting the most rational possible allocation of jurisdiction between state and federal courts.

a. Complex litigation

Complex, multi-party disputes often give rise to litigation in both state and federal courts. The committee supports a statutory amendment, and proposes two steps the courts should take, to facilitate the processing of complex litigation in federal court.

(1) Congress should amend the multi-district litigation statute to permit consolidated trials as well as pretrial proceedings and should create a special federal diversity jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of major multi-party, multi-forum litigation.

The past few decades have witnessed a considerable increase in complex litigation in which litigants press related claims concurrently in several federal and state courts. Airplane crash and product liability cases are two examples. There is partial federal court authority to deal with such cases, but it does not go far enough. For cases already in federal court, 28 U.S.C. § 1407(a) permits consolidated proceedings in cases involving common questions of fact—but only for pretrial proceedings. As a practical matter, to be sure, cases often settle, or liability questions are tried together by con-

sent. Many parties to these national cases, however, cannot have their state law claims tried in federal court because they are citizens of the same state as one of their adversaries and thus do not meet the long-standing requirement of complete diversity among parties.

We believe, though, that the federal trial forum should be available to ensure the economy of one court's resolving disputes involving multiple parties from many states. Thus we recommend that Congress broaden § 1407(a) to allow for consolidated trial as well as pretrial proceedings and adopt a new jurisdiction based on minimal, rather than complete, diversity so that parties to a multi-state, multi-party state law litigation can be included even if they are citizens of the same state. This jurisdiction would permit more efficient handling of cases that are already partly before the federal courts, thus minimizing any workload increase. (And any increase would be more than offset if Congress eliminates most current diversity jurisdiction.)

We do not take up numerous difficult subsidiary issues in complex litigation, such as choice of law, statutes of limitations, single-event or related-matter jurisdiction, removal, possible revision of joinder and class action rules, and remand for trial on damages. The American Law Institute and the American Bar Association Commission on Mass Torts have conducted major studies of these questions, and the House of Representatives is considering legislation to create a special federal jurisdiction for mass disasters.

(2) The *Manual for Complex Litigation* should include guidelines for consolidation and severance.

Generally speaking, federal district judges should consolidate separate cases and sever common issues for combined disposition if they can do so efficiently and fairly. Opportunities for consolidation and severance will become more common, especially if Congress adopts our preceding recommendation. Consolidation, though, is not always desirable. It may not be economical, and trial on liability issues alone may skew results. Thus, while it is important to make consolidation possible for cases in which it could be desirable, guidelines for its use could reduce its misapplication when consolidation might be inappropriate. Case law and commentary provide few guidelines for the judiciary, and this committee is not the body to devise them. But either the Board of Editors of the *Manual for Complex Litigation, 2d,* should include such guidelines in future editions, or they should be reflected in the Federal Rules of Civil Procedure.

Summary of Comments & Testimony: Overlapping Classes

Michael J. Stortz, Esq., S.F. hearing 5-: Represents a drug company that has been the target of dozens of class actions upon withdrawal of a drug from the market. Many seek medical monitoring – some for statewide classes, some for national classes. They are pending in half a dozen state courts. The federal MDL judge has about 30 class actions. Plaintiff counsel have been racing to see who can go first in getting a favorable class decision. Many of the state actions cannot be removed. One drug store in Mississippi has been made defendant in many class actions to prevent removal. "You can't do two medical monitoring programs," but that is the risk of multiple actions. And the litigation risks are that "the state courts proceed on their own schedule without regard to anything that is happening in the federal MDL." Federal courts are attempting to corral these problems. It would help to provide some guidelines through articulated rules. Minimal diversity jurisdiction also would help. If there is doubt about the ability to act by rule, legislative proposals would be welcome. "There is a real problem out there. It's not scattered. It's not rare. It's very common." As defendant, we argue that an MDL court has in rem jurisdiction to prevent some of these abuses by injunction. Despite the anti-injunction act, "judges have created and crafted solutions, given the pragmatic crisis they face."

There is a further problem with duplicative, overlapping discovery. The same company officials are being noticed for depositions in different jurisdictions – there may be demands to produce the same person for depositions in different places at the same time. Judges attempt to coordinate, but "it's very much a liquid promise that, unfortunately," dissolves. Plaintiff counsel get what they can in the MDL proceeding, and then try state proceedings to get what was not available in the MDL proceeding. MDL judges are anxious to accomplish coordination.

(His written statement, 01-CV-011, observes that at times overlapping classes are filed by the same group of counsel in an effort to obtain the most favorable forum. More common are filings by different groups of plaintiffs' attorneys.)

(His written statement also suggests that the proposals to strengthen review of settlement will be frustrated unless federal courts are given authority to limit and control parallel state-court proceedings.)

Jacqueline M. Jauregui, Esq., S-F Hearing p 45 ff: Her firm has been defending a medical device litigation. In the first six months of 2001 53 class actions were filed involving the same product; 35 of them alleged nationwide classes, while 18 alleged a single-state or Canadian class. 36 were initially filed in federal court or were removed; they are now in MDL proceedings. There were 17 cases that could not be removed – or, if removed, were dismissed and then refiled in state court with an additional and local defendant to defeat removal. These events involve a prodigious

waste of judicial and public resources, and of the defendant's resources as well. Other people in the product-liability arena tell me that this is a not uncommon series of events. For just this one device, the cases in federal court involve 1.5% of a year's class-action filings. Half a dozen similar events a year would mount up to 10% of the class-action filings. Minimal diversity legislation would go a long way toward supporting MDL processes for these cases. There may be a reluctance to support expanded diversity jurisdiction, but that is the only way to unravel this knot. Outside the mass torts context, another client provided another example. Oklahoma state courts, through the state supreme court, denied certification of a class. Two weeks later the same law firm challenged the same practice on behalf of a different named plaintiff in a federal court class action. A different client in the insurance field says that the average cost of discovery and briefing before decision of a certification motion is one million dollars. The client in the Oklahoma litigation reflected and agreed that her costs in this stage run from $750,000 to one million dollars. Going through that process twice or more often is wasteful. The not-published certification-preclusion draft Rule 23(c)(1)(D) would be a superb tool to diminish the waste.

When we have been confronted with competing class actions in different courts, it has tended to be a competition among lawyers each of whom wishes to represent a nationwide class. Coordination, when it has occurred, has been the result of informal efforts of defense counsel. In financial services and insurance litigation, there has not been any sign of informal efforts of the judges to cooperate among themselves. Coordination among judges might be a good thing, "but I don't know whether in a state court setting judges would be willing to do that."

Gerson Smoger, Esq., S-F Hearing 73 ff: For ATLA. ATLA is "rather strongly opposed to the preclusion proposals." There has been limited study and limited ability to get empirical evidence on the problem of dual classes, apart from "the high profile examples that we all hear about." The proposals are designed to affect only a minority of filings, but if adopted in general terms will affect all state-court class actions. The proposals seem to be simply a matter of telling judges to do their jobs. "This is legislation over * * * the state judicial systems." This is a matter for state legislatures, and perhaps for Congress; it is not a matter for the rulemaking process. Class actions commonly are justified for reasons that bear either on efficiency or on providing a forum for small claims.

As to forum-shopping on certification, once one court has denied certification the defendant will describe that decision to any other judge asked to certify the same class. Then it is a question for the second judge. If the job is not being done right, the answer lies in judicial education and in cooperation among the judges.

Settlement shopping is done by the defendant, by the person who is being asked to pay money. If the defendant does not want to settle, there is no settlement to shop. Again, it is a question for the judiciary. In response to a question whether a court should be able to enjoin a defendant from settling in another court while a class claim remains pending in the first court: The settlement might change, the procedures might change. It may not be the same cause of action. And the parties may dismiss the federal action after the court refuses to approve a settlement. Once an action is dismissed, how does the court exercise continuing control? Who enforces the injunction — the judge who issued it? But if the action remains pending in the first court after the settlement is rejected and another court is preparing to approve the same settlement, "that's very problematic." Overall, these problems — the 37 class actions — seem to arise "where there are high stakes and very bad acts." When there are 37 classes, "a lot of it gets sorted out realistically fairly shortly on." The sorting process occurs in the plaintiffs' bar; there is a self-policing. The problem of overlapping classes is for the most part being resolved within the system. "You couldn't say that in certain situations it's not a problem," but the tools exist to resolve it. Resolution of the actions depends on the defendant. There is some attempt to try to have resolution even if there are multiple state and federal actions. It is not always settlement: very few go to trial. Once the first trial or second trial is lost on a classwide basis, plaintiffs become unwilling to put more resources into a classwide trial. A second trial will happen only if it appears that the earlier trial or trials were not well managed; the risk, cost, and time required deter multiple attempts.

In response to a question whether it is fair to allow multiple opportunities for certification? How many times do we have to win before we lose on certification? Is it fair that when certification is finally ordered, it's the whole ball game? There are many types of class actions. In a mass-tort class action, certification is not the ball game. "The ball game is the reality of the existence of the large torts." In a small-claim consumer class action, certification is necessary for effectuation of the action. The discovery has been done for the first certification attempt, the issues have been explored, so the duplication in successive certification attempts is reduced. So in the example earlier this morning: after Oklahoma courts have denied certification, a federal judge certainly has power to certify a class, but certainly will be influenced by what the state courts did. And there may be a new federal element added when the new action is filed in federal court; if the law changes, there is a new certification issue. The reality is that the multiple filings are there, but most of the federal filings will get consolidated in MDL proceedings. A lot of the state filings will sit back "and not have activity." A few state filings will have activity, but you will never have more than five full "trials" on certification, and usually it is fewer than two. It is not a matter for judicial

power to decide whether to enjoin state-court cases once the federal cases are consolidated for MDL proceedings; that is a legislative judgment. But the system is working itself out well without legislation. Informal conversations are taking place among judges. If there is a federal MDL proceeding, the federal judge will be talking to the state judges. Informal mechanisms also exist within the plaintiffs' bar, because there is a coalescence of the plaintiffs' bar. There is some agreement as to who takes what roles. When there are multiple defendants, the same thing happens on the defense side. These things "have to happen because * * * everyone needs the efficiency. The plaintiffs don't need thousands of hearings to attend."

(His written statement, 01-CV-017, adds several points. It is not surprising that these proposals have the enthusiastic support of multinational corporations. But there is not sufficient problem to warrant new rules. The federal courts do not need more cases — and defendants, if given the opportunity, will remove virtually every class action. Class actions that involve state law belong in state courts. The draft proposals depart so drastically from basic federalism as to be unconstitutional. None of the alternative proposals can disguise the impact. The idea of revising the statutes to authorize rules that the statutes now forbid is surprising, absent any "paramount, urgent basis for doing so.")

Jack B. McGowan, Jr., Esq., S-F Hearing 107 ff: Has defended pharmaceutical, medical-device, and product-liability cases. The breast implant litigation provides an example of overlapping classes. One client had 34 federal class actions around the country, three Canadian class actions, and at last one state-court class action that was limited to a statewide class. There were also 17,000 individual actions around the country. It cannot be said that these numbers reflect the merits of the claims: it has been fairly well established that there is no causal link between the implants and autoimmune disease. In another case involving phenylpropanolamine, there were two virtually identical class actions filed in California courts, alleging violation of state unfair competition statutes and seeking statewide class certification. "One obviously copied the other." The class actions and individual actions are being coordinated before a single state judge. (California has a consolidation procedure similar to federal MDL proceedings; there has been active coordination. In the breast implant litigation, California Judge O'Neill was very active in coordinating with the federal MDL court.) There are, however, likely to be federal actions as well. The state judge is likely to seek active coordination with the federal judge. In California latex glove litigation, the state judge is having conversations with the federal judge in Philadelphia who has the MDL proceeding. But for all the efforts at coordination, state judges oftentimes try to push the litigation faster than the pace of the MDL proceedings. That happened with the California breast implant cases; we tried cases; "they were

never tried in the MDL." The cost of parallel proceedings "is phenomenal." There have been numerous class actions around the country in the diet drug litigation. Some seek statewide classes, while others seek national classes. Some have been dismissed because the state involved does not recognize medical monitoring relief. In other states medical monitoring classes were certified. (In response to a question based on the earlier testimony that multiple filings get sorted out: "Maybe they are sorted out at great expense." So it was in the diet drug litigation. It does not make sense to have more than one nationwide class. "We only have one group of all the people. And it just makes no sense.") It may be that the rulemaking process lacks power to address these problems. But then legislation should be considered. Congress should address a problem that "is costing hundreds and hundreds and hundreds of millions of dollars. I'm just talking about three or four clients." The class actions often come first "because there is a major interest on the part of class action lawyers, personal injury lawyers around the country to be there first, to get on the committee, to be a player in the decisions around the country – not only in state courts, but in federal courts – to participate in that activity."

The written statement submitted for the San Francisco hearing, 01-CV-010, added two points. First was an account of a state-court class action involving laser eye surgery: when the defendant filed a motion to compel arbitration, a second class action was filed that named an additional defendant who could not invoke an arbitration agreement. The sole purpose seemed to be to defeat the arbitration demand. Second was the observation that mass-tort litigation often is launched by the filing of multiple class actions in different jurisdictions. Commonly there is no coordination or control of discovery, leading to inconsistent rulings that escalate the cost of litigating. And there may be inconsistent rulings on class certification.

Anna Richo, Esq., S-F Hearing 129 ff.: Vice-President for Law, Biosciences Division, Baxter Healthcare. Baxter never made breast implants, but inherited litigation based on the activities of a division of an acquired company. It was named in class actions filed in ten state courts – mostly nationwide classes, four federal courts, and four courts in Canada. Some sought worldwide classes. None of the state actions was certified, but Baxter had to contest certification in each one. The federal actions were consolidated. Baxter had to settle some 6,500 suits for people who opted out. The litigation was bet-the-company for Baxter and several other defendants. The science that exonerated the defendants came too late for some companies. Baxter did defend individual actions on the merits; it won consecutively over 20 cases, but the cost was $1,000,000 to $2,000,000 a case. Publicly-traded companies cannot afford to defend themselves one-by-one. And the class action is a lever for settlement.

In the HIV Factor Concentrate litigation, Baxter was sued in

class actions in three state courts and five federal courts. The federal actions were consolidated, but no class was certified for trial in any court. These experiences with multiple class actions brought simultaneously in state and federal courts has shown that the MDL procedure is an effective mechanism for federal courts. But competing multistate, multiparty actions in state courts should be removed to federal court whenever possible. Baxter strongly supports the proposed Class Action Fairness Act.

The Reporter's Call for Comment is a thoughtful attempt to address the problems. Multiple overlapping class actions have overreached the original goal of providing access to courts for similarly situated claimants. The abuses have ignored the clients and enriched the attorneys. They ignore due process and single recovery. "They have presented inconsistent and uncertain results and have contributed to the financial crisis in which corporate America, the insurance industry, and the American consuming public find themselves."

Another illustration is provided by five separate class actions in four different state courts seeking damages for children inoculated with childhood DPT vaccine containing Thiomerosol. The National Childhood Vaccine Injury Compensation Act of 1986 provides an administrative remedy and precludes injury claims for more than $1,000 outside the statutory claims process. In an effort to circumvent this limit, some of the plaintiffs' attorneys are seeking to represent national classes of persons with claimed damages of less than $1,000 each. These de minimis claims, when aggregated, could once again threaten to cripple the industry. The certification preclusion proposal, draft Rule 23(c)(1)(D), and the settlement preclusion proposal, draft Rule 23(e)(5), are clearly wise. "Each side will have one opportunity to make its best case on the issuing of class certification or class settlement. The informed well-reasoned decision of the court * * * will have the final word on the subject." Forum shopping will be ended. Judicial resources will be preserved. The Enabling Act gives authority to adopt these rules; in any event, the Advisory Committee should recommend them to Congress.

Alfred W. Cortese, Jr., Esq., S-F Hearing 156 ff, 01-CV-015: The problem of overlapping duplicative class actions has become worse. The preclusion rules in the call for comment are within the power of the Committee to adopt to "protect Federal judges' Article III powers and jurisdiction. I think that is the essence of federalism. * * * The federal courts were created to provide protection to out-of-state residents and to provide protection against the extension of state law to other states to the detriment of other state residents." But these are very controversial issues. They involve exceedingly important policy choices. They have a substantial impact on substantive rights. Perhaps these changes ought to be left to Congress. If the Committee decides it is better for Congress, the Committee has the responsibility to participate in the process in whatever way it can "to ensure,

frankly, that Congress gets it right." The letter transmitting the Mass Torts Working Group Report to the Chief Justice observed that the best chance of success lies in the lead of the Third Branch "with a sensitive interaction with Congress." If not rulemaking, then the Committee should develop a package of legislative recommendations.

Minimal diversity legislation "should rightly be a very high priority for this Committee." The Judicial Conference is presently on record opposing such legislation. That should be worked out, "so that nationwide class actions are tried or handled in nationwide courts, federal courts." Dealing with overlapping classes will (1) avoid the waste of duplicative litigation; (2) prevent use of overlapping actions for interim strategic effects, the need to win 50 separate certification hearings until there is res judicata; and (3) to minimize forum shopping. Sequential forum shopping is much more invidious in class actions than in individual actions.

Even with minimum diversity legislation, the preclusion rules would serve a purpose because there will be a certain number of competing state class actions that are limited by a state's boundaries.

John Beisner, Esq., D.C. Hearing 7-16, and written statement (01-CV-27): Class Action Watch has reported a study of 50 federal MDL proceedings that involved class actions. The research has been completed as to 35. There are competing state-court class actions with respect to more than half, and the number of competing state-court actions tends to increase as the federal MDL proceeding continues. Many of the federal proceedings that do not encounter competing state-court actions involve subjects that cannot be litigated in state court, as with securities actions. The Committee should consider carefully adopting rules that operate only within the federal courts, such as the proposal that a federal court cannot certify a class after another federal court has refused to certify substantially the same class. Although in present circumstances that would leave the plaintiffs free to migrate to state court, adoption of minimal diversity class-action jurisdiction would bring the actions back to federal court. It is hard to find empirical data, but I have had personal experience with attempts to persuade another federal court to certify a class that has been denied certification by an earlier federal court. The Advisory Committee should express support for the pending minimal diversity bills. The added burden on the federal courts may not be as great as some fear, since even now federal courts commonly have to deal with some part of multiple actions and devote time to efforts to coordinate them. In present circumstances, it is easier to establish federal jurisdiction of a slip-and-fall action than a multistate class action. "The interstate class actions involve more people, more dollars, and more interstate commerce issues than any other sort of lawsuit that's out there, yet, by and large, they're being excluded from our Federal Court

system." (The Vol. 3, No. 1 issue of Class Action Watch made available at the hearing by an unidentified member of the audience reports a different survey sent to 75 Fortune 500 companies, with 24 responses. The 24 respondents reported 465 sets of multiple filings in an 11-year period. The median number of actions filed in a single "set" was 24.)

The written statement adds that class actions have become "universal venue" suits – a nationwide class can be filed anywhere an attorney can find a representative plaintiff. Increasingly, class actions have become a state-court phenomenon, so much so that the marginalization of federal courts makes it a real question whether much can be accomplished by improving federal practice. Overlapping and competing class actions are "destroying the legitimacy of the class action device," spawning "an endless litigation cycle." There is a risk of settlement bidding, and races to the bottom.

The written statement is supplemented by a copy of an article by Mr. Beisner and Jessica Davidson Miller, "They're Making a Federal Case Out of It . . . In State Court," Civil Justice Report No. 3, September 2001, The Manhattan Institute Center for Legal Policy. The article reports findings of the County Court Research Project, detailing experience with nationwide class actions in state trial courts that have attracted particularly high numbers of such actions. A wealth of detailed evidence is provided.

Victor E. Schwartz, Esq., for American Tort Reform Assn. and American Legislative Exchange Council, D.C. Hearing and Written Statement, 01-CV-031: The published proposals will augment the incentives for plaintiffs to divert massive class actions to state courts. It is common practice to recruit a representative plaintiff from the state of a defendant's principal place of business. Or the plaintiff may sue a local manager, agent, or retailer to defeat diversity – an example is an action that involved the sale of 120,000 [or 140,000] vehicles in which the plaintiffs added as defendant a salesperson who had sold 14. The "fraudulent joinder" doctrine has had little effect. Its weakness is exacerbated by the rule that bars removal on the basis of diversity jurisdiction after more than one year. The best solution would be minimum diversity legislation for class actions. But until then, Civil Rules provisions could help. A rule could encourage "the highest degree of scrutiny consistent with existing law in determining whether either plaintiffs or particular defendants in removal actions are nominal or real." If a local retailer or distributor is named in a class action against a large manufacturer, the judge "should conduct a hearing to determine whether the plaintiffs' counsel truly intends to enforce a judgment against that local defendant." Sanctions similar to Rule 11 sanctions could be adopted for enforcement. Steps should be taken to ensure that when there has been an MDL consolidation, later-filed cases are retained in federal courts rather than remanded to state courts so that they may be considered for the consolidation.

And the Committee should consider "whether it has the authority to promulgate a rule addressing the procedural opportunities to fraudulently destroy diversity which are created by the one-year removal requirement." If the Committee concludes that it lacks power, it should recommend legislative amendments to Congress establishing a longer period for removal.

Thomas Y. Allman, Esq., D.C. Hearing 105-110, 111-113: Plaintiffs have a seemingly unending ability to sue in several states successively. It is astonishing to learn that a defendant can win by defeating class certification in several states, and then lose: "how many times do I have to win before the class doesn't have to be certified"? The certification preclusion proposal is good; if it requires amendment of the Rules Enabling Act, that should be done. Another approach would be to encourage the states to enact similar, parallel, or reciprocal rules; but there is reason to be concerned that not all states will go along – particularly the states that are more likely to permit improvident certification. Settlement preclusion also would be good; it is improper for a court to approve a settlement that another court has refused to approve. "There are courts that are willing to do this." Defendants should refuse to participate in seeking approval by another court after a rejection. The one personal experience worked out that way – our agreement to submit the same settlement to a second court was conditioned on approval of the federal court that refused approval. The federal court "did have a problem with it" and we stayed in federal court. A rules amendment would help; it would help even if it addressed only federal courts, not state courts. Federal courts should be encouraged to make maximum use of the power they have under the anti-injunction act; the current "knee and hip litigation" is an illustration. We should focus on what is a national class action, looking to citizenship of class members, the amount in controversy, and the nature of the controversy. The best remedy would be to support minimal diversity jurisdiction for national class actions. Together with MDL procedures, concentration of these actions in federal court would be a big help. (His written statement suggests that Rule 23 might provide that a person who seeks to represent a class commit to not seeking certification by another court; he recognizes the difficulty that other representatives could be found. The obvious solution is to authorize federal courts to enjoin state-court certification proceedings. Minimal-diversity jurisdiction is still better.)

Lewis H. Goldfarb, Esq., D.C. Hearing 132-140: Overlapping class actions are a serious problem. It is important to distinguish the circumstances that give rise to them. They may arise because competing lawyers choose to file actions "all over the country." But they also may arise as a calculated strategy of a common group of lawyers. A "joint venture and fee agreement" is provided with the written statement. This agreement establishes strategies among cooperating lawyers that include filing multiple state class

actions "in order to coerce settlement. That is the kind of situation that I'm used to dealing with and that many others are used to dealing with." Another illustration is provided by the many cases filed involving every pharmaceutical product that includes PPA. "No one, no lawyer should be able to march into court on behalf of millions of clients and ask a judge down in Plaquemine in Louisiana to decide that some pharmaceutical ingredient is harmful. I mean, that's a job for the FDA." The same is true for vehicle components. (His written statement, 01-CV-019, adds that "[t]he proliferation of such lawyer generated class actions is one of the many unfortunate by-products of the tobacco settlement – plaintiffs' lawyers, believing their own press, now see their clients as the public at large, and believe that the public is somehow served by whatever settlement they can extract from a deep pocket defendant, regardless of who gets the payoff." One client had 25 nearly identical state-court class actions filed against it in a 2-month period. Another was sued in six, and threatened with 30 more – it took more than a year to get them dismissed, at considerable cost and after suffering substantial adverse publicity. The overlapping class proposals are creative and effective solutions, but they will have no impact at all when the cases are all filed in state courts, and they will take years to implement. The Committee should endorse minimal-diversity class-action jurisdiction bills.)

Prof. Ian Gallacher, D.C. Hearing 141: Asks the committee to support the legislation pending in Congress.

Michael Nelson, Esq., D.C. Hearing 161 ff: One of his clients is defending a number of state-court class actions. In each, the complaint disclaims any recovery greater than $75,000 for any class member. Plaintiffs clearly are trying to avoid federal court. The discovery in these cases "is astronomical." One judge has ordered discovery of 80,000 e-mails from one corporate defendant. Minimum diversity legislation would go a long way to address these issues. "The preclusion rule * * * would also help." And something should be done to regulate voluntary dismissal. A client has encountered this dilemma: A class action was started by a firm, and remains pending. A lawyer left that firm and started an identical class action at a new firm in one state; it was voluntarily dismissed after motions to dismiss were filed. The action was then filed in a second state, again alleging a nationwide class. The law of that state was changed and that action was dismissed. A new action was brought in yet another state. Something should be done to stop this. (His written statement, 01-CV-021, observes that the effectiveness of federal class-action rules depends on establishing federal court authority to manage and control overlapping state and federal actions. Overlapping actions increase the plaintiffs' opportunity to achieve certification in at least one forum: the defendant can never win, and the millions of dollars in costs to defend each action create pressure to settle to buy peace "at a premium to avoid potentially catastrophic results in any one

forum." The Committee should go further than the proposed amendments to take every opportunity to remedy the problems created by overlapping class actions.)

David Snyder, Esq., and Kenneth A. Stoller, Esq., D.C. Hearing 167 ff.: Representing the American Insurance Association, notes the perspective of insurers: They are "the financial managers of the civil justice system, * * * a pass-through mechanism between plaintiffs and defendants." Insurers, increasingly, are also defendants in class actions. Insurers also work with public-interest groups to bring about safer workplaces, safer products, cleaner air, and so on. From these perspectives, the most important reform is to address the problems that arise from decision by state courts of class actions with nationwide significance. The state courts are not equipped to do that. Federal courts should be restored to their "appropriate and constitutional role in the class action situation." An example is provided by an action in a Washington State Court asserting "diminished value" claims on behalf of a class that includes residents in 27 different states. The National Association of Insurance Commissioners joined in an unsuccessful attempt to win review of the certification. They urged that the effect of the class certification is to apply Washington law extraterritorially to all these states, depriving state regulators and legislators of the power to regulate within their own states. (The written statement, 01-CV-022, urges the Advisory Committee to "implement, or at least support," minimal diversity reforms. Federal jurisdiction is particularly appropriate when the legal issues are subject to litigation and adjudication in many states, the law varies significantly across state lines, and the industry involved is heavily regulated by state systems.)

Robert Scott, Esq., for Lawyers for Civil Justice, D.C. Hearing 175 ff.: The proposed rules changes do not go far enough. The plaintiffs' bar now routinely seeks class certification of product liability claims, creating "bet the company" cases. The mere fact of aggregation is enough to coerce settlements. These multi-million dollar transfers have significant long-term implications for the economy and for society. The race for certification leads to overlapping actions in state and federal courts, "trampling on the due process rights of the defendant." The class representative claims to represent unknown numbers of people, most of whom do not even know of the class action, probably would not seek to vindicate the claimed rights, and in many cases would object to being thrust into a court proceeding without their knowledge or consent. The opt-out change in 1966 was wrong. Federal-court oversight is increasingly important: "It is not uncommon to observe overlapping putative class actions in Federal and State Courts by the same or different groups of plaintiffs' counsel." First, the Advisory Committee should support minimal diversity legislation. A preclusion rule also should address "the problem of multiple conflicting, overlapping, and competing class actions because of

the increasing frequency of competing and overlapping parallel suits." The present system leads to waste and inefficiency. It also leads to inconsistent rulings both on substantive matters and on discovery. Coordination is attempted in some cases, on an informal basis, but when it works it is only after great expenditures of money, time, and other resources. (The written statement, 01-CV-038, adds that a rule or statute should bar mass tort actions on a consolidated or class-action basis "because such trials result in the deprivation of both plaintiffs' and defendants' due process rights.")

Stephanie A. Middleton, Esq., D.C. Hearing 184 ff.: The better federal courts become in the fair processing of class actions, the more irrelevant they become. Plaintiffs go to state courts and frame actions that cannot be removed. Overlapping, competing, copycat class actions require defendants to submit to coercive settlements. Most state courts are very good, but it takes only one or two state courts to be open to abusive class actions to allow the abuses to continue. State courts also lack the resources available to federal courts. One current area involves the managed care industry. There is a federal MDL proceeding in which the judge is carefully considering all motions to dismiss, for discovery, and so on. Meanwhile, state courts have certified parallel class actions, heavy discovery proceeds, and the cases are headed for state-court trials. The first the industry learned of these actions was not by filing, but by a story in the Wall Street Journal; the Journal was told by the lawyers that they were going to force settlement by driving down the defendants' stock prices. There are abuses, "and there are some very sophisticated, very well financed, very good attorneys who do know how to force settlements." We cannot explain to our clients how we can be sure that we are buying peace, what class actions are about, how we can budget for them. The Advisory Committee should support minimal diversity jurisdiction. In response to a question, the federal MDL proceeding is a bit unwieldy, but the judge is considering every motion; the problem is that there are unremovable actions in about 20 state courts. (Her written statement, 01-CV-032, urges adoption of a preclusion rule to "enforce a denial of certification" by barring attempts to obtain certification of any substantially similar class no matter who might appear as representative. A preclusion rule precludes serial forum shopping, but leaves plaintiffs free to use other procedural devices. In response to a question at the hearing, she observed that a preclusion rule that operates only among federal courts would not address the real problems, which arise from state proceedings. The written statement also offers examples of cases in which state courts seek to fix the law of a single state on all states through nationwide class actions. She further observes that there is a drug store in Jefferson County, Mississippi, that has been made defendant in many actions — commonly to be dropped after expiration of the time allowed to remove a diversity action.)

David E. Romine, Esq., D.C. Hearing 256-257: The proposal to give preclusive effect to a federal court's refusal to certify a class has good and troubling aspects. Description of a case in which the federal court enjoined a competing state class action seemed an appropriate step. But states are entitled to have their own procedures, and it is not clear that a federal court should be able to say that a state court cannot certify a state class action.

Walter J. Andrews, Esq., D.C. Hearing 276-280: Class-action practice raises the costs of insurance more than any other litigation activity. Competing and overlapping class actions multiply expense with motions practice, discovery, certification, scheduling, and other pretrial procedures occurring simultaneously on multiple tracks. The likelihood of inconsistent decisions impairs the proper consideration of claims and defenses. There may be outright forum shopping. Alternatively, multiple actions may be filed for strategic purposes. "[R]eforming this practice is perhaps the most fundamental problem with the present class action practice * * *." Plaintiffs have unfair opportunities to relitigate endlessly the certification question, and to impose unmanageable discovery demands.

Judith Mintel, Esq., State Farm Mut. Auto. Ins. Co., D.C. Hearing 294-301 and Written Statement, 01-CV-040: State Farm is defending a large number of class actions; 90% of them are in state court. They have experienced "drive-by" certification ordered before service of process. State court actions often involve major policies pursued across the country. One example is the use of crash parts not made by original equipment manufacturers. Many states have concluded that it is desirable to use these parts to reduce costs and insurance premiums, to promote international trade, and avoid monopoly pricing in an area that involves tens of millions of people and billions of dollars. After winning or settling 19 actions, a court in Southern Illinois entered a $1,800,000,000 judgment for a nationwide class finding the practice unlawful. Diminished value cases are coming next. "[W]hat I'm seeing in these cases, these are federal questions * * *." It would help to have a rule that denial of class certification by a federal court precludes certification of the same class by a state court. (Her written statement supports minimal diversity jurisdiction bills. It also provides much greater detail about the multiple overlapping state-court class actions encountered in the non-OEM crash parts and diminished value cases. Following the Illinois judgment in the crash-parts case, State Farm "no longer issues repair estimates using non-OEM parts." There is also a detailed statement that some state courts persist in certifying nationwide classes to apply their own law to outlaw practices that are in fact lawful in some or many of the states included in the class.)

Sheila Carmody, Esq., D.C. Hearing 301-310, and Written Statement, 01-CV-050: There is a problem with overlapping class actions so severe as to require action. Minimal diversity jurisdiction is

desirable. Preclusion rules also are desirable. "I have cases, substantially similar cases in Arizona, Florida, Maryland, Washington, Illinois, Louisiana." The enormous costs of defending include a cost no one has yet mentioned – not just document searches, but document retention. One particular case is an illustration of the origins of these actions. Deposing the class representative in our action, we were led to his deposition in another action in which he also represented a nationwide class. In that deposition he stated that he had told counsel he did not want to be representative in the present action, but they kept calling and finally he agreed. He repeatedly stated that he was thinking about dropping the present action, and that he did not bother to open communications from class counsel. But the case continues. (Her written statement offers examples of two other cases in which class representatives stated that they had not been injured by the practices complained of in the class action. She adds that nationwide class actions are being filed in state courts to avoid MDL consolidations in federal courts. The testimony of some that the problems are being worked out informally "is not supported by the countless simultaneous class actions that are being litigated even during this Comment period." The Committee should consider supporting minimal diversity legislation. There also is a problem with "sequential forum shopping" in which a denial of certification in one court is followed by filing in another court. The Committee should support a rule change or legislation that establishes preclusion on the certification issue.

Bruce Alexander, Esq., D.C. Hearing 310 ff and Written Statement, 01-CV-041: Minimal diversity is good. One example is a series of eight successive litigations; seven were filed by the same firm, six of them within three days and in six different jurisdictions. The plaintiffs lost all of the certifications, but the defendant had to litigate the issue every time. It also would be useful to have a rule that once a federal judge has denied certification, no court can certify. But the alternative approach that would preclude a lawyer from making successive attempts to achieve certification should be rejected – it is in all practical respects a regulation of the practice of law. There is another problem not yet mentioned. Class action counsel will have a local practitioner file an action that includes a small federal claim with small state claims; after the time to remove has passed, the complaint is amended to add class allegations. This strategy should not be allowed to defeat removal. The remedy is to provide that addition of class allegations starts a new period for removal.

Bruce S. Harrison, Esq., D.C. Hearing 327 ff. and Written Statement, 01-CV-060: After years of employment discrimination class actions in federal court, it looks as if the focus will shift to state courts. One example is presented by an opt-in action in federal court under the Fair Labor Standards Act that is duplicated by an opt-out class action pending in a Washington state court. If the state action proceeds, it will be a race to judgment. It is

not at all clear that judgment in the state action will be good for class members, because the state law sets a much higher standard for liquidated damages than the standard set by federal law. There is a risk that the rights of employees will be lost in the shuffle. There is a further problem of what law to apply in the Washington court: the class includes members from states with differing laws, including five states that do not even have fair labor standards laws – will the court apply its own law? Will it group claims according to similarities of state laws? The class action fairness acts should be passed by Congress. The Rules Committee should study amendments, as to the Anti-Injunction Act, that would give federal courts power to prevent competing class actions in state courts.

Linda A. Willett, Esq., 01-CV-028: The Reporter's Call for Comment and testimony of McCowan and Richo in San Francisco "more than adequately set forth the enormous problems created by duplicative class actions and strengthen our belief that the filing of competing suits is an egregious abuse of the intended purpose of class action litigation." The remarkable work of coordinating federal and state actions in the breast implant litigation serves to show how difficult the enterprise is. The coordination came "only after a number of chaotic years during which corporate defendants were forced to pay exorbitant settlements in order to avoid the substantial economic threats posed by competing class actions, endure the often unfair treatment in state courts as out-of-state parties, fell victim to the inconsistent, or absent, application of Daubert standards to scientific evidence, and literally spent thousands of valuable work hours and millions of dollars attending the often repetitive discovery coming from all fronts." Plaintiffs' counsel have learned from the eventual tour de force accomplished by Judge Pointer in effecting substantial coordination with state courts; they now "strive to file their overlapping actions in courts that history has demonstrated are less apt to cooperate with federal court efforts to coordinate litigation." Similar problems are looming in the growing number of class actions filed against manufacturers of products containing phenylpropanolamine. (These actions are described at length. Plaintiffs' attorneys "appear to intend to move at warp speed to the end game – settle now – using the threat of overlapping class actions to convince defendants they should pay now or suffer. That may be effective, but it is not fair!") The draft proposals dealing with overlapping class actions and preclusion would be a modest improvement. The Advisory Committee has authority to adopt such proposals. But if it decides not to adopt them, it should recommend a comprehensive package of meaningful rule and legislative proposals. The Advisory Committee should support minimal diversity jurisdiction legislation. But even with such legislation, preclusion rules will be necessary because "individual competing state class actions would continue to cause waste and inefficiency, in terrorem strategic effects, and unfair, sequential forum shopping."

Donald J. Lough, Esq., 01-CV-029: Details the experiences of Ford Motor Company. "Overlapping class actions are one of the biggest legal problems confronting Ford today * * *." "In the past ten years, average annual class action filings against Fort have increased by 1,600%." There are three types of overlapping classes: concerted, competing, and copycat. (1) "Concerted class actions are multiple cases in multiple courts alleging essentially the same class claims by the same lawyers. * * * Concerted class actions are the preferred method of forum shopping in class actions." Several examples are offered of concerted filings against Ford. "No legitimate purpose is served when a single lawyer or a group of lawyers acting in concert file multiple cases seeking the same relief for the same people." (2) "Competing class actions allege essentially the same class claims by plaintiffs' lawyers who are not working together. In these cases, rival counsel race to the courthouse to be the first to obtain class certification or a settlement." Among the examples is "[a]n eruption of competing class actions immediately follow[ing] a joint announcement * * * of a recall of 6.5 million tires * * *. More than 100 class actions were filed, mostly in state courts, by nearly 100 law firms. In the most egregious case, one plaintiffs' lawyer anxious to get a lead on his rivals literally 'sued first and asked questions later' – the day after the recall announcement, he filed a form complaint with hundreds of blanks where the names of the parties, the products and the liability theories were to be inserted." [94 of the actions have been consolidated in federal MDL proceedings; 7 "remain trapped in state courts" because they were remanded before the MDL consolidation. The federal judge has achieved an unprecedented level of cooperation between the state and federal courts.] Competing actions follow a common pattern: "competing class actions filed in quick succession following publicity about a recall, termination of a product or a government investigation." "The interests of consumers and judicial efficiency are not served when dozens of different law firms purport to represent the same class of plaintiffs. Certainly, public confidence in class actions and the legal profession is diminished by the spectacle of feeding frenzies among contingency fee lawyers competing to control cases." (3) "Copycat class actions are filed after a decision by one court on class certification or the merits. Copycat cases are filed for three reasons: to end-run a prior denial of class certification, to capitalize on a class certification order entered by another court or to interfere with a potential settlement." Examples are given. As to solutions: "Overlapping class actions are filed predominately in state courts because plaintiffs' lawyers avoid federal court in favor of state courts with lax class certification standards." The Advisory Committee should support minimum-diversity legislation. The Committee also should adopt a rule that denial of class certification by a federal court precludes all federal courts from certifying substantially the same class. Courts should be empowered to impose sanctions on counsel who without good cause attempt to relitigate a federal court's denial of certification, or

who unreasonably and vexatiously multiply class actions by filing overlapping cases. And proposed Rule 23(g)(1) on appointing class counsel should require appointment of class counsel at the outset of the case to discourage "piling on" by multiple filings.

Patrick Lysaught, for Defense Research Institute, 01-CV-033, 034, 046, 047: The second section, 32-56, responds to the Reporter's Call for Comment. It pursues many themes. **(1)** First is a statement that the problem of overlapping class actions is severe. The problem arises because counsel can derive economic benefit from a class action, leading to competing filings in an attempt to gain control of the litigation. Few courts would countenance multiple filings by a single plaintiff, whether represented by one counsel or many; "[u]nfortunately, in class action litigation, this is the rule, rather than the exception." Examples are provided. In the Fen-Phen litigation, 58 class actions were filed in federal court and 75 in state courts; when Baycol was withdrawn from the market, 56 class actions were filed in federal courts, and 64 in state courts; when Rezulin was withdrawn, 64 class actions were filed in federal courts, and 24 in state courts; in litigation involving an "orthopedic medical device," 37 class actions were filed in federal courts, and 18 in state courts. A Federalists Society survey provides further information. **(2)** Due process requires that an attorney who seeks to represent a class vigorously pursue the best interests of class members. "Filing of multiple and competing class actions generally demonstrates that such is not the real goal." Defendants face potentially enormous and completely unnecessary costs. The deliberate effort of federal MDL courts to provide due process "often permits judges in state court the opportunity to proceed far more 'expeditiously.' * * * There are genuine reasons for concern about maintaining and securing due process because state courts often lack the resources to appropriately address the issues and sometimes do not neutrally apply the law." Defendants face the incredible due process dilemma that they have to relitigate the same defense "over and over until eventually a loss occurs in some court. Resulting pressures on the companies' resources and its stock prices are enormous." **(3)** What is needed is a mechanism that enables a single federal court to take control of all class-action litigation that arises from the same transaction or occurrence and involves the same claims. That will require ready removal of state actions to federal court. At present, cooperation between federal and state courts "is the exception, not the rule." **(4)** It may be difficult to win adoption of either form of the Rule 23(g) draft on competing class actions, but it is worthwhile. The purpose is to maintain the authority of a federal class-action court and the integrity of federal class-action procedure. The first alternative allows regulation of competing litigation in any form; this is necessary to reach state procedure that involves massive joinder without class procedures, as in Mississippi's "all for one" proceedings. The second alternative, which allows control only of state-court class actions, would be less effective. The provisions in (g)(2) and (3)

that authorize deference to state courts, or coordination with them, are useful, but "much more could be done to provide helpful insight." "Virtually all class actions, unless strictly limited to citizens of the forum state, should be supervised by a federal court. Although state courts have many outstanding judges, simply put, seldom do they have the same level of resources available to federal court judges." **(5)** "[R]elitigation of the same class action issues once a court * * * has denied class certification is virtually never appropriate." Unless denial of certification has res judicata effect, failure to meet the requirements of Rule 23 in one proceeding becomes meaningless. A rule such as proposed 23(c)(1)(D) "should be unnecessary, but that is not the case." The rule should not depend on the court's determination to issue a preclusion order; preclusion should be automatic. It would be very helpful to provide detailed guidance on the reasons that defeat preclusion – whether a later class involves substantially similar claims, issues or defenses, or whether a difference of law or change of fact creates a new certification issue. It is proper to bind absent class members – only the issues actually addressed are precluded, and class members remain free to pursue individual actions or substantially different class actions. To be sure, creative state legislatures or courts may seek to lower the bars to certification, thus defeating preclusion, but the effort is worthwhile. The alternative that would add a factor to Rule 23(b)(3), inviting the court to consider as part of the superiority determination whether any other court has refused to certify a substantially similar class, is reasonable. But it should be made clear that preclusion applies only if the due process rights of the parties were protected by a state court denial of certification, and that there must have been written findings of fact and conclusions of law so that the federal court can determine whether the reasons for denying certification still apply. **(6)** Settlement finality will reduce the practice of settlement shopping. This is eminently fair. The exceptions that allow approval of a substantially different settlement, or approval of substantially the same settlement in face of changed circumstances, are important and "make good sense." But there must be clear guidelines, preferably in the Note or at least in developing case law, to establish what is meant by "'substantially the same,' or not." And if a new court concludes that a second settlement is not substantially the same, it should be made clear that the first court has power to enjoin approval of the settlement. And in any event, appeal should be permitted from the determination whether the settlement was substantially the same. Changed circumstances may relate to the development of the litigation from infancy to maturity. Changes in the defendant's financial condition are relevant. So are changes in the strength of the liability issues. The alternative, which would add a provision to (e)(1)(C) prohibiting approval of a settlement rejected by another court, is preferable because it is a stronger admonition. [Reporter caution: this comment may reflect a misleading suggestion in the call for comment. The (e)(1)(C) alternative affects only approval by a

federal court; it leaves state courts free to approve a settlement rejected by a federal court.] **(7)** The Rule 54(b) analogy rule that would allow entry of final judgment refusing to certify a class or to approve a settlement "is the best of the various alternate approaches." It is best because it goes beyond issue preclusion. Class members are bound. There is no need to worry about confusions of the right to appeal: there should be a right to appeal a certification decision. **(8)** The alternative that would preclude a lawyer from directly or indirectly seeking a second certification decision is not likely to be much help. It will be difficult to stop indirect participation. And this approach is no help when competing class actions are filed by different lawyers.

Part III, pp 57-62, reviews again the problems caused by multiple class-action filings. The perspective again is that the increasing control of class actions by federal courts, and particularly the unwillingness to use class actions to address mass torts, has led to filings in state courts that have proved friendly to plaintiffs and hostile to defendants. The Advisory Committee should support minimum diversity jurisdiction; to avoid occasional wrangling, it would be better to set the same $75,000 amount-in-controversy threshold as is used in § 1332 for ordinary diversity jurisdiction. In the alternative, federal removal jurisdiction could be established to reach: "(a) any class action or consolidated proceeding; (b) pursued on behalf of citizens of more than one state; and (c) that ARISES from a transaction or occurrence implicating interstate commerce * * *."

Alan B. Morrison, Esq., 01-CV-042: Makes points in three parts. **(1)** It is important to distinguish simultaneous from consecutive class actions. Simultaneous actions create problems of coordination in discovery and timing of certification motions, and most importantly problems of defining which court has ultimate authority. Consecutive actions involve second attempts by those who have failed in certification or settlement; there are not as many of these. The evidence that must be gathered to identify and assess the problems is different for these two different situations. **(2)** Action in either area involves potential intrusions on state-court power, and on the freedom of litigants to choose a forum. Proposals such as minimum-diversity jurisdiction have been extremely controversial, and so far have failed in Congress. "[T]his is an area in which the rulemakers should be reluctant to tread because it is more political than procedural." Congress has not considered legislation focused on the consecutive actions. **(3)** The models in the Call for Comments have limits. The certification preclusion model depends on interpretation of what is a substantially similar class, and what changes of law or fact may justify reconsideration of the same class certification. If a federal court decides these questions, it must act by injunction; that is intrusive. If the second court decides, as usual with res judicata, the limit on the second court may be ineffective. The alternative models fare little better. An attempt to treat denial

of certification as a final judgment does not square preclusion of absent class members with due process: no class has been certified, so how can they be bound? Lawyer preclusion intrudes on regulation of lawyer activities, a matter left to the states; litigation of "indirect" involvement "would, at best, create a lengthy digression from the main case." The proposals dealing with federal-court control of state-court actions encounter the difficulty that a court has no personal jurisdiction over absent class members until a class has been certified and an opportunity to opt out has been given. Once a person opts out, moreover, there is nothing to prevent an individual action, and no apparent basis for barring the opt-outs from filing an independent class action.

Exxon Mobil Corp., 01-CV-059: Class action practice, designed to eliminate repetitive litigation, to promote judicial efficiency, and achieve uniform results has developed into a practice that "perverts each of these original goals." Exxon Mobil has "seen an increase in competing class actions filed against it in different state courts." These actions are used "to avoid federal jurisdiction, consolidation, and oversight * * *." The most effective means of addressing these problems require legislative action, including the pending minimal diversity legislation. The Judicial Conference should support this legislation.

ABA Antitrust Law and Litigation Sections, 01-CV-069: "[W]e strongly favor the Advisory Committee's continued efforts to address these issues. Overlapping and competing class actions continue to be a problem for practitioners * * *."

Association of the Bar of the City of New York, 01-CV-071: Attaches a June 1, 2001 letter addressing the rules proposals that later were circulated with the Reporter's Call for Comment. The proposals seem better fit for legislation than rulemaking. Concern about Enabling Act limits is an impediment that suggests Congress should address these issues. The preclusion proposal, moreover, raises other questions: what is a "substantially similar" class? How long would the preclusion last?

Civil Division, U.S. Department of Justice, 01-CV-073: The Committee should continue to review Rule 23 amendments "to clarify or enhance the authority of district courts to issue orders concerning duplicative or overlapping class actions." The problems that were identified in the Committee's April 2001 draft "merit further examination."

Prof. Martin A. Redish for Lawyers for Civil Justice, 01-CV-074: The problems addressed by the overlapping class proposals "are extremely serious ones." The problems asserted by many are overstated. "[I]t is essential that the Federal Rules provide for a mechanism to prevent the inescapable and severe harms that flow from the problem of overlapping class actions." Permitting another court to certify a class that a federal court has refused to certify "enables plaintiffs' lawyers to use the class action device as a means of legalized blackmail. * * * [D]efendants are

effectively forced to 'buy' litigation peace." The resulting forum shopping is much worse than the single federal-state choice that animates Erie doctrine. It is necessary to extend preclusion beyond the particular representative who failed to win certification. Class members remain free to bring individual actions. In any event, in most class actions it is the attorney, not the named plaintiff, who is the real party in interest. The proposed preclusion rules, moreover, include rules that run in both directions – refusal by a state court binds federal courts, and refusal by a federal court binds other federal courts as well as state courts. Such preclusion is far less invasive than an injunction to protect a federal judgment. But empowering a federal court to enjoin an overlapping class action is itself proper federalism; the in-aid-of-jurisdiction exception in § 2283 "clearly authorizes such relief." This interpretation brings that exception in line with the relitigation exception. Section 2072 permits adoption of such a rule; Rule 13(a) already has the effect of precluding litigation in state court on a claim that ought to have been asserted as a compulsory counterclaim in federal court.

The Committee should support minimal diversity legislation, "fulfilling its role as an important partner in the fashioning of modern federal procedure." Anecdotes about the abuse of class actions in state courts show that "concerns about prejudice towards out-of-state interests go considerably beyond the purely theoretical." Indeed, established doctrine rests on a form of minimal diversity – only the citizenship of the named class representatives is considered in determining whether there is diversity jurisdiction.

Denise P. Brennan, Esq., 01-CV-080: Concurs in the statement filed by Bruce Alexander; see above.

Beverly C. Moore, Jr., Esq., 01-CV-083: "The impetus for many of these Rule 23 'reforms' * * * comes from large corporate defendants who are frustrated that clever plaintiffs' counsel can forum shop to find a judge somewhere who will certify a class, meaning that such defendants cannot consistently rely upon federal judges disproportionately appointed by Republican presidents to deny class certification." "This is very selective forum shopping," aimed at a small number of local courts, often courts with only a single judge so the plaintiff knows who will get the case. It is to the Committee's credit that it decided that it could not adopt minimal diversity proposals under the Enabling Act. The certification proposal in the Rule 23(c)(1)(D) draft "is unnecessary because forum shopping for a pro-class action federal judge has not been a particular problem." If a class certification is not final, why should a denial be final? And federal courts generally give great deference to a prior class denial by another federal court – there is no need for res judicata. More importantly, a new class counsel may be able to "fix" the cause of denial; the fix may not lie in a change of fact or law, but a different crafting of the same facts and law. An injunction against related class actions, as the draft

Rule 23(g) would permit, also is unnecessary; federal courts address these problems through J.P.M.L. tag-along rules and § 1404 transfer.

Mortgage Bankers Assn., 01-CV-087: Understanding that there are legitimate issues of Enabling Act Authority, immediate reforms are needed to address multiple class actions. Most MBA members have mass consumer bases, and are heavily regulated by both federal and state law. That supports multiple class actions. In the last several years "over 200 materially identical class actions challenging lender-paid compensation to mortgage brokers under the Real Estate Settlement Procedures Act * * * have been filed all over the country." There is naked judge-shopping. In at least seven instances a single lender has been sued on three or more occasions, each suit challenging the exact same practice on behalf of a putative nationwide class. Even when the actions are in federal court, MDL processes do not always work: several members have failed to achieve consolidation of parallel actions, while another has won consolidation in seemingly identical circumstances. And MDL processes cannot work when the fillings are sequential, not simultaneous – members have had the experience of defeating class certification, "only to have the same plaintiff's counsel or copycat counsel file the identical lawsuit with a new named plaintiff in some other federal jurisdiction." Comity, res judicata, and collateral estoppel principles have not stopped the practice.

J.C. Powell, Esq., 01-CV-088: Centralizing mass-tort litigation will harm people. In fen-phen, the lawyers involved in the federal MDL proceeding failed to produce damning documents regarding the bias of the key witness. The information "was finally obtained after the compliance with state laws regarding discovery." "The use of many eyeballs watching inspecting matters is important."

Lawyers' Committee for Civil Rights Under Law, 01-CV-091: (For 18 civil rights, public interest organizations, and bar associations; joined by law firms, practitioners, and professors.) Legislation such as the "Class Action Fairness Act" would have astounding and disastrous consequences for class-action practice in federal courts. The federal caseload would be expanded by hundreds of complex cases that do not involve federal law. Rule 23 amendments such as those proposed now would further complicate class-action practice, and are clearly inconsistent with legislation that would enormously increase the volume of federal-court class litigation.

Association of Trial Lawyers of America, 01-CV-098: Has in the past commented extensively on the drafts presented most recently in the Reporter's Call for Comments. "[I]t is our understanding that those proposals will not be pursued further. Accordingly, we will have no more comment on them at this time."

Chicago Conference: October Minutes Summary

Panel 5: Overlapping and Duplicative Classes:

The Extent and Nature of the Problems

Panel 5 was moderated by Professor James E. Pfander. Jeffrey J. Greenbaum, Esq., and Professor Deborah Hensler were presenters. Panel members included Fred Baron, Esq.; Elizabeth Cabraser, Esq.; William R. Jentes, Esq.; John M. Newman, Jr., Esq.; David W. Ogden, Esq.; and Lee A. Schutzman, Esq.

The panel was presented a set of questions: How often are overlapping and duplicating class actions filed? What function do they serve? Are they filed by the same lawyers, or do they result from races of competing lawyers? Can we identify subject-matters that typically account for this phenomenon? What eventually happens – do most of the actions simply fade away?

Professor Hensler began by suggesting that only a subjective answer can be given to the question whether there is a problem, and if so what is the problem. It is hard to agree. The RAND study began by interviewing some 70 lawyers on plaintiff and defense sides, including house counsel. What defendants call duplicating class actions, plaintiffs call competing class actions. Defendants complain of costs; plaintiffs talk of the race to the bottom as defendants settle with the greediest attorneys. Defendants offered lists of cases demonstrating duplication; plaintiffs described the deals made by competing attorneys. One plaintiff, for example, described being told by a defendant: "you don't understand how the game is played; I'll make the same deal with someone else."

Professor Hensler then described the in-depth study of ten cases, including six consumer classes and four mass-tort classes involving personal and property damages. Cases were selected from these areas because they seemed to be the areas generating problems; securities actions were in a state of flux at the time of the study, and were excluded for that reason. In four of these ten cases, the plaintiff attorneys who resolved the case filed in other courts, at times many other courts. In five, other attorneys filed in other courts. In only two were there no competing class actions; each of these two were cases involving localized harm and restricted classes. In at least one case, the judges got drawn into a competition to win the race to judgment: it became necessary to mediate between the judges. This is not close to being a scientific sample, but the course of these cases was consistent with what the lawyers said in interviews. The lawyers who filed in other courts did it to preserve the chance to win certification if certification should be denied by the preferred court, or else to block others from filing parallel actions.

When other groups of attorneys filed parallel actions, operating independently, they often asked for compensation to withdraw their actions. The payments did not become part of the public record. The attorneys who took payment often asked for changes that improved class results, but this was not true in all cases. The presence of these csaes, often at different stages of development, affected the strategies of plaintiff counsel, and

especially affected defendants who sought to negotiate in the most favorable case.

From the judicial perspective, competing actions increase public costs. But the costs are a "tiny fraction" of the total costs. From the defendant's perspective there are additional costs, but the defendants interviewed were not willing to say how much.

When settlement followed the joining of forces by plaintiffs, the plaintiff fee award was driven up because there were more attorneys claiming fees. This may be in part a cost imposed on defendants. But in reality, plaintiffs and defendants negotiate the total to be paid by the defendant; the fees come out of the plaintiff pot. It is not clear whether the total payment offsets this.

The more important consequences of parallel filings are these: First, there are increased opportunities for collusion between plaintiff and defendant attorneys. This is a particular risk in "consumer" classes where there is no client monitoring the attorneys. Many state judges have never seen a class action, and their instinct is to cheer, not to review, a settlement. Second, parallel findings provide a means for plaintiffs and defendants whose deal does not pass scrutiny to take the deal to another judge for approval. These consequences support the efforts to provide closer scrutiny of settlements and of fee deals.

Attorney Greenbaum began his presentation by observing that the "current crisis" is overlapping and competing classes. "The multi-headed hydra is with us; cut off one head and two more grow back." Yes, there is a problem; it is described, among other places, in a recent article by Wasserman in the Boston University Law Review. Courts also recognize the problem. And practitioners face it every day. Why has it developed?

Class actions are lawyer driven. They can be very lucrative. It is easier to copy an idea than to invent a new one. Lawyers who file an independent and parallel action may hope to wrest control of the litigation from those who filed first.

In a different phenomenon, the same lawyers may file in several courts, looking for certification, more rapid discovery, or other advantages deriving from the ability to choose among actions as one or another seems to develop more favorably. The Matsushita decision, by empowering state courts to dispose by settlement of exclusively federal claims, encourages such behavior.

There are three types of parallel filings: (1) Plaintiffs bring separate actions against each company in an industry – the plaintiffs and courts duplicate, but not the defendants. (2) The same lawyers sue in multiple courts for the same plaintiffs against the same defendants. (3) Different groups of lawyers bring multiple actions. These suits may be successive as well as

simultaneous.

One problem is the tremendous cost of duplicating effort. Coordination of discovery is often worked out, but not always; the more actions that are filed by different attorneys, the more likely it is that at least one will involve an unreasonable attorney.

Another problem is that there is a lack of preclusion. Dismissal of one action for failure to state a claim, for example, does not preclude pursuit of a similar action. A denial of certification by one court does not preclude certification by another.

And of course there is a great pressure to settle, augmented by the burdens and risks of parallel actions.

An illustration is provided by litigation growing out of tax anticipation loans. The litigation generated twenty-two class actions, in the state and federal courts of eleven different states. For a period of ten years, the defendants had "great success"; none of the actions went to judgment. But finally a Texas court certified a class, and the case settled.

It is important to establish preclusion on the certification issue. One refusal to certify simply leads to another effort in a different court. And differences among state certification standards confuse the matter. Further confusion arises from "different levels of scholarship" among different judges. The plaintiffs eventually will find the most lenient forum. Even if you settle or win, preclusion questions remain – who is in the class? Was there adequate representation?

A plaintiff may find it easier to wreck the class by farming opt-outs when there are parallel actions pending.

The presence of competing actions forces a defendant to hold back money from any settlement, harming the plaintiff class.

And plaintiff lawyers complain that other plaintiff lawyers steal their cases.

The reverse auction is often discussed. "I have not seen it in practice, but there is an odor when the newest case is the one that settles."

From the court's perspective there is a burden, and they suffer from the perception that lawyers escape judicial supervision by going from one court to another. The result undermines the very purpose of class actions.

Panel discussion began with the observation that there was no apparent tension between the perspectives of academic Hensler and lawyer Greenbaum. They present a joint perception: they give an unqualified "yes" to answer the question whether overlapping class actions in state and federal courts are a sufficiently serious problem to justify Rule 23 amendments. In addition to the cases

they describe, Judge Rosenthal's memorandum to the Advisory Committee last April described another seven disputes that gave rise to parallel class actions, only two of which involved mass torts. A survey of litigation partners in this panel member's large firm turned up six more examples, only one of which involved a mass tort. "You will hear other examples."

The Manhattan Institute released a study in September 2001 that concentrated on Madison County, Illinois. The county population is some 250,000 people. Yet it is second only to Los Angeles County and Cook County in class-action filings in the last three years. Eighty-one percent of them were for putative national classes on claims that had no real nexus to Madison County. Why should this be? Madison County has a long history as a hotbed for plaintiffs. It began years ago as a favorable forum for FELA plaintiffs. Now they have found a much more fruitful project. One illustration is a class action involving Sears tire balancing, in an attempt to use the Illinois statute for consumers in all states.

The next panel member identified himself as an expert who litigates mass torts. By definition mass torts involve much duplication; victims file individual claims, as they have a right to do. That is his perspective on Rule 23. From that perspective, the question is whether there is a need to revise Rule 23. What are the perceived abuses? The principal abuse is collusion – when a mass tort occurs, the defendant wants global peace. There would be no problem if it were not for this propensity of defendants. They do not like Rule 23, except when they want to use it. Class actions should not be certified for mass torts. It is consumer cases that drive the problems. The proposals on overlapping classes must be dramatically offensive to state-court judges. We cannot by rulemaking solve the problems that arise from plaintiffs' quest for favorable courts. These proposals are not within the ambit of the Enabling Act; they cannot be done. Accordingly there is no need to worry about how they should be done.

A third panel member, speaking from a defense perspective, agreed that the desire to change Rule 23 is substantially driven by consumer claims. The 1998 Securities legislation is a model that deserves consideration. Some state claims have been excluded or federalized. State courts have been told this is a national problem to be addressed on a national basis. The 1995 PSLRA caused a migration to state courts; the 1998 SLUSA responded by limiting the role of state courts. The problem of overlapping class actions is real. In the most recent experience, the evils were demonstrated by a network of lawyers who undertook to file coordinated actions in each state, framing the actions in an effort to defeat removal. If successful, this tactic would eliminate any overlap between federal and state actions. The problem is fairness, not duplication. You have to win every point in every jurisdiction. Discovery, confidentiality, privilege are all at risk every time a state court rules: disclosure in any one action effects disclosure in all. Any focus on certification or

settlement comes too late; fairness problems arise before that. And voluntary judicial cooperation is not a sufficient answer. Even as among federal courts, voluntary cooperation is no substitute for MDL processes. Under present procedures, appointment of a master to facilitate coordination is essential; the master's task, however, requires colossal effort.

The fourth panel member spoke from a plaintiff's perspective, based on experience in federal and state courts and in many different subject-matter fields. Unless we abolish state laws, we will have class actions in state courts. The Federal Rules cannot prevent that. Result-oriented rulemaking is a weak approach. The judge in federal court who does not wish to manage a class should not be able to prevent an able and willing judge from managing the same class. Nationwide business enterprise, moreover, generates nationwide classes. It would be futile to tell the manufacturer of a defective product that it should be sold only in the state where it is made. Overlapping classes arise in other fields for similar reasons. Antitrust actions may be filed in several states, for example, because state laws – unlike federal law – often permit suit by indirect purchasers. Plaintiffs, further, often seek statewide classes in state courts as an alternative to the national class that federal courts now discourage. To have the first court – a federal court – direct that there should be no class action in any court "will lead to no litigation, or to many chaotic individual actions." The concept of adding to Rule 23(b)(3) a factor to consider denial of class certification by another court as illuminating the predominance and superiority inquiry is fine; courts do this now, as they should, but a reminder does no harm. Another good idea is an express reminder to judges that it is proper to talk together across court lines; when this happens, coordination works out. But this works only if lawyers tell the judges that there are multiple actions. Defendants know of overlapping actions more often than plaintiffs do, but often do not raise the subject because they fear that plaintiff lawyers will coordinate their work and develop a stronger case. Many problems would be solved if defendants provided this information, and this duty should be recognized as a matter of professional responsibility. Finally, "preclusion is not the answer to collusion," but rather will exacerbate it.

The fifth panel member spoke from a defense perspective. Corporate counsel see a lot of consumer-type actions. And there are hybrids that involve products that have gone wrong, or that might go wrong. For the most part, mass torts are not certifiable. Overlapping classes have been around for at least 25 years. In 1975, the engine-interchange litigation generated many parallel actions, but these actions were "brought incidentally as a result of publicity." There was a different attitude – people believed such actions should be in federal court. This view continued through the 1980s. In the 1990s the phenomenon changed. It is a problem for the system. Rule 23 is a powerful tool. One class now

pending against his client involves 40,000,000 people. Beginning with the GM pickup trial, lawyers have brought multiple actions as a weapon to coerce settlement. They often pick state courts in remote rural counties, hundreds of miles from the nearest airport. Legislation will be an important part of any package approaching these problems.

The final panel member spoke both from government experience defending class actions and from experience in private practice. The problem is a consequence of federalism. The United States as litigant has an advantage because actions against it come to federal court. Rule 23 is something that government litigants find valuable to resolve problems, to get a fair result. Typical actions are brought on behalf of federal employees. Rule 23 avoids a proliferation of litigation. This result should not be cut back. When cases can proceed in any of 50 state-court systems, "you lose a judge vested with control of the situation." The incentives seem to be to gain advantage: the plaintiffs get multiple bites at the apple, and can impose high costs in order to encourage settlement. Defendants have an opportunity to look for a lawyer with whom they can make a "reasonable" deal. The slide of benefits from class to the plaintiff attorney can escape the judge's review and understanding. There is a risk of losing fairness to class members and deterrence.

An audience member asked about parallel litigation as a problem apart from class actions: should we have legislation for all forms of litigation, as perhaps a federal lis pendens statute written in general terms?

One of the presenters observed that "duplicative" litigation is a term used in many senses. The simple fact that events producing hundreds of victims may generate hundreds of individual actions has not been viewed as a problem by the Advisory Committee. So there are families of cases: plaintiffs win against one defendant, and then bring a similar action against another defendant. Again, the Advisory Committee has not viewed this as a problem. The nationwide class, commandeering the strength of the class action, is a distinctive problem: (1) Plaintiff attorneys can coordinate campaigns to press for settlement. (2) Competing classes generate a potential for collusion – this problem is recognized by lawyers, and is not a mere abstract concern of academics. Class actions generate "very powerful financial incentives." We must rely on judges to curb those incentives.

A panel member thought it a lot easier to justify a regimented approach in representative litigation, where the named representative's interest is submerged to the lawyer. But any solution cannot be framed narrowly in terms of "class actions" alone; Mississippi does not have a class-action rule, but achieves substantially similar results by other devices.

Another panel member observed that a plaintiff-perspective panel member had recognized that overlapping classes are a fact of

life. The history of responses to multiple overlapping actions began with the electrical equipment pricefixing litigation forty years ago. The lawyers were told there was nothing that could be done about the overlap. But the federal judges created a coordinating committee that dealt with the problems. Discovery and trials were coordinated. The present proposals recognize the similar problems that exist today. State-court actions will remain.

The plaintiff-perspective panel member noted by the prior panel member suggested that there is an elegant solution. Judicial regulation is a need. More judges are involved. Rule 23, § 1407, and § 1651 can all be used. Judges can employ these tools cooperatively. A strict preclusion rule is far too restrictive of substantive and procedural rights. A good test of any solution is whether it makes all lawyers uncomfortable with the process: a fair and balanced solution should do that.

An audience member noted that the electrical equipment experience inspired the federal judges to go to Congress for a statute. There is a real question whether the Enabling Act can be used to preempt state law, or whether legislation is needed.

A judge asked from the audience what was the final outcome of the migration of the GM pickup litigation from federal court to the state courts of Louisiana. Panel members responded that the litigation was still pending. The parties agreed to a settlement that substantially enhanced the terms that had been rejected in the Third Circuit. The settlement was supported by the parties who had objected to the federal settlement. "Amchem findings" were made on remand in the state court. "There was no quick deal." But as soon as the settlement was signed, a dispute arose over its meaning; the question whether it requires the opportunity to develop a secondary market for sale of class members' rebate coupons has become a stumbling block. It was further noted that the litigation wound up in a small parish in Louisiana because there were more than 40 cases. Some state judges <u>like</u> class actions. The defendant view is that this was a power-play by plaintiffs. After some protest, the certification hearing was extended, but even then was held only three weeks after filing. The hearing was perfunctory, and followed by immediate certification.

Panel 6: Federal/State Issues

The moderator for Panel 6 was Professor Francis McGovern. Panel members included John H. Beisner, Esq.; Judge Marina Corodemus; Paul D. Rheingold, Esq.; Joseph P. Rice, Esq.; Professor Thomas D. Rowe, Jr.; and Chief Justice Randall T. Shepard. The subject was the "unpublished" proposals that would address overlapping, duplicating, competitive class actions.

The moderator observed that this is the "real world" panel. Discussion might begin by starting with "the bottom line," in the manner of reverse trifurcation. The strongest form of the

unpublished proposals addressing parallel class actions, a potential "Rule 23(g)," would allow federal courts to seize control, excluding state litigation. This proposal might, as a practical matter, move mass torts to federal court. It could eliminate state class actions that do not conform to federal practice. Using a scale on which extreme approval is a 1 and extreme disapproval is a 10, how would each panel member vote?

The first panel member, representing a defense perspective, voted 1 with respect to the need for action. All of the proposals together rate a 3; there is a concern whether they are "doable." The need is to clarify which court deals with which class action.

A plaintiff-perspective lawyer voted 10. The next panel member abstained. Two more voted 4. The final member, again taking a plaintiff perspective, voted "10 twice": this cannot be done by rule, and should not be done by any means.

The panel was then asked to consider what is "unique": personal injury actions, medical monitoring, consumer fraud, antitrust, securities, in these terms: (1) It could be argued that we have federalism in all cases; class actions simply involve amplification of the amounts at stake. (2) An arguable concern of many people is that class members are not truly represented by the named representatives: class members lack knowledge, the process is not democratic, class members have no control. (3) We are not any longer talking about personal injury cases involving significant present injury: the actions are for consumer fraud, medical monitoring, and the like, based on state law. A state national class works because opt-outs will not defeat it.

The first panel response was that what is unique about competing class actions is that they are "universal venue" cases: they can be filed in any state or federal court, nationwide. So this is different from individual plaintiff personal-injury cases. Second, the federalism issues are quite different: "This is reverse federalism." The Roto-Rooter case is an example: venue is set in Madison County, Illinois, for a nationwide class claiming a violation because the defendant's house-call employees are not all licensed plumbers. Venue was established on the basis of a set-up by plaintiffs who arranged for one visit to a customer in Madison County by an employee sent from Missouri. The attempt is to enable an Illinois judge to export the Illinois statute to govern events in all states.

Another panel member observed that this may not, does not, apply to mass torts. There are no dueling federal classes; they are swept together under § 1407. Nor has there even been a state class for actual injury; perhaps there have been for medical monitoring. The Advisory Committee has thought about developing an independent mass-tort rule. "One size Rule 23 does not fit all." A "Rule 23A" for mass torts would help.

The next panel member spoke to experience in New Jersey. The

state courts have had centralized handling from the time of the early asbestos cases. The tendency has been to select the same county for coordinated proceedings. Judges in that county have built up expertise, and have two special masters for assistance. At present tobacco cases are pending there. Certification has been turned down in seven cases; they have been handled as individual actions. State courts can handle these cases. There are many manufacturers in New Jersey. The documents and individuals with knowledge are there. State courts can and do cooperate with federal courts. There have been some great experiences with particular federal judges. Not as much experience has developed with consumer-fraud actions, but when they arise there is an attempt to cooperate. One reason why plaintiffs go to state courts is because the Lexecon decision prevents trial in an MDL court.

The following panel member asked what is different about overlapping classes? First, the relationship between the lawyer and client is different from the relationship that courts normally rely on. This has serious consequences – ordinarily the lawyer in a class action has a greater financial stake than the client does. There is a much greater need for judicial oversight, even of settlements. (It may be noted that state courts often have to review and approve settlements of actions involving minors – there is a danger that even parents as representatives may not do the right thing.) Second, class actions are "different in the rules of engagement." A judge's first experience with a class action is quite different from the same judge's second experience. In my state, there is a special assignment system, and intensive training for the specialized judges who handle these cases. The difference between these specialized judges and federal judges "is not troubling."

Yet another panel member observed that the constitutional authorization for nationwide classes in state courts is part of the uniqueness. The Lexecon decision can be overruled by statute, although not by rule. The Advisory Committee has been reluctant to take up the suggestion to develop a specialized mass torts rule because that seems to address a particular substantive area, rubbing against Enabling Act sensitivities. Special mass tort rules, however, are readily within the reach of Congress; the PSLRA is an illustration of a parallel effort. Finally, bringing state actions into federal MDL proceedings for pretrial handling would address the problem of continually relitigating the same issues, such as privilege, in many state courts. One useful approach is to think about creating new procedural rules within the framework of legislation.

The next panel member observed that he generally does not resort to class actions in mass torts. Rule 23 is a tool to resolve existing mass torts; problems arise when it is used to <u>create</u> mass torts. We are trying to make too much of Rule 23. One rule cannot be asked to cover consumer fraud, human rights, securities, and other fields. The overlapping class proposals are

"biting off much more than § 2072 permits." To be sure, there are problems with duplicating class actions in mass torts. The MDL process does not fix the problems; it creates them. Many state actions are filed because the lawyers know a consortium will file a number of federal actions to provoke MDL proceedings that will be controlled by the federal attorney consortium. "MDL is a defense tactic." In one current set of actions, there is an MDL order that stops discovery in state actions, even though discovery has not even begun in the MDL proceeding.

An audience member asked about the seeming sensitivity to substance-specific rules: Rule 9(b) requires special pleading for fraud and mistake, so why not others? A panel member responded that we should be troubled by Rule 9(b).

The panel was then asked to consider the hypothesis that voluntary cooperation can work: the obstacles are "communication, education, and turkeys [referring to those who refuse to cooperate in sensible working arrangements]." Assume a personal injury drug case that involves present injuries, "known future injuries," and medical monitoring. MDL proceedings take more time than many state actions; how does a state judge deal with this?

One panel member stated that a state judge has developed a standard "MDL letter." The letter tells the MDL judge "who I am, what experience I have." It is supported by a web page with all the judge's opinions and orders, and also a hyperlink to the MDL judge. After that the state judge tries to contact the MDL judge to find whether committees have been formed, and whether this will be a cooperative venture. "As communication improves, liaison will get better."

The panel was asked what should happen if the MDL judge asks other courts to defer for a while?

A panelist, speaking from the plaintiff perspective, stated that he tries to persuade the state judge to proceed. Cooperation with the MDL judge takes time, and forces state attorneys to pay a tax for work by MDL counsel that the state attorneys do not want.

A second panelist, also speaking from the plaintiff perspective, said that communication among judges is proper if the purpose is to move the case along. It is not proper if the purpose is to delay proceedings and then to settle all claims.

A third panelist, speaking from a defense perspective, said that coordination has worked well on pure discovery issues in mass torts. These cases will not all be before one court.

The panel then was asked to suppose that there is "an outlier court consistently misbehaving": how do you deal with it on a voluntary basis? (Identification of these courts now proceeds not by states, but by specific counties in different states.)

The first panel response was that the outlier judge is the big

risk to the role of state courts as viable contributors to resolving these large-scale actions. A variety of tools can be used by state appellate courts to deal with an outlier judge. Writs can be used "to rein in the judge who goes beyond the pale. Some of our law has been generated in this way. State supreme courts should not be oblivious to these risks." Such extraordinary intervention seems difficult to accomplish under standard precedent, but "new day makes new law." So one state case involved a judge on the brink of retirement "who got taken to the cleaners"; it took three appellate opinions, but eventually the problems were worked out with a better judge. In this field, a more managerial attitude is in order for state courts.

It was observed that an on-line education program is being developed to help state judges.

An audience member asked what is done about "outlier judges on the defense side"? A panel member suggested: "Change venue. Go someplace else." The audience member agreed: there are not that many judges who are favorable to plaintiffs, or even that many who take a balanced approach.

Another panel member suggested that the preclusion approach "will exacerbate forum shopping." Plaintiffs will try harder to get certification from a favorable court before it is denied by a hostile court.

The panel was asked to consider funding and appointment of counsel: should there be an override to compensate lead counsel for their work? Should lead counsel be permitted to sell the fruits of discovery?

The first panel response was that this is a big problem between state and federal courts. Following the Manual for Complex Litigation, interim appointments are properly made in a state action. For the most part, lawyer committees come to the state court already formed. New Jersey discovery is open: you can see it on paying the costs of copies. Assessments are not good. In a recent case that overlapped with a federal action, the question was worked out by permitting discovery to go on in the state action, on terms that avoided assessing lawyers for discovery work they do not use.

Another panel member asserted that multiple state filings are not used to defeat MDL proceedings. A different panel member responded that he has handled a number of cases where this has happened, but the MDL can invite cooperation and discovery. The first panel member observed that in the fen-phen litigation he had been forced to pay an assessment of 9% of the recovery – nearly 30% of his fee – for discovery he did not want.

The panel was asked whether this problem can be solved by the composition of the plaintiffs' committee. A panel member responded yes, but added that the problem is that MDL committees include

lawyers who have no individual clients. They should not be on the committee. (But if all MDL cases are different, it's different.) This response was met by the observation that the problem with MDL proceedings is that there is no way to pay anyone. A solution is needed.

The panel was then asked to consider state certification of national classes.

A defense perspective was offered: in a pure class action, someone has to decide who is in charge of deciding whether it is to be a class action. If it is to be a class action, someone has to be in charge of managing it. There is no way to cooperate in managing two parallel classes. We need to eliminate competing classes. It is not persuasive to argue that different states may have different certification standards. When denial rests, for example, on the lack of predominating common issues, "it is close to a due process ruling. This should not be reconsidered" in another court.

The question was reframed: a state judge has to decide the cases presented. If a national class is filed, what do you do? talk to a federal judge?

A panel member replied that there is no one answer for all cases. Lawyers are very creative. "I have not been presented a national class" in state court. When there is overlap, "I pick up the phone." Coordinated discovery is possible, more so as communication is improved. In one recent case, a single Daubert hearing was held with one presentation that several courts could then use as the basis for each making their own particular rulings.

Another panel member said that in mass torts there is no problem of state courts certifying nationwide classes.

The final advice was that it helps to disaggregate the problem. The Advisory Committee should do this. It is important to understand what kinds of class actions present problems. Securities actions, for example, do not.

Panel 7: Rule-Based Approaches to the Problems and Issues

The moderator for Panel 7 was Professor Steven B. Burbank. The panelists included Professors Daniel J. Meltzer, Linda S. Mullenix, Martin H. Redish, and David L. Shapiro, and Judge Diane P. Wood.

The discussion was opened with the question whether amending the Federal Rules is a feasible approach to duplicating actions. Discussion should assume that the case has been made for change by some vehicle; the question is what vehicle is appropriate.

The first statement was that the conclusions advanced by the Reporter "do not warrant confidence." The legislative history of 1934 and 1988 shows that Congress intended to protect the allocation of power between the Supreme Court and Congress;

protection of state interests was not a concern. The Supreme Court has labored under its own mistaken view that Congress meant to protect state interests. "The politics have changed since 1965" when Hanna v. Plumer was decided, as shown in the legislative history of Enabling Act amendments in 1988. These problems should be acknowledged. The memorandum supporting the nonpublished amendments suggests that the Enabling Act delegates to the Supreme Court all the power that Congress has to make procedural rules for federal courts. This is a "tendentious reading" of Supreme Court opinions, and the legislative record is clear that Congress did not want this. In like fashion, the memoranda seek to narrowly confine more recent decisions. The most important of these recent decisions is the Semtek case. The Semtek decision is not distinctive in the way the Reporter suggests; the Court was aware that "rules of preclusion are out of bounds." The original advisory committee refused to write preclusion into Rule 23; in 1946 a later advisory committee took preclusion out of Rule 14; the transcript of the oral argument in the Semtek decision shows that Justice Scalia believes that preclusion is outside § 2072. Attention also should be paid to the Grupo Mexicano case. Neither can a court rule define injunctive powers; the Committee Note to Rule 65 says that § 2283 is not superseded. Supersession of § 2283 is a bad idea.

A panel member asked about the broad interpretation of § 2072 repeated in the Burlington Northern decision? And what of Rule 13(a), which has preclusion consequences, or Rule 15(c) which affects limitations defenses by allowing relation back?

The response was that Rule 15(c) relation back "is a state-law problem"; Rule 15(c) is invalid for federal law purposes as well as state law. And Rule 13(a) does not itself state a rule of preclusion; preclusion arises from federal common law.

The question was pressed: if we think that Rule 15(c) is valid, should we reject the argued approach to § 2072? The response was no.

The first member began the formal panel presentations by observing that he had written an article urging the view that the class itself should be seen as the party and the client. Many of the nonpublished proposals are consistent with these views. Given enthusiasm with Rule 23, and the need for more supervision, it is distressing to be concerned with the certification-preclusion and settlement-preclusion drafts and the Enabling Act, etc. The certification-preclusion draft does not refer directly to preclusion, but the direction not to certify may exceed the Enabling Act even if the Supreme Court has all the power of Congress. Some rights may be enforceable only through a class action. A federal court can refuse to enforce rights this way; it should not be able to tell state courts not to enforce state rights this way. In any event, the policy and politics issues should be addressed by Congress. There is, further, a constitutional

problem: binding a class by preclusion is accepted. Refusal to certify may not include a finding that there is adequate representation — and the finding should be subject to attack. Besides, if the federal court says there is not a class, does not the bottom fall out of any foundation for preclusion? The member of the nonclass is a stranger to the litigation. The settlement-preclusion draft does not present a constitutional problem, but the Enabling Act problem is magnified: a state court may have a very different standard of what is fair and adequate.

The second panel member addressed the "lawyer preclusion" alternative draft that would bar a lawyer who had failed to win class certification from seeking certification in any other court, without barring an independent lawyer from seeking certification of the same class. Some background was offered first. First, overlapping classes present a problem that should be addressed by federal courts. They generate inefficiency, waste, and burdens of the sort we seek to avoid by other procedural devices such as supplemental jurisdiction, compulsory counterclaims, and nonmutual preclusion. They also encourage forum shopping, not the accepted choice for a single preferred forum but an invidious sequential forum shopping. And they magnify the in terrorem impact of litigation procedure by the impact of endless class actions; a defendant may win twenty class actions, but then lose everything in the twenty-first action pursuing the same claims. Competing classes also create a reverse-auction problem when they are filed by competing groups of lawyers rather than a coordinated group of friendly lawyers. Second is the question whether rules of procedure should be used to address these problems. The Enabling Act "is plenty broad enough." Burlington Northern gave a thinking person's version of the Sibbach test; a regulation of procedure can have an incidental impact on substantive rights. This is no strait-jacket on the rules process. Within this framework, the lawyer preclusion draft is paradoxically both the most revolutionary and the most narrow of the several alternatives. It is narrow because it recognizes the lawyer as the real party in interest, avoiding any need for concern about precluding the interests of the class itself. But it is a dramatic departure from private rights theory. And it may not be the most effective device.

Another panel member asked the lawyer-preclusion presenter about the effects of the Semtek decision on the understanding of Enabling Act power. The response was that the Semtek opinion "has some troubling off-hand dictum, introduced by 'arguably.'" The opinion should be read as it is presented — it is a construction of Rule 41(b).

The third panel member addressed the nonpublished Rule 23(g), which in various alternatives would authorize a federal court to enjoin a member of a proposed or certified federal class from proceeding in state court. One alternative would allow an injunction against individual state-court actions; the more

restricted alternative would allow an injunction only against state-court class actions, and even then might exempt actions limited to a statewide class. Rather to her surprise, she concluded that the Enabling Act does not permit this approach. Over the years, it has seemed that the Advisory Committee has authority to do pretty much whatever it thinks wise. But this runs up against Enabling Act limits. Why? There is a problem with overlapping classes; there is a problem with reverse-auction settlements; and there are even duplicating mass-tort class actions. But the attempt to codify an exception to the Anti-Injunction Act by court rule transgresses the Enabling Act; this point was made in the Committee Note to the original Rule 65. Congress will not like this attempted supersession. No case supports this approach either directly or by analogy. It is a stretch to suggest that because Rule 23 is procedural, we can do this to support the procedural goals of Rule 23. Nor is the idea of creating a procedural construct — the class — enough. There is a need to do this, but it cannot be done by rulemaking. That is so even though courts have made inroads on the Anti-Injunction Act by issuing injunctions designed to protect settlements. The argument that an Enabling Act rule fits within the Anti-Injunction Act exception for injunctions authorized by act of congress "is intriguing but too arcane." The better approach is to amend the Anti-Injunction Act to authorize these injunctions; the alternative of amending the Enabling Act to authorize the Rules Committees to do this also might work. Potentially workable legislative solutions include expanding the MDL process or removal. The chief impediment to legislation is political. A lawyer panel member this morning said he would oppose such legislation. Why borrow trouble?

The next panel member said that Professor McGovern is right: we should disaggregate in an effort to define which overlapping classes cause problems. For federal courts, the MDL process works. If a federal-question case is filed in state court, it can be removed. So the problem arises when some plaintiffs go to state court on state-law claims, while other plaintiffs take parallel claims to federal court, or — perhaps — when all plaintiffs go to state courts, but file duplicating and overlapping actions. "The state-law claims are the problem." The fact that the problem arises from state-law claims "should be a red flag." How far should a court rule, or a statute, tell state courts not to enforce state law as they wish? Another problem is the scope of state law: commonly the problem is stretching the law of one state out to the rest of the country. The choice-of-law aspects of the Shutts decision "may deserve more development." One part of the overlapping-class drafts suggests deference: the federal court can decide not to certify a class because another court has refused. There is no problem with that approach. And it would happen, although the federal court would need to know why certification was refused. If denial rested on a lack of adequate representation, further consideration in another action is proper. That of itself would be a significant change: as Rule 23 stands, a representative

who satisfies its criteria is entitled to certification. A different proposal would adopt a "quasi-Rule 54(b) approach." This is surprising; it sweeps the new Rule 23(f) appeal procedure off the table for these cases. Allowing immediate appeal only from a denial of certification is unbalanced, and would lead to many interlocutory appeals. We should give the Rule 23(f) process a chance to develop. Finally, these approaches are "tinkering at the edges." The more fundamental proposals "are stopped by the Enabling Act and federalism."

This panel member was asked to respond to the observation that the Rule 54(b) analogy is relied on to establish preclusion, not to support appeal. The response was that "this is not clear." Nor can the judgment court determine the preclusion effect of its own judgment.

Another panel member asked about the risk of sweetheart settlement in state court for a national class: the defendant in such a case does not want to remove. Would it be desirable to adopt minimum-diversity removal, including removal by any class member? The response was "I am not in favor of bringing more state-law cases into federal court by minimum diversity."

A different panel member observed that the decision of the judgment court to describe its dismissal as "with" or "without" prejudice has an enormous impact on preclusion. The response was that a second court may well say that the representative plaintiff before it seeking class certification was not a plaintiff in the first court, so there is nothing to support preclusion.

The final panel member addressed the legislative proposals advanced as alternatives to the "adventuresome" proposals for rule amendments. The alternatives include amendment of the Enabling Act, of the Anti-Injunction Act, and of the full faith and credit act. Of the three, the Enabling Act approach should be preferred. "It is hard to be confident of the quality of Congress's work." Nor can drafting a statute anticipate all problems; it will be easier to change a rule of procedure to accommodate unanticipated problems than to change a statute. Should Congress amend the Enabling Act to authorize rulemaking in this area, moreover, political concerns would be reduced. Congress can take an open-ended approach in the Enabling Act. The Enabling Act proposal sketched here would be improved, however, if it incorporated the language set out in the alternative Anti-Injunction Act proposal: it should refer not simply to the ability of a federal court to proceed with a class action, but instead to the ability of a federal court to proceed effectively with a class action. Another possibility would be to combine the two approaches, amending the Anti-Injunction Act to authorize injunctions subject to refinements to be provided by the rules of procedure. Apart from these possibilities, "minimal diversity removal may not happen." If such a removal statute were adopted, it would concentrate suits in federal court and reduce the problems of different state class-

action standards. But this approach still does not address collusive settlements, since neither plaintiff nor defendant will remove when they like the deal; only the broad proposal to permit removal by any member of a plaintiff class, or by any defendant, would address that weakness. Even then, removal by individual class members faces limits of knowledge and incentive. "Exclusive federal jurisdiction is a bit much." So if a federal court denies certification, there still could be a second action; as an earlier panel member observed, it may be that due process requires a second chance.

Bankruptcy Committee Subcommittee Report on Mass Torts

Two attachments frame the question. The National Bankruptcy Review Commission advanced a set of recommendations for handling "mass future claims" in bankruptcy. A subcommittee of the Bankruptcy Committee has studied the recommendations. The conclusion of the subcommittee report to the Bankruptcy Committee is that while the recommendations "do not solve all the problems inherent in dealing with the thorny thicket of future claims, they are an important step in the right direction." This report is the first attachment. The second attachment is a set of notes that reflect on the report. These notes are calculated to suggest that the subcommittee report does not provide the level of inquiry needed to support even a modest recommendation that the recommendations "are an important step in the right direction."

The Bankruptcy Committee will consider the subcommittee report at its June meeting. Consideration was deferred to afford the Civil Rules Committee an opportunity to comment on the report.

Comment on the report may be informed by the questions raised by the notes. If those questions are as real as they seem, the comment might be this:

The National Bankruptcy Review Commission has recommended adoption of a procedure that would use bankruptcy courts and bankruptcy procedure to resolve potential liability to future victims of a mass tort. The report of the Bankruptcy Committee Subcommittee on Mass Torts provides a valuable initial inquiry into the questions that surround this recommendation. The inquiry, however, is too preliminary to support endorsement by the Civil Rules Advisory Committee. The Civil Rules Committee has devoted many years to studying class actions, including the role that class actions might play in resolving mass torts. The particularly acute problems of future claims arising from mass torts have been part of this study. The fundamental question is whether there is any satisfactory means of preserving assets to ensure meaningful remedies to tort victims who may have claims in the future but who have not yet developed the most serious injuries that may fall to some (but not all) of them. Absent some reliable means of predicting the number and severity of future injuries, any effort to ensure future recoveries is speculative. The risks of speculation must be run when the wrongdoer is actually insolvent, and may be worth running when there is a powerful basis to predict that future claims will make the wrongdoer insolvent. Even then, division of authority between bankruptcy courts and other courts — both state and federal — requires separate attention. It is far more difficult to move beyond these points to a more general system that would enable a putative wrongdoer to initiate proceedings that would discharge all future claims without any showing of present or impending insolvency. The difficulties are so pervasive that it remains impossible to conclude now that the National Bankruptcy Review Commission recommendation is an important step in the right direction. Broader, more general, and more fundamental questions remain to be resolved.

Reporter's Notes on Bankruptcy — Mass Torts

Introduction

Mass tort claims arising from products and environmental contamination have presented exquisitely difficult problems arising from the prospect that injuries and claims will continue to arise over prolonged periods. Asbestos claims provide an example that may prove unique. Injuries often become manifest after latency periods that can run for thirty, forty, or even fifty years. Persons who eventually develop asbestos diseases may not even be aware of exposure to asbestos, and in any event have no effective basis for predicting whether a disease will develop. There is some sense that other product claims may present these problems in more manageable terms — that confident predictions can be made as to the total number, severity, and value of future injuries, and that the injuries will become manifest in much shorter periods of time. Of course that confidence may be shaken as more sophisticated epidemiological methods come to disclose presently unknown long-term effects of common events.

Whatever level of confidence may be brought to predicting the overall incidence and severity of future injuries, it will commonly be difficult to identify the individuals who will experience the injuries. In turn, that difficulty makes it equally difficult to provide meaningful notice of any proceeding that may be brought to dispose of future claims. The most plausible approach to achieving a judgment that binds future claimants is through representation rather than notice that provides a meaningful opportunity to participate. It has not yet been determined whether due process permits representation to substitute for notice, particularly in circumstances that afford little opportunity for effective supervision of the representative by future claimants. The most persuasive arguments in favor of preclusion by representation rest on the assertion that it is important to establish "global peace" by disposing of all claims before they mature in the natural but disorderly course of events.

Traditional views of federalism in general, and of relations between state and federal courts in particular, present further challenges to any attempt to achieve comprehensive resolution of a mass tort. State law predominates, and often overwhelms possible federal-law claims. State laws frequently vary, and vary in ways that defy good-faith efforts to define a consensus "law" that might ease the way to unified disposition. State courts provide forums for much litigation, both as individual actions, aggregations of individual actions, and class actions. Developments in the class-action practices of a few state courts have led to serious concerns that a small number of local courts are dictating law for many other states.

Bankruptcy courts may seem to provide a convenient solution to these problems. The long-recognized need for control of all claims by a single tribunal has established clear authority for a bankruptcy court to control parallel litigation in all courts, state or federal. Bankruptcy courts, in the process of achieving a single coordinated disposition of all claims are familiar with the processes of representation, estimation, and distribution under a court-approved plan that allocates the available resources according to established priorities. Bankruptcy proceedings, moreover, seem to have achieved real successes in dealing with the massive tort liabilities that have exceeded the assets of many asbestos companies.

The seeming advantages of bankruptcy courts, however, cannot be taken on faith without further inquiry. The underlying nature of the problems is not changed by resort to a bankruptcy

tribunal. It is no easier to measure future claims. The delicate balance between federal and state interests is affected only when the tort claims force liquidation of the debtor, and even then is affected only because we are accustomed to recognize the need for central — that is to say federal — control.

The prospect that the underlying problems are not changed by reliance on bankruptcy courts does not mean that bankruptcy courts are without comparative advantages. In many ways it seems fair to frame the question in these terms: Article III courts could be given, by statute, all of the powers now enjoyed by bankruptcy courts or proposed to be conferred on bankruptcy courts. Article III courts have regular experience with tort claims, including the need to choose among state laws to find a rule of decision. Article III courts also enjoy the reassurances that flow from Article III status. One choice is to assign mass-tort claims to bankruptcy courts that have been established primarily for specialized purposes to be served by specialized procedures. The other choice is to assign mass torts to generalized courts that follow generalized procedures to adjudicate, among many others, tort claims. The elemental requirements of due process cannot be reduced by moving from one court to another. The choice must be made with great care, on the basis of the deepest possible understanding of the problems and the most careful possible appraisal of possible solutions.

The more optimistic way to frame the question is to ask which path promises the best means of developing an effective judicial response to future mass-tort claims. One part of the question is whether the future claims should be separated entirely from the present claims. The bankruptcy proposal seems to address only the future claims, forcing them out of whatever tribunals are engaged in resolving the present claims. That may not be the best approach. It also emphasizes the focus on tort defendants who are not currently insolvent — if the weight of present claims makes for insolvency, then the bankruptcy solution seems more obviously sensible. The more fundamental questions are whether a package of legislation and procedural changes could work better through the bankruptcy system or through district courts. Legislation can readily establish in the district courts the powers and remedies that now seem to provide advantages to the bankruptcy courts. The Report, focusing as it does on the questions raised by the proposal for lodging future claims in bankruptcy courts, does not help answer the question whether district courts could be used to equal or greater advantage.

A less optimistic way to frame the question is to ask whether any form of judicial proceeding provides a satisfactory approach to future claims. It is important to explore all judicial alternatives before surrendering. Some means should be found to ensure that present claimants do not take all, leaving nothing for future claimants. Some means should be found, if possible, to permit an enterprise, or its productive assets and people, to work free from uncertain future liabilities. But it would be a mistake to seize the least unsatisfactory judicial procedure as a reason to forgo more effective substantive reform.

Background

The National Bankruptcy Review Commission advanced a set of recommendations for handling "mass future claims" in bankruptcy. A "mass future claim" is defined as a set of numerous demands arising from a debtor's acts or omissions when there are likely to be "substantial future demands for payment on similar grounds"; "the holders of such rights to payments are known or, if

unknown, can be identified or described with reasonable certainty; and * * * the amount of such liability is reasonably capable of estimation." Any "party in interest" can petition a bankruptcy court for appointment of a "mass future claims representative"; a representative is to be appointed "for each class of holders of mass future claims" "when a plan includes a class or classes of mass future claims." The mass future claims representative has exclusive power to decide whether to file a claim "on behalf of the class of mass future claims," but a "holder" of a mass future claim can opt out of being represented and to present the holder's own interests. The mass future claims representative's fees and expenses are administrative expenses up to confirmation of a reorganization plan; fees and expenses after confirmation are an expense of the fund established to compensate mass future claims. The representative is a fiduciary for the holders of future claims, and is subject to suit in the district where the appointment was made. The bankruptcy court may, as a "core proceeding," "estimate" mass future claims and may "determine the amount of mass future claims prior to confirmation of a plan for purposes of distribution as well as allowance and voting." The court may issue "channeling injunctions" and the trustee "may dispose of property free and clear of mass future claims"; when sale of the property is approved, the court "could issue, and later enforce, an injunction to preclude holders from suing a successor/good faith purchaser."

The Civil Rules Advisory Committee has considered these proposals briefly at various times, but has not had occasion to study them in depth. Many of the issues raised by the proposals involve matters of bankruptcy practice and administration that are not within the Committee's responsibilities. The Committee has been asked, however, to comment on the Report to the Judicial Conference Committee on the Administration of the Bankruptcy System drafted by the Bankruptcy Committee's Subcommittee on Mass Torts. The Report is attached. The Report closes by observing that it provides "a selective discussion of some of the more prominent issues," and concluding that the Review Commission recommendations "are an important step in the right direction."

It is difficult to offer straight-forward advice on the ways in which the Advisory Committee might respond to the request for comment. The five numbered parts of the subcommittee report explore the specific issues summarized below. The broader questions are touched upon only in passing. The broader questions, however, are the questions that come closest to the Advisory Committee's work. There is little point in addressing the questions that the subcommittee quite properly bypassed. But there is not much to be contributed by commenting on the more specific issues that the subcommittee does address. The two parts that follow sketch some of the broader questions and then offer a few reflections on the more specific issues.

Broad Questions

Although the Review Commission's mass future claims proposals encompass contract claims and other non-tort claims, the focus of most discussion is on the utility of bankruptcy proceedings as a means of addressing dispersed mass torts. That has been the area in which the Advisory Committee has approached the proposals.

The most important set of questions addresses the choice between bankruptcy and civil litigation as a means of addressing mass tort claims. These questions can arise in many settings, but two poles frame the problems. One pole is the company that does not have sufficient assets to satisfy all present claims against it, mass tort and otherwise. The company is bankrupt in any sense, and

the challenge is to marshal and distribute its assets in the most efficient and fair way possible. The advantage of relying on bankruptcy proceedings for the central distribution function seems apparent, no matter whether ordinary civil proceedings might be relied upon to fix the amounts of full relief for individual tort claimants. The other pole is the company that is faced with the uncertain prospect of massive future claims, that wishes to resolve the claims to remove a cloud from its future, but remains fully able to carry on its present affairs into the indefinite future. Resort to bankruptcy to establish "global peace" by allocating a fixed portion of company assets to compensate future claims is quite different from the need to allocate clearly inadequate resources among present and future claims.[1] The advantages of relying on bankruptcy in this setting are quite different, and need explicit exploration and justification. The possible advantages are indeed touched upon in the subcommittee report, but only briefly and almost in passing. It is observed on page 8 that the bankruptcy process seems well-suited to addressing mass torts, "with its automatic stays, nationwide jurisdiction, and in rem approach." At pages 9-10, it is noted that Professor Gibson has concluded that bankruptcy has done better than the limited-fund class actions of almost-recent practice "with respect to the fairness of the resolution process and the effectiveness of judicial review." There is — quite understandably — no attempt to ask whether ordinary civil litigation might be made a better means of addressing mass torts through legislative and procedural reforms that enable use of the special powers that may give the advantage to bankruptcy under present procedures.

A second set of questions goes to matters that are of particular concern to the Federal-State Jurisdiction Committee. The Review Commission proposals clearly nationalize administration of the mass future claims, although there may be room to leave to state courts the process of fixing the amount of individual claims as they mature. Presumably the existence of an individual claim is governed by the law that would apply if there were no mass future claims bankruptcy proceeding, ordinarily state law. But here, as in any aggregated proceeding, there is a compelling pressure to ignore the differences of state law that affect the existence and value of individual claims. The subcommittee report approaches these issues with respect to limitations problems, but offers no general guidance.

Specific Issues

The subcommittee report addresses five sets of specific issues. Each is described briefly below.

1. Due Process. The first section, captioned due process, addresses primarily the difficulty of

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[1] This pole appears to be a genuine possibility. The Advisory Committee has been assured in past meetings that a Chapter 11 reorganization can be initiated without any showing of "insolvency," and that there are good reasons for that. It also has been said that by way of "prepack" and "pass-through" proceedings, a reorganization can be framed to address only one class of claims — such as future tort claims — without affecting any other claims. If this advice is correct, a robustly healthy enterprise could formulate a reorganization plan that leaves all commercial obligations unscathed, doing nothing more than establishing a fund that will be the only source of compensation for future tort claims as they mature. The "bankruptcy" proceeding would accomplish the same result as a "mandatory" class action binding on all future claimants, and nothing more.

giving notice to future claimants. The difficulty is obviously severe with respect to persons who have been exposed to an injury-generating condition or event without yet experiencing injury, and is most severe with respect to persons who have not yet even been exposed. The central question is whether it suffices to provide the best notice feasible in the circumstances and to rely on representation as a substitute for effective individual notice. A subsidiary question goes to the need to provide effective representation, in part by establishing separate representation for each group that has identifiably conflicting interests. The report suggests that representation must be accepted when the alternative is no participation in the distribution of all the assets that ever will be available. It also seems to be suggested in more general terms, quoting from the Review Commission, that bankruptcy practice provides better protection for future claimants than current class-action practice because bankruptcy requires collective action, provides "extraordinary disclosure," and provides regular and extensive court supervision.

Two specific suggestions are made to improve the Review Commission recommendations. The first is that the definition of a mass future claim be restricted to a situation in which not only is it possible to identify or describe with reasonable certainty the holders of future claims, but also it is possible to describe with specificity "the nature and extent of their rights to payment." This requirement, if successfully implemented, would indeed provide reassurance that a fair share of the available assets had been dedicated to the future claims. With respect to dispersed mass torts, however, it may be wondered how far it is possible to describe with specificity the "extent" of the future liability, at least if this means the aggregate dollar amount of liability. If anything more than an open-ended guess is required, this requirement could easily hamstring the enterprise.

A second suggestion is that if the proceeding is a Chapter 11 reorganization, "it might better comport with due process for the amount of any fund set aside to pay future claims not to be forever fixed at the time of discharge but rather to be subject to possible future expansion in situations where the estimates on which the fund was based prove later to have been materially mistaken." (This suggestion apparently is repeated in the p. 18 suggestion that the problem of underestimating claims can be reduced if the amount of assets set aside for future claims "is subject to periodic reconsideration in light of new information and experience.") This change would drastically reduce the risk that Chapter 11 proceedings might be launched for the purpose of purchasing peace at bargain-basement rates. It also might dramatically reduce the use of the bankruptcy alternative. These results may be desirable, but the suggestion reopens most of the basic questions about the role of bankruptcy.

2. Future Claims Representatives. This section of the report subtly introduces a discussion of the representative's role that focuses on an aspect not much emphasized in earlier discussions. Once the debtor is discharged, the representative becomes responsible to "administer the fund so as to assure that the fund is protected into the future and will grow to meet increasing demands." The Review Commission suggests that the representative is a fiduciary; this discussion analogizes the fiduciary duties to "the responsibility of the insurance adjustor to the policy holder or the ERISA administrator to beneficiaries." Nothing more is said about the ways in which the representative is to allocate the fund to individual claimants, although the issue is addressed in part in the "estimation" section noted below. The reorganization plan may fill in the gap by providing for claims administration and dispute resolution procedures. The procedures may include adjudication, perhaps

in state courts. Although it goes unspoken here, the Review Commission seems to contemplate enforcement of the representative's fiduciary responsibility in administering and allocating the fund by holding the representative personally liable. This administrative system seems quite different from the systems contemplated by current class-action theory. In a civil action, a court might easily establish an elaborate administrative claims-processing structure, but the court would retain jurisdiction and the ultimate responsibility of review and disposition. Again, the critical questions remain to be addressed.

3. Estimation. The Review Commission recommends that the bankruptcy court be authorized to "estimate" and "determine the amount" of mass future claims. These steps determine the weight of the claim holder's vote for or against a Chapter 11 plan, establish the sequence for recognizing progressively junior classes of claims, and set the amount to be distributed to account for the future claims. The report notes that it will be "very difficult to estimate the dollar amount of future claims with a high degree of confidence," and suggests that the limited experience with estimation — primarily in asbestos cases — has been that actual claims at times have materially exceeded the value of assets set aside. It is urged that the Review Commission recommendation that a mass future claim be recognized only when "the amount of such liability is reasonably capable of estimation" "be applied much as in the insurance industry to estimate insurable risks but exclude as uncovered those risks too diffuse or speculative to be reasonably estimated." The meaning of this recommendation is unclear. It may mean only that significant difficulties of estimation will foreclose any mass future claims proceeding. Instead, it might mean that the future claims that can be estimated will be included in the proceeding, while nothing is done to address the claims that cannot be estimated. Such "exclusion" of some future claims, but not all, would be obviously troubling. The debtor is left exposed to future liability, some future claimants may be left without any protection, and there may be difficulties in determining which future claimants fall into which category.

One sentence in this section suggests that channeling injunctions can be used to "mandat[e] arbitration of future claims." This suggestion might be taken to imply that judicial resolution of individual claims can be denied. Or it may mean only that resort to alternate resolution methods can be required as a precondition to independent judicial resolution. As with the discussion of the future claims representative's role, this hint is tantalizing but frustrating.

The final sentence of the estimation section raises a fundamental question by way of assertion: "Inherent in the bankruptcy approach to mass torts is the recognition that all kinds of creditors, including future tort claimants, will recover less than they would be entitled to in the absence of all other creditors, and the problem of estimation, while difficult, is essentially just a variation on that theme." The more familiar questions suggested by this statement again involve the distinction between dissolution and reorganization: it is not obviously necessary to reduce the recovery of future tort claimants when the tortfeasor remains alive as an ongoing enterprise and has not even shown some form of "insolvency." That result may be desirable, but it requires explicit exploration and justification. The more radical questions suggested by this statement have not figured in the current discussions. It is not self-evident that ordinary priority rules should apply to determine priorities, for example, between personal injury tort victims and unsecured commercial suppliers. Any comprehensive effort to address mass torts through bankruptcy should at least address this question, no matter what the answer may be.

4. Statutes of Limitations and Repose. This section begins with the forthright conclusion that "state statutes of limitations should determine the enforceability and therefore the allowability of claims in bankruptcy." The difficulty of applying limitations rules to claims with a long latency is recognized; it even is suggested that there may be due process difficulties with applying statutes of repose to cut off claims that have not even accrued within the repose period. The most interesting question is framed by this example: a developer builds 10,000 homes, all with lead-based primer paint. It is stated that if the developer anticipates mass tort litigation and files for bankruptcy protection, state limitations periods should apply just as in other areas of present bankruptcy practice. This question deserves further study. Suppose the 10,000 houses are parts of 200-home projects in each of the 50 states. The many states may have remarkably different limitations policies, and perhaps repose policies as well. It is not self-evident that once a single federal tribunal has control of the entire proceeding, some claimants should be defeated by local limitations practices while others are protected by their own local practices. Again, the answer may depend on the distinction between a true inadequacy of the debtor's assets and the simple anticipation and resolution of future mass claims. The lead paint illustration, moreover, might be resolved differently for two quite distinct types of claims. Homeowners seeking the cost of removing the paint might well be subject to ordinary state limitations doctrine. Children — including those not yet born — who are physically injured by the paint might deserve different treatment.

5. Conflicts of Interest and Inappropriate Incentives. This section recognizes that if bankruptcy practice is to be extended to mass future claims, appointment of a future claims representative for each identifiably distinct class of claimants is better than having no representation. It is suggested that the United States Trustee be empowered to move for appointment of a representative and to nominate the person to be appointed. The Bankruptcy Court should take an active role in selection and supervision. There are disputes whether the representative will have much bargaining power, but some representation is better than none. At least one commentator has suggested that the representative be given an incentive to maximize recovery by awarding a percentage of the amount held back for future claims, but this suggestion is found not helpful.

There is a beginning on the comparison between the court-appointed future claims representative and class counsel. Since only one representative is possible for each class, the risk of reverse auctions is much diminished. The effect of the differences between a court-selected and supervised fiduciary and an entrepreneurial class-action or individual lawyer is more difficult to gauge. There is no attempt to revisit the issues raised in the second section concerning the representative's continuing duties after the reorganization is completed, nor to compare those duties to the balance among court, class counsel, and defense counsel in administering a class-action judgment.

Conclusion

The Report concludes that the Bankruptcy Review Commission recommendations "are an important step in the right direction." Properly understood, that conclusion is unremarkable. The recommendations point out one line of inquiry that deserves careful development. In time, bankruptcy courts and procedures may indeed come to play a valuable role in resolving the problems that arise from future mass-tort claims. The Report, however, also identifies many of the questions

that must find persuasive answers before the Commission recommendations can be developed into a system that might be enacted. The questions must be set against the alternative questions that surround further development of judicial procedures outside bankruptcy. Many alternative judicial procedures have been considered; this present and future work must be brought to bear more directly on the bankruptcy proposals. In the end, all may be found wanting. But there is a long way to go before reaching the inquiry's end.

June 20, 2001

U.S. Judicial Conference

Committee on the Administration of the Bankruptcy System

REPORT OF THE SUBCOMMITTEE ON MASS TORTS

Future claims -- that is, claims that have not yet ripened but may well do so in the future -- present the greatest challenge to the adequate legal treatment of mass torts, whether in or out of the bankruptcy system. In 1997, the National Bankruptcy Review Commission (the "Commission"), partly in elaboration of § 524(g) of the Code, made five recommendations for revision of the Code to standardize the treatment of mass future claims in bankruptcy. See National Bankruptcy Review Commission, Bankruptcy: The Next Twenty Years 316-18 (1997). The recommendations are set forth in full in the Appendix to this report. Briefly stated, the recommendations are to amend the Bankruptcy Code to expressly cover "mass future claims" and "holders of mass future claims" (defined in terms of a modified "conduct" test, discussed infra); to provide for appointment of future claims representatives; to expressly permit estimation of future claims; to limit (as through "channeling injunctions") the assets against which such claims could be satisfied; and to permit discharge of such claims. Id. In February, 2000, the Committee On Federal-State Jurisdiction of the U.S. Judicial Conference asked its sister Committee On The Administration Of The Bankruptcy System to review the recommendations, and a Subcommittee on Mass Torts (the "Subcommittee") was created for this purpose. In August, 2000, following a preliminary review, the Subcommittee reported that the Commission's recommendations had merit but that significant problems remained to be explored, which the Subcommittee identified and grouped under the headings: (1) due process; (2) future claims representatives; (3)

estimation; (4) statutes of limitations and repose; and (5) conflicts of interest and inappropriate incentives. Following further study, the Subcommittee herewith presents its views as to each of the problem areas.

1. Due Process

A. Some Concerns*

The primary due process problem presented by any attempt to deal with future claims is the problem of lack of notice. As the Supreme Court noted in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950):

> "The fundamental requisite of due process of law is the opportunity to be heard. Grannis v. Ordean, 234 U.S. 385, 394. . ." This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

The Commission's recommendations pose due process problems in that some persons whose rights are to be affected may not receive notice and an opportunity to be heard before their rights are substantially limited. Moreover, certain potential claimants, at the time that their claims are discharged, may not yet have experienced any injury or have any way of knowing that they will one day have a claim.[1]

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Marjorie O. Rendell, U.S. Circuit Judge, Third Circuit.

[1] In his article, Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability, 148 U. Pa. L. Rev. 2045 (2000), Professor Alan N. Resnick refers to these claims, as a group, as "unmanifested." Id. at 2067. However, it should be noted that the harm may not even have occurred, based on the definitions proposed, so that the holders may well have claims that are unknowable, not merely unknown or "unmanifested."

Under the Commission's proposals, debtors would be able to affect and discharge "mass future claims." A "mass future claim" would be defined as a "claim arising out of a right to payment, or equitable relief that gives rise to a right to payment, that has or has not accrued under non-bankruptcy law that is created by one or more acts or omissions of the debtor," if certain things have occurred. See Commission Recommendation 2.1.1. By adopting this "conduct" test, the Commission essentially gives a claim to all those who could be harmed by a debtor's act or omission, whether or not the claim has yet accrued or is even known.

It is true that the proposed definition of "mass future claim," found at section 2.1.1 of the Commission's Recommendations, does contain further limitations, including:

> . . . .
> (3) at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds;
> (4) the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and
> (5) the amount of such liability is reasonably capable of estimation.

But even with these limitations, the holders of future claims need not be able to be "identified" but, instead, can be merely "described" with reasonable certainty.[2] It is thus apparent

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[2] Professor Resnick argues that even the concept of claimholder identification or description can be eliminated because there is a provision for a future claims representative (discussed infra). Interestingly, nowhere in the Commission's comments is there any reference to the "description" requirement, while the other "gatekeeping" provisions are discussed to some extent. While the concept of claims identification or description may be somewhat hollow assurance, if it were eliminated would a claims representative know whom he or she is representing?

that holders of these claims are not intended to necessarily receive prior personal notice of the proceedings, let alone of the determination of their claims.

This is made even more apparent by the express provision for a "mass future claims representative," and a recommendation that the Bankruptcy Code should authorize the bankruptcy court to order the appointment of a mass future claims representative. The recommendation thus embraces the concept of some kind of constructive notice, or substitute for notice altogether, noting that in Mullane the Supreme Court discussed the impracticalities of personal notice in every case. See 339 U.S. at 313. While the Commission does recognize the potential for due process concerns in such an approach, see Bankruptcy: The Next Twenty Years, supra, at 331 n. 818, it nevertheless concludes that such constructive notice is sufficient.

Admittedly, some courts have already been willing to deal with future claims in bankruptcy proceedings, and discharge them, where the "conduct" test was employed and there was no actual notice;[3] but query whether approval of such across-the-board constructive notice should be legislated in this manner? And even if it should as a matter of policy, query whether the Due Process Clause permits such substitute notice in the bankruptcy arena, let alone in such wholesale fashion. Just because a claimholder cannot be notified and there is a need to discharge his claim so that bankruptcy policies can be advanced, does that make an alternative -- such as a

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[3] See, e.g., Grady v. A.H. Robins Co., 839 F.2d 198, 201 (4th Cir. 1988) (holding that "claim" existed prior to filing of bankruptcy petition where shield was inserted before bankruptcy); In re Texaco Inc., 182 B.R. 937, 955 (S.D.N.Y. 1995) (stating that publication was sufficient to discharge potential environmental claims of landowners); In re Waterman S.S. Corp., 141 B.R. 552, 556 (S.D.N.Y. 1992) (finding that claims of future asbestos claimants were not discharged where attempt to notify them was unreasonable and Court did not appoint a representative), vacated on other grounds, 157 B.R. 220 (S.D.N.Y. 1993).

future claims representative -- a permissible and satisfactory guarantee of due process?

Perhaps the key to this issue lies in assessing, and predicting, the scope of the Supreme Court's disapproval of the class action treatment of future claimants in Amchem Products, Inc. v. Windsor, 521 U.S. 591 (1997), and of its disposition in Flannigan v. Ahearn, 521 U.S. 1114 (1997), which vacated the Court of Appeals' judgment and remanded the case in light of Amchem. Can a Bankruptcy Code that embodies the same objectionable traits pass constitutional muster?

It should be noted that in Amchem, the public notice was designed to reach out to anyone and everyone who might possibly be exposed. The Court was concerned, however, with the "sufficiency" of the notice. 521 U.S. at 628.[4] Here, the situation is slightly different in that, while actual notice might be attempted to the maximum extent possible, it is still contemplated that there would be instances where a complete substitute for notice by way of a class

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[4] The Supreme Court made the following observation in Amchem:

> Impediments to the provision of adequate notice, the Third Circuit emphasized, rendered highly problematic any endeavor to tie to a settlement class persons with no perceptible asbestos-related disease at the time of the settlement. Many persons in the exposure-only category, the Court of Appeals stressed, may not even know of their exposure, or realize the extent of the harm they may incur. Even if they fully appreciated the significance of class notice, those without current afflictions may not have the information or foresight needed to decide, intelligently, whether to stay in or opt out.
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> . . . .
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> . . . In accord with the Third Circuit . . . we recognize the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous.

521 U.S. at 628 (emphasis added).

representative would be relied upon as sufficient. How the Supreme Court would view that, in the context of the Bankruptcy Code, is difficult to say. Does the presence of a class representative reduce due process concerns? Does constructive notice add to the attempts at actual notice in a way that improves the "sufficiency" of notice?

As Professor Gibson notes in her article on this topic, the Supreme Court has not granted certiorari in a mass torts bankruptcy case. S. Elizabeth Gibson, A Response to Professor Resnick: Will this Vehicle Pass Inspection, 148 U. Pa. L. Rev. 2095, 2098 n.18 (2000). While one could argue that there are considerations in bankruptcy that could weigh differently on the Supreme Court's view of the requisite notice, nonetheless, Professor Gibson notes that class actions actually are an exception to the general due process requirement "that everyone be afforded her own day in court." Id. at 2107. The rationale for such an exception in the class action context is based on the legal principle that "the certification of classes . . . is confined to the situations in which there is a sufficient identity of interest between the class members and their representatives that the members' rights may be fairly adjudicated in their absence." Id. Therefore, while it could be said that bankruptcy policy considerations might support a relaxed notice requirement as part of a bankruptcy solution, nonetheless, it should be noted that policy considerations did not in the end prove sufficient to avoid due process impediments in the class action setting in Amchem. See Samuel Issacharoff, Class Action Conflicts, 30 U.C. Davis L. Rev. 805, 805 (1997).

Some further due process problems should also be noted. One is conflicts of interest among future claimants. As Professor Gibson notes, based upon the Supreme Court's statements in Amchem,

> [O]ne might question whether the Supreme Court will view constructive notice as providing much protection for future claimants in bankruptcy. If not, the Court may be unwilling to allow future claimants to be bound by a reorganization plan confirmed in a bankruptcy case in which their interests were litigated by an appointed representative unless great care was given to insuring the absence of conflicting interests within the group represented by each future claims representative.

Gibson, supra at 2115. Another problem is the difficulty of putting effective advance limits on future claims. As Professor Gibson notes further, in her penultimate footnote:

> Even if the "practicalities and peculiarities" of a mass tort bankruptcy case, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), justify the provision of constructive notice to such future claimants, I fear that it pushes the limits of due process too far to include within the group of future claimants persons who, at the time of bankruptcy, have not been exposed to the offending product. It cannot even be pretended that someone who has not yet purchased, used, or come in contact with a product that precipitates a mass tort bankruptcy will have any reason to understand that the bankruptcy might affect her rights.

Id. at 2115 n. 97.

Finally, due process also implicates issues of fairness as between future claimants and as between the class of future claimants compared with the classes of known claimants. Some of these problems are discussed, infra, in the section on Future Claims Representatives.

B. Some Countervailing Considerations and Suggestions*

Notwithstanding the potential due process problems described above, it is worth remembering that the Due Process Clause is designed to make the legal process work fairly, not

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* This portion of the Subcommittee's Report was primarily drafted by Hon. Jed S. Rakoff, U.S. District Judge, S.D.N.Y.

to prevent it from working at all. As a practical matter, if procedures cannot be devised consistent with due process to provide for present protection of future claims and future claimants, in many cases there will be nothing left to satisfy future claims and compensate future claimants when their injuries become manifest and they most deserve help. Accordingly, notwithstanding cases like Amchem, it may be that the Supreme Court will not interpret due process so as to entirely eliminate any solution to the future claims problem in mass tort bankruptcies, especially since the bankruptcy process -- with its automatic stays, nationwide jurisdiction, and in rem approach -- seems otherwise so well suited to addressing the mammoth problems presented by mass torts.

The key to the Commission's response to the due process concerns discussed above is the appointment of a future claims representative who, as mandated by the Commission's recommendations and further discussed in section 2 of this report, infra, has a fiduciary responsibility to future claimants. Both state and federal law recognize that a fiduciary can sometimes act on behalf of a person who lacks notice without thereby offending due process, not just because of the legal fiction of "constructive notice" but because of the very strict standards to which the fiduciary will be held and the ultimate accounting she will have to render. Thus, for example, courts, consistent with due process, regularly appoint guardians to represent both infants, who will not have any meaningful notice of the guardian's actions until the infant reaches an age of understanding, and incompetents, who will never have any meaningful notice of the guardian's actions. The analogy to a future claims representative is not perfect for the guardian at least knows exactly who he is representing, whereas a future claims representative may not know her actual "clients" until sometime in the future, but the point is that due process is not so

rigid a concept as to preclude practical accommodations to situations where notice is inherently impossible at the very time when action is required.

If the future claims representative is to serve as a genuine fiduciary, however, she must have a reasonably tight idea of the characteristics of the persons she serves, even if she doesn't yet know their identity. A somewhat narrower definition of "future claimant" than the one suggested by the Commission may therefore be in order. At a minimum, this Subcommittee would recommend that subparagraph "4" of the Commission's definition of a mass future claim be amended so that it is limited, inter alia, to situations where "the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty and the nature and extent of their rights to payment can be described with specificity" (new language underscored). Likewise, as suggested by the Commission itself and discussed further in section 2, infra, there may be a need for separate future claims representatives to represent definably separate groups of future claimants.

The fiduciary responsibilities of the future claims representative are not the only due process protection that future claimants will receive in the bankruptcy context. As the Commission notes, bankruptcy "rules requiring collective action, extraordinary disclosure requirements, and regular and extensive court supervision from the inception of the case, make bankruptcy more protective of future claimants [than are class actions] . . . The fundamental structure of the bankruptcy system, with restrictions such as the 'absolute priority rule,' provides safeguards for the interests of mass future claimants that are unmatched in the class action system." Bankruptcy: The Next Twenty Years, supra, at 340-41. Similarly, Prof. Gibson, after carefully comparing mass tort limited fund settlements under Rule 23 with mass tort bankruptcy

reorganizations, concludes that "bankruptcy comes out ahead of limited fund class action settlements with respect to the fairness of the resolution process and the effectiveness of judicial review." Gibson, Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations at 5 (2000).

In practice, to be sure, some of these protections operate better in some contexts than in others. In a Chapter 7 liquidation, a failure to deal with future claims, however difficult, means, in effect, that future claimants will be deprived of any recovery whatever. If ever some substitute for personal notice would seem direly required, it would be in such a case. By contrast, in the case of a Chapter 11 reorganization there is at least the possibility of meaningful assets being available for future claimants even if no future claims representative is appointed, and, conversely, there is more of a danger of future claimants' rights being unfairly compromised if negotiated by a future claims representative who does not yet know exactly who the future claimants will be. In the case of a Chapter 11 reorganization, therefore, the Subcommittee is of the view that it might better comport with due process for the amount of any fund set aside to pay future claims not to be forever fixed at the time of discharge but rather to be subject to possible future expansion in situations where the estimates on which the fund was based prove later to have been materially mistaken.

Will any or all of this be enough to satisfy the Supreme Court? Prof. Gibson, in the article cited in the preceding subsection, is uncertain, noting that "the Court has not shown itself to be pragmatic in its approach to the judicial resolution of mass torts." Gibson, supra, at 2116. Moreover, there are a wide variety of situations in which mass tort bankruptcies may arise, and it may be that a solution that satisfies due process in some such situations may not satisfy it in

others. But it is respectfully submitted that, short of far more radical legislation than anything suggested by the Commission, no better solution has been proposed to the problem of future mass tort claims than the bankruptcy approach utilizing future claims representatives.

2. Future Claims Representatives*

The issues raised by the selection and responsibilities of a future mass tort claims representative in bankruptcy proceedings, especially as contemplated by the proposals of the Commission, are usefully considered against the backdrop of similar issues presented by Rule 23 class representatives in dispersed mass tort class actions involving future claimants. In dispersed mass tort cases involving exposure to toxic substances that may produce injury or death after a long latency period, there are at least two different categories of future claimants. First, there is the category of those who know that they have been exposed but do not yet show signs of illness. Those in this category know, or can be provided with notice, that there is some risk of future illness, but they do not presently know that they will develop symptoms, when such symptoms will occur, or to what degree of severity. Second, there is the category of those who have been exposed, but do not know of the exposure. They are an "amorphous and unself-conscious" group, Amchem, 521 U.S. at 628; they do not know of the risk of future illness and cannot even be given notice of such a risk. In the context of the class action, the courts have made it clear that special obligations and limitations accompany a judge's ability to appoint an

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Larry J. McKinney, U.S. District Judge, S.D. Ind., and the Hon. Lee H. Rosenthal, U.S. District Judge, S.D. Tex.

adequate representative for such claimants. These obligations and limits inform the need for specific standards governing the appointment and duties of the future claims representative and the threshold decision whether the future claims representative is merely a professional or more closely akin to a fiduciary.

In Amchem, supra, the Supreme Court addressed the problem of future claimants in the context of settlement class actions. The Court held that a settlement class of asbestos claimants must meet all the requirements for certification under Rule 23(a) and (b), with the sole exception of trial manageability. In so holding, the Court emphasized that the presence of different categories of future claimants raised a large obstacle to finding adequacy of representation, a necessary finding for class certification. The Court's discussion made it clear that the problem was not limited to Rule 23, but included constitutional dimensions.

In Amchem, the Court rejected a proposed nationwide settlement of thousands of asbestos claimants. The Court held that the class representatives and their attorneys did not meet the Rule 23(a)(4) adequacy of representation requirement because of conflicts of interest. Those who were presently ill wanted a large present recovery. Those who were exposed but had no manifest symptoms, one category of future claimants, had a conflicting interest in preserving assets for future claims. The Court raised doubts that those who did not even know that they had been exposed to asbestos could ever be given constitutionally sufficient notice. However, such claimants have an identifiable interest in preserving sufficient assets far into the future to respond to the most delayed manifestations of illness.

After Amchem, courts and parties have addressed the problem of cohesiveness in determining whether adequacy of representation can be assured for the purpose of Rule 23.

Courts have relied upon subclasses, with separate representation for each discrete group, to avoid problems of conflicting settlement goals and disparate interests that would otherwise defeat Rule 23 certification. For example, courts have attempted to create subclasses, and appoint separate representatives for each subclass, of presently injured and exposed but not yet injured groups, who require measures to assure that assets are available in the future to respond to later manifestations of symptoms; of groups for whom medical monitoring is the only present relief; and of groups that have similar types of present symptoms, who require the availability of an appropriate amount of assets in the present to respond to present symptoms. The success of these efforts has varied. In some cases, the courts have found that proposed classes present such diversity of interests that adequacy of representation cannot be achieved even with subclasses and separate representatives. See, e.g., Walker v. Liggett Group, Inc., 175 F.R.D. 226 (S.D. W. Va. 1997) (refusing to certify for settlement a proposed class of past and present cigarette smokers, their families and estates, those exposed to secondhand smoke, and those who paid medical claims). Other courts have relied upon subclasses for different types of claims, particularly to separate out future claims, with separate representatives, to achieve cohesiveness and adequacy of representation. See, e.g., O'Connor v. Boeing N. Am., Inc., 185 F.R.D. 272, 275-76 (C.D. Cal. 1999); Cook v. Rockwell Int'l Corp., 181 F.R.D. 473 (D. Colo. 1998). However, since Amchem, courts appear to recognize that those who do not even know that they have been exposed and could be class members in the future cannot be provided notice or adequate representation under Rule 23, even in a separate subclass certified as part of a settlement class.

Can this problem be solved in the context of bankruptcy? As already suggested in the

preceding sections of this report, the solution, if there is one, must rest with the creation of a future claims representative who has a reasonably specific idea of whom she represents and has the power to do so adequately. So armed, the future claims representative for the class of exposed but not yet ill claimants should attempt to create as large a fund as possible to protect those who move from a quiescent to an active condition. Such a future claims representative must also administer that fund so as to assure that the fund is protected into the future and will grow to meet increasing demands. Also, the future claims representative must pay out funds only under specifically enumerated circumstances, to be agreed upon at the creation of the fund.

While that pay-out itself might be considered an administrative task, depending upon the nature of the qualifications imposed upon the claimants, the duties imposed on the future claims representative are, under the Commission's proposals, fiduciary in nature. The fiduciary relationship is much like that between the administrator of an ERISA plan and beneficiaries under that plan. Many of the already established principles of insurance law and ERISA law could be applied to the future claims representative as criteria governing the responsibility for amassing and preserving the fund, administering the fund, and paying claimants from the fund. In order to insure the integrity of the fund in the most efficient manner, the future claims representative should be regarded from the outset as a fiduciary.

As the Commission also recognizes, it is necessary for a separate future claims representative to be appointed for each separate class if a separate fund is required. The same reasons that require the creation of subclasses under Rule 23 require the creation of separate funds for groups with disparate interests with respect to those funds, with different representatives that have undivided loyalties -- the hallmark of the fiduciary.

It is also vital that each future claims representative be empowered to vote on a plan of reorganization on behalf of his class of future claimants, with the number of votes determined by the reasonably estimated amount of the future claims. The difficulties inherent in giving a group of existing creditors more power than future creditors can be avoided if they are treated in the same fashion.

A future claims representative possessing these powers and particulars may possibly avoid the due process objections earlier described. To draw again on the analogous principles from insurance and ERISA law, the presence of presently unknown claimants does not necessarily defeat or alter the ability to represent such interests, consistent with fiduciary obligations. The fiduciary nature of the responsibility the future claims representative owes the class of claimants represented is analogous to the responsibility of the insurance adjustor to the policy holder or the ERISA administrator to beneficiaries. The point here is not to specifically list all the powers and responsibilities of the future claims representative but to suggest that there are sources of familiar and developed principles from which the duties and responsibilities could be derived and applied.

3. Estimation*

It has been suggested that the bankruptcy process is appropriate for disposition of mass tort claims, in part, because Section 502(c) of the Bankruptcy Code allows for estimation of

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Marcia S. Krieger, U.S. Bankruptcy Judge, D. Colo., and the Hon. Jed S. Rakoff, U.S. District Judge, S.D.N.Y.

present and future tort claims. However, as presently written, the function of Section 502(c) is so limited that, without modification, it would offer little benefit in a mass tort context. This is one of the reasons why, if bankruptcy is to play a successful role in resolving mass tort litigations, the Commission's proposal for estimation, or something akin to that proposal, should be enacted.

Section 502(c) of the Bankruptcy Code provides:

> (c) There shall be estimated for purpose of allowance under this section----
>
> (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or
>
> (2) any right to payment arising from a right to an equitable remedy for breach of performance.

Section 502(c) is intended to facilitate allowance of claims against a bankruptcy estate. It permits the court to estimate the amount of a contingent or unliquidated claim for purposes of distribution of estate assets to the claimholder. Once the claim has been estimated, the estimated amount can be used to determine the holder's vote for or against a proposed Chapter 11 plan. (Acceptance by a class of creditors requires that a majority in number and at least 2/3 in the amount of claims actually voting vote to accept.) Because claims are payable in accordance with the statutory hierarchy, senior claims must be satisfied (by payment in full or acceptance by class) before payment of junior claims. Estimation of contingent or unliquidated claims thus fixes the amount necessary to satisfy such claims (or classes of claims), and therefore when junior claims can be paid. Ordinarily, a contingent or unliquidated debt is scheduled by the debtor, but for such a claim to be allowed, the claimholder must timely file a proof of claim. Once the proof of claim is filed, the claim can be estimated upon notice to the claimholder.

Future claims are, by nature, unliquidated and in some instances may be contingent. The

debtor may schedule such claims by group designation, but it is unlikely that they will be scheduled individually. Without identification of the claimholder(s), the claimholder(s) will receive no individual notice of the bankruptcy case, likely will not file a proof of claim, and will not receive notice of and therefore will not participate in the estimation process.

The recommendations of the Commission do not solve all these problems, but they do mitigate many of them. Recommendation 2.1.3 proposes amending § 502 to expressly empower the bankruptcy court to estimate mass future claims and determine the amount of mass future claims prior to confirmation of a reorganization plan for purposes of distribution as well as allowance and voting. Recommendation 2.1.4 proposes expanding § 524 to authorize courts to issue in all cases involving future claims so-called "channeling injunctions," which would prohibit future claimants from pursuing any of the debtor's present or future assets other than those specifically designated assets that, as part of the plan of confirmation, had been placed into a trust to be administered by the future claims representative for the payment of future claims.

Although these two recommendations would resolve or reduce many of the legal problems described above, they are not without difficulties of their own. The multiple contingencies inherent in the Commission's definition of future claims make it very difficult to estimate the dollar amount of future claims with a high degree of confidence; and, indeed, the limited experience with such estimation thus far (chiefly in the context of asbestos bankruptcies) has been that the actual amount of future claims has sometimes materially exceeded both the estimated amounts and the value of the assets put aside for their satisfaction. But the Commission's recommendations expressly provide that future claims will only apply to liabilities that are "reasonably capable of estimation," see 2.1.1(5), and the Subcommittee would expect

that this would be applied much as in the insurance industry to estimate insurable risks but exclude as uncovered those risks too diffuse or speculative to be reasonably estimated.

Channeling injunctions, by effectively placing a "cap" on the amount of money available to future assets, are also vital if meaningful reorganization is to occur to a company confronting a mass torts problem. But at the same time placing such a cap on recovery may mean that difficult questions will arise as to whether preference should be given to certain kinds of future claimants over others; and it may also mean that some distant future claimants may not realize any recovery at all (although, because of statutes of limitations, see infra, this may be a small group). As previously noted, the Subcommittee believes these problems (as well as due process problems) can be reduced if the "cap" thus created is subject to periodic reconsideration in light of new information and experience. It should also be noted that channeling injunctions can also be used for other positive purposes, such as mandating arbitration of future claims.

With experience, moreover, the extent of the problems sketched above should be reduced. As the Commission points out, while the future claims estimates made in the Johns-Manville case proved woefully inadequate, the trust established in the subsequent A.H. Robins case turned out to be, if anything, over-funded. Inherent in the bankruptcy approach to mass torts is the recognition that all kinds of creditors, including future tort claimants, will recover less than they would be entitled to in the absence of all other creditors, and the problem of estimation, while difficult, is essentially just a variation on that theme.

4. Statutes of Limitations and Repose*

The Commission's recommendations do not address the issue of whether future claimants should be entitled to seek payment from the estate (or trust created by the plan) when their claims would have been denied under state law because of the expiration of the state's statute of limitations. This Subcommittee, however, is of the view that state statutes of limitation should determine the enforceability and therefore the allowability of claims in bankruptcy.[5] Stated otherwise, if the victim had a cause of action that could have been pursued under state (or if applicable, other federal law), and that cause of action expired before bankruptcy, that victim should be precluded from asserting a claim against a bankruptcy estate. The approach is consistent with the interaction between bankruptcy and non-bankruptcy law in general,[6] and there is no sound reason to alter this principle as it applies to claimants in a mass tort bankruptcy case.

Integrated into the concerns about affording future claimants due process is the issue of whether state statutes of limitations should apply. The main objective of these recommendations is to balance the concerns of procedural due process with finality and with the predictability of estimating the number of claimants and extent of claims.

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Dennis Montali, U.S. Bankruptcy Judge, N.D. Cal.

[5] 11 U.S.C. § 502(b)(1) provides in pertinent part: "[T]he court . . shall determine the amount of such claim. . . as of the date of filing of the petition, and shall allow such claim in such amount, except to the extent that . . .such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law."

[6] In most circumstances, a "claim" arises for bankruptcy purposes when the event or conduct giving rise to liability occurs, though injury is manifested post-petition. In re Jensen, 995 F.2d 925, 928-30 (9th Cir. 1993); Grady v. A.H. Robins, 839 F.2d 198, 201 (4th Cir. 1988), cert. dismissed, 487 U.S. 1260 (1988).

It should be acknowledged that, depending on the type of the cause of action, the state statute of limitations may be difficult to apply. For catastrophic events, the victims will likely be readily aware they have a claim, although the exact extent may be unknown. For personal injuries caused by mass torts, the discovery rule generally applies: the claimant's rights are triggered when he or she knows or should have known that his/her rights existed. The clearest situation involves a present tort claimant with manifested personal injuries that directly relate to the tortious conduct or product. For other types of claims, such as claims based on breach of contract, state law statutes of limitation seem relatively easy to apply. For example, the date payment on a note is due readily triggers the running of time in which the holder may sue.

A more difficult situation is presented when the prospective plaintiff (much like the victim of a classic mass tort who experiences no symptoms) has no way of knowing a claim exists as of the date the prospective defendant files bankruptcy. Take the situation of a developer of real property, or a contractor or architect who works on the project, who negligently performs services that result in latent defects. The California statute of limitations for suits against such a party runs ten years after the conduct took place, regardless of discovery of the injury.[7] Is it a denial of due process for state law to bar a claim before the claimant knows of the claim? Apparently the California legislature favors finality.

On the assumption that such a statute of limitations could survive a constitutional challenge, there does not appear to be a reason to make a different rule in bankruptcy. If the

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[7] California Code of Civil Procedure § 337.15 bars actions based upon a "latent deficiency" after ten years from substantial completion, except in cases of fraudulent concealment or wilful misconduct. "Latent deficiency" is defined in the statute to mean "not apparent by reasonable inspection."

developer files for relief nine years after completing the project, the homeowner who is yet to discover the defect should be allowed to file a claim, assuming that homeowner can discover it in time. The real problem comes along when the homeowner (with or without knowledge of the developer's bankruptcy) has no reason even to suspect that something was done negligently nine years earlier. If the court confirms a plan that says nothing about the class of homeowners who bought latently defective homes but do not know it, it seems as though post-confirmation it would be best to let state statutes of limitations control. If the developer files eleven years after completion, then state law would bar the claim regardless of when it is discovered.

If, instead of a single home, the developer builds 10,000 homes, all with lead-based paint as a primer, -- now the developer faces mass tort litigation and files for bankruptcy under the provisions contemplated by the National Bankruptcy Review Commission. But we see no reason why the same principles regarding choice and application of statutes of limitations should not apply.

Possibly the most difficult application of the state statute of limitations in the mass tort context arises in a case of an insidious tort, such as toxic torts, where injuries may be latent for a period of years. See The Fairness and Constitutionality of Statutes of Limitations for Toxic Tort Suits, 96 Harv. L. Rev. 1684 (May 1983). Where appropriate, notice procedures should be applied so as to reach those claimants to which the "should have known" branch of the discovery rule applies, and to give them an opportunity to participate. While it may still be impossible to achieve total fairness, this would minimize unfairness and accord with minimal due process (see section on due process, supra).

Although applying state law statutes of limitations to claimants against bankruptcy

estates in a mass tort case may be complex and may lead to different results in different states, it is consistent with interpretation of the bankruptcy code generally, and promotes the goal of finality in bankruptcy litigation. By inherently limiting the pool of claimants, it minimizes the "floodgate" problem, and properly discriminates in favor of legitimate claimants.

5. Conflicts of Interest and Inappropriate Incentives*

A forceful and independent future claims representative is critical to the Commission's approach. The question therefore arises as to what safeguards can be created to prevent a mass tort future claims representative from colluding with, or simply being overswayed by, counsel for present claimants and debtors.

It should first be noted that the classic kind of collusion said to arise in certain "prepackaged" bankruptcies is very unlikely to arise in mass tort bankruptcies involving future claim representatives. The term prepackaged bankruptcy applies to plans where the negotiations and solicitation of acceptance occurred before commencement of a chapter 11 case. Sandra E. Mayerson, Current Developments in Prepackaged Bankruptcy Plans, 804 PLI/Comm 979, 981 (2000). Although the term has also been used sometimes to apply to "hybrids where all or part of the plan has been negotiated prepetition and/or certain but not all creditors have been solicited prepetition," id., the essence of a "prepack" is that most or all of the negotiation and solicitation occurs prebankruptcy and therefore is presented to the Court as a fait accompli. A future claims representative, however, would always be appointed after the bankruptcy petition has been filed.

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* This portion of the Subcommittee's report was primarily drafted by the Hon. Jack B. Schmetterer, U.S. Bankruptcy Judge, N.D. Ill.

Because that additional party would be interjected, any prebankruptcy agreements among other parties could be challenged, and the future claim representative would often have a fiduciary duty to do so. By contrast, without that new party the "prepack" collusion would not likely be challenged. Therefore, appointment of a future claims representative would likely reduce rather than enhance collusive or otherwise unfair arrangements in "prepack" cases.

This is not the end of the issue, however. Some articles have expressed concerns regarding possible conflicts of interest or other inappropriate incentives to which a future claims representative might be subject, see, e.g., Frederick Tung, The Future Claims Representative in Mass Tort Bankruptcy: A Preliminary Inquiry, 3 Chap. L. Rev. 43 (2000); Hon. Edith Jones, Rough Justice in Mass Future Claims: Should Bankruptcy Courts Direct Tort Reform, 76 Tex. L. Rev. 1695 (1998). For example, Judge Jones writes in pertinent part:

> In bankruptcy, as in future claims class actions, the claimants are absent, invisible, and passive, creating room for exploitation in several ways. The class representative, delegated extraordinary exclusive power under the proposal to file and compromise class claims, operates without the supervision or control of real clients. Because the claims themselves are not concrete, but rather amorphous and conjectural, the representative's bargaining position is weak. The representation of future claims thus carries with it a tendency toward conflicts of interest. There is no vigorous check on a class representative's accepting a settlement that provides generous fees for the representative but modest relief for the class. A conflict may arise if the representative undertakes to settle claims of both present and future "future" claimants. In short the Commission proposal offers no protection analogous to "[t]he adequacy inquiry under Rule 23 [which] serves to uncover conflicts of interest between named parties and the class they seek to represent."

Jones, 76 Tex. L. Rev. at 1713.

The concerns raised by Prof. Tung and Judge Jones stem from their asserted apprehension that the future claims representative would be an agent without a principal. They contend that

conflicts of interest are inherent in representation of this type. Both authors are skeptical as to whether the future claims representative mechanism would truly provide zealous representation for future claimants when those persons would have no role in choosing or monitoring their agent. Tung, at 67. In addition, the debtor and creditors might initiate the process of whom to appoint, as well as terms of the appointment, of the future claims representative, Tung, at 61 and 67, even though debtors and creditors as moving parties would have interests in likely conflict with those of future claimants. (See Amchem, supra).

But the actual Commission recommendation 2.1.2. urges that any "party in interest" have standing to petition for appointment of the future claims representative. While the U.S. Trustee is not defined by statute or rule as a "party in interest," that officer is allowed under the Code to "raise . . . appear and be heard on any issue . . ." (except filing of a plan). 11 U.S.C. § 307. Therefore, the U.S. Trustee could initiate a motion to appoint the future claims representative and nominate the person to be appointed, and this Subcommittee recommends this approach since the U.S. Trustee has no financial interest at stake and would likely be viewed as a source of objective recommendations. Furthermore, this Subcommittee would favor a further modification of the Commission's recommendations to make explicit that the Bankruptcy Court itself is expected to play an active role in both the selection and the supervision of the future claims representative. Finally, of course, the future claims representative should be required to make the same kind of disclosures regarding possible conflicts of interest as is required for any professional to be employed by a trustee or debtor-in-possession under Rule 2014(a) Fed. R. Bankr. P. See Resnick, supra, 148 U. Pa. L. Rev. at 2078-79.

The other point of concern expressed is that the bargaining power of the future claims representative would be weak because future claimants and their losses are abstract and prospective, while competing present claimants and their losses are concrete and present. Tung, at 75; Jones, at 1713. Moreover, within bankruptcy cases involving mass torts, there is a culture that values consensual reorganization. Lawyers for different interests in large cases may have to "forego strict enforcement of their clients' legal entitlements in order to achieve consensus." Tung, at 73. The future claims representative must operate in this culture, and because future clients are abstract and conceptual, she may be vulnerable to group pressure to compromise interests because the other players have clients to answer to.

On the other hand, as Prof. Tung recognizes, under the Commission's proposals the future claims representative would have an extraordinary amount of independence to resist such pressure. Tung, at 75. Moreover, as described above, the Subcommittee would favor increasing the powers of the future claims representatives even beyond the Commission's recommendations.

As mentioned in section 1.B, supra, the future claims representative is in some respects called upon to play a role akin to the classic role of a guardian appointed to protect minors or future interests. While the use of such a representative is not without possible problems, see Hon. Sheila Murphy, Guardian Ad Litem: The Guardian Angels of our Children in Domestic Violence Court, 30 Loy. U. Ch. L.J. 281 (1999); David M. Johnson, The Role of the Guardian Ad Litem; Changes in the Wind, 27 Colo. Law 73 (1998), state courts using such appointments have recognized that the alternative of leaving the future interests and minors unprotected by a representative could result in little or no protection of their interests, see id. Critics of the

Commission's future claims representative proposal have not shown why difficulties in use of such representatives in bankruptcy would justify doing nothing to appoint a champion for future claims merely because that champion might not be perfect.

Giving the future claims representative economic motivation has also been suggested as one way to create a further safeguard of independence. Giving that party a financial stake in recovery by future claimants might provide the greatest incentive to maximize recovery, as by compensation giving a percentage of the amount held back for future claimants. Tung, at 78. One concern expressed in creating a compensation arrangement of this sort, however, is that the future claims representative might "unreasonably" scuttle a deal in hopes of obtaining more for he future claimants and thereby increasing the representative's personal compensation. On balance, the Subcommittee is unpersuaded that the economic incentive approach is either necessary or helpful.

In sum, while appointment of a future claims representative is not a perfect solution, in the absence of such a representative the other parties are free to collude with each other without adequately considering future claims of unrepresented parties, leaving only the judge and U.S. Trustee to question projection of future needs, without benefit of an adversarial presentation by someone charged with concern for the future. The recommendation to add a future claims representative provides a check on collusive or self-interested behavior by others, an imperfect check, but a check nonetheless.

Conclusion

This report is not intended to be a comprehensive discussion of every issue raised by the

Commission's proposals but rather a selective discussion of some of the more prominent issues. Overall, however, the Subcommittee believes that, while the Recommendations of the National Bankruptcy Review Commission do not solve all the problems inherent in dealing with the thorny thicket of future claims, they are an important step in the right direction.

Respectfully submitted,

Subcommittee on Mass Torts

Hon. Jed S. Rakoff, Chair
Hon. Marcia S. Krieger
Hon. Larry J. McKinney
Hon. Dennis Montali
Hon. Marjorie O. Rendell
Hon. Lee H. Rosenthal*
Hon. Jack B. Schmetterer**

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* Liaison from the Advisory Committee on Civil Rules

** Liaison from the Committee on Federal-State Jurisdiction

Appendix

1997 Recommendations of the National Bankruptcy Review Commission for Amendments to the Bankruptcy Code Regarding Mass Torts

2.1.1 Definition of Mass Future Claim

A definition of "mass future claim" should be added as a subset of the definition of "claim" in 11 U.S.C. § 101(5). "Mass future claim" should be defined as a claim arising out of a right to payment, or equitable relief that gives rise to a right to payment that has or has not accrued under nonbankruptcy law that is created by one more acts or omissions of the debtor if:

1) the act(s) or omission(s) occurred before or at the time of the order for relief;
2) the act(s) or omission(s) may be sufficient to establish liability when injuries ultimately are manifested;
3) at the time of the petition, the debtor has been subject to numerous demands for payment for injuries or damages arising from such acts or omissions and is likely to be subject to substantial future demands for payment on similar grounds;
4) the holders of such rights to payments are known or, if unknown, can be identified or described with reasonable certainty; and
5) the amount of such liability is reasonably capable of estimation.

The definition of "claim" in section 101(5) should be amended to add a definition of "holder of a mass future claim;" which would be an entity that holds a mass future claim.

2.1.2 Protecting the Interests of Holders of Mass Future Claims

The Bankruptcy Code should provide that a party in interest may petition the court for the appointment of a mass future claims representative. When a plan includes a class or classes of mass future claims, the Bankruptcy Code should authorize a court to order the appointment of a representative for each class of holders of mass future claims. A mass future claims representative shall serve until further order of the bankruptcy court.

The Bankruptcy Code should provide that a mass future claims representative shall have the exclusive power to file a claim or claims on behalf of the class of mass future claims (and to determine whether or not to file a claim), to cast votes on behalf of the holders of mass future claims and to exercise all of the powers of a committee appointed pursuant to section 1102. However, a holder of a mass future claim may elect to represent his, her, or its own interests and may opt out of being represented by the mass future claims representative.

The Bankruptcy Code should provide that prior to confirmation of a plan of reorganization, the fees and expenses of a mass future claims representative and his or her agents shall be administrative expenses under section 503. Following the confirmation of a plan of reorganization, and for so long as holders of mass future claims may exist, any continuing fees and expenses of a mass future claims representative and his or her agents shall be an expense of the fund established for the compensation of mass future claims.

The Bankruptcy Code should provide that a mass future claims representative shall serve until further orders of the bankruptcy court declare otherwise, shall serve as a fiduciary for the holders of future claims in such representative's class, and shall be subject to suit only in the district where the representative was appointed.

2.1.3 Determination of Mass Future Claims

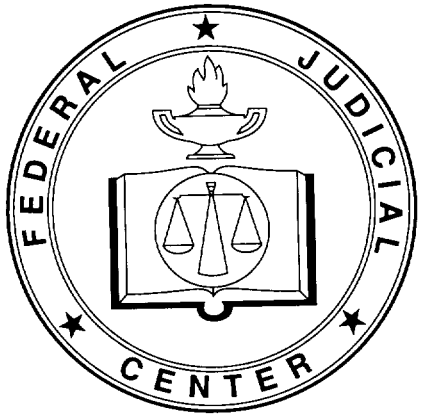
Section 502 should provide that the court may estimate mass future claims and also may determine the amount of mass future claims prior to confirmation of a plan for purposes of distribution as well as allowance and voting. In addition, 28 U.S.C. § 157(b)(2)(B) should specify that core proceedings include the estimation or determination of the amount of mass future claims.

2.1.4 Channeling Injunctions

Section 524 should authorize courts to issue channeling injunctions.

2.1.5 Plan Confirmation and Discharge; Successor Liability

Sections 363 and 1123 should provide that the trustee may dispose of property free and clear of mass future claims when the, trustee or plan proponent has satisfied the requirements for treating mass future claims. Upon approving the sale, the court could issue, and later enforce, an injunction to preclude holders from suing a successor/good faith purchaser.



A Qualitative Study of Issues Raised by the Discovery of Computer-Based Information in Civil Litigation

Preliminary Report

Molly Treadway Johnson
Kenneth J. Withers
Meghan A. Dunn

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Introduction and Background

Since the fall of 1999, the Federal Judicial Center (FJC) and the Discovery Subcommittee of the Advisory Committee on Civil Rules ("the Subcommittee") have sought to learn more about discovery of computer-based information in civil litigation. Among other things, the Subcommittee is considering whether to propose amendments to the Civil Rules to accommodate distinctive issues raised by discovery of computer-based information. FJC research staff have conducted a multi-part study to help inform the Subcommittee's consideration of these issues and to shed light more generally on the problems and advantages that arise as discovery of computer-based evidence becomes more commonplace in civil litigation. This report presents an overview of that study and preliminary results. A final report will be prepared for the fall 2002 meeting of the Committee.

The Subcommittee did not ask the FJC to obtain precise base rate information about the frequency with which discovery of computer-based information occurs—both because it is evident that such discovery will increase, and because the need for potential rule changes need not hinge on the absolute frequency of occurrence of discovery of this type of evidence. Instead, the Subcommittee wanted to gain a better understanding of the nature of specific problems relating to computer-based discovery, including (but not limited to) issues concerning preservation or spoliation or computer-based evidence; costly, "heroic" efforts to retrieve computer-based information for purposes of discovery; the use of computer experts to assist with computer-based discovery; and privilege waiver in the context of computer-based discovery. A more thorough understanding of how these issues arise and are handled in individual courts or cases will help the Subcommittee determine whether rules changes are warranted. An underlying question concerns the extent to which computer-based information is qualitatively different from more traditional hard-copy evidence.[1]

In this preliminary report, we present descriptions of and results from three research approaches used in the study: a survey of magistrate judges,

[1] The Subcommittee has requested that FJC Research Associate Kenneth J. Withers undertake a separate "white paper" on this topic, which is forthcoming.

designed to learn about their experiences with computer-based discovery and to obtain suggestions of cases illustrating various computer-based discovery issues to study in greater depth; a survey of computer consultants who are frequently hired to assist in cases involving discovery of computer-based evidence; and a detailed set of case studies of selected cases involving computer-based evidence, the results from three of which are presented in this preliminary report. Because the study is by design not based on data representative of all experiences with computer-based discovery in federal civil cases, no general conclusions about federal court experience with such discovery can be drawn from these results. The data do, however, provide some insight into both the frequency of federal court experience with computer-based discovery and the nature of some of its associated problems and advantages.[2] Our final report will include some additional analyses of the data already obtained as well as detailed descriptions of the remaining cases selected for the case study.

Summary of Preliminary Findings

In summary, to this point we have found:

- About 3 out of 5 magistrate judges who handle discovery disputes have had a case in which a question surrounding discovery of computer-based evidence was brought to their attention;

- The most frequent case types in which computer-based discovery issues reportedly arise are employment cases with individual plaintiffs, general commercial litigation, and intellectual property cases. These types of cases, particularly the first two, are also relatively frequent in the general population of case filings.

[2] Because the committee is interested in whether rule changes are warranted to accommodate discovery of computer-based evidence, our investigation focuses mostly on problems raised by such discovery. We have also, however, gathered some data on instances in which the computer-based nature of certain evidence provided an advantage over traditional hard-copy discovery.

- The activities or problems most frequently reported regarding computer-based discovery include: the hiring of computer experts by one or more parties; problems regarding inadvertent disclosure of privileged computer-based information; on-site inspection of a party's computer system by an opposing party; and the sharing of costs between parties to retrieve computerized information.

- Based on the three completed case studies (of the ten we plan to do), there may be differences between magistrate judges' and attorneys' views of the need for rule changes. The rules changes suggested by participants to date range from allowing the producing party to specify the form of production to providing for sanctions to issue, including the cost of a computer expert, when the expert is able to find computerized information that is claimed to be unavailable by an opposing party.

Research Approach

In this and the following sections we describe how we surveyed magistrate judges and computer consultants and undertook the case studies, and then provide preliminary results.

1. Survey of Magistrate Judges

After consulting with Subcommittee members, in spring 2000 FJC staff designed a brief questionnaire asking magistrate judges about their experiences with discovery of computer-based information.[3] In addition to asking about the extent of their experience with such issues and the types of problems they had encountered, the questionnaire also asked for suggestions of cases with computer-based discovery issues that might warrant further attention as case

[3] We restricted the survey to magistrate judges because we (and the Subcommittee) believed they would have more experience with computer-based discovery than district judges and would be more likely to respond to the questionnaire.

studies. The questionnaire was computerized, with button boxes and scroll-down menus for responses, and placed on a web page maintained by the FJC (see Appendix A for a copy of the questionnaire).

In May, 2000, Tom Hnatowski of the Magistrate Judge's Division of the Administrative Office provided us with a list of all magistrate judges subscribed to the division's listserv (428 total), which sends mass mailings of e-mail messages from the division to all magistrate judges subscribed to the listserv. Although not all magistrate judges subscribe to the listserv, more than 80% do subscribe, and that proportion was deemed sufficient for the purposes of this research, particularly since we were not necessarily seeking information representative of the experience of all magistrate judges.

On June 14, 2000, we sent a message via the listserv, over the names of District Judge David Levi and Magistrate Judge John Carroll, asking recipients to visit the web page and fill out the questionnaire. Altogether, we received 120 responses to the survey, for a response rate of 28%. Ten of these responses were not subjected to further analysis, either because the judge did not complete the questions in the questionnaire, or because the judge had no experience handling discovery disputes of any kind.

Follow-up survey. Because the low response rate to the Web-based survey made it difficult to interpret the results, particularly with respect to the frequency of magistrate judge experience with computer-based discovery[4], we sent a one-page follow-up questionnaire to the non-respondents, asking them why they did not respond. The follow-up survey specifically asked whether one reason for non-response was that the respondent did not have experience with computer-based discovery.

Of the 314 non-responding magistrate judges who were mailed the follow-up survey, 236 responded, for a response rate of 75%. This means that, across both surveys, we received responses from 85% of the magistrate judges to whom

[4] In particular, we suspected that magistrate judges who had no experience with computer-based discovery might have chosen not to respond to the first questionnaire, causing the results we did receive to over-estimate the extent of magistrate judge experience with computer-based discovery.

the original listserv message had been sent on the question of whether they had experience with computer-based discovery.

2. Survey of Computer Consultants

In 2001 FJC research staff undertook a survey of consultants in the fields of computer forensics and electronic discovery. The survey solicited general information about the work the consultants had done on behalf of clients involved in federal civil litigation. It asked about the types of cases in which the consultants had been hired and the nature of the computer-based discovery issues they encountered in those cases. This survey was undertaken in part to solicit more cases for the in-depth case study, and in part at the behest of the Subcommittee to see if experiences with computer-based discovery issues reported by consultants were similar to that of magistrate judges as reported in response to our magistrate judge survey. Because of this, the questions were was designed to parallel the questions asked in the magistrate judges survey as closely as possible.

Consultants who work in the area of electronic discovery are not organized in any professional body or trade association, and do not have any authoritative professional certifications or training programs that would help us identify the population as a whole. However, before this survey was contemplated, FJC research staff came into contact with a number of computer consultants while studying the issue of electronic discovery through articles, conferences, and professional networks. The consultants maintained contact with the FJC and each other through an informal but active electronic discussion group called "CFED," for Computer Forensics and Electronic Discovery.

The FJC research staff used the CFED membership list to distribute the survey, which was a simple word-processing questionnaire (see Appendix B). On September 4, 2001, the survey was sent by email to all 57 CFED members on the list at that time, representing 38 consulting firms or agencies. The response over the next three weeks was poor, with only four completed questionnaires returned, possibly due to the intervening events of September 11, 2001. On

September 27 the survey was distributed again, resulting in ten additional responses.

Of the total of 14 responses (representing 25% of the CFED individual membership and 36% of the organizational membership), only ten were useable. Three responses were from CFED members outside of the United States with no federal case experience, and one respondent did not have access to the information requested. Of the ten useable responses, two explicitly stated that their answers would be limited, as they operated under confidentiality agreements or court orders preventing them from sharing information. Based on informal discussions with other CFED members, we suspect that others might not have responded for that reason.

3. Case Studies

As mentioned previously, the Subcommittee is most interested in a more thorough understanding of how various computer-based discovery problems are manifested in specific cases, rather than an estimate of their absolute frequency. FJC staff designed a study to look at selected cases illustrating these issues in detail. Study of each case involves reviewing and coding the court files and interviewing the participants (attorneys and judges) who were most intimately involved with the discovery of computer-based evidence in each case.

a. Identification of potential cases for study.

We have used several methods to identify cases that might be appropriate for more in-depth study. First, the magistrate judge survey asked for nominations of appropriate cases, and 15 cases were nominated by responding judges. Second, we reviewed published case law on the topic, which yielded five possible additional cases. Third, at the Brooklyn mini-conference sponsored by the Subcommittee in October 2000, we solicited suggestions of cases from the attendees. Although we followed up this solicitation with an e-mail reminder, no suggestions were forthcoming from mini-conference participants. Fourth, we asked for nominations from the computer discovery consultants surveyed, and received one additional case. Finally, we sent letters to several organizations and

individuals asking them to help identify possible additional cases. These individuals and organizations include nearly 50 Texas state bar leaders, the Federal Bar Association's Litigation Section, and products liability chairpeople of the following organizations: American Bar Association; Federal Bar Association; American Corporate Counsel Association; Federation of Insurance and Corporate Counsel; Defense Research Institute; and Association of Trial Lawyers of America. None of these organizations has nominated a case for study.

Two additional cases were nominated from communications with individuals involved in other case-study cases. Altogether, through these various methods, we identified 23 cases for possible in-depth study.

b. Selection criteria.

We used the following criteria to ascertain whether an identified case was appropriate for inclusion in the case study:

- The case was closed.
- The judge(s) and most of the attorneys involved were willing to talk with us about the computer-based discovery issues in the case;
- Most or all of the relevant documents from the case file were available to us (i.e., not under protective order or seal);
- Discovery occurred relatively recently, so that participants' memories would be fresh and their files available for reference.

To the extent possible, we also strove to include cases that together displayed a range of computer-based discovery issues, case size, and geographic locations.

c. Further review of nominated cases.

A few of the cases suggested for the case study were clearly inappropriate for further study, as they were not closed or likely to close in the near future, or the attorneys involved were highly unlikely to cooperate in the research. For the

remaining cases nominated, we used commercial databases of federal docket records to download the dockets for review. In addition, we conducted preliminary interviews with 19 judges or their representatives about the nominated cases, to glean more information about the appropriateness of the case for in-depth study. From this further review, we labeled cases as either "Green," "Yellow," or "Red" with respect to their appropriateness for our case study, as defined by the selection criteria set forth above. Ten cases were identified as "Green," seven as "Yellow," and two as "Red." The "Green" cases generally met our selection criteria, and the judge assigned to the case believed it was worthy of further study and that the attorneys would cooperate. They covered a range of case types and computer-based discovery issues of interest to the subcommittee.

Cases rated "Yellow" or "Red" normally received that rating either because the discovery in the case was still pending or the judge indicated that the litigation was very contentious and the attorneys probably will not speak with us. Even though we might not do interviews in those cases, however, examination of the publicly-available documents from them might still yield information of interest to the Subcommittee.

Results

1. Survey of Magistrate Judges

The results of the magistrate judge survey reported in this section include the 110 magistrate judges who responded to our electronic survey and reported that they do handle discovery disputes.

a. Percentage of responding judges with experience handling computer-based discovery disputes.

According to the combined results of our Web-based survey and the follow-up survey, about 60% of magistrate judges experienced a case raising computer-based discovery issues in the two years preceding our surveys.

If we add the judges who indicated on the Web-based survey that they have no experience with computer-based discovery (29) with the judges who indicated the same in response to the follow-up survey (111), we find that 39% of our respondents report that they have not had experience with computer-based discovery in their cases in the two years preceding the study.[5] Thus, it appears that approximately three out of five magistrate judges have had experience with computer-based discovery issues in civil cases.

Note that this information does not directly indicate the frequency with which computer-based discovery presently occurs in civil cases. District judges do not always choose to delegate the handling of discovery disputes to magistrate judges, and many computer-based discovery issues could be handled by attorneys without being brought to the attention of the presiding judge. What the data tell us at minimum, however, is that computer-based discovery occurs in more than just a tiny proportion of cases, and the majority of magistrate judges have had cases in which such discovery has been brought to their attention.

b. Types of cases in which disputes involving computer-based discovery arise.

We asked magistrate judges to report how many cases of various case types they had handled in which discovery of computer-based evidence had been brought to their attention. We then calculated the proportion of responding magistrate judges who reported having at least one case of each case type that involved computer-based discovery. Table 1 shows, for each case type, what proportion of responding magistrate judges reported having a computer-based discovery issue arise in at least one case of that case type.

[5] Normally it is not sound research practice to combine results from separate surveys. In this instance, however, we surveyed the same population on the same topic in the two surveys, and thus report them together on the limited question of the extent of magistrate judge experience with discovery of computer-based evidence.

Table 1. Percentage of Responding Magistrate Judges Who Reported Handling at Least One Case of Selected Case Types that Involved Computer-Based Discovery Issues (N=81).

Case Type	% of Magistrate Judges reporting at least one case of this case type that raised computer-based discovery issues
Employment – Individual plaintiff	59
General commercial litigation	55
Patent/Copyright	44
Employment – Class action	25
Products liability	24
Other	23
Construction litigation	10
Securities litigation	10
Antitrust	8

Although the respondents to our questionnaire might not completely represent all magistrate judges, the large differences in relative frequency in the above table suggest that computer-based discovery is brought to a magistrate judge's attention in certain types of cases—particularly employment cases involving an individual plaintiff, general commercial litigation, and patent/copyright cases—with greater frequency than in other types of cases. These types of cases, particularly the first two, are relatively frequent in the overall case population of the federal courts as well, so it is not clear from these results that they involve computer-based discovery issues to a disproportionate

extent.[6] "Other" case types that were identified by respondents included personal injury tort, breach of contract, qui tam, insurance, and toxic tort cases. None of these case types, however, was identified by more than three respondents.

c. Types of computer-based discovery issues most often brought to the attention of the magistrate judge.

We asked magistrate judges to report how many cases they had had in which particular issues relating to computer-based discovery had occurred. The next table indicates how many magistrate judges reported having experienced each issue or activity at least once, and what percentage of cases overall (across all respondents) were reported to have included each issue.

Table 2. Frequency of Computer-Based Discovery Issues Brought to the Attention of Magistrate Judges (N=81).

Issue	% of respondents with at least one case with this issue	% of total cases reported involving this issue
Hiring of computer experts by one or more parties	69	25
Problems regarding privilege waiver when computerized information was produced	49	15
On-site inspection of a party's computer system by an opposing party	48	15

[6] A more detailed analysis of how the case types reported in our surveys compare to the overall distribution of case types in federal courts will appear in our final report.

Table 2. Frequency of Computer-Based Discovery Issues (cont.).

Issue	% of respondents with at least one case with this issue	% of total cases reported involving this issue
Sharing of costs required to retrieve computerized information between the party requesting the information and the respondent	48	15
Alleged spoliation (intentional or inadvertent destruction of evidence) of computer-based information by one or more parties	47	13
Issuance of preservation order forbidding deletion of e-mail or other computer-based information	35	10
Sharing of costs resulting from the format for production (e.g., requests to produce in hard copy as well as electronic form)	35	9
Substantially increased efficiency in discovery due to the computer-based nature of the information	21	13

As shown in Table 2, more than two-thirds of responding magistrate judges with computer-based discovery experience report having been involved in at least one case in which a computer expert was hired, making that activity by far the most frequent. Of all the cases with which respondents reported having computer-based discovery experience, a quarter had involved the hiring of computer experts.

Four situations—privilege waiver problems, on-site inspection of a party's computer system by the opposing party, alleged spoliation, and sharing of costs of retrieval between parties—had been experienced by about half of the magistrate judges responding to the survey, and two situations—issuance of a preservation order and sharing of costs concerning format of production between parties—had been experienced by about one-third of respondents.

Fewer than a quarter of responding magistrate judges reported having had experience with a case in which the efficiency of discovery was substantially increased due to the computer-based nature of the information. Because most of the survey was answered only by magistrate judges who reported handling disputes related to computer-based discovery, however, this percentage likely underestimates the frequency of cases in which computer-based discovery increases or has no effect on efficiency and no problems are raised by it.

2. Survey of Computer Consultants

The results of the survey reported in this section are limited to the ten consultants who returned questionnaires with useable data. These results are labeled "preliminary," as many of the respondents either did not complete their questionnaires or responded in ways that made interpretation and tabulation difficult. Follow up with this group may be necessary if the Subcommittee believes that more reliable data from them is necessary for the final report.

a. Number of cases handled by consultants.

Of the ten useable responses, the number of civil cases in which these consultants are involved per year varied tremendously, from one to 400. The average was 85 cases per year. The wide range reflects the wide variety of consultants involved in this field, from individual computer investigators working alone or in very small firms, to computer forensics and electronic discovery departments of large accounting and data management firms, to nationwide electronic discovery firms with multiple offices and scores of employees.

Computer-based discovery consultants are used in both state and federal litigation. The percentage of respondents' cases litigated in federal court varied from consultant to consultant, from zero to 85%. The average was 38%. There was no discernable relationship between the total number of cases handled by a firm and the percentage of those cases litigated in federal courts.

b. Types of cases in which computer forensics and electronic discovery consultants are involved.

Computer-based discovery consultants are involved in many different types of federal civil cases. Their involvement is not confined to those types conventionally considered "big cases," such as antitrust or employment class action. The types of cases in which consultants report most frequent involvement correspond roughly with the types of cases in which the magistrate judges most frequently report disputes, although we cannot draw any cause-and-effect inferences. Any cause-effect relationship could go in either direction: the presence of disputes could create the need for consultants, or the hiring of consultants could produce disputes (or a third factor could affect both the use of consultants and the presence of disputes).

In our survey, we asked the consultants to report how many federal cases of various case types they worked on in the past two years. We then calculated the total number of cases they reported and the percentage of that total for each case type represented. Some of the respondents did not provide a number, but simply checked off the case type. We counted those responses as "1" for tabulation purposes. Table 3 ranks the case types by the frequency reported by the consultants.

Table 3. Frequency of federal case type involvement reported by computer forensics and electronic discovery experts.

Case Type	Number of instances reported by consultants (N=191)
General commercial litigation	59 (31%)
Employment – Individual plaintiff	34 (18%)
Securities litigation	34 (18%)
Patent/Copyright	33 (17%)
Antitrust	11 (6%)
Products liability	7 (4%)
Construction	4 (2%)
Employment – class action	3 (2%)
Other	6 (3%)

"Other" case types identified by respondents include criminal investigations (hacking, child pornography, and counterfeiting), intellectual property, trade secrets, and trade secret theft.

Although it is difficult to make direct comparisons between the results of the two surveys, three of the four most frequent case types reported by the consultants are the same as those reported by the magistrate judges in Table 1. Again, these are case types that are relatively frequent on the federal docket in general. The consultants report a higher frequency of cases in the securities and

antitrust areas than the judges, and a lower percentage of employment class action cases.

c. Types of computer-based discovery issues encountered by consultants

Like the magistrate judges, the consultants report being involved with many different issues relating to computer-based discovery. The two groups reported encountering the problems with different frequencies, perhaps reflecting the different roles that consultants and magistrate judges play in civil litigation and the different relationships they have to the day-to-day conduct of discovery. This may also indicate that the problems most often encountered by the consultants in the day-to-day conduct of discovery are being resolved by the parties without resort to the court.

We asked the consultants to report how often they encountered particular issues or activities relating to computer-based discovery in the federal cases in which they were involved. We then calculated the percentage of cases involving each issue. The table below indicates how often each issue arose relative to the other issues listed. The total number of issues or activities reported is larger than the total number of cases reported, as each case may involve several issues. Again, when respondents simply checked off an issue instead of reporting a frequency, we counted that response as "1" for tabulation purposes.

Because of differences in the wording of the two surveys, the list of issues presented in Table 4 differs from the list of issues presented in the survey of magistrate judges and reported in Table 2. Direct comparison of these two sets of results is therefore difficult. Still, some comparisons can be made that point to common elements in both sets of results. Such comparisons are discussed after Table 4.

Table 4. Frequency of computer-based discovery issues encountered by computer forensics and electronic discovery consultants.

Issue	Frequency reported by consultants (N=496)
An effort by one party to limit or prevent deletion of e-mail or other computer-based information by another party, pending discovery	151 (30%)
A demand for on-site inspection of a party's computer system by an opposing party	92 (19%)
An offer or demand to share costs required to locate and retrieve computerized information	78 (16%)
Alleged spoliation	52 (10%)
An ex parte order from the court forbidding deletion on e-mail or other computerized information by the other party, pending discovery	27 (5%)
An offer or demand to share costs of production	25 (5%)
An order from the court requiring that the party seeking production of computer data pay all or part of the costs of production	30 (6%)
Problems regarding the inadvertent disclosure or production of privileged computerized information	23 (4%)
A request that the court impose sanction on a party for alleged misconduct in discovery of computerized information	18 (4%)

The consultants and the magistrate judges both report relatively high frequency of three issues or activities: on-site inspection, efforts to share computer-based discovery costs, and allegations of spoliation. The issue most

frequently encountered by the magistrate judges (aside from the presence of the consultants themselves) is problems with privilege waiver, reported in 15% of cases. Consultants report experience with inadvertent disclosure (privilege waiver) in only 4% of cases, although this difference in reported frequency may be because privilege waiver is primarily a legal issue, which consultants would not necessarily be privy to. Similarly, data preservation efforts – which would not necessarily require judicial intervention - are reportedly encountered in 30% of the consultants' cases, while the magistrate judges report that issue in only 10% of cases.

We also asked the consultants to add any electronic discovery issues they have encountered that are not specifically listed. Problems identified by consultants that were not specifically mentioned in the list include: difficulty acquiring data from obsolete systems that are no longer present; late hiring of consultants, minimizing the time for their analysis of computerized information; inadvertent destruction of evidence due to parties' lack of understanding of computer systems; discovery produced on defective computer media or in a form that cannot be read by the opposing party; and other problems related to clients' lack of understanding of computer system functioning.

3. Case Studies

We identified ten of the cases nominated as "Green," meaning that after preliminary reviews we determined that we are able to proceed with our study. For all ten of these, we have reviewed the dockets, selected relevant public filings, and received copies of these documents from the courts. We have coded the documents in six of the cases. Interviews have been completed in three of the cases, and are ongoing in one other. This section provides descriptions of the three cases for which document review and coding and all interviews have been completed. To give the Subcommittee and Committee an idea of what might be expected in the final report, Table 5 lists all case-study cases, including the general nature of the case, the apparent computer-based discovery issues involved, and the status of our study of the case.

Table 5. Status of case-study cases.

Type of case	Computer-based discovery issues raised (preliminary assessment)	Status
Automobile loan fraud/class action	Attorney work product; data preservation	Completed
Antitrust	Problems with obsolete computer systems; data preservation/spoliation; hiring of experts	Completed
Patent infringement	Form of production; privileged information	Completed
Patent validity	Use of email to establish personal jurisdiction	Documents coded, interviews in progress

Table 5. Status of case-study cases (cont.).

Type of case	Computer-based discovery issues raised (preliminary assessment)	Status
Trade secret theft	On-site inspection of computers	Documents coded
Patent infringement	Scope of discovery	Documents coded
Securities class action	Access to email, privilege claims	Documents received
Trademark infringement	Spoliation	Documents received
Commercial insurance class action	*Ex parte* data preservation order, access to business database, privilege claims	Documents received
Breach of software development contract	Access to email files	Documents received

Preliminary Descriptions of Completed Cases

Of the four magistrate judges interviewed thus far for our study of selected cases, three believed no rule changes are necessary to accommodate specifically discovery of computer-based evidence. Of the seven attorneys interviewed to this point, six suggested the rules be changed to acknowledge specifically this type of discovery.

Specific rule changes suggested by case-study participants include: allowing a party who believes computerized information is being hidden by an opposing party to hire a computer expert to search for the information, with sanctions to issue if the information is found by the expert; allowing an attorney who creates a database solely for his own purposes to not disclose the existence of such database to the other party; in suitable cases, allowing a court to require that all discovery be done in electronic form; and allowing a producing party to specify the form of production.

Case Study #1

I. Summary of Case.

This was a class action involving allegations of automobile loan fraud against a car dealer and lender under RICO and the Federal Debt Collection Practices Act. Smaller defendants settled out early, leaving the lender. The case was extremely contentious, with multiple hearings on the computer-based discovery issues and several intermediate appeals, although it eventually settled.

II. Computer-based discovery issue(s).

a. Access to attorney work product data; preservation of data in the ordinary course of business.

The primary computer-based discovery dispute in this case centered on an electronic database maintained by the defendant's law firm. The database

contained certain fields of information relevant to the case that had been extracted from hard-copy files about each loan (e.g., vehicle I.D. number, date of repossession). Plaintiffs filed a motion to compel production of this database. The defense attorney claimed that he had created the database for his own use in preparing the case, and not for use at trial, and therefore it should not have to be turned over to the plaintiffs, since the same information was available in hard-copy form.

Plaintiffs asserted that at least some of the information in defendant's electronic database had been computerized before the litigation began, and therefore was not attorney work product. In support of their motion to compel, they cited defendant's response to an earlier request for the electronic data, in which the defendant said that producing the information requested would be too burdensome, as defendant had been through at least three computer systems since the time the electronic data had begun being entered, and that much of the data had been destroyed in the ordinary course of business. At that time, defendants had further argued that it would be a "Herculean" task to determine which specific information had and had not been deleted from the original databases on these various computer systems.

Plaintiffs argued that, despite defendant's claim that the information could not be retrieved, defendant was using the same data in a related case as evidence in support of a motion for summary judgment. The defendant admitted that some of the information had previously been computerized, but claimed that those computerized records had been destroyed in the ordinary course of business before litigation began, and that the data used in the related case were from the database compiled from hard-copy files by defendant's attorney. Plaintiffs disputed the claim that the information was no longer available in computerized form.

The magistrate judge handling discovery in the case ordered that the database created by the attorney be filed under seal for *in camera* inspection, and subsequently denied the motion to compel, finding the that database fell within attorney work product. He apparently did not credit plaintiffs' argument that the original electronic databases were still in existence.

b. Cost savings and efficiencies from using computer-based data to determine class size.

In May 2000, this case came before a different magistrate judge for a settlement conference. During this conference, the settlement judge determined that "a major problem prohibiting settlement of this matter is the inability of either side to discuss, with clarity, the precise size of the class." At this point, both parties had developed electronic databases concerning various loan transactions from the hard-copy files maintained by the defendant. The settlement judge ordered the parties to share specific data from these databases that were relevant to determining class size. With the exchange of these databases, the parties were able to identify several hundred claimants about which there was no dispute in terms of their entitlement to compensation, as well as a number of claims for which more evidence was needed.

c. Cost and usefulness of party-employed computer experts.

When the motion to compel production of defense counsel's electronic database was denied, the plaintiffs hired accounting experts to create electronic databases using information extracted from the hard-copy files. According to the plaintiffs' attorney, they spent $100,000 for this work, likely increasing the cost of discovery by "a factor of 8 to 10." The defense also hired a computer consultant, who reviewed the database created by plaintiffs to determine "whether there were any problems with how that database was put together." Both sides reported that, although the use of experts/consultants increased the cost of discovery significantly, the cost was justified by the assistance the consultants provided.

III. General Observations by Participants.

a. Magistrate Judge Who Handled Discovery Disputes.

The magistrate judge who handled discovery in this case and denied the plaintiffs' motion to compel said that "there was nothing about the fact that the

discovery was in computer form that affected my decisions, [though] that's not to say counsel weren't motivated by that."

b. Magistrate Judge Who Handled Settlement.

The magistrate judge who held the settlement conference in this case and ordered the parties to exchange electronic data to determine class size says that "the case could not have settled if the information was not available in computerized form," and that the computer-based nature of the evidence "facilitated their ability to deal with the claims." In a situation like this, he indicated, computerized discovery is "a means for attorneys to save a lot of time."

c. Plaintiffs' Attorney.

1. *Work product/preservation of data issues.* The plaintiffs' attorney did not believe defendant's claim that the electronic database that previously contained the information fields plaintiff was interested in no longer existed, and had been destroyed in the ordinary course of business prior to the litigation. He observed that "the 'defense du jour' is to say the computerized information no longer exists," adding that "it's very hard to disprove a claim that information doesn't exist in electronic form."[7] This attorney also believed that the magistrate judge who oversaw discovery did not completely understand the computer issues in the case, and that his failure to understand the issues led to his denial of the plaintiff's motion to compel: "They put just enough computer language gibberish in their memorandum of law, so that the judge just threw his hands up. Judges don't understand these computer issues."

2. *Use of computer-based data to determine class size.* With respect to the electronic data exchanged during settlement negotiations, the plaintiffs' attorney

[7] The same could be said of hard-copy data, but the attorney did not comment on whether one type of claim was more difficult to prove than the other.

said that the computerized nature of the evidence "absolutely" had an effect on the ability to settle the case: "We couldn't try to settle without information from the database."

d. Defendant's Attorney.

1. *Work product/preservation of data issues.* At the hearing on the motion to compel, the defense attorney argued that the contents of his electronic database were analogous to notes taken by an attorney on a yellow legal pad while reviewing hard-copy files. When interviewed, he acknowledged that one difference between these two situations would be the extent to which the information compiled could be searched.

The defendants' attorney believed that he should not have had to disclose the existence of the electronic database he created, since he had no plans to use it at trial. He had "erred on the side of disclosing its existence," but resented that he had to do this, as he believed the database was attorney work product. As he described it, "The plaintiffs very effectively used that database as a touchstone for the theme that we were hiding things."

2. *Use of electronic data to determine class size.* On the use of electronic data to determine class size, the defendant's attorney agreed that these data were "absolutely" critical to settlement of the case: "It enabled us to determine with clarity that there were very few people actually in the class. This substantially affected settlement."

IV. Role of Federal Rules.

Both of the attorneys interviewed, but neither of the magistrate judges, believed that modifications to the rules would have helped in this case.

1. *Plaintiffs' attorney.* The plaintiffs' attorney believes that the rules should contemplate that a party who is told that [electronic] records can't be retrieved should be able to hire computer experts – by rule – and "go into the [other

party's] computer operations." If he finds the data that were claimed to be unavailable, sanctions should issue, including the costs of the computer consultants. He did not specify how he believed such a rule change should be implemented.

2. *Defendant's attorney.* The defense attorney, who created the electronic database at issue in this case, believes that the rules should provide that an attorney who prepares a database for his own purposes (and not for use at trial) should not have to disclose its existence.

3. *Settlement judge.* The magistrate judge who oversaw settlement said that the current discovery rules were adequate in terms of allowing him to order the exchange of electronic information to determine class size. He does not see a need for rules changes to accommodate these situations, even where the computerized nature of the evidence clearly plays a large role in settling the case.

Case Study #2

I. Summary of Case.

This was an antitrust case in which a collection of independent boat builders accused the defendant of monopolizing the market for certain boat engines, engaging in unreasonable restraint of trade, and substantially reducing competition in the engine market. Because of the nature of the suit, many documents were filed under seal in order to preserve the confidentiality of company business plans. After three years of discovery, the case went to trial, and the jury ruled in favor of the plaintiffs. The judgment was overturned on appeal, however, by the 8th Circuit Court of Appeals on issues unrelated to the subject of discovery.

II. Computer-Based Discovery Issue(s).

a. Volume of email requested and legacy issues/spoliation.

The majority of the computer-based discovery disputes in this case centered around the scope of discovery, and primarily focused on email. In response to plaintiffs' motion to compel all email files, including current and backups, the magistrate judge proposed a questionnaire to determine how many of the defendant's employees transmitted discoverable information via email. Those employees who responded "yes" or "maybe" on the questionnaire were ordered by the magistrate judge to retain all email.

While the email questionnaire was being constructed and completed, the magistrate judge ordered a spot check of the computer systems of 15 defendant employees to determine whether the defendant had provided plaintiffs with all the relevant electronic materials. The spot check encompassed all of the computer files (including sent and received email) of the named employees, excluding only the privileged matter (the defendant was permitted to screen all materials for privileged matter, and maintain a privilege log). As a result of this spot check, several business-related emails were found, leading plaintiffs to claim that the defendant had withheld and destroyed relevant emails during the

original document sweep; the plaintiffs asked for a spoliation instruction for the jury. The defendant countered by stating that they had switched from one email system (Fisher) to another (Lotus Notes) while discovery was taking place. Because the new email system was easier to operate, it was used for business-related communication, whereas the previous email system had not been. It was those Lotus emails that were uncovered in the spot check, and the defendant claimed there was no evidence that the missing Fisher emails had contained business-related information.

The district court judge ruled that, while it seemed likely many things on the defendant's Fisher email system had been destroyed, those emails were unlikely to be highly significant because the system was more cumbersome than its replacement and therefore was rarely used for business-related email. The request for a spoliation jury instruction was denied, as the judge ruled that the deletion of email "was not the result of an intentional or bad faith effort to destroy evidence," and that "even if the deleted emails were relevant to the Plaintiffs' case, Plaintiffs have not suffered the requisite prejudice necessary for the giving of an adverse inference instruction." Further email discovery was permitted on a limited basis – the defendant was ordered to search the existing Fisher system for responsive emails, but was not required to restore backup tapes to search for deleted Fisher emails.

b. Preservation of data in the ordinary course of business.

In response to the plaintiffs' motion to compel production of electronically stored information, the magistrate judge ordered the defendant not to destroy electronically stored materials. After the defendant argued that preserving every piece of electronic information constituted an undue burden, the magistrate judge narrowed the preservation order, permitting the "destruction of irrelevant material or materials whose cost of preservation substantially outweighs their relevance". Plaintiffs also requested that the defendant restore and produce all deleted and destroyed documents from the past 5 years; this motion was denied by the magistrate judge.

c. Role of the court in managing discovery.

The magistrate judge played an active role in managing the discovery. Although he became involved in the case relatively late, he educated himself about the computer issues involved and held a one-day computer "summit" involving both sides' attorneys and computer experts. During the summit the parties explained what they wanted from discovery and the technical problems involved in answering the discovery requests. The summit resulted in the formulation of a general plan for conducting further computer-based discovery. Thereafter regular telephone conferences between the lawyers from both sides and the magistrate judge were held to resolve discovery issues.

d. Cost and usefulness of party-employed computer experts.

The plaintiffs brought in outside computer experts to help frame their discovery by providing guidance about what materials to request from the defendant. A computer forensics expert was also brought in by the plaintiff to testify about the discovery disputes regarding computer data. The expert planned to testify that the defendant had deleted relevant email and that a search of the old email system should have been done earlier, thereby preventing the destruction of potentially relevant messages. The defendant objected to the use of the plaintiffs' expert in testifying at trial about matters relating to discovery, and brought in its own outside expert to rebut the plaintiffs'. The district judge denied the defendant's motion to strike the plaintiffs' expert, but forbade the expert from talking about the destruction of email without making it relevant to the substantive issues in the case.

III. General Observations by Participants.

a. Magistrate Judge.

The magistrate judge who handled discovery thought that the use of computer-based information was "a double-edged sword" in this case. On the one hand, the electronic discovery made a massive case more manageable, and

"the plaintiffs got more information and a jury verdict, which they probably wouldn't have done in the paper days. There would have just been too much paper for the jury to digest". On the other hand, difficulties arose because some of the computer-based information "was not as well organized as it might have been."

Volume of email/spoliation. According to the magistrate judge, alleged spoliation of computer-based information was a "big problem" with regard to email, largely because of the defendant's change in email systems. As he stated, the defendant "allegedly destroyed vitally important emails. They had changed their email systems around this same time, and maintained that they had preserved the relevant email. A spot check proved inconclusive, and the plaintiffs were not able to demonstrate that the missing information would have been discoverable."

Role of the court in managing discovery. The magistrate judge stressed the importance of early disclosure by the parties and early intervention by the court. He reported that in a subsequent case involving computer-based discovery, he took a lesson from this case, got involved much earlier, and "managed the dickens out of it."

b. Plaintiffs' Attorneys.

Two plaintiffs' attorneys were interviewed regarding this case; both had similar opinions about the computer-based discovery issues.

Volume of email/spoliation. Obtaining potentially deleted emails from the Fisher system was a "serious problem that was never really resolved." One attorney stated that, despite the defendant's claim that the Fisher system was not used to conduct business, "we got at hundreds of relevant email," that had been printed out, "but not enough". The email question highlighted one of the differences between computer-based discovery and traditional paper-based discovery: "when it is electronic information [you are asking for], one side can come up with all sorts of reasons why they cannot provide that information, and

the courts will listen to that argument. Once you get past that issue, however, the disputes that arise apply to both computer-based and hard-copy documents."

Role of the court in managing discovery. Both attorneys praised the magistrate judge's handling of discovery, stating that the weekly conferences to "hash out a lot of the problems" were "very useful". One said the magistrate judge was "really excellent", and did an admirable job of understanding what the computer issues were.

Cost and usefulness of computer experts. The plaintiffs relied on outside consultants to help the plaintiffs' attorneys frame discovery: "what to ask for and how to define it, how to understand whether the responses we got from the defendant were excuses or real reasons, and how to 'unlock' electronic discovery." While the outside consultants were expensive, both attorneys agreed that they were "definitely" worth the money and "probably didn't add significantly to the overall cost" of the case. In-house consultants were also used, but on a smaller scale and in a more limited capacity, "primarily helping to find purchase records" on personal computers.

c. Defendant's Attorney.

Volume of email/spoliation. The defense attorney believed that the plaintiff relied disproportionately on computer-based discovery. Instead of using it to obtain all relevant information, the defense attorney believed the plaintiffs, "used electronic discovery to highlight email that was not produced and to make an issue of that." In his opinion, the expense and burden of discovery was disproportionate to its relevance; he claimed that the plaintiffs' strategy was to make the case one of spoliation, rather than a case on the merits. Part of the problem regarding the email situation was the relative recency of email as a means of communicating. The defendant's attorney acknowledged that, "now it's routine to look for email, but it wasn't then."

Role of the court in managing discovery. With regard to the court's role in managing discovery, the defense attorney believed that while the weekly telephone conferences solved many problems before they became overwhelming,

the availability of a forum for discovery disputes may have increased the number of disputes: "I think many things became issues because we had this ready forum, and without that forum, those things wouldn't even have come up."

Cost and usefulness of computer experts. The defendant used in-house computer consultants to determine "factual information", such as what data was on the computers, how backups were made and where they were stored, and how to resolve format issues. These in-house consultants were "definitely worth" their minimal cost, and were more useful than the outside consultant hired to rebut the plaintiffs' expert.

IV. Role of Federal Rules.

The district in which this case was handled was an opt-out district at the time, so no Rule 26(f) discovery plan was filed. Most participants (magistrate judge, defendant counsel, one plaintiff counsel) believe that a Rule 26(f) plan would have been beneficial in this case, and would have forced the parties and the court to think about discovery issues sooner.[8] Although the magistrate judge's handling of the discovery did this to some extent, a more formal rule may have gone farther.

a. Magistrate judge.

The magistrate judge recommended that the Federal Rules be changed to account "specifically for the discovery of computer-based information", though he did not specify how such a change could be made. He also believed that a Rule 26(f) plan would "absolutely" have helped in this case: "The case would have been ready earlier. It would have forced both parties to exchange information about computer systems earlier. As it was, neither side had a good grasp of what was there and how to get at it."

[8] Rule 26 no longer allows for opt-out districts, so if the case were filed now, a 26(f) plan normally would be required under the rules.

b. Plaintiffs' attorneys.

The two plaintiffs' attorneys had differing views on the role of the Federal Rules.

One attorney felt that having a Rule 26(f) plan covering computer-based discovery would have helped in this particular case by getting the court and the parties to think about these things "before disputes arise." He also felt that the federal rules governing discovery did not need to be changed to accommodate computer-based discovery because "the context varies so much that you really have to do things ad hoc", on a case by case basis. In his opinion, educating judges and magistrate judges to take a more active role is far more important.

The other plaintiff attorney took the opposite viewpoint, indicating that a Rule 26(f) plan would have been useless because "everyone skirts it". However, he did advocate altering the federal rules to "amend the definition of 'document' to specifically include computer-based items" and to spell out that "requests of email and electronic documents" are included under Rule 34.[9]

c. Defendant's attorney.

Although the defendant counsel indicated that a Rule 26(f) plan might have helped in this case, he also acknowledged that, "we had the equivalent of a plan with the judge's oversight, and it probably would have been contentious regardless of whether there was a rule." With regard to changing the federal rules, he observed that, "we would have benefited from a principle limiting what the plaintiff could ask for," but acknowledged the difficulty of imposing limitations before knowing what is available.

[9] Although "email and electronic documents" are not specifically mentioned in Rule 34(a)'s definition of documents, the phrase "...other data compilations" encompasses email and other electronic records, as clarified in the Committee Notes to the 1970 amendments to that section.

Case Summary #3

I. Case Summary.

This was a patent infringement case in which a computer manufacturing company claimed that the defendant's widely sold computer system violated several of the plaintiff's patents. Five years after the suit was filed, the plaintiff corporation was bought by another computer corporation, and the case eventually settled a year later. Although neither side admitted fault, the defendant paid the plaintiff an undisclosed sum, and both sides agreed on a five year moratorium on patent suits.

An examination of the docket indicates that most of the discovery disputes revolved around the scope of discovery. Specifically, the plaintiff requested documents regarding one of the defendant's computer systems, but the defendant claimed that the system had been announced after the date the suit was filed, and was therefore not included in the discovery. The magistrate judge denied the plaintiff's motion to compel, and denied the subsequent request for reconsideration.

II. Computer-based Discovery Issues.

a. Form of production.

The type of information sought during discovery led to disputes regarding the form of production. Much of the information regarding systems design needed during discovery was stored in large on-line databases. The plaintiff requested drawings of the defendant's relevant projects, but the defendant had no paper designs to exchange since their engineers did all of their work online. According to the defendant's attorney, "nothing was designed to be printed or downloaded onto a user-friendly file." The defendant eventually produced electronic files in a format the plaintiff could access, but the files were so large that a dedicated server was required.

Both sides also produced emails in both hard copy and electronic form; neither side indicated that this was particularly problematic.

b. Privilege/confidentiality.

Because the defendant's engineers created and modified their designs online, many of the designs contained privileged information in the form of engineers' notes. At the beginning of the discovery process, the magistrate judge issued an order establishing which document imaging and database services would deal with confidential documents for both sides, and how those services would treat those confidential documents.

Additionally, the defendant's attorney reported that a protective order provided for inadvertent production of privileged information, allowing either side to reclaim the information without it constituting a waiver of privilege.

III. General Observations by Participants.

a. Magistrate Judge.

The magistrate judge firmly believed that the problems that arose were not specific to electronic discovery. Overall, "the problems weren't electronic -- they were the same things we'd see in non-computer based discovery... and my approach was the same as it would have been in paper-based cases."

On the other hand, he felt that "there were fewer problems because it was computer-based." The fact that both parties were computer companies meant that they had computerized records, which in turn allowed for a more efficient exchange of documents. He hypothesized that "having all those documents electronically stored and retrievable, allowing immediate access, may have helped to settle the case."

Form of Production. There were, however, a few problems arising from form of production. The magistrate judge indicated that he "had to intervene a few times" to resolve issues when "electronic stuff had to be printed out and paper things had to be scanned." Additionally, one request from the defendant necessitated the plaintiff changing the format of the data before the defendant

could access it. The process was costly, and the magistrate judge "told the defendant they had to pay, since they requested the information."

Privilege/Confidentiality. Because of the nature of the case, there were many privileged documents involved. The magistrate judge issued orders to deal with problems as they arose, but felt that he would have done the same even if the discovery were completely paper-based: "There were some questions about confidential and highly confidential documents, but they were the same issues that would have arisen with paper-based discovery."

b. Plaintiff's Attorney.

Form of Production. In general, the plaintiff's attorney did not have many complaints about the computer-based nature of discovery in this case, but felt that having discovery items in different forms was "the most difficult problem...you can't deal with discovery if half of it is in hard copy and half is in computer-based form." To remedy this, the plaintiff expended time and money to make sure that everything was in electronic form, but was still wary about the process, saying "it was not so reliable that you could treat electronic discovery the same as you would paper discovery, because you knew at the back of your mind that there were always things that were not in the database." He cautioned, however, that the size of the case permitted him to devote more resources to the discovery phase than usual: "we couldn't normally do electronic discovery in such detail."

c. Defendant's Attorney.

Form of Production. Like the plaintiff's attorney, the defendant's attorney identified form of production as the biggest problem associated with discovery, although for a different reason. Much of the information that the plaintiff requested from the defendant was "in huge databases" that "were not designed to do what [the plaintiff] wanted them to do." Even supplying hard copies of this information was difficult, as there were many steps involved before the data reached the point where it could be printed out. The defendant encountered

problems with the magistrate judge with regard to this issue: "the magistrate judge had a hard time understanding why [the defendant] couldn't just print out the information...the courts have to understand that the systems are not designed to be printed out, and were not designed for litigation."

Privilege/Confidentiality. Confidentiality was another issue that the defendant's attorney had to address. When the magistrate judge wanted to give the plaintiff the ability to search through the defendant's systems, the defendant's attorney objected, saying "there are all sorts of trade secrets and privileged information [the plaintiff] could access, and [the defendant] would never allow it."

IV. Role of Federal Rules.

The participants had differing opinions about the role of the federal rules with regard to this case. Although there was no formal Rule 26(f) discovery plan, the magistrate judge reported that both parties "worked out the protocol among themselves for producing documents, and I intervened when there were any disagreements." This discovery plan did, according to the defendant's attorney, "vaguely cover computer-based discovery" in the sense that the parties worked out the protocol for electronic discovery issues.

Magistrate judge. The magistrate judge reported that, because of the volume of information involved, he played an active role in implementing the discovery plan formulated by the parties and intervened in times of disagreement. He had frequent meetings to keep on top of "any potentially delaying problems", which resulted in the parties attempting to work things out among themselves and avoid appearing before the magistrate judge. He did not believe that the current provisions of the federal rules had any effect on how computer-based discovery issues were handled in this case, and did not think that the rules needed to be changed to accommodate computer-based discovery.

Plaintiff's attorney. Like the magistrate judge, the plaintiff's attorney believed the current provisions of the federal rules neither helped nor hindered the way computer-based discovery issues in this particular case were handled. However, he did believe that the rules should be altered to take the form of production into account: "The most important thing to include in the rule is that the court can require that all discovery should be electronic for cases that are suited for it... It would make things more reliable, and the parties could be more confident that they had a complete set of discovery in electronic form."

Defendant's attorney. The defendant's attorney also believed that the federal rules should be changed to acknowledge form of production, but in a different way. The rules, he stated, "should allow the producing party the option of saying what form the information will be produced in, either hard-copy or electronic." Even a "draconian" rule would be helpful to the parties and the judge, because "at least you'd know what you were dealing with. In my experience, judges want something firm to look at."

APPENDIX A
SURVEY OF UNITED STATES MAGISTRATE JUDGES
JULY, 2000

(Authors' note: because this survey instrument was created in Lotus Notes and administered via the World Wide Web, this transcript does not capture the layout or functionality of the original. Buttons, drop-down menus and text boxes have been eliminated. All text has been transcribed in full.)

Federal Judicial Center
Research Division
SURVEY OF UNITED STATES MAGISTRATE JUDGES ON EXPERIENCES WITH DISCOVERY OF COMPUTER-BASED EVIDENCE

Thank you for participating in the Federal Judicial Center's survey on magistrate judges' experiences with discovery of computer-based evidence.

For purposes of this survey, "computer-based evidence" means information that was originally created on computers, such as e-mail, word-processed documents, business transaction data, etc.; or evidence that is currently stored on computers or computer-readable media, such as digital images of paper documents, digital voice or video recordings, etc.; or evidence that is best presented or manipulated on computers, such as animations, scientific models, financial databases, etc.

At the end of the questionnaire, you will be given an opportunity to provide open-ended comments about the topic.

1) In the past two years (since June 1998), have you been called upon to resolve disputes affecting discovery of any kind (not limited to computer-based discovery) in civil cases?

Please select one.

☐ No; I do not handle discovery disputes.

☐ Yes; I have had at least one civil case in which I have been asked to handle a discovery dispute.

In approximately how many cases has this occurred in the past two years?

If "No", please skip to Question #7.

2) In the past two years (since June 1998), have you had any civil cases in which an issue connected to the discovery of computer-based evidence was brought to your attention for action on your part?

Please select one.

☐ No; I handle some discovery disputes but have not had any issues involving discovery of computer-based evidence in the past two years.

☐ Yes; I have had at least one civil case in which such an issue was brought to my attention.

In approximately how many cases has this occurred in the past two years?

If "No", please skip to Question #7.

3) Please indicate in how many cases of each of the following case types discovery of computer-based evidence has been brought to your attention in the past two years. For example, if you have handled two antitrust cases in which such issues were raised, select the number "2" next to "Antitrust." Please select a number for each case type, even if that number is zero:

☐ Products liability

☐ Employment - Class action

☐ Employment - Individual plaintiff

☐ Antitrust

☐ Construction litigation

☐ General commercial litigation

☐ Securities litigation

☐ Patent/Copyright

☐ Other. Please specify:

4) Of the cases you indicated in response to question #2 (i.e., cases in which you have been made aware of discovery of computer-based evidence), in how many have the following occurred? Please enter a number next to each item, even if that number is zero:

☐ Issuance of preservation order forbidding deletion of e-mail or other computer-based information

☐ Alleged spoliation (intentional or inadvertent destruction of evidence) of computer-based information by one or more parties

☐ On-site inspection of a party's computer system by an opposing party

☐ Hiring of computer experts by one or more parties

☐ Problems regarding privilege waiver when computerized information was produced

☐ Sharing of the costs required to retrieve computerized information between the party requesting the information and the respondent

☐ Sharing of costs resulting from the format for production (e.g., requests to produce in hardcopy as well as electronic form)

☐ Substantially increased efficiency in discovery due to the computer-based nature of the information

5) Have you issued any orders that specify procedures or standards for discovery of computer-based evidence in a particular case that you would be willing to share with us? If so, please briefly describe the nature of the order(s).

6) Have you issued any standing orders that specify procedures or standards for discovery of computer-based evidence that you would be willing to share with us? If so, please briefly describe the nature of the order(s).

7) Does your district have any local rules or standing orders that specify procedures or standards for discovery of computer-based evidence? If so, please briefly describe the nature of the rules (with citations, if possible) or orders.

8) Are you aware of a case or cases in your district involving discovery of computer-based evidence that you think would be a good candidate for an in-depth case study by the Federal Judicial Center?

We are interested in cases in which discovery of computer-based information was handled well by the attorneys, and cases in which problems related to computer-based discovery occurred and may not have been handled as well, or cases in which experiences were mixed. In addition, it would be particularly useful if the case was terminated relatively recently, and if the judge(s) and the attorneys involved would likely be willing to respond to further inquiries about the case. We wish to include cases with magistrate judge activity as well as cases in which the district judge chose not to delegate discovery management to a magistrate judge.

☐ No; I am not aware of such a case.

☐ Yes; I am aware of a case or cases that I think would be appropriate for a case study.

If Yes, please provide the name and docket number of the case(s):

(1) Case Name:

Docket Number:

(2) Case Name:

Docket Number:

(3) Case Name:

Docket Number:

9) Would you be willing to be contacted by an FJC staff member for further inquiry about your experiences with discovery of computer-based evidence?

Please select one.

☐ Yes

☐ No

☐ Not applicable

10) Your Name: (required)

11) Your District:

Please note that your name and district information will be used only to determine the response rate to the survey and follow up with those who indicate a willingness to be contacted. If you do not wish to provide your name, please enter the numerical judge ID code assigned to you by the Administrative Office of the Courts.

12) If you wish to add any additional experiences or ideas from which you think the Advisory Committee might benefit as it studies issues related to discovery of computer-based evidence, please provide them here:

Thank you for your participation. Your responses will be very helpful to the Federal Judicial Center and the Discovery Subcommittee of the Advisory Committee on Civil Rules. If you have identified a case for study, or orders that you have issued and would be willing to share, we will follow up with you shortly. If you have any questions about the survey, please contact Ken Withers (202 502-4065, kwithers@fjc.gov) or Molly Johnson (315 824-4945, mjohnson@fjc.gov).

APPENDIX B
SURVEY OF COMPUTER CONSULTANTS

Electronic Discovery and Computer Forensics Experts and Consultants Survey August-September 2001

Name:

Organization:

On whose behalf are you responding? Please check one:

___ myself

___ my organization

PART ONE

1. In approximately how many **civil** cases per year are you retained by counsel or a court to consult or assist with computer-based discovery? _____

2. Approximately what percentage of these cases are in U.S. federal courts? _____

If you have not worked on any federal civil cases,
please stop here and return this questionnaire in the enclosed envelope.

3. In the past two years (since September 1999), approximately how many **federal** cases have you worked on in each of the following legal areas? *Please write a number next to each case type, even if that number is "0."*

___ Products liability

___ Employment - Class action

___ Employment - Individual

___ Antitrust

___ Construction litigation

___ General commercial litigation

___ Securities litigation

___ Patent/Copyright

___ Other (please specify):

4. In approximately how many of your **federal civil** cases in the past two years (since September 1999) have any of the following situations arisen? *Please write a number next to each situation, even if that number is "0."*

___ An effort by one party to limit or prevent deletion of e-mail or other computer-based information by another party, pending discovery

___ An *ex parte* order from the court forbidding deletion of e-mail or other computer-based information by the other party, pending discovery

___ A request that the court impose sanctions on a party for alleged misconduct in discovery of computerized information

___ Alleged spoliation (intentional or inadvertent destruction of evidence) of computer-based information by one or more parties

___ A demand for on-site inspection of a party's computer system by an opposing party

___ Problems regarding the inadvertent disclosure or production of privileged computerized information

___ An offer or demand to share the costs required to locate and retrieve computerized information (e.g., restoration of backup tapes or development of special search programming)

___ An offer or demand to share of costs of production (e.g., production of information in hard copy form or a particular data format)

___ An order from the court requiring that the party seeking production of computer data pay all or part of the costs of production

5. Are there any problems related to the discovery of computer-based information that you have frequently encountered, but are not mentioned in the above list? If so, please describe:

PART TWO

We would like your help in identifying federal civil cases involving the discovery of computer-based evidence that might be appropriate for inclusion in our in-depth case study project. We are interested in knowing about any case in which discovery of computer-based information played a significant role. In our study, we obtain and analyze all the court documents regarding discovery available to the public, and conduct interviews with the judge and with counsel for both sides. The goal is to shed light on whether the rules of procedure and the case management tools available were fair and adequate to deal with the electronic discovery issues raised, or whether new procedures should be considered. Members of the Advisory Committee have expressed particular interest in looking at:

* product liability cases involving significant computer-based discovery

* cases in which the judge considered or imposed sanctions for the withholding, mishandling, or destruction of computer data subject to discovery, and

* sample agreements, procedures, or protocols agreed to by the parties or ordered by the court for the conduct of computer-based discovery (whether or not the particular litigation is appropriate for the case study project).

If you are aware of any case(s) that might be appropriate for our case study, please provide the information requested below. If you wish, we will not identify you as the person who suggested this case for study.

1. Case name:

2. Court (federal district):

3. Approximate filing date:

4. Any comment on why you believe this case should be studied:

Please check one:

___ I do not wish to be identified as having suggested this case

___ I do not mind being identified as having suggested this case

(You may nominate multiple cases, if you wish.)

Thank you for your time.
Please return your completed questionnaire in the enclosed envelope to:

Kenneth J. Withers
Research Associate
Federal Judicial Center
One Columbus Circle NE
Washington DC 20002-8003

RULE 15 "RELATION BACK" ISSUE

C

United States Court of Appeals,
Third Circuit.

Dorothy SINGLETARY, individually, and as Administrator of the Estate of Edward Singletary,
v.
PENNSYLVANIA DEPARTMENT OF CORRECTIONS; S.C.I. Rockview Institution; Joseph
Mazurkiewicz, Superintendent of Rockview; Several Unknown Corrections
Officers, Dorothy Singletary, Appellant.

No. 00-3579.

Argued April 16, 2001.
Sept. 21, 2001.

Prisoner's mother brought section 1983 action against Pennsylvania Department of Corrections (PADOC) and its facility superintendent alleging that superintendent exhibited deliberate indifference to prisoner's medical needs. The United States District Court for the Middle District of Pennsylvania, Malcolm Muir, J., granted judgment for defendants. Mother appealed. The Court of Appeals, Becker, Chief Judge, held that (1) "shared attorney" method of imputing notice could not be applied to psychologist; (2) "identity of interest" method of imputing notice could not be applied to psychologist; and (3) mother failed to establish mistake in order that she might amend her complaint to include psychologist.

Affirmed.

West Headnotes

[1] Sentencing and Punishment 1533
350Hk1533 Most Cited Cases

[1] Sentencing and Punishment 1546
350Hk1546 Most Cited Cases

A prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety, claims of negligence or medical malpractice, without some more culpable state of mind, do not constitute "deliberate indifference." U.S.C.A. Const.Amend. 8.

[2] Federal Courts 817
170Bk817 Most Cited Cases

The Court of Appeals reviews for abuse of discretion a district court's decision granting or denying leave to amend a complaint. Fed.Rules Civ.Proc.Rule 15, 28 U.S.C.A.

[3] Federal Courts 870.1
170Bk870.1 Most Cited Cases

When reviewing the factual conclusions that a district court made while considering a motion to amend a complaint, the standard of review of the Court of Appeals is clear error. Fed.Rules Civ.Proc.Rule 15, 28 U.S.C.A.

[4] Federal Courts 763.1
170Bk763.1 Most Cited Cases

If a district court's decision regarding a motion to amend a complaint is based on the court's interpretation of the Federal Rules of Civil Procedure, review by the Court of Appeals is plenary. Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.

[5] Limitation of Actions 124
241k124 Most Cited Cases

The rule of civil procedure providing for amendment of a complaint can ameliorate the running of the statute of limitations on a claim by making the amended claim relate back to the original, timely filed complaint. Fed.Rules Civ.Proc.Rule 15(c), 28 U.S.C.A.

[6] Limitation of Actions 124
241k124 Most Cited Cases

Prejudice and notice are closely intertwined in the context of a motion to amend relating back to the original complaint since the amount of prejudice a defendant suffers is a direct effect of the type of notice he receives; once it is established that a newly named defendant received some sort of notice within the relevant time period, the issue becomes whether that notice was sufficient to allay any prejudice the defendant might have suffered by not being named in the original complaint. Fed.Rules Civ.Proc.Rule 15(c)(3), 28 U.S.C.A.

[7] Limitation of Actions 124
241k124 Most Cited Cases

Psychologist would have been unfairly prejudiced if court would have allowed prisoner's mother to amend complaint so that her claims against psychologist could relate back to filing of original complaint, since she sought $10,000,000 in various damages, the underlying events occurred more than four years previously, and the trial was scheduled to commence in a very short time. Fed.Rules Civ.Proc.Rule 15, 28 U.S.C.A.

[8] Limitation of Actions 124
241k124 Most Cited Cases

Under the rule of civil procedure which provides for a relation back amendment to a complaint, "notice" does not require actual service of process on the party sought to be added since notice may be deemed to have occurred when a party who has some reason to expect his potential involvement as a defendant hears of the commencement of litigation through some informal means; at the same time, the notice received must be more than notice of the event that gave rise to the cause of action, it must be notice that the plaintiff has instituted the action. Fed.Rules Civ.Proc.Rule 15(c)(3), 28 U.S.C.A.

[9] Limitation of Actions 124
241k124 Most Cited Cases

"Shared attorney" method of imputing notice could not be applied to psychologist to allow prisoner's mother to amend complaint to relate back to time when original complaint was filed, in lawsuit against Pennsylvania Department of Corrections (PADOC) and its facility superintendent alleging that superintendent exhibited deliberate indifference to prisoner's medical needs; attorney who wound up representing prison was not assigned to case until after relevant notice period had expired and prior attorney never represented psychologist. Fed.Rules Civ.Proc.Rule 15(c)(3)(A), 28 U.S.C.A.

[10] Limitation of Actions 124
241k124 Most Cited Cases

Under the rule of civil procedure which provides for relation back amendments, "shared attorney notice" occurs when an originally named party and the party who is sought to be added are represented by the same attorney, the attorney is likely to have communicated to the latter party that he may very well be joined in the action. Fed.Rules Civ.Proc.Rule 15(c)(3), 28 U.S.C.A.

[11] Limitation of Actions 124
241k124 Most Cited Cases

Under the rule of civil procedure which provides for a relation back amendment to a complaint, "identity of interest notice" occurs when the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other. Fed.Rules Civ.Proc.Rule 15(c)(3), 28 U.S.C.A.

[12] Limitation of Actions 124
241k124 Most Cited Cases

"Identity of interest" method of imputing notice could not be applied to psychologist to allow prisoner's mother to amend complaint to relate back to time when original complaint was filed, in lawsuit against Pennsylvania Department of Corrections (PADOC) and its facility superintendent alleging that superintendent exhibited deliberate indifference to prisoner's medical needs; psychologist was not high enough in the administrative hierarchy of the prison to share sufficient interests with any of the original defendants. Fed.Rules Civ.Proc.Rule 15(c)(3)(A), 28 U.S.C.A.

[13] Limitation of Actions 121(2)
241k121(2) Most Cited Cases

Prisoner's mother failed to establish mistake in order that she might amend her complaint to include psychologist who treated prisoner so that it would relate back to filing of original complaint to avoid statute of limitations, in lawsuit against Pennsylvania Department of Corrections (PADOC) and its facility superintendent alleging that superintendent exhibited deliberate indifference to prisoner's medical needs; although original complaint named "Unknown Corrections Officers," psychologist would have had no way of knowing that mother meant to name him. Fed.Rules Civ.Proc.Rule 15(c)(3)(B), 28 U.S.C.A.

[14] Limitation of Actions 124
241k124 Most Cited Cases

Fairness requires that a plaintiff be allowed to add newly named defendants relating back to an originally filed complaint when the newly named parties: (1) knew about the lawsuit within the relevant time period; (2) knew they were the ones

targeted; and (3) had the information as to their correct names but withheld that information from the plaintiff. Fed.Rules Civ.Proc.Rule 15(c)(3)(B), 28 U.S.C.A.

***189** Wayne A. Rodney, (Argued), Rodney & Associates, Philadelphia, PA, Counsel for Appellant.

D. Michael Fisher, Attorney General, Gregory R. Neuhauser, (Argued), Senior Deputy Attorney General, Calvin R. Koons, Senior Deputy Attorney General, John G. Knorr, III, Chief Deputy Attorney General Chief, Appellate Litigation Section, Office of Attorney General, Harrisburg, PA, Counsel for Appellees.

Before BECKER, Chief Judge, McKEE, Circuit Judges, and POLLAK, District Judge. [FN*]

FN* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

BECKER, Chief Judge.

This is an appeal from a grant of summary judgment for defendants Pennsylvania Department of Corrections (PADOC), State Correctional Institute at Rockview (SCI-Rockview), and former Superintendent of SCI-Rockview, Joseph Mazurkiewicz, in a 42 U.S.C. § 1983 civil rights lawsuit brought against them by Dorothy Singletary, the mother of Edward Singletary, a prisoner who committed suicide while incarcerated at Rockview. The plaintiff does not appeal from the grant of summary judgment for PADOC and SCI-Rockview. She does appeal the District Court's grant of summary judgment in favor of defendant Mazurkiewicz, but there is plainly no merit to this challenge for there is no evidence that Mazurkiewicz exhibited deliberate indifference to Edward Singletary's medical needs.

In her original complaint, the plaintiff also included as defendants "Unknown Corrections Officers." The only chance for the plaintiff to prevail depends on her ability to succeed in: (1) amending her original complaint to add as a defendant Robert Regan, a psychologist at SCI-Rockview, against whom the plaintiff has her only potentially viable case; and (2) having this amended complaint relate back to her original complaint under Federal Rule of Civil Procedure 15(c)(3) so that she overcomes the defense of the statute of limitations. Rule 15(c)(3) provides for the "relation back" of amended complaints that add or change parties if certain conditions are met, in which case the amended complaint is treated, for statute of limitations purposes, as if it had been filed at the time of the original complaint.

The District Court denied the plaintiff's motion for leave to amend because it concluded that the amended complaint would not meet the conditions required for relation back under 15(c)(3). Rule 15(c)(3) has two basic parts, both of which must be met before relation back is permitted. First, 15(c)(3)(A) requires that the party that the plaintiff seeks to add has received, within a certain time period, sufficient notice of the institution of the action that the party is not prejudiced. In addition to actual notice (which is not claimed here) Rule 15(c)(3)(A) cognizes two means of imputing the notice received by the original defendants to the party sought to be added: (i) the existence of a shared attorney between the original and proposed new defendant; and (ii) an identity of interest between these two parties. Second, 15(c)(3)(B) requires that the party sought to be added knew or should have known that, but for a mistake, the plaintiff would have named him in the original complaint.

We conclude that the District Court was correct in ruling that the amended complaint ***190** did not meet the notice requirements of Rule 15(c)(3)(A). The plaintiff cannot avail herself of the "shared attorney" method of imputing notice to Regan because the defendants' attorney was not assigned to this case until after the relevant notice period under Rule 15(c)(3). Furthermore, the "identity of interest" method is not open to the plaintiff because Regan was not high enough in the administrative hierarchy of SCI-Rockview to share sufficient interests with any of the original defendants.

The District Court also found that the plaintiff did not meet the requirement of Rule 15(c)(3)(B)--that Regan knew (or should have known) that, but for a mistake, the plaintiff would have named him in the original complaint. The correct legal interpretation of 15(c)(3)(B) is not settled, and it is unclear whether the plaintiff's original complaint, which included as defendants "Unknown Corrections Officers," meets 15(c)(3)(B)'s mistake requirement. More precisely, because the plaintiff simply did not know of Regan's identity, it is an open question whether failure to include him originally as a defendant was a "mistake"

under Rule 15(c)(3)(B). Resolution of the question whether lack of knowledge can constitute a mistake is important in civil rights cases. For example, a person who was subjected to excessive force by police officers might not have seen the officers' name tags, and hence would likely need discovery to determine the names of his attackers, although he cannot get discovery until he files his § 1983 complaint. If this person were prevented from having his complaint relate back when he sought to replace a "John Doe" or "Unknown Police Officers" in his complaint with the real names of his assailants, then he would have to file his complaint substantially before the running of the statute of limitations on his claim in order to avoid having his claim end up being barred. This would render the § 1983 statute of limitations much shorter for this person than it would be for another complainant who knows his assailants' names.

Although there seems to be no good reason for the Rules of Civil Procedure to treat two such similarly-situated plaintiffs so differently, in most Courts of Appeals the naming of "unknown persons" or "John Does" (the functional pleading equivalent of "unknown persons") as defendants in an original complaint does not meet 15(c)(3)(B)'s mistake requirement. In our one case to consider the issue this Court implied (though we did not squarely hold) that such "John Doe complaints" [FN1] do meet this mistake requirement. But even if the mistake requirement is met in this case, it is not at all clear that Regan knew or should have known that the original complaint would have included him since the complaint named "Unknown Corrections Officers," and Regan is a staff psychologist, not a corrections officer, at SCI-Rockview.

> FN1. For simplicity's sake, for the rest of this opinion we will refer to complaints that list as defendants "John Does," "Unknown Persons," or their functional equivalents as "John Doe complaints."

It is clear that the plaintiff does not meet Rule 15(c)(3)(A)'s notice requirement, and hence we need not decide the thorny issues outlined in the preceding two paragraphs. However, because the position taken by the other Courts of Appeals on Rule 15(c)(3)(B)'s "mistake" requirement would seem to lead to seriously inequitable outcomes, we suggest to the Judicial Conference Advisory Committee on Civil Rules that it amend the language of Rule 15(c)(3)(B) so as to clearly provide that the ***191** requirements of that section of the Rule can be met in situations in which the plaintiff seeks to replace a "John Doe" or "Unknown Person" with the name of a real defendant. As we further explain *infra* at note 5, such an amendment, which is supported by the weight of scholarly commentary, would make Rule 15(c)(3) fit more closely with the overall tenor and policy of the Federal Rules of Civil Procedure.

I.

Edward Singletary was serving a 6-12 year sentence at SCI-Rockview for his conviction of rape. In November 1995, Singletary was transferred to the maximum security restricted housing unit (MSRHU) of SCI-Rockview as a result of "threatening an employee or family with bodily harm." Over the next ten months, Singletary became increasingly agitated, acting hostilely to the staff and accusing them of tampering with his food and mail. During this period, Singletary was given chances to leave the MSRHU and re-enter the general population unit of SCI-Rockview, but he refused each time.

During his stay in the MSRHU, Singletary was seen weekly by a counselor, monthly by a three-person Program Review Committee, and by medical and psychological staff as needed. A staff psychiatrist, Dr. Abdollah Nabavi, prescribed an anti-depressant to help Singletary with his sleeplessness and anxiety. Nabavi also offered Singletary Trilafon, an anti-psychotic drug, because he "felt [Singletary] was agitated, he was over suspicious, he was just very uncomfortable in the environment.... I think he was [psychotic]. If he was not, he was very close to being psychotic." Dep. of Dr. Nabavi at 31-32. Singletary, however, refused the Trilafon.

On October 3, 1996, Singletary became agitated when he was told to remove some magazines that had accumulated in his cell, and he threatened a prison officer. Because of the threat, the next day Singletary was transferred to a cell in the "Deputy Warden" (DW) building with the approval of the prison Superintendent, defendant Joseph Mazurkiewicz. After placement in a DW cell, Singletary was seen on October 4, 1996 by Kevin Burke, a psychiatrist consultant for SCI-Rockview, and by Robert Regan, a psychological services staff member and the person whom Dorothy Singletary seeks to add as a defendant. Regan was working as a "psychological service specialist" at SCI- Rockview at this time; his duties included the psychological testing and assessment of inmates, parole evaluations,

group therapy, mental health intervention, and suicide risk evaluation and prevention. Regan did not have any administrative or supervisory duties at the prison. Beginning in late 1994, Regan had met with and evaluated Singletary on a weekly basis.

In their meetings with Singletary on October 4, Regan and Burke talked separately with him to assess his mental state. Singletary vehemently denied to both of them at that time that he was suicidal. On the basis of these examinations, neither Regan nor Burke saw any reason to take further precautions for Singletary. Just after midnight on October 6, 1996, Singletary committed suicide by hanging himself with a bedsheet.

On October 6, 1998, Dorothy Singletary filed in the District Court for the Eastern District of Pennsylvania a § 1983 deliberate indifference lawsuit alleging cruel and unusual punishment in violation of the Eighth Amendment along with pendent state law claims for wrongful death. Named as defendants were PADOC, SCI-Rockview, Mazurkiewicz, and "Unknown Corrections Officers." The action was ordered transferred to the Middle District of Pennsylvania on January 12, 1999 to correct ***192** a venue deficiency, and that order and the original file were officially docketed by the Middle District on February 16, 1999. On April 16, 1999, PADOC and SCI-Rockview moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), and on May 28, 1999, the District Court granted this motion in part by dismissing Singletary's § 1983 claims against these defendants on Eleventh Amendment grounds, but denied their motion to dismiss the pendent state claims on sovereign immunity grounds.

The parties then conducted discovery, and on June 23, 2000, the defendants moved for summary judgment. On July 28, 2000, about a week after filing her response to the summary judgment motion, the plaintiff moved to amend her complaint to add Regan as a defendant. In two orders dated September 20, 2000, the District Court: (1) denied the plaintiff leave to amend her complaint to add Regan as a defendant on the grounds that that claim would be barred by the statute of limitations because it did not meet the conditions for relation back in Federal Rule of Civil Procedure 15(c)(3); (2) granted summary judgment for defendant Mazurkiewicz on the deliberate indifference claim on the basis that the plaintiff had not presented any evidence of what Mazurkiewicz knew or should have known about Edward Singletary; (3) granted summary judgment for defendants PADOC and SCI-Rockview on the plaintiff's pendent state law claims because they were barred by the Eleventh Amendment; and (4) dismissed the remaining state law claims without prejudice because there were no federal law claims remaining in the lawsuit. This appeal followed.

II.

[1][2][3][4] We find the plaintiff's assertion that the District Court erred in granting summary judgment to defendant Mazurkiewicz to be clearly lacking in merit and dispose of it in the margin. [FN2] We thus turn ***193** to Singletary's contention that the court erred by not granting her leave to amend her complaint to add Regan as a defendant. We review a district court's decision granting or denying leave to amend a complaint for abuse of discretion. *See Urrutia v. Harrisburg County Police Dept.*, 91 F.3d 451, 457 (3d Cir.1996). However, if we are reviewing the factual conclusions that a district court made while considering the Rule 15 motion, our standard of review is clear error. *See Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 174 (3d Cir.1977). Furthermore, if the district court's decision regarding a Rule 15(c) motion was based on the court's interpretation of the Federal Rules of Civil Procedure, our review is plenary. *See Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1177 (3d Cir.1994).

FN2. The District Court granted summary judgment for Mazurkiewicz because it found that the plaintiff had not presented any evidence that tended to show that Mazurkiewicz had been deliberately indifferent to Edward Singletary's medical needs as that concept has been developed in Supreme Court and Third Circuit case law. Summary judgment is proper if there is no genuine issue of material fact and if, viewing the facts in the light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, "the burden on the moving party may be discharged by 'showing'--that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case" when the

nonmoving party bears the ultimate burden of proof. *Celotex*, 477 U.S. at 325, 106 S.Ct. 2548.

The general standard for a § 1983 deliberate indifference claim made against a prison official is set forth in *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), which focuses on what the official actually knew: "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837, 114 S.Ct. 1970. In the context of a deliberate indifference claim based on failure to provide adequate medical treatment, "[i]t is well-settled that claims of negligence or medical malpractice, without some more culpable state of mind, do not constitute 'deliberate indifference.' " *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir.1999).

The plaintiff's basic argument on deliberate indifference is that Mazurkiewicz authorized Edward Singletary's transfer to a disciplinary cell instead of a medical facility with deliberate indifference to his medical/psychological needs. The only evidence the plaintiff presents in support of this is a report by Faith Liebman, a "Forensic Sexologist and Criminologist," which states that Edward Singletary was exhibiting various suicidal symptoms and then conclusorily opines that "the Department of Corrections exhibited a deliberate indifference to the needs of Mr. Singletary by ignoring these symptoms." Nowhere does the report address what Mazurkiewicz knew or must have known, and the plaintiff's brief does not address this either.

The plaintiff would have the burden of proving at trial that Mazurkiewicz was deliberately indifferent to the excessive risk to her son, which, as *Farmer* instructs us, would involve showing that Mazurkiewicz knew or was aware of that risk. The defendants contend that the record is lacking any evidence to support that claim, and in fact, the plaintiff does not dispute that contention. Instead, she argues that the burden is on the defendants to show the lack of a genuine issue of material fact as to Mazurkiewicz's deliberate indifference. This assertion, however, is clearly contrary to the Supreme Court jurisprudence on summary judgment as we outlined above; in order to survive a summary judgment motion in which the movant argues that there is an absence of evidence to support her case, the plaintiff must point to some evidence beyond her raw claim that Mazurkiewicz was deliberately indifferent. *See Celotex*, 477 U.S. at 325, 106 S.Ct. 2548. Because she failed to do that, the District Court was correct to grant summary judgment for Mazurkiewicz.

A. Rule 15(c)(3)

[5] The parties agree that the statute of limitations for this action is two years, which expired on October 6, 1998, the day that Singletary filed her original complaint. The plaintiff then moved to amend her complaint by adding Regan as a defendant on July 28, 2000, almost two years after the statute of limitations had run. The plaintiff argues that this proposed amendment did not violate the statute of limitations because the amendment would relate back to the original, timely filed complaint under Federal Rule of Civil Procedure 15(c)(3). Rule 15(c) can ameliorate the running of the statute of limitations on a claim by making the amended claim relate back to the original, timely filed complaint. *See Nelson v. County of Allegheny*, 60 F.3d 1010, 1015 (3d Cir.1995). Rule 15(c) provides:

> (c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when
>
> (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
>
> (2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
>
> (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, ***194** and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed.R.Civ.P. 15(c).

The issue in the case is whether the plaintiff can use 15(c)(3) to have her amended complaint substituting Regan as a defendant in place of "Unknown Corrections Officers" relate back to her original complaint. The Rule is written in the conjunctive, and courts interpret 15(c)(3) as imposing three conditions, all of which must be met for a successful relation back of an amended complaint that seeks to substitute newly named defendants. *See Urrutia*, 91 F.3d at 457. The parties do not dispute that the first condition--that the claim against the newly named defendants must have arisen "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading"--is met. The second and third conditions are set out in 15(c)(3)(A) & (B), respectively, and must be met "within the period provided by Rule 4(m) for service of the summons and complaint," Fed.R.Civ.P. 15(c)(3), which is "120 days after the filing of the complaint," Fed.R.Civ.P. 4(m). The second condition is that the newly named party must have "received such notice of the institution of the action [within the 120 day period] that the party will not be prejudiced in maintaining a defense on the merits." Fed.R.Civ.P 15(c)(3)(A). *Urrutia* states that this condition "has two requirements, notice and the absence of prejudice, each of which must be satisfied." 91 F.3d at 458. The third condition is that the newly named party must have known, or should have known, (again, within the 120 day period) that "but for a mistake" made by the plaintiff concerning the newly named party's identity, "the action would have been brought against" the newly named party in the first place. Fed.R.Civ P. 15(c)(3)(B).

Under these facts, we are concerned with three issues: (1) did Regan receive notice of the institution of the action before February 3, 1999 (which is 120 days after the complaint was filed); (2) was the notice that Regan received sufficient that he was not prejudiced in maintaining his defense; and (3) did Regan know (or should he have known) by February 3, 1999 that but for a mistake Singletary would have named him as a party in the original complaint? As explained above, the answers to all of these questions must be "Yes" for Singletary to prevail on her Rule 15(c)(3) argument. The District Court concluded that Regan did not receive any notice of the litigation or of his role in that litigation during the 120 day period. The court also concluded that Regan would be unfairly prejudiced by having to mount his defense at this late date, and that he neither knew nor should have known that, but for a mistake, he would have been named in the original complaint.

[6][7] Notice is the main issue, and we will address that first. For reasons that we set forth in the margin, the unfair prejudice issue is closely dependent on the outcome of our notice inquiry; because we agree with the District Court that Regan did not receive notice within the 120 day period (and because the District Court based its decision on notice and mentioned prejudice only in passing), we will not address prejudice. [FN3]

FN3. Prejudice and notice are closely intertwined in the context of Rule 15(c)(3), as the amount of prejudice a defendant suffers under 15(c)(3) is a direct effect of the type of notice he receives. *See* 6A Charles A. Wright et al., *Federal Practice And Procedure* § 1498, at 123 (2d ed. 1990) ("A finding that notice, although informal, is sufficient ... frequently [depends] upon determining whether the party to be added would be prejudiced by allowing relation back under the circumstances of the particular case."). That is, once it is established that the newly named defendant received some sort of notice within the relevant time period, the issue becomes whether that notice was sufficient to allay any prejudice the defendant might have suffered by not being named in the original complaint.

If the newly named defendant received no notice, then it would appear unlikely that such non-notice was sufficient to allay the prejudice. We recognize that it is at least arguable that it is conceptually possible for a newly named defendant to have received no notice and yet not be prejudiced. But, since Rule 15(c)(3) does not appear to contemplate such a scenario, we will not undertake to express an opinion on that question.

If Regan had received notice of the institution of this action within the 120 day period, his failure to prepare a defense could be construed as "careless or myopic," so he would not be legitimately prejudiced because his "alleged prejudice results from his own superficial investigatory practices or poor preparation of a defense." *Id.* § 1498, at 126. The District Court, however, based its prejudice analysis on the premise that Regan received no such notice:

Singletary seeks $10,000,000 in various

damages from the Defendants. The underlying events occurred more than 4 years ago and the trial is scheduled to commence in a very short time. Subjecting Regan to such potential liability for the first time at this late date on the eve of trial and requiring him to "set about assembling evidence and constructing a defense when the case is already stale," *Nelson*, 60 F.3d at 1015, would unfairly prejudice him.
Dist. Ct. Order # 1, Sept. 20, 2000, at 11-12. Of course, if Regan had received notice earlier, he could have prepared his defense when the case was not so stale. We agree with the District Court that Regan did not receive any notice within the requisite time period, and we also agree that Regan would suffer prejudice by being forced to prepare his defense at this point. We have noted above that, arguably, a non-notice non-prejudice scenario is a conceptual possibility; but this case does not present such a situation.

***195 B. Notice**

[8] This court has seldom spoken on the meaning of "notice" in the context of Rule 15(c)(3). Still, we can glean some general instruction from the few cases that address the issue. First, Rule 15(c)(3) notice does not require actual service of process on the party sought to be added; notice may be deemed to have occurred when a party who has some reason to expect his potential involvement as a defendant hears of the commencement of litigation through some informal means. *See Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 175 (3d Cir.1977) (holding that a person who the plaintiff sought to add as a defendant had adequate notice under 15(c)(3) when, within the relevant period, the person by happenstance saw a copy of the complaint naming both the place where he worked and an "unknown employee" as a defendant, which he knew referred to him); *see also Berndt v. Tennessee*, 796 F.2d 879, 884 (6th Cir.1986) (notice need not be formal); *Eakins v. Reed*, 710 F.2d 184, 187- 88 (4th Cir.1983) (same); *Kirk v. Cronvich*, 629 F.2d 404, 407-08 (5th Cir.1980) (same). At the same time, the notice received must be more than notice of the event that gave rise to the cause of action; it must be notice that the plaintiff has instituted the action. *See Bechtel v. Robinson*, 886 F.2d 644, 652 n. 12 (3d Cir.1989).

The plaintiff does not argue that Regan received formal or even actual notice within the 120 day period; instead, she contends that Regan received "constructive or implied notice" of the institution of the action. She cites to several district court cases within this Circuit for the proposition that "notice concerning the institution of an action may be actual, constructive, or imputed." *Id.* (citing *Kent v. Doe*, 1994 WL 385333 at *4 (E.D.Pa. July 22, 1994); *Heinly v. Queen*, 146 F.R.D. 102, 107 (E.D.Pa.1993); ***196***Kinnally v. Bell of Pennsylvania*, 748 F Supp 1136, 1141 (E.D.Pa.1990)). The plaintiff then advances two methods of imputing notice to Regan that she argues are implicated here: (1) the shared attorney method (Regan received timely notice because he shared his attorney with SCI-Rockview, an originally named party); and (2) the identity of interest method (Regan received timely notice because he had an identity of interest with SCI-Rockview). The central question before us is whether the facts of this case support the application of one or the other of these forms of notice.

1. *Notice via Sharing an Attorney with an Original Defendant*

[9][10] The "shared attorney" method of imputing Rule 15(c)(3) notice is based on the notion that, when an originally named party and the party who is sought to be added are represented by the same attorney, the attorney is likely to have communicated to the latter party that he may very well be joined in the action. This method has been accepted by other Courts of Appeals and by district courts within this Circuit. *See Gleason v. McBride*, 869 F.2d 688, 693 (2d Cir.1989); *Barkins v. Int'l Inns, Inc.*, 825 F.2d 905, 907 (5th Cir.1987); *Berndt v. State of Tennessee*, 796 F.2d 879, 884 (6th Cir.1986); *Heinly*, 146 F.R.D. at 107; *Kinnally*, 748 F.Supp. at 1141. We endorse this method of imputing notice under Rule 15(c)(3).

The relevant inquiry under this method is whether notice of the institution of this action can be imputed to Regan within the relevant 120 day period, i.e., by February 3, 1999, by virtue of representation Regan shared with a defendant originally named in the lawsuit. The plaintiff contends that Regan shared an attorney with all of the originally named defendants; more precisely, she submits that appellees' attorney, Deputy (State) Attorney General Gregory R. Neuhauser, entered an appearance as "Counsel for Defendants" in the original lawsuit, and hence that Neuhauser represented the "several Unknown Corrections Officers" defendants, one of whom turned out to be Regan. The plaintiff submits that Neuhauser's investigation for this lawsuit must have

included interviewing Regan (as he was one of the last counselors to evaluate Edward Singletary's mental state), so that Regan would have gotten notice of the institution of the lawsuit at that time.

The plaintiff notes further that Neuhauser responded to all of the allegations in the complaint including those governing the unknown corrections officers; that Neuhauser defended at Regan's deposition; and that nothing in Neuhauser's Answer to the Complaint was inconsistent with jointly representing employees like Regan. The defendants counter that, even if Regan were made a defendant in this suit, Regan would not have to accept Neuhauser as his counsel: Pennsylvania law specifically allows state employees to engage their own counsel when sued for actions taken in the course of their employment. *See* 4 Pa Code § 39.13(a)(3) (2001).

The plaintiff's contentions raise an interesting issue: whether an attorney's original entry of appearance as "Counsel for Defendants" can be used to establish, at the time of that appearance, a sufficient relationship for Rule 15(c)(3) notice purposes with a party who is later substituted as a defendant for a "John Doe" (or its functional equivalent) named in the original complaint. Because we are concerned with the notice that the newly named defendant received, the fundamental issue here is whether the attorney's later relationship with the newly named defendant gives rise to the inference that the attorney, within the 120 day period, had some communication or relationship with, and ***197** thus gave notice of the action to, the newly named defendant.

In this case, however, the record is clear that Neuhauser did not become the attorney for the defendants until well after the relevant 120 day period had run. The plaintiff originally filed this action in the Eastern District of Pennsylvania on October 6, 1998. The action was then transferred to the Middle District of Pennsylvania; the order directing the clerk to transfer the case was entered on January 12, 1999, and that order and the original file were docketed by the Middle District on February 16, 1999. Neuhauser was substituted as counsel for the defendants on February 24, 1999, replacing John O.J. Shellenberger. The relevant 120 day period ended on February 3, 1999, so any representation and investigation (and contact with Regan) by Neuhauser did not begin until at least three weeks after the 120 day period ended.

Therefore, even if we were to conclude that Neuhauser in some sense represented and thereby gave notice to Regan before Regan was sought to be named as a defendant, this does not help the plaintiff because Neuhauser's representation of the defendants commenced after the 120 day period. Furthermore, the plaintiff has not made a "shared attorney" argument regarding the original attorney Shellenberger (the defendants' attorney of record during the 120 day period), but even if she did, Shellenberger has not represented, and will never represent, Regan at any point in this action. Because this case was quickly transferred to the Middle District, the record does not support the inference that any investigation of the case was performed that would have given Regan notice within the 120 days; that is, there is no evidence in the record that Shellenberger contacted Regan about this case or had any relationship with Regan at all. For these reasons, we reject the plaintiff's argument that Regan obtained sufficient Rule 15(c)(3) notice via the "shared attorney" method of imputing notice.

2. *Notice via an Identity of Interest with an Originally named Defendant*

[11][12] The "identity of interest" method of imputing Rule 15(c)(3) notice to a newly named party is closely related to the shared attorney method. Identity of interest is explained by one commentator as follows: "Identity of interest generally means that the parties are so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other." 6A Charles A. Wright et al., *Federal Practice And Procedure* § 1499, at 146 (2d ed.1990). One could view the shared attorney method as simply a special case of, or as providing evidence for, the identity of interest method, in that sharing an attorney with an originally named party demonstrates that you share an identity of interest with that party. *See, e.g.*, *Jacobsen v Osborne*, 133 F.3d 315, 320 (5th Cir.1998) (using the fact that the parties shared an attorney as evidence that the identity of interest test was met). *But cf.* 3 James Wm. Moore, *Moore's Federal Practice* § 15.19[3][c], at 15-88 to 15-89 (3d ed. 2001) ("Legal counsel shared by the original and new defendants is not sufficient to establish an identity of interest." (citing *In re Integrated Res. Real Estate Ltd P'ship Sec. Litig.*, 815 F.Supp 620, 645 (S.D.N.Y.1993))). However, because the parties and various district court cases within this Circuit treat identity of interest and shared attorney as separate methods of imputing Rule 15(c)(3) notice, we will do likewise. *See, e.g.*, *Kettt v. Doe*, 1994 WL 385333 (E.D.Pa. July 22, 1994).

***198** In *Schiavone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986), the Supreme Court seemingly endorsed the identity of interest method of imputing notice for Rule 15(c)(3): "Timely filing of a complaint, and notice within the limitations period to the party named in the complaint, permit imputation of notice to a subsequently named and sufficiently related party." *Id.* at 29, 106 S.Ct. 2379. District courts within this Circuit have interpreted this passage to mean that the Supreme Court has accepted the identity of interest notice method, *see, e.g., Keitt* 1994 WL 385333 at *4, and we find this reading of *Schiavone* plausible. At all events, we adopt it as a logical construction of the Rule. Thus, the relevant issue is whether Regan has a sufficient identity of interest with an originally named defendant to impute the notice that defendant received to Regan.

The plaintiff does not substantially develop her identity of interest argument (she concentrates mainly on the shared attorney method of imputing notice), but she does advance the argument that Regan shared an identity of interest with SCI-Rockview because he was employed by SCI-Rockview. The question before us is therefore whether an employee in Regan's position (staff psychologist) is so closely related to his employer for the purposes of this type of litigation that these two parties have a sufficient identity of interest so that the institution of litigation against the employer serves to provide notice of the litigation to the employee. *See* 6A Wright et al., *supra*, § 1499 at 146.

There is not a clear answer to this question in the case law. The parties do not cite, and we have not found, any Third Circuit case that addresses this issue. We have found, however, two cases from other Circuits and one district court case from within this Circuit that shed some light on this topic. In *Ayala Serrano v. Lebron Gonzalez*, 909 F.2d 8 (1st Cir.1990), the plaintiff, a prisoner in Puerto Rico, brought a § 1983 lawsuit alleging that a prison guard violated his civil rights by standing idly by as the plaintiff was stabbed seven times by other inmates in the Intensive Treatment Unit of the prison. The original complaint was filed *pro se*, and named as defendants the superintendent of the prison and the head administrator of the Puerto Rican prison system. The District Court allowed the plaintiff's amended complaint, which added the prison guard as a defendant, to relate back to the original complaint under Rule 15(c)(3), on the grounds that the identity of interest that the prison guard shared with the prison officials named in the original complaint meant that the notice given to the latter could be imputed to the former.

The First Circuit held that the district court did not err in imputing notice to the prison guard based on the identity of interest he shared with the originally named prison officials. In finding this identity of interest, the Court of Appeals focused on the facts that the originally named defendants were the prison guard's superiors, the prison guard was present at the attack, and the guard continued to work in the Intensive Treatment Unit where the plaintiff remained as an inmate, subject to special protective measures (so the guard and the prisoner would likely have had further contact). Under these facts, the court held that "it is entirely reasonable to assume that [the prison guard] was notified or knew of the lawsuit commenced by[the prisoner] as a result of the assault." *Id.* at 13.

In *Jacobsen v. Osborne*, 133 F.3d 315 (5th Cir.1998), the plaintiff brought a § 1983 action against a named officer (Osborne) and several unnamed officers, along ***199** with state tort claims against the City of New Orleans and the Sheriff. The plaintiff sought to have his amended complaint replacing Osborne with the previously unnamed other officers relate back under Rule 15(c)(3). The Fifth Circuit held that the newly named defendants received constructive notice because there was a sufficient identity of interest between the newly named officers, Officer Osborne, and the City to infer notice. The court based this conclusion on the fact that "the City Attorney, who represented the original City defendants (the City and Officer Osborne) ... would necessarily have represented the newly-named officers. The City Attorney answered the complaint on behalf of the City and Officer Osborne and, to do so, presumably investigated the allegations, thus giving the newly-named officers the [Rule 15(c)(3)] notice of the action." *Id.* at 320.

In *Keitt*, 1994 WL 385333, the district court found that police officers employed by Amtrak did not have a sufficient identity of interest with Amtrak for 15(c)(3) imputed notice purposes. The court stated that "[n]on- management employees, such as the officers herein, do not bear a sufficient nexus with their employer to permit a conclusion that they share an identity of interest in the litigation so as to permit the presumption that they received notice that they would be sued simply because their employer had timely notice." *Id.* at *6 (citing *Perri v. Daggy*, 776 F.Supp. 1345 (N.D.Ind.1991)).

These cases demonstrate that this issue is a close one in this case. We believe, however, that Regan does not share sufficient identity of interest with SCI-Rockview so that notice given to SCI-Rockview can be imputed to Regan for Rule 15(c)(3) purposes. Regan was a staff level employee at SCI- Rockview with no administrative or supervisory duties at the prison. Thus, Regan's position at SCI Rockview cannot alone serve as a basis for finding an identity of interest, because Regan was clearly not highly enough placed in the prison hierarchy for us to conclude that his interests as an employee are identical to the prison's interests. That is, Regan and SCI-Rockview are not "so closely related in their business operations or other activities that the institution of an action against one serves to provide notice of the litigation to the other." 6A Wright et al., *supra*, § 1499, at 146.

Furthermore, the circumstances present in *Ayala Serrano* and *Jacobsen* that were the bases for the findings of identity of interest in those cases are not present in this case. In *Ayala Serrano*, the prison guard's continued close contact with the plaintiff led the court to conclude that the guard likely had notice of the instigation of the lawsuit. Here, Regan did not have such continuing contact with the plaintiff, so there is no similar basis for concluding that he would have received such notice. In *Jacobsen*, the key fact for the court was that the same City Attorney would likely have interviewed the newly named defendants soon after the lawsuit was filed, thus giving these defendants sufficient notice of the lawsuit within the relevant 120 day period. As we noted in the previous section, however, this case was originally filed in the Eastern District of Pennsylvania with a different attorney representing the defendants, and it was only after the case was transferred to the Middle District that attorney Neuhauser began his representation of the defendants and investigation of the case--well after the 120 day period had expired. Because there is no evidence or any reason to believe that the previous attorney for the defendants represented or even contacted Regan, the basis for finding sufficient notice that existed in *Jacobsen* is not present here.

***200** Thus, we find ourselves in agreement with *Kent* that, absent other circumstances that permit the inference that notice was actually received, a non-management employee like Regan does not share a sufficient nexus of interests with his or her employer so that notice given to the employer can be imputed to the employee for Rule 15(c)(3) purposes. For this reason, we reject the plaintiff's identity of interest argument, and conclude that the District Court did not err in denying the plaintiff leave to amend her complaint to add Regan as a defendant.

C. But for a Mistake Concerning the Identity of the Proper Party

[13] Rule 15(c)(3)(B) provides a further requirement for relating back an amended complaint that adds or changes a party: the newly added party knew or should have known that "but for a mistake concerning the identity of the proper party, the action would have been brought against the party." Fed.R.Civ.P. 15(c)(3)(B). The plaintiff argues that this condition is met in her proposed amended complaint, but the District Court found otherwise. The defendants also contend that (1) the plaintiff did not make a *mistake* as to Regan's identity, and (2) Regan did not know, nor should he have known, that the action would have been brought against him had his identity been known, because the original complaint named "Unknown Corrections Officers" and Regan is not a corrections officer but a staff psychologist.

The issue whether the requirements of Rule 15(c)(3)(B) are met in this case is a close one. We begin by noting that the bulk of authority from other Courts of Appeals takes the position that the amendment of a "John Doe" complaint--i.e., the substituting of real names for "John Does" or "Unknown Persons" named in an original complaint--does not meet the "but for a mistake" requirement in 15(c)(3)(B), because not knowing the identity of a defendant is not a mistake concerning the defendant's identity. *See Wilson v. United States*, 23 F.3d 559, 563 (1st Cir.1994); *Barrow v. Wethersfield Police Dept.*, 66 F.3d 466, 469 (2d Cir.1995), *amended by* 74 F.3d 1366 (2d Cir.1996); *W. Contracting Corp. v Bechtel Corp.*, 885 F.2d 1196, 1201 (4th Cir.1989); *Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir.1998); *Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir.1996); *Worthington v. Wilson*, 8 F.3d 1253, 1256 (7th Cir.1993); *Powers v. Graff*, 148 F.3d 1223, 1226-27 (11th Cir.1998). This is, of course, a plausible theory, but in terms of both epistemology and semantics it is subject to challenge.

In *Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171, 175 (3d Cir.1977), this Court appeared to have reached the opposite conclusion insofar as we held that the amendment of a "John Doe" complaint met all of the conditions for Rule 15(c)(3) relation back, including the "but for a mistake" requirement. In

Varlack, the plaintiff had filed a complaint against, *inter alia*, an "unknown employee" of a branch of the Orange Julius restaurant chain, alleging that this employee had hit him with a two-by-four in a fight, which caused him to fall through a plate glass window, injuring his arm so severely that it had to be amputated. After the statute of limitations had run, the plaintiff sought to amend his complaint to change "unknown employee" to the employee's real name, using Rule 15(c)(3) to have the amended complaint relate back to the original. The newly named defendant testified that he had coincidentally seen a copy of the complaint naming both Orange Julius and an "unknown employee" as defendants, and that he had known at that time that he was the "unknown employee" referred to. This Court affirmed the district court's grant of ***201** the 15(c)(3) motion, holding that the plaintiff met all the requirements of 15(c)(3), including the requirement that the newly named defendant "knew or should have known but for a mistake concerning the identity of the proper party." *See id.* at 175.

We are, of course, bound by *Varlack* insofar as it held that the plaintiff's lack of knowledge of a particular defendant's identity can be a mistake under Rule 15(c)(3)(B). *See* Internal Operating Procedures of the United States Court of Appeals for the Third Circuit 9.1 (2000). [FN4] Moreover, as is also noted above, every other Court of Appeals that has considered this issue (specifically, the First, Second, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits) has come out contrary to *Varlack*; generally speaking, the analysis in these other cases centers on the linguistic argument that a lack of knowledge of a defendant's identity is not a "mistake" concerning that identity. However, even assuming that *Varlack* allows for amended "John Doe" complaints to meet Rule 15(c)(3)(B)'s "mistake" requirement, it is questionable whether the other parts of 15(c)(3)(B) are met in this case, namely, whether Regan knew or should have known that he would have been named in the complaint if his identity were known. Because the original complaint named "Unknown *Corrections Officers*," it is surely arguable that psychologist Regan would have no way of knowing that the plaintiff meant to name him.

> FN4. We note, however, that two district court cases from within this Circuit have seemingly concluded that *Varlack*'s holding does not entail that amended "John Doe" complaints meet Rule 15(c)(3)(B)'s "mistake" requirement, as these cases have followed the rule of the other Circuits in denying the relation back of amended complaints that replace "John Doe" defendants because there was no mistake involved in the original complaints. *See Gallas v. The Supreme Court of Pennsylvania*, 1998 WL 599249, at *4 (E.D.Pa. Aug.24, 1998); *Frazier v. City of Philadelphia*, 927 F.Supp. 881, 885 (E.D.Pa.1996). The majority of district court cases from within this Circuit that have considered this issue, however, have followed the broader interpretation of *Varlack* and thus allowed the relation back of amended "John Doe" complaints under Rule 15(c)(3). *See, e.g., Trant v. Towamencin Township*, 1999 WL 317032 at *5-*6 (E.D.Pa.1999); *Trautman v. Lagalski*, 28 F.Supp.2d 327, 330 (W.D.Pa.1998); *Cruz v. City of Camden*, 898 F.Supp. 1100, 1110 n. 9 (D.N.J.1995); *Advanced Power Sys., Inc. v. Hi-Tech Sys., Inc.*, 801 F.Supp. 1450, 1457 (E.D.Pa.1992). We think this to be the better reading of *Varlack*.

[14] These are sticky issues. Because, as we explained above, the plaintiff's argument on the applicability of Rule 15(c)(3) to her case fails on notice grounds, we do not need to decide these questions here. We do, however, take this opportunity to express in the margin our concern over the state of the law on Rule 15(c)(3) (in particular the other Circuits' interpretation of the "mistake" requirement) and to recommend to the Advisory Rules Committee a modification of Rule 15(c)(3) to bring the Rule into accord with the weight of the commentary about it. [FN5]

> FN5. As we note in the text, some Courts of Appeals have held that proposed amended complaints that seek to replace a "John Doe" or other placeholder name in an original complaint with a defendant's real name do not meet Rule 15(c)(3)(B)'s "but for a mistake" requirement. We find this conclusion to be highly problematic. It is certainly not uncommon for victims of civil rights violations (e.g., an assault by police officers or prison guards) to be unaware of the identity of the person or persons who violated those rights. This information is in the possession of the defendants, and many plaintiffs cannot obtain this information

until they have had a chance to undergo extensive discovery following institution of a civil action. If such plaintiffs are not allowed to relate back their amended "John Doe" complaints, then the statute of limitations period for these plaintiffs is effectively substantially shorter than it is for other plaintiffs who bring the exact same claim but who know the names of their assailants; the former group of plaintiffs would have to bring their lawsuits well before the end of the limitations period, immediately begin discovery, and hope that they can determine the assailants' names before the statute of limitations expires. There seems to be no good reason to disadvantage plaintiffs in this way simply because, for example, they were not able to see the name tag of the offending state actor. The rejoinder to this argument is that allowing the relation back of amended "John Doe" complaints risks unfairness to defendants, who, under the countervailing *Varlack* interpretation of Rule 15(c)(3)(B), may have a lawsuit sprung upon them well after the statute of limitations period has run. But fairness to the defendants is accommodated in the other requirements of Rule 15(c)(3), namely the requirements that (1) the newly named defendants had received "such notice of the institution of the action" during the relevant time period "that the party will not be prejudiced in maintaining a defense on the merits"; and (2) the newly named defendants knew or should have known that the original complaint was really directed towards them ("the action would have been brought against the party"). These requirements generally take care of the "springing a claim on an unsuspecting defendant" problem. Because these other Rule 15(c)(3) requirements must be met before an amended complaint can relate back, the "mistake" requirement of 15(c)(3), as interpreted by the other Circuits, would be dispositive in disallowing relation back only when the to-be-added defendants had timely notice of the lawsuit and knew that the lawsuit was really meant to be directed at them. We do not think that fairness requires that a plaintiff be barred from adding newly named parties as defendants when these newly named parties (1) knew about the lawsuit within the relevant time period, (2) knew they were the ones targeted, and (3) had the information as to their correct names but withheld that information from the plaintiff--indeed, we believe that fairness requires that a plaintiff in such a situation should be allowed to add the newly named defendants to his complaint. We also note that Rule 15(c)(3)(B)'s mistake requirement has been held to be met (and thus relation back clearly permitted) for an amended complaint that adds or substitutes a party when a plaintiff makes a mistake by suing the state but not individual officers in a § 1983 action. *See Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1192 n. 13 (3d Cir.1994) (Becker, J., concurring in part and dissenting in part) (listing cases in which plaintiffs have been permitted to have their complaints relate back when they made mistakes in the naming of defendants in their complaints, including naming states and state agencies instead of state officials in § 1983 cases). We think that it makes no sense to allow plaintiffs who commit such a clear pleading error to have their claims relate back, while disallowing such an option for plaintiffs who, usually through no fault of their own, do not know the names of the individuals who violated their rights. This disparity of treatment of § 1983 plaintiffs seems to have no principled basis and should not be codified in our Rules of Civil Procedure.

All of the commentators who address this issue (at least those that we found in our research) call for Rule 15(c)(3) to allow relation back in cases in which a "John Doe" complaint is amended to substitute real defendants' names. *See* Edward H. Cooper, Rule 15(c)(3) Puzzles at 3-5 (November 1999) (unpublished manuscript, on file with the Administrative Office of the United States Courts, Rules Committee Support Office); Carol M. Rice, *Meet John Doe: It is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. Pitt. L.Rev. 883, 952-53 (1996); Steven S. Sparling, Note, *Relation Back of "John Doe" Complaints in Federal Courts: What You Don't Know Can Hurt You*, 19 Cardozo L.Rev. 1235 (1997) (arguing that the structure, purpose, history and development of Rule 15(c) all cut in favor of allowing relation back of amended John Doe complaints).

> In his manuscript "Rule 15(c)(3) Puzzles," Professor Edward H. Cooper of the University of Michigan Law School suggests the following alteration (in italics) in subsection 15(c)(3)(B) of the Rule in order to make it clear that the relation back of "John Doe" amended complaints is allowed: "the party to be brought in by amendment ... knew or should have known that, but for a mistake *or lack of information* concerning the identity of the proper party...." Cooper, *supra*, (manuscript at 8). We believe that a change in Rule 15(c)(3) along the lines advocated by Professor Cooper would fix the lack of fairness to plaintiffs with "John Doe" complaints that currently inheres in the other Circuits' interpretation of the Rule, and would bring the Rule more clearly into alignment with the liberal pleading practice policy of the Federal Rules of Civil Procedure.
>
> For these reasons, we encourage the Rules Advisory Committee to amend Rule 15(c)(3) so that it clearly embraces the Cooper approach to the relation back of "John Doe" complaints. As the Supreme Court has said, "the requirements of the rules of procedure should be liberally construed and ... 'mere technicalities' should not stand in the way of consideration of a case on its merits." *Torres v Oakland Scavenger Co.*, 487 U.S. 312, 316, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988). Rule 15(c)(3) is clearly meant to further the policy of considering claims on their merits rather than dismissing them on technicalities, and this policy is substantially furthered by the Cooper approach to Rule 15(c)(3)(B).

***203 III. Conclusion**

For the above reasons, the District Court's grant of summary judgment for the defendants and the court's order denying the plaintiff's motion to amend her complaint will be affirmed. The Clerk is directed to send copies of this opinion to the Chairman and Reporter of the Judicial Conference Advisory Committee on Civil Rules and the Standing Committee on Practice and Procedure, calling attention to footnote 5.

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Miscellaneous Items

Rule 6(e) — 3 days shall be added

The Appellate Rules Committee has referred to the Civil Rules Committee a "nice" time-counting problem that arises from the interaction between Rule 6(e) and the time-counting conventions of Rule 6(b). The problem was raised in comments on amendments of the Appellate Rules designed to make the time-counting provisions in the Appellate Rules similar to the Civil Rules. Because the problem arises from the Civil Rules, the Appellate Rules Committee believes that the Civil Rules Committee should take the lead in proposing a solution.

As recently amended, Rule 6(e) says:

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

The problem described below could be addressed by changing the final clause: ~~3 days shall be added to the prescribed period~~ the prescribed period begins 3 days after service.

This change would capture the meaning that surely must have been intended.

Rule 6(a) says that intervening Saturdays, Sundays, and legal holidays are excluded when computing a prescribed or allowed "period of time" that is "less than 11 days." The Appellate Rules had used 7 days in the parallel rule, but are switching to the less-than-11-days rule to establish uniformity with the Civil Rules. In the course of deliberating the change, the Appellate Rules Committee was asked to address the integration of the additional 3 days. There are at least three possible choices to be made. They are described, with citations to apparently conflicting decisions, in 4B C.A. Wright & A.R. Miller, Federal Practice & Procedure: Civil 3d, § 1171, beginning at p. 595.

The first choice is to add the three days to the underlying period; if it begins as a 10-day period, it becomes a 13-day period when applying Rule 6(a). Because it is a 13-day period, intermediate Saturdays, Sundays, and legal holidays are counted. The result is that the time to respond after mail service is shorter than the time to respond after personal service. Not smart.

The second choice is to treat the 3-day addition independently for purposes of Rule 6(a). If the original period is 10 days, there are two exclusions of intervening "dies non". Saturdays, Sundays, etc. are excluded from the 10-day period and also from the 3-day period. This gives a lot of extension: the three days can easily become five, and with the help of a legal holiday perhaps six.

The third choice is to count the 3-day addition as an addition, not as a period of time prescribed by the rules. This approach corresponds to the apparent intent, and also to the language: "3 days shall be added." Dies non count only if the 3-day addition causes the time to expire on one.

(E.g., time, as enlarged by the 3 days, runs out on a Saturday; the time is extended to the next weekday that is not a legal holiday.) Wright & Miller opt for this choice, adding that the 3 days always should be added at the beginning: we need a clear convention, and this reflects the perception that mail may take as long as 3 days to arrive. (It could be argued that it is improper to count Saturday and Sunday against the 3 days if a letter arrives on Saturday: no one will notice it. But if it is mailed Friday and arrives on Saturday, why not let the 10-day period start on Tuesday: the recipient should have seen it on Monday.)

It is not hard to illustrate circumstances in which it makes a difference whether the Rule 6(e) 3-day addition is inserted at the beginning or at the end of a prescribed 10-day period. The paper is mailed on Wednesday. If we count Thursday, Friday, and Saturday as the 3 days added by Rule 6(e), Monday is day 1 of the 10-day period; the tenth day is Friday, sixteen days after mailing. If we count Thursday and Friday as days 1 and 2 of the 10-day period, day 10 is a Wednesday; the third day added under Rule 6(e) is Saturday, and the response is due on Monday, 19 days after mailing.

If we accept the Wright & Miller recommendation, drafting may not be difficult. The ambiguity arises from saying "3 days shall be added to the prescribed period." We need to find a way to say that "the prescribed period begins 3 days later than it would begin if service had been made under Rule 5(b)(2)(A)." It may suffice to say, as suggested above, that "the prescribed period begins three days after service." This drafting depends on the Rule 5(b) provisions that define the time when service is made. (b)(2)(B) says: "Service by mail is complete on mailing." (C), which permits service by leaving a copy with the clerk of court, does not say that service is complete on leaving the copy, but that seems to speak for itself. (D) says: "Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery."

The alternatives are increasingly uncouth: "3 days shall be [are] added before calculating the prescribed period," or something in that vein.

A more complete restyling — avoided when we amended Rule 6(e) to account for electronic service — might look like this:

(e) Additional Time After Service Under Rule 5(b)(2)(B), (C), or (D). Whenever ~~a party has the right or is required to do some act or take some proceedings within a prescribed period of time after the service of a notice or other paper and the~~ a notice or paper is served ~~upon~~ on a ~~the~~ party under Rule 5(b)(2)(B), (C), or (D), any period prescribed for acting after the notice is served begins 3 days after the notice is served ~~shall be added to the prescribed period~~.

COMMITTEE NOTE

Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. The prescribed period begins three days after the notice or other paper is served. All the other time-counting rules apply unchanged.

[One example illustrates the operation of Rule 6(e). A paper is mailed on Wednesday. The period to act begins on Sunday, three days — Thursday, Friday, and Saturday — after the paper was served by mailing. If the period for acting is less than eleven days, Sunday is excluded from the computation under Rule 6(a). Day 1 then becomes Monday.]

Reporter's Note

The Appellate Rules Committee Reporter believes strongly that the operation of Rule 6(e) in conjunction with Rule 6(a) requires illustration in the Committee Note. The bracketed second paragraph provides one example of the final sentence in the first paragraph: "All the other time-counting rules apply unchanged." There is good reason to be nervous about explaining a rule we do not propose to amend, but time counting is so sensitive that we may want to add this paragraph. Multiple illustrations could be provided, but one should suffice.

Video Deposition as Taxed Costs: 02-CV-B

Judge Jane J. Boyle has written to suggest revision of the cost rules. The problem is that 28 U.S.C. § 1920 seems to limit the award of costs under Civil Rule 54(d). Lawyers are increasingly presenting evidence at trial by means of videotaped depositions or eletronically presented evidence. Section 1920 lists as recoverable costs fees and disbursements for reporter fees for all or part of the stenographic transcript necessarily obtained for use in the case, for printing and witnesses, and for copies of papers necessarily obtained for use in the case. Courts of appeals have interpreted § 1920 to exclude the costs of video trial exhibits and videotaped depositions. Video media do not count as stenographic transcripts, printing, or copies of papers.

A recent illustration of these questions is provided by Kohus v. Cosco Inc., Fed.Cir.March 13, 2002, 70 USLW 1565. Adhering to Sixth Circuit law, the Federal Circuit ruled that the cost of a video exhibit prepared by the successful defendant in an action for patent infringement could not be taxed as costs. Section 1920(4) allows as costs "fees for exemplification and copies of papers necessarily obtained for use in the case." The Sixth Circuit had ruled that the cost of charts and drawings may be taxed, but not the cost of physical models.

Judge Boyle recognizes that the Advisory Committee may believe that these questions are better addressed through legislation than through amendment of Civil Rule 54(d). She urges that if legislation seems more appropriate, the Standing Committee be asked to recommend Congressional consideration of these questions.

The immediate question is whether the Advisory Committee thinks it appropriate to undertake a project to review the categories of items properly taxed as costs. This topic may well fall more naturally into the responsibilities of a different Judicial Conference committee. No recommendation is offered.

CONSENT CALENDAR

Two items are included as consent-calendar subjects.

02-CV-A: Civil Rule for Title VII Cases

Ms. Tracey Ellis has suggested adoption of a rule to regulate practices that are described in uncertain fashion. The focus is on Title VII actions. There is a reference to proceeding pro se that might include proceeding in forma pauperis. The apparent problem is a practice that enables a "committee" to decide whether her complaint will be considered by a "hearing judge."

Several possible interpretations vie for attention. One is that there is a local court procedure — perhaps the Northern District of Illinois, guessing from the area codes of Ms. Ellis's telephone numbers — for screening pro se complaints, or forma pauperis complaints. Another possibility is that a specific order has entered to require court approval before Ms. Ellis can file civil actions. There might be some different explanation.

Whatever the problem may be, there is little indication of a likely subject for revision of the Civil Rules. The rules cannot be amended to address specific case orders. If there is a general local screening practice, the subject is one of court administration more than rules of procedure.

It is recommended that this item be removed from the agenda without further action.

02-CV-_: Use of Deponent's Social Security Number

Ms. Tracey Ellis has suggested adoption of a rule that would prohibit an attorney from using a deponent's social security number during a deposition to look up the deponent's work history. This suggestion is mingled with observations that the work history of an employment-discrimination plaintiff should not be used in a way that may defeat the claim.

The appropriate limits on using a social security number seem a matter not for the Civil Rules but for regulation by statute and perhaps administrative regulation. The propriety of conducting an on-line investigation of a deponent's work history during the course of a deposition, putting aside the means used to identify the deponent for search purposes, may be within the scope of possible Civil Rules. The Civil Rules have not been designed to operate at this level of specific detail, however, and there is little apparent reason to undertake this particular task.

It is recommended that this item be removed from the agenda without further action.