MINUTES

CIVIL RULES ADVISORY COMMITTEE

October 22-23, 2001

The Civil Rules Advisory Committee met on October 22 and 23, 2001, at the University of Chicago Law School. The meeting was attended by Judge David F. Levi, Chair; Judge John L. Carroll; Justice Nathan L. Hecht; Mark O. Kasanin, Esq.; Judge Richard H. Kyle; Professor Myles V. Lynk; Hon. Robert D. McCallum, Jr.; Judge H. Brent McKnight; Judge Lee H. Rosenthal; Judge Thomas B. Russell; 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; Charles J. Cooper, Esq.; Dean Mary Kay Kane; Judge J. Garvan Murtha; Judge Thomas W. Thrash, Jr.; and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge James D. Walker attended as liaison member from the Bankruptcy Rules Committee. Members of the Judicial Conference Federal-State Jurisdiction Committee who attended included Judge Frederick P. Stamp, chair; Judge Loretta A. Preska; Judge Jack B. Schmetterer; and Justice [Linda Copple Trout?]. Judge Jed S. Rakoff, a memeber of the Committee on Administration of the Bankruptcy System, also attended. Peter G. McCabe, John K. Rabiej, and James Ishida represented the Administrative Office. Mark Braswell and Karen Kremer were additional Administrative Office participants. Thomas E. Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Observers included Lorna G. Schofield (ABA); Francis Fox (American College of Trial Lawyers); Thomas Moreland (ABCNY); Marcia Rabiteau, Esq.; Alfred W. Cortese, Jr.; Jonathan W. Cuneo (NASCAT); and Christopher F. Jennings. The moderators and participants in the several panel discussions are listed separately with each panel.

The agenda of the meeting included a memorandum from Judge Levi summarizing actions by the Standing Committee in June 2001, and a memorandum describing new subjects that are being carried forward on the agenda for consideration at future meetings. The discussion agenda of the meeting was devoted entirely to a conference arranged by the Committee to provide advice about proposals to amend Civil Rule 23 that were published in August 2001 and also about proposals that were held back from publication.

Judge Levi opened the conference by expressing the thanks of the Advisory Committee to all who were attending and participating in the conference, and to the University of Chicago Law School for hosting the conference.

Judge Levi noted that consideration of Rule 23 has been an important task for the Committee, commanding serious attention on a sustained basis for more than a decade. If improvements are indicated, there is an opportunity to contribute to the public weal. The conference brings together a group of lawyers, judges, and scholars representing diverse views to offer their best

thinking on the current state of practice and the current proposals. In addition to the conference participants, the representatives of bar groups carry forward the valued tradition of participating in Committee work. Finally, it must be noted that Judge Rosenthal put in much hard work to assemble the conference with a good balance of experts who bring the perspectives of a wide variety of experiences.

Dean Saul Levmore welcomed the conference to the Law School.

Professor Marcus presented a brief summary of the historic development of Rule 23. If adopted, the published proposals will be the second time that Rule 23 has been modified in a significant way. Rule 23 "was not a big deal" when it was adopted in 1938; Judge Clark's explanations of the new rules to the bar were devoted much more to other topics — Rule 12(b) practice commanded fifteen times as much attention, and Rule 14 impleader practice commanded twice as much attention. All that changed with the 1966 amendments. Professor Kaplan said that the revision was designed to correct some artificial artifacts in the original rule, and to look to the mechanics of its operation. It is not clear what they expected, but within ten years a holy war was being fought over Rule 23(b)(3). The war abated somewhat, and for a time some observers thought the day of class actions was disappearing. Class actions have proved resurgent.

As compared to the continual work that regularly revised the discovery rules, the Advisory Committee deliberately refrained from considering Rule 23, adhering to a Judicial Conference policy that regarded Rule 23 revision as a topic for legislation. In 1991, however, the Judicial Conference — acting in response to a report by the ad hoc committee on asbestos litigation — suggested that consideration would be proper. Proposals addressed to class certification issues were published in 1996, but only the interlocutory appeal provisions of Rule 23(f) emerged from that round of the process. Today's proposals carry forward one thrust from 1963 because they address not the criteria for certification but the mechanics of the class-action process.

Judge Rosenthal added her welcome to the conference. She noted that her visits to the Law School always invoke memories of the uncertainty and inadequacy that students feel as they begin to study the law. Similar feelings may be appropriate as we approach Rule 23. The several successive panels will aid consideration of these many proposals.

Panel 1: Precertification Case Management

The moderator for the first panel was Judge Frank H. Easterbrook. Panel members included John H. Beisner, Esq.; Allen Black, Esq.; Robert Heim, Esq.; Edward Labaton, Esq.; Diane M. Nast, Esq.; and Judge Sam. C. Pointer, Jr.

The proposals to amend Rule 23(c)(1) begin with a proposal to change the demand for certification as "[a]s soon as practicable"

to "at an early practicable time." An earlier version of this proposal, which would have demanded certification "when practicable," was rejected by the Standing Committee in 1997. The Standing Committee was concerned that delay in certification could lead to one-way intervention. The parties, moreover, need to know the stakes of the litigation. But the recent Seventh Circuit decision in the Szabo case reflects the fact that to be able to apply the Rule 23 certification criteria a judge needs to know what is the substance of the dispute. The pleadings alone do not do it — a plaintiff cannot establish the conditions for certification by mere assertion. The current proposal is based on the premise that it is sound to take the needed time to uncover the substance of the dispute, but not to indulge discovery on the merits or decision on the merits.

It was noted that the proper time for the certification decision has been a question. The Manual for Complex Litigation Second observed long ago that time is needed to explore how the case will be presented; that means discovery into the merits. Some judges were allowing this discovery even in the 1970s. Since the Second Edition was published in the early 1980s, there has been a steady progression in this direction. If this change of language were to be the only change in Rule 23, it would not be worth the effort; it conforms to better present practice, and the gradual evolution will continue with continuing education. But if Rule 23 is to be changed, this change is probably a good one.

This observation was tied to the observation that the amendment proposals fail to address the question of settlement classes, or Rule 23 alternatives for mass torts.

Another panel member spoke from the plaintiff's view. The change to certification "at an early practicable time" likely will have no effect. "As soon as" practicable gives more than ample latitude. The *Szabo* opinion makes this abundantly clear. There are no situations where district courts have been constrained by the present language. The Committee Note, indeed, says that the intent is to preserve current practice. And there is a risk of unintended consequences: more pre-certification activity will be encouraged. Courts should not allow more discovery than needed for the certification decision. More important still, it is a mistake to codify the Federal Rules of Civil Procedure, to fine-tune the Rules in a fruitless effort to make them more perfect. The Rules are not a Code. Rule 23(c)(1) works; why add new words?

The same panel member stated that notice in (b)(1) and (b)(2) classes can be given now. The proposal calling for notice to a "reasonable number" of class members is odd.

The requirement of plain notice language also adds nothing; plain language is sought now.

More generally, the Rules should be written in broad terms, leaving much flexibility to district judges. The Rules should deal with the large issues. The 1966 changes got rid of "spurious"

class actions; the changes have worked. We should not hamstring judges with more detailed rules now. The Advisory Committee should look to the philosophy of the 1938 rules: avoid details such as those that would be established by the plain-language requirement, the requirement of notice in (b)(1) and (b)(2) classes, or certification "at an early practicable time." Simple rules are best. Explanation can go into the Manual for Complex Litigation.

There is a real problem with fitting mass torts into Rule 23; perhaps they deserve a separate rule.

The next panel member spoke from a defense view. The change to certification "at an early practicable time" "is a close call, though I favor it." There has been a substantial change in district-court practice in the last five or six years, prompted by appellate demands that a record be established on the certification decision. The FJC study documents the change. One reason to revise the rule is to support publication of the Committee Note, which does an excellent job of alerting district courts to "the tensions," although it could be improved in some ways. At least some discovery is needed in most cases to support the certification decision. The question is how much discovery — there should be an adequate record, but no more discovery than needed for that. The Note encourages trial courts to play an active role in determining how much discovery is needed for the certification decision. That is good.

A rule change also may drive out some lingering vestiges of practice that allow certification on the pleadings with minimal or no discovery. Some local rules still require a certification determination within a defined and short period such as 90 days — a period that expires before disclosures need be made or discovery can even begin. And some courts still want to decide on certification before entertaining motions under Rule 12(b)(6) or Rule 56. The change also will serve as a good example to state courts: if there is no big problem in federal courts, there is in some state courts. Just a few years ago, some courts in Alabama were certifying classes on a "drive-by" basis; Alabama has dealt with this practice, but other states are doing strange and unwise things.

But the proposal carries forward the present rule statement that certification is "conditional." The word should be deleted. Certification is supposed to be "for keeps."

Another lawyer observed that the "at an early practicable time" provision reflects the practice today. Practice has changed. In 1976, there was de minimis discovery to support the certification decision, or none at all. There has been a progressive movement; it may have carried too far into discovery on the merits in some cases. The Committee Note helps this. The Seventh Circuit Szabo decision is a clear statement. Class-action discovery does relate to the merits, most obviously when it seeks to identify the issues that actually will be tried, but it may be

carried too far. The Committee Note may help; the proposed language is, as it is characterized, "fastidious."

The same lawyer identified other issues. (1) Rule 23 should address discovery from "absentee" class members. This problem is not much addressed in reported decisions. But experience as a plaintiffs' lawyer shows that such requests are presented. Courts do have the power to address the issue, but a Rule would help. There is a concern with relationships between the class attorney and class members as clients. (2) There may be a problem with discovery of the notice plan. It would be better to provide for automatic review of the notice plan in a nonadversarial setting as part of the case-management plan. (3) "Trial plans" have been requested by courts in the last few years. This can be a good idea if it is kept down to a brief, four- or five-page outline. But it is too much when, as in one recent case, it extends to fifty pages. The Note refers to trial plans; that is a good thing.

A defense lawyer said that the "at an early practicable time" change "is more than angels dancing on pins." The underlying principle is salutary; the rule change may be important. The Note carefully lays out what is, and what is not, intended. The Note deals adequately with the risk of unintended consequences. It tells the judge not to delay too long. The change says that courts now generally take the time required to make a well-informed decision. The trial plan is a good idea. 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. The early 5th Circuit Bluebird case is good: you have to look down the road to what proofs will be used to prove what. If there is a lot of proof to be taken after the class trial, we need to ask whether the class trial is worthwhile.

The idea of submitting draft class notice with the trial plan is a good one. The notice often shows issues not reflected in the plan, including problems with choice of law and jury trial, and is important simply by identifying the persons to whom notice is to be directed.

There is a real question whether any notice can be effective unless it is directed individually to class members as a letter from the court.

Important questions that will be reserved for other discussions include settlement classes and overlapping classes.

Another plaintiffs' lawyer thought there is no need to change to certification at an early practicable time. The change is not advisable. Courts have plenty of flexibility under the "as soon as practicable" formulation, and have been using it wisely. At times the certification decision is postponed "to the very back end." In one recent litigation the FTC wanted to finish its discovery on the merits before certification was addressed in parallel private litigation; that worked out well. The Note will not deflect

wrangling over what the change means. Publishing the Note without changing the language of the Rule might be helpful.

The same lawyer observed that appointing class counsel at the time of class certification "is way too late." Class counsel is needed to undertake pre-certification discovery, and to argue for certification. Someone has to be in charge. This helps the court: you only have to deal with one person.

The "plain language" requirement is one that no one will argue with. This is a far more real and difficult problem than the timing of the certification decision. Almost every notice is unintelligible to the ordinary person. Ten, twelve, or fifteen pages of single-spaced fine-type print are simply not going to be read. You need a way to get people to look at it. Lawyer-drafted notices are far too dense, far too complete; the lawyer needs "to cover his rear end." In one recent case the notice was completely incomprehensible; an attempt to draft a summary ballooned from a couple of reasonably clear paragraphs to six pages. Plain language has been achieved only when the judge writes the notice. The rule might focus on asking the judge to write the notice, or else on appointment of someone — preferably not a lawyer — to write it.

It was observed that the emphasis on the Committee Note is interesting. In some ways the Note is longer and more interesting than the Rule, and at times it even contradicts the Rule. But is this a sound way to revise a Rule? The response was that it depends on whether there is a need to amend the Rule. As to the time of certification, there is no need — the operative word in both present and proposed versions is "practicable." The risk of unintended consequences should prevail. A different response was that it is indeed wise to write the Rules in general terms, but that generality reduces the level of guidance. The Note does give guidance. There is real value in the Notes and the function they serve. A still different response was that the Advisory Committee should contribute its good ideas to the Manual for Complex Litigation, rather than propound elaborate Committee Notes. The Manual provides the details, and works pretty well. And a judge suggested that judges generally do not seem much persuaded by Committee Notes. Another judge (not on the panel) observed that the Manual does not seem to be mentioned in the Committee Notes. The Notes are sprinkled with observations that a judge may do this, or a judge may do that. Rather than explain what the Rules mean, these Notes are written like the Manual. Some consideration should be given to relying on the Manual as the "real bible"; the Notes could be shortened by incorporating references to the Manual. (It was pointed out by a panel member that the Notes do indeed refer to several sections of the Manual at one point.) A lawyer said that he has lots of experience with judges who are not familiar with the Manual, but that at least some judges do look to the Committee Notes for guidance. Without the Notes, it will be hard for judges to follow the change from "as soon as practicable" to "at an early practicable time." A professor not on the panel added the observation that a recent study of the 2000 discovery amendments

shows that judges are using the Committee Notes extensively.

A judge in the audience observed that the Seventh Circuit *Szabo* decision allows the court to treat a certification motion in the same way as a 12(b)(1) motion, allowing the parties to gather fact information necessary to determine whether to certify. The Second Circuit, however, has rejected a similar approach. The rule change and Note will allow more leeway in what can be considered in making the certification decision. The Note, however, is somewhat Janus-faced.

The panel was asked whether it is possible to do what the Note advises — permit enough discovery to inform the certification decision without full discovery on the merits? Some attorneys believe that the final event will be either trial or else a certification decision that is immediately followed by settlement. There are a lot of cases where this is true now under the "as soon as practicable" direction. One defense lawyer said that it can be done, and has been done. It may not be universally possible, but it works. The extent of discovery needed to decide on certification will vary from case to case. A plaintiff lawyer agreed that it can be done, although it is a difficult thing. The court does need a sense of what the proof will be at trial: was there a conspiracy? Is it to be proved by providing evidence of each class member's transactions and inference, or is it to be proved by documents? If the parties can sit down with a judge who is informed, this can be worked out at an early Rule 16 conference. A judge said that certification-merits discovery cannot be done in all cases. When it can be done, it is not fruitful to battle over the issues whether discovery is for certification or only for the merits: often it is both. It is better to move on; the fighting is wasted when no class is certified. Another defense lawyer said that especially in (b)(3) classes, the certification dispute comes down to typicality; to adequate representation; and then to predominance and manageability. Common issues can always 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 plaintiff lawyer disagreed: the defense lawyer is very good at defeating certification by shifting the focus to individual issues, and by imposing the burden of discovery on the merits. Another plaintiff lawyer disagreed with that observation: it is proper to separate discovery to support an early certification decision so you know whether to do the mammoth merits discovery. Generally you can tell the difference.

A judge in the audience observed that the FJC study explored the use of 12(b)(6) and summary-judgment motions before the certification decision, and found a full spectrum of practice. Some courts were doing it. Others seemed to feel that the "as soon as" direction prohibited the practice. The "early time" change may not address the issue. The Note says that the court may not decide the merits first and then certify: does that mean that it cannot act on a 12(b)(6) or summary-judgment motion? There is an

ambivalence here.

Another member of the audience asked whether the change will support another delaying tactic that lets defendants go after the representatives, and help defendants get merits discovery? A judge responded that the change in the Rule will not change practice.

Another audience member, speaking from a defense orientation, asked how many times must we go through consideration of certification in the same case: today there are multiple considerations of certification in each case, prompted by ongoing discovery. A judge responded that multiple considerations in the same case had not been his experience. A plaintiff lawyer on the panel said that in federal courts, there is one decision on certification in the case; multiple consideration may become a problem when there are parallel federal and state filings. A defense lawyer on the panel stated that MDL practice waits for federal court filings to accumulate, then provides on decision on certification 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. And state cases are a bigger problem.

A different audience member suggested that given the proposed rule on attorney appointment, we might want to expedite the certification decision. We are hearing different voices from experience because different types of classes are different and are treated differently.

A panel member repeated the view that the certification decision should be final, not conditional.

Another audience member applauded the provision that would require some form of notice in (b)(1) and (b)(2) classes. But it is troubling to suggest that individual notice is not required for every identifiable class member; we should demand that. Still, we need not require as extensive notice as in (b)(3) classes. And we should make it clear that the defendant can be made to pay for the notice, or to include it in regular mailings to class members. And we should consider imposing notice costs on defendants in (b)(3) class actions. A panel member agreed that notice in (b)(1) and (b)(2) classes should be meaningful.

The same audience member suggested that the Committee should consider a softening of the requirement of notice to every identifiable member of a (b)(3) class. In some small-claims cases representative notice is enough. A panel member noted that the Committee in fact had considered sampling notice, but abandoned the project in face of the difficulty of deciding in each case which members would not get notice.

A panel member observed that the Note, p. 49, says that notice in (b)(1) and (b)(2) classes supports an opportunity for class members to challenge the certification decision. This should not be what you have in mind. Change it.

A judge in the audience suggested that the proposed rules on

attorney appointment and fees belong at an earlier point in the rule, in part because appointment is tied to certification. Rather than new subdivisions (g)and (h), they might be inserted before (e). A judge immediately responded that redesignating current Rule 23 subdivisions would complicate computer research inquiries for all future time. It was suggested that the appointment provisions might be included in the certification provisions of subdivision (c). A related suggestion was that "lead" counsel could be appointed before certification, to be presumptively class counsel. A panel member observed that under the PSLRA, the lead plaintiff is designated first, lead counsel is selected, and then the certification decision is made. Another panel member observed that courts now are handling appointment of class counsel as part of general pretrial management. Still another noted that the party opposing the class needs to know who can discuss discovery. An audience member stated that lead counsel has fiduciary responsibilities to the class from the moment of filing.

A panel member noted that the rules, including the discovery rules, emphasize the federal-state dichotomy: state cases proceed with alacrity into full merits discovery while the federal courts languish in limited certification discovery. That makes coordination of state and federal proceedings more difficult.

A committee member picked up the earlier references to the possibility of adopting a separate mass-torts rule, observing that the references had included a hint that an opt-in rule might be developed, and asked what such a rule might be? A panel member suggested that a mass-torts rule that does not involve a class might be useful, but could not describe what the rule might look like. During the early Committee consideration of Rule 23, a thorough revision was prepared that collapsed the 23(b) categories, provided an opportunity to limit the class to opt-ins, allowed a court to condition exclusion from a class on submission to claim preclusion or surrender of possible nonmutual issue preclusion, and supported sampling notice. This revision was withdrawn from consideration by the Standing Committee for fear of colliding with the contemporaneous debates over discovery reform. That model might be considered again.

A panel member noted that mass torts are very 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.

Another panel member suggested that perhaps the Committee — or Congress — should work toward a procedure that facilitates "judicial management of individual settlements." The procedure would not be a class action, but a process to try to establish a method for settlement or resolution that does not depend on counsel alone in the way that class settlements do.

Panel 2: Attorney Selection

The moderator for the second panel was Chief Judge Edward R. Becker. The panel included Stanley M. Chesley, Esq.; Professor Jill E. Fisch; Sol Schreiber, Esq.; and Judge Vaughn R. Walker.

The panel discussion opened with the observation that the conference is being held for the benefit of the Rules Committees, to inform their judgment about the issues that have been raised surrounding revision of Rule 23.

The first question asked the panel to address the provisions of draft Rule 23(g)(1)(A) and (2)(A), requiring appointment of class counsel when a class is certified and permitting the court to allow a reasonable time to apply for appointment. Do these provisions belong in Rule 23? Are they helpful?

The first panelist said that generally the appointment provision is very important. It underscores the fiduciary obligation of counsel to the class, and the fiduciary obligation of the court to make sure that counsel discharges the duty to the class. But it is not necessary to qualify the appointment rule by the preface: "unless a statute provides otherwise." There is no conflict between the PSLRA and Rule 23(g): lead plaintiffs nominate class counsel, who does not become class counsel until approved by the court. If there is a difference between draft rule and statute, it is that the PSLRA provides a specific time line for appointing counsel — this is where the exception for statutory directions should be made.

The next question asked the panel observed that the Note, p. 72, refers to "lead" and "liaison" counsel. These references involve the time for appointing counsel. Should the Rule define these terms?

The panelist who first responded to this question thought it important to be careful about language. "Class counsel" often is used to refer to "lead counsel": the Note seems to refer to temporary class counsel. Liaison counsel is different still. The concept of lead counsel needs definition. In mass torts, lead counsel may represent individuals, and get individual fees at the end.

It was agreed that the Advisory Committee should not misuse terms that have accepted meanings. Insights into general usage are helpful.

Another panelist observed that the Manual for Complex litigation is not law. There is no statute defining "lead" or "liaison" counsel. You have to define the term if you use it. In response to a question, he stated that "lead" counsel has a fiduciary duty, just as does class counsel.

Another panel member suggested there is no problem. You can have class counsel before certification, from the moment the class claim is filed. You can have a court appoint, or the attorneys agree on, lead counsel before the class is certified. But if you are going to address this topic in the Rule, you must recognize

that someone has to do the job before certification. The attorneys should get the court to appoint lead or liaison counsel as soon as possible; the court has to address the question only if the attorneys cannot agree.

An audience member added that counsel also may organize by an "executive committee." Courts accept a lot of leeway in describing leadership arrangements. This leeway is important. The politics of the class-action bar are involved.

Another audience member observed that lead and liaison counsel are just subsets of class counsel, perhaps with different responsibilities.

Another member of the audience suggested that there is a difference if only one case is filed. The one who filed the case is it. If there are multiple filings, coordination is needed, which may take the form of lead or liaison counsel. In MDL proceedings you have to have lead or liaison counsel. All of these settings differ from one another. The Manual speaks to this. A related observation suggested that perhaps the Rule or Note should recognize the "common-benefit" lawyer.

The panel then was asked to consider draft Rule 23(g)(2)(B), which mandates that the court consider three factors in appointing class counsel, grants permission to consider other factors, and recognizes authority to direct applicants to propose terms for fees and costs. Subparagraph (C) further provides that the order appointing class counsel may include provisions for the fee award. Should any criteria for selecting counsel be listed?

The first answer was that there is nothing wrong with these criteria. They provide guidance. But the list may be too confining. Other matters that might be included are the absence of conflicts; side agreements; relationships with some class members; and — in the securities area — "pay to play." Such matters must be considered in the appointment decision. It is not clear that any list can include all the relevant factors. It would be better to frame the rule in more general terms: class counsel should be one who will fairly and adequately represent the class. The terms of appointment can reinforce the representation.

Another panel member opposed specificity in the rule. Courts need to have discretion. The class is the ward of the court. The judge should pick counsel as someone the judge can work with. Sound discretion is what we need.

Agreement was expressed by yet another panelist. The attempt to identify specific factors in the rule will cause courts to give those factors undue emphasis. Freedom for precedent to develop in subject-matter specific ways is better. Fee arrangements and experience are more important in some areas than others. "Client empowerment" also is important. The perspective should not be entirely judge-centered.

A caution was voiced by a fourth panel member. Not all judges

have lots of class-action experience. It would be better to add more factors: the absence of conflict and side agreements are good examples. The list of factors also provides guidance to lawyers. Getting to know the judge is not how it should work.

The panel then was asked whether the fee terms should be separate from appointment, as may be implied by the provision that simply grants permission to include fee provisions in the order of appointment?

The first panel response was that fee terms are important, especially in (b)(3) common-fund cases, and should not be separated from the appointment. In most damages cases the total recovery is split between class and counsel. Fee terms are central.

A second panel member noted that contention has surrounded the question whether fees should be made part of the selection process, or otherwise considered ex ante. The Third Circuit Task Force draft report reflects the contentions. There is room for continuing development. It is too early to bind judges by a rule. Problems arise from putting the judge into the position of weighing and comparing fee arrangements. But in some cases fee arrangements can properly play a role in selecting class counsel. This can be discussed in the Note without putting it into the rule as a selection criterion.

The first panel member rejoined that fees should be considered as part of the appointment in every case. It should be mandatory for all cases, including those in which there is no competition for appointment as class counsel.

A third panel member stated that "fees should depend on results, not auction." Many foolish bids will be made. Lawyers need to make in camera presentations to the judge in a bidding process; this is unfair to the defendant.

The fourth panel member said that appointment should not go to the low bidder. The lodestar approach should be discussed with class counsel, but "making it a nexus" is a mistake. Beauty contest presentations can be impressive even when counsel lacks the ability to carry out the impressive representations. An auction may precede quick settlement, yielding fees that are too high; or it may precede proceedings that drag on interminably, yielding fees that are too low. "May" will be read as mandatory. "We should not put the deal out front."

An audience member — who is a federal judge — expressed "less confidence in the omniscience of federal judges." It is a mistake to debate bidding now. The draft rule is supposed to be universal, applying to class actions that are quite dissimilar one to another. Many of the considerations expressed in the Note apply equally to securities actions; the Note should make it clear that the same factors weigh in approving the lead plaintiff’s choice of counsel under the PSLRA. We avoid particulars in the text of the Federal Rules of Evidence; they belong better in the Committee Notes. The

Notes are helpful to both judges and lawyers. We should not particularize in the text of the rules.

Another audience member asked what consideration has been given to the problem that arises when a judge has an "investment" in counsel — having chosen counsel, the judge develops an interest in ensuring that counsel achieves a good result for the class because the judge has selected counsel to do that. One panelist responded that even under present practice, counsel must be identified and approved. The language of the Rule does not aggravate the "investment" problem.

An audience member suggested that it would be good to have counsel appointed by a judge who is not going to be responsible for managing the case. The bidding process typically goes in stages: first many contestants make preliminary presentations, then a few finalists are selected and make serious presentations.

Another audience member asked how far the draft rule is written to be enforced by appellate courts. A response was that it is written for district judges. But it also requires creation of a record that will support review. It is not clear whether the connection between appointment and class certification would support a stand-alone Rule 23(f) appeal, but it does not seem likely that courts of appeals will be eager to permit appeals from counsel-appointment orders. The question was then pursued: why have a rule if it is not going to be enforced?

A different audience member suggested that draft Rule 23(g)(2)(C) should be made mandatory. In ordinary practice an agreement on fees at the beginning of the representation is deemed essential as a matter of professional responsibility. If the fee basis is not resolved until the case is finished, there is a fight between the class and class lawyers to divide the pie.

Still another audience member voiced approval of the ex ante approach. But the role of the criteria for appointment listed in draft Rule 23(g)(2)(B) is unclear: is this a manual for the district judge? A direction to counsel on how to conduct the beauty contest? A source of Rule 23(f) appeals? Why provide a check list?

Another question from the audience asked how the rule would work when there is only a single class action, with only one set of lawyers and no competing applicants: would the court be responsible for going out to find competing applicants? A panel member suggested that the rule only requires lawyers to provide the information.

A related question observed that the court might deny certification because the only interested counsel could not provide adequate representation. But this can be done now under Rule 23(a): is Rule 23(g) calculated to divide the adequate representation inquiry, focusing on the representative party through 23(a) and on class counsel through 23(g)?

The next question put to the panel was whether it is proper to appoint a consortium of attorneys as class counsel.

One panel member found this question similar to the question whether the court's task is to select an adequate attorney or instead is to somehow select the attorney best able to represent the class. Should the designated class counsel have authority to make all decisions about conduct of the action? Does that include authority to farm out some of the work? However described, a de facto consortium may emerge as lead counsel brings in help from others. Some cases rule out appointment of a group of firms as lead counsel, but that approach may simply push the formation of the consortium out of sight, as lead counsel "makes deals" with others. The Note should recognize the reality of the need or desire for multiple fees; it is better not to drive underground the arrangements that are made.

A second panel member suggested that if there is not a consortium, the result will be "chaos on the plaintiffs' side" that harms the class and benefits the defendant. But the plaintiffs' bar has become much more sophisticated at working out these issues. Judges also have become more sophisticated. There never is a problem of involving too many lawyers; judges can control how much is paid in attorney fees. And this system does not exclude the novices and "little guys" from participation: they can be, and are, admitted to the consortiums.

Still another panel member said that in the real world, there is no problem. He further observed that the Manual for Complex Litigation is being revised even now.

The panel then was asked whether restrictions should be imposed on "side agreements" by class counsel outside the terms of appointment.

A panel member observed that one factor in deciding whom to appoint should be willingness to submit to regulation of side agreements. But there is no need to state this approach in the Rule or the Note. "Judges will develop good answers over time."

Discussion returned to Committee Notes in general terms. A panel member asked whether a Committee Note serves any purpose. Most lawyers do not know how to find them after a rule takes effect. Is a Note as binding as a rule? An audience member responded that commercial publishers produce annual rules books that include all the Committee Notes. The effect of a Note depends on which Supreme Court Justice you ask. Some, who do not believe in legislative history as an interpretive guide in any setting, would reject reliance on a Committee Note. But not all judges feel that way. And in any event a Note serves an educational function. A judge on the panel stated that he looks at Committee Notes all the time, but also observed that the draft Notes to the several Rule 23 proposals are too discursive. Much of what is in the drafts should be transferred to the Manual.

A judge in the audience added that the Enabling Act authorizes adoption of rules, not committee notes. The notes are Committee Notes, not notes of the Judicial Conference, the Supreme Court, or Congress. A Note cannot be adopted, or amended, without simultaneously amending the underlying rule through the full process. Any attempt to change a Note independently would be an invalid attempt to amend the rule without going through the full process.

A panel member observed that people seem to want guidance to the courts on the factors that may be considered in applying open-ended rules. One alternative would be to direct the courts to make findings in each case as to the factors that actually prompted a particular decision. The Notes could then describe things that courts might want to consider, without attempting to confine courts to the list.

Another audience member observed that "Notes are not Rules." The present package has rule-like statements in the Notes that belong, if anywhere, in the rules.

The panel then was asked whether the "empowered plaintiff" notion of the PSLRA should inform the designation of counsel under proposed Rule 23(g) in other cases?

The first panel response was "yes and no." The Rules Committees can learn from institutional investors who do take a lead role (as in Cendant): they have interest and expertise, although limited to securities cases. They are learned in the criteria for selection of class counsel. Mass-tort victims, on the other hand, are not likely to provide sophisticated insights into the selection of class counsel.

Another panel member suggested that the "Unless a statute provides otherwise" preface to draft Rule 23(g)(1)(A) has been put in the wrong place. There are different models of the "empowered lead plaintiff." The PSLRA requires the court to appoint a lead plaintiff, who in turn is primarily responsible for making decisions for the class, including selection of class counsel. Although some courts view it differently, the lead plaintiff's selection is dominant, even though subject to court approval. This same model could work in antitrust and intellectual property litigation. It is not likely to work in other areas, such as consumer classes. But Rule 23(g) could be drafted in terms that leave room for client input into selection of class counsel. It seems better, however, to leave such matters for the Note. The same may be true for such questions as the court's authority to modify fee arrangements between a class representative and class counsel, or to second-guess the very selection of counsel.

Another panel member suggested that the PSLRA responded to specific real-world concerns. Much of the motivation may have been to "stop" securities litigation. Another part was concern that a "100-share plaintiff" not be responsible for cooperating in the self-selection of class counsel. But lawyers have got around the

purpose. Sophisticated firms now "hustle state attorneys general and pension funds." If the "lead plaintiff" model is followed more generally, firms will arrange to "round up thousands of consumers" as clients to win the counsel-appointment race. One injured plaintiff should not have more voice than any other; the court should designate lead counsel.

The panel was then asked what should be the professional responsibility perspective on the proposition that the client has no role to play in selecting counsel?

A member of the audience observed that there are state rules on fees, fiduciary duties to clients, and selection of counsel. The Rule 23(g) draft may depart from these rules.

Another member of the audience suggested that in the real world what often happens is that a newspaper publishes a report that raises questions about the safety of a product. Dozens of product-liability class actions are then filed. Clients are accumulated by advertising on television and in national-circulation newspapers. Class counsel have an interest in appointment on terms that set fees in advance. There are beauty contests on the defense side as well: clients assume attorney competence, and compare or negotiate financial terms.

A different audience member suggested that there will be "collusion among plaintiffs' counsel to avoid contests." When there is a fee negotiation for a contingent fee, events may require renegotiation. But it is not clear how this can be done. Consider the auction house pricefixing litigation. The auction for counsel appointment was won by a bid that measured fees as a share of the recovery above $400,000,000. Suppose it turned out that, after much hard work, the award was only $350,000,000: should the original terms be renegotiated?

Yet another audience member urged that there is a need to encourage lawyers who have clients to take them to lawyers who are better able to represent them. It is important to ensure that the class is represented by lawyers who are good, and who can bear the risk of investing heavily in developing a case that may fizzle out. It is adequate to set the fee terms as the amount that the court will award. A front-end agreement is an unattractive thing. Consider the Exxon-Valdez litigation, in which victorious plaintiff counsel have yet to receive anything after waiting eleven years.

The panel was then asked to consider the Note statements at pages 79-80, suggesting guidelines for fees or costs and suggesting that the court may want to monitor the performance of class counsel as the case develops. The Rule does not talk about monitoring. Should the Rule say something? Should the Note be expanded, or should these comments be deleted?

A panel member thought that the monitoring comment is fine. A court will consider monitoring requirements as part of the selection of counsel and as part of the terms of engaging counsel.

Greater specificity would be futile.

Another panel member suggested a distinction between the ongoing conduct of litigation and the time spent and costs expended. The PSLRA should discourage monitoring of counsel's performance in the conduct of the litigation. An attempt by the court to monitor progress in developing the case against time expended would involve the court too deeply in counsel's work.

The first panel member added that lawyers have shown no interest in appointment of a master to provide monitoring during the progress of the case.

Another panel member asked who monitors defense counsel? What the defense does "drives what plaintiffs do." Judges in important class actions "keep tabs on things." They monitor the case, and can tell who is wasting time. Plaintiffs have no incentive to waste time; their efforts are to respond to the defense. When an action is brought against five, or ten, or fifteen companies the defendants retain national, regional, and local counsel. Local counsel look for things to do, contributing to waste work.

An audience member observed that Rule 23 is not the sole source of judicial monitoring authority in a class action. Excessive discovery efforts, for example, can be monitored through the discovery rules as a matter of discovery management. Separately, she also observed that the Note says at page 80 that the court should ensure an adequate record of the basis for selecting class counsel; this statement should be put in the Rule.

A different audience member said that the rule used to be that the trial judge should not settle the case. Monitoring counsel's ongoing work for the class creates the same risk of involving the judge with the merits. The MDL process provides for monitoring. Why not put monitoring in the rule?

Yet another audience member suggested that "monitoring" has a variety of meanings. One meaning may refer to the need to limit discovery demands because the demanding party is able to impose externalities — this is good monitoring. In a class action, the concern is that the class cannot monitor its own lawyer. The lawyer's freedom from any engaged client can help or hurt the class. It is difficult to know how to provide monitoring that helps the class.

The panel's attention was directed to the draft Rule 23(g)(1)(B) statement that counsel must fairly and adequately represent the class. Should this be included in the rule? If it properly belongs, is this bare statement sufficient?

The first response was that the provision is a bit confusing, but is adequate to draw attention to the need to consider the arrangement between counsel and the individual class representative. A second panel member agreed. In mass torts, the Victims Compensation Act signed this September 22 provides a model that could be considered, with changes, for mass torts. The same

panel member added the observation that a pre-certification order granting dismissal for failure to state a claim or granting summary judgment is not a ruling on the merits that binds the class; a second action may be brought, and is likely to be brought in state court.

The panel was asked to comment on the statement on page 73 of the draft Note that the rules on conflicts of interest may need to be adapted to the class-action setting.

A panel member responded that the draft Rule does not address conflicts of interest. The Note comment is a bit troubling. The meaning is not clear. The Committee should figure out whether they mean to tolerate conflicts that would not be accepted in other areas, or whether instead they mean to narrow conflicts rules by prohibiting conflicts that would be accepted outside a class-action setting.

An audience member urged that the Note statement should be retained. The Note provides a good discussion; the cases cited show why analysis of conflicts cannot be the same in class actions.

Another panel member said that it is dangerous to say that class members cannot insist on "complete fealty" of class counsel. The Note should say that the duty is owed to the whole class, not to individual class members.

Another audience member urged that 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.

Yet another audience member asked who monitors the defense? The client does. The Note suggests that it may be desirable to have class counsel report to the court under seal on the progress of the action. That is undesirable. It provides a one-sided source of information that may distort the court’s understanding and approach to the case.

Panel 3: Attorney Fee Awards

The moderator for the third panel was Professor Thomas D. Rowe, Jr. Panel members included Judge Louis C. Bechtle; Lew Goldfarb, Esq.; Alan B. Morrison, Esq.; Professor Judith Resnik; Judge Milton I. Shadur; and Melvyn Weiss, Esq.

The discussion was opened with the observation that several questions can be addressed to draft Rule 23(h) on attorney fees. Consideration of fees is not completely separate from the draft Rule 23(g) provisions for appointing class counsel. First, do we need any rule at all? The Note says a lot of interesting things, but nothing on why the Committee feels there is a need for a rule. Second, if it is useful to have a rule, does the draft do anything more than to codify practice? Third, are there things that should be added to the draft rule? Fourth, the text of the draft rule is structural and procedural, and says nothing about criteria for

determining the amount of an award. The Note, however, provides extensive comments on such criteria. Should these criteria be included in the Rule text? The Committee considered drafts that included criteria in the rule, but concluded that criteria should be relegated to the Note. A Note, however, persists until the Rule is changed: if the subject is in flux, should we run the risk that a list of criteria in the Note will become outmoded before it is possible to change the Rule? The discussion may be advanced by the fact that two panel members are also members of the Third Circuit Task Force on the Selection of Class Counsel.

The first panel member thought there is good reason to adopt a fee rule. The Note says that the rule addresses fee awards to lawyers other than class counsel. An unsuccessful rival for appointment as class counsel, "common benefit counsel," or objectors may be included. The Note also says that the choice between calculation by lodestar, percentage of recovery, or a blend of these approaches is left open. There is an emphasis on the tradition of equity. And a big list of factors is provided — actual outcome, risk factors, terms of appointment, fee agreements, and so on. We do need a rule, but in simplistic form. The simple rule will allow the Note material to become part of the federal jurisprudence. All judges will have the Note; it will bring uniformity. (But some of the Notes are too long, and there is a danger in citing cases.) The Note is a great resource. There are tons and tons of Rule 23 cases. A Rule saying that fees should be reasonable is not new; saying that class members can object is not new; and so on.

Another panel member thought the draft rule "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. 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. Rule 23(g), however, does not require the judge to hold a hearing or make findings in designating class counsel; Rule 23(h) requires findings on fee awards, but not a hearing. Rule 23(f) is an illustration of courts of appeals waiting to provide supervision in class actions. We should use the Rule to impose more regulation on district judges as they shop for, and as they pay, class counsel. 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.

The same panel member continued by observing that we do not want an impression of judges 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 and compensation should be in one rule. (2) The 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 by using a lodestar or by using a lodestar as a cross-check. (4) A schedule for expenses could be set, perhaps by the Administrative Office as a general matter, regulating such things as fees for copying, nightly 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 — the class has a role, but the judge also is responsible for taking account of client concerns.

A third panel member suggested that 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." The principal problem 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. There should be an opportunity for discovery. The Rule has evolved from a draft that required a hearing on a fee application to the present draft that simply 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 table without a hearing. And the draft 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 book.

A fourth panel member found "no objection to having a rule like this in general." Indeed, it was a surprise to discover that Rule 23 does not already include such provisions. Courts generally know what to do, but "codification is OK." 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." Class-action accountability is an important deterrent, a valuable law-enforcement tool. We need to enable people to take risks to bring victims into court. So Wall Street firms have partners whose function is to woo clients. The business-getter shares firm profits, even if doing no significant legal work. The equivalent happens in the plaintiff litigation bar. The plaintiff client

lawyer who cannot take on a litigation for one client alone takes the client to a class-action firm. It cannot be determined at the outset how much time the class-action firm will have to devote to the litigation, what risks it will have to take. Some matters are quite independent of the rational disposition of the litigation: a defendant, for example, may feel compelled to reject a present settlement that otherwise makes sense simply because the firm bottom line cannot absorb the cost, even though it is recognized that a much more expensive settlement three or four years later makes no sense apart from such bottom-line concerns. This phenomenon cannot be predicted. And the substantive law may change, making a case more difficult or impossible to win. Or everything may go according to reasonable predictions, but be followed by a great delay in getting paid. Draft Rule 23(h) does not take account of these realities.

This panel member continued by observing that the Note says at page 88 that the risks borne by class counsel are "often considered": why not "always"? There is an implication that it may be proper to refuse to consider this factor. And why does the draft Rule 23(h) say that a court "may" award a reasonable fee, rather than "must"? Of course a zero fee is reasonable if counsel is not successful. And the concern about a "windfall" can work both ways. The windfall may benefit client rather than counsel. The standard contingent fee is 1/3 of the recovery; anything less than that is to the client's advantage. Certainly anything less than 15% is a windfall to the client. Every case won by class counsel has to support many that "go nowhere" — thirty to forty percent of security actions are dismissed.

A fifth panel member began by observing that experience with more than 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 interesting claims with real clients who actually oversee the litigation. But matters are different in the other world. Of the 200-plus actions in this two-year sample, only one had a fee dispute. These cases were put together by syndicates of class-action lawyers. They have a syndicate agreement; one of those agreements designated two lawyers to be responsible for hiring clients. And no one goes to federal court any longer; they go to state court. One recent client was the target of 30 similar class actions filed in different states, each claiming damages of $74,999 to defeat removal. Abuse of the class-action mechanism is a real problem.

Part of the problem is that there is no real client. Rule 23(h) serves a need. The defendant does not care what the class lawyer gets; they want a package that achieves maximum res judicata, and are concerned about the cost of the entire package. The judge should be given maximum autonomy to consider what the result is worth to the class and to society. High risk exists only because the lawyers make up the claims out of whole cloth. But the risk is reduced — by filing 20 or 30 actions, the risk of losing all of them is reduced greatly.

It is proper to say that the court "may," not "must," award a reasonable fee.

The sixth panel member, introduced as the clean-up hitter, observed that "Batting 6 is not clean-up hitter." The task is enormous. "One size does not fit all." Each perspective is legitimate from one perspective at least. The Rule 23(h) draft "is unexceptionable." It does a necessary job in straight-forward form. The requirement of making findings and conclusions should apply both in Rule 23(g) and Rule 23(h). But the reference to origins in equity are troubling; the length of the chancellor's foot should not make a difference.

The Rule and Note do not say anything about the idea that the fiduciary obligation extends to the class representative as well as class counsel.

It is "just not possible" for a judge in retrospect to determine the adequacy of a fee application. That has driven the recent use of bidding. Knowledgeable lawyers know more about the case than the judge when they come in; the judge, indeed, knows little about the case. In camera submissions of one side's view of the case are troubling. Application of lodestar analysis is difficult because it relies on hindsight, and also because it creates incentives to pad the bill.

Even when the ultimate decision is vested in the class representative — see the PSLRA — it is useful to have up-front presentations by counsel as part of the determination of who is the most adequate plaintiff.

Rule 23(h) is well-crafted, although the Note might be shortened a bit. One difficulty arises from the suggestion at pages 83 to 84 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 the unsuccessful rival to contribute to the result.

Finally, it is fiction to think that a one-third percentage fee is the norm. That share is drawn from long-ago origins in representation of individual plaintiffs in personal-injury litigation. There is no reason to suppose that it should apply to the quite different setting of contemporary class actions.

An earlier panel member then urged that the Rule should be forward looking. Multidisciplinary practice is upon us. "Counsel" fees include payments for banks, accountants, escrow agents, and others. "Lawyer entourage" expenses can be used to make money. The judge is paying money to a lot of entities and different professions. They may be providing necessary and high quality service, but the judge should seek to ensure that the least expensive means are followed.

Another panel member reiterated that side agreements to pay for promising not to object, or for withdrawing objections, should be made known. But we should recognize that there are real class

actions to redress real wrongs.

A panel member responded that there is no problem with making side agreements known. Usually payment is for improving on the class settlement; we seek to have the court order payment to the objector.

An audience member suggested that it is difficult to know what percentage is appropriate when a percentage fee is set. It is particularly difficult to use a percentage fee when there is important equitable relief. A lodestar analysis may not suffice where there is risk, risk should be compensated. Lodestar relief, on the other hand, may be too much if it encourages elaborate structural relief that is in fact worth little to the class.

A panel member observed that the Supreme Court has ruled in the civil-rights statutory fee setting that a reasonable attorney fee may exceed the dollar amount of the judgment. "You should not commodify all value": there is a social utility in enforcing the law. One alternative worth considering is establishing authority for the Department of Justice to pursue important "consumer" actions; such a proposal, framed by Dan Meador, was in fact developed more than twenty years ago.

Another panel member suggested that in class actions that do not generate a common-fund recovery, defendants have a greater interest in the amount of any fee award and are much more likely to provide effective adversary contest of the amount. Draft Rule 23(h) applies in both the common-fund setting and other settings.

An audience member noted that the recent RAND study found cases where injunctive relief was assigned a dollar value after a presentation. In one case fees were based in large part on the injunction; the defendants negotiated with the plaintiff and joined in presenting the award proposal to the court. Objectors appeared; the eventual settlement directed much more of the benefits for the class, away from the class attorneys who negotiated the original deal. The financial incentives should be constrained without deterring useful class actions.

A panel member observed that there is another setting in which judges supply lawyers with clients. Lawyers are appointed for criminal defendants. Federal judges lobbied for creation of a panel system for private lawyers, a system that moves appointments away from focus on the individual lawyer and the attendant risk of patronage appointments. This model provides support at least for the proposal that the Administrative Office should establish guidelines for nontaxable costs.

Another panel member responded that Criminal Justice Act lawyers are paid inadequately. They accept appointments only for the trial experience. It would be a mistake to get the government into this.

An audience member suggested that 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. Of course there are cases where the defendant promises to obey the law and a fee is appropriate. But the defendant is not making an adversary job of it on the fee application.

The panel member who offered the analogy to Criminal Justice Act attorneys agreed that the court faces a problem when the defendant agrees not to oppose a fee application up to a stated amount. A judge who tries to cut below the stated amount may get — indeed has been — reversed on appeal.

A panel member returned to the percentage-fee amount: If not one-third, what? The case law developed out of the fee arrangements made for representing an individual plaintiff. There is at least a semblance of a market for representing individuals. There is no market in the class-action setting: the judges have created it. They need to do a lot of work in determining what are the real investments and the real risks.

An audience member asked what is the trial court's responsibility as to class counsel or the class representative? It is not a "fiduciary" duty to the class: the judge who manages a class action cannot be a fiduciary to the class. The Committee Notes do not suggest the fiduciary role, and it is properly avoided. 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; the judge has a judicial responsibility, not a fiduciary responsibility, to determine whether there has been an abuse.

The same audience member continued by observing that side agreements are a problem. If the total fee to a consortium is reasonable and fair, 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.

A panel member agreed that it is not right to describe the judge as "fiduciary." But the judge does have an obligation to see that the fee is fair. And if the fee basis is to be the lodestar, or if a lodestar calculation is used as a cross-check, the judge needs to know about side agreements.

An audience member asked two questions. First, what is the nature of the notice of the fee motion to class members? How expensive will it be? At times it is the defendant who provides notice. We need more information on who is to provide notice and what the notice is to be. Second, the draft provides for objections to a fee application by a class member or by a party who has been asked to pay. Why should a class member be allowed to object if the fee is not coming out of a common fund?

A different panel member observed that most lawyers who negotiate settlements "are decent"; "judges do their jobs. Do not

take away our weapons by requiring disclosure of side agreements." In the process of settling fifteen billion dollars of life insurance fraud cases, all of the lawyers were made happy in every case but one.

A panel member offered the view that it is important to equip clients and insulate judges. The judge is hiring and paying lawyers: if the judge is not a fiduciary, what is the judge? Still we can recognize that the judge is not to be more favorable to the plaintiff or defendant. A judge in the audience responded "then I have to be a judge.

At the conclusion of the panel discussion, Judge Levi described the first panel discussion for the next day. The 1996 Rule 23 proposals included a provision for settlement classes; fierce resistance appeared, including a strong objection by a large consortium of law professors. Part of the opposition arose from concern that abuses occur in the settlement process. The Committee turned its attention away from settlement classes toward strengthening the settlement process. Judge Schwarzer's article provided a solid foundation. One problem in judicial review of settlements often arises from a lack of adversariness. Another issue arises in (b)(3) classes as to the opportunity to opt out. When a proposed settlement and certification are considered at the same time, (b)(3) class members have an opportunity to opt out that is informed by knowledge of actual settlement terms. Even then, there is an inertia. But the class may be certified, and the opt-out period may expire, before there is a settlement agreement. The incentive to opt out is reduced when the decision must be made in a state of ignorance as to the consequences of remaining in the class or exiting. The Rule 23(e) proposal contains two versions of a second, or "settlement" opt-out for these cases. This settlement opt-out opportunity will be one of the important issues for discussion.

Professor Cooper summarized the issues to be addressed by three subsequent panels. The Committee has developed, but has not yet formally published for comment, proposals addressed to overlapping, duplicating, and competing class actions. The problems seem to be well managed as among federal courts, in large part thanks to the multidistrict litigation statute. When parallel class actions are filed in federal and state courts, coordination through the Judicial Panel on Multidistrict Litigation is not now possible. The panels will be asked to provide information on the nature and importance of such problems as may arise from multiple parallel findings. They also will be asked to discuss the question whether any problems that may deserve new solutions should be addressed by making new rules of procedure. The questions involved raise sensitive issues of federal-state relations, and might be better addressed by Congress. Even if rules solutions seem desirable, it must be decided whether effective rules are within the scope of the Rules Enabling Act and can be made consistent with the Anti-Injunction Act, 28 U.S.C. § 2283.

Panel Four: Settlement Review

The moderator for the fourth panel was Professor Jay Tidmarsh. The panel included John D. Aldock, Esq.; Professor John C. Coffee, Jr.; Kenneth R. Feinberg, Esq.; Gene Locks, Esq; Judge William W Schwarzer; and Brian S. Wolfman, Esq.

Discussion opened with the observation that present Rule 23(e) is quite short. The proposal is longer, but largely codifies existing practice. Draft Rule 23(e)(1)(A) makes explicit a requirement that the court approve voluntary dismissal even before certification. Draft Rule 23(e)(1)(B) requires notice to the class if a voluntary dismissal or settlement is to bind the class. Draft Rule 23(e)(1)(C) requires a hearing and findings of fact, and also states a standard for approval. It may help to begin with these assumptions: Amchem and Ortiz are satisfied by the settlement; no more can be done; the Notes are fine; and the settlement-opt out will be confronted later. On those assumptions, is the proposal — that is, paragraphs (1), (2) [disclosure of side agreements], and (4) [objections] an improvement?

The first panel member observed that the proposal largely incorporates present practice. There are no major problems in it. The notice provision in (1)(B) is an improvement. It is proper to spell out a standard for approval. It is an improvement to require findings. But there are some problems with the Notes.

A second panel member agreed that what the proposal attempts is sensible. The stronger version of the settlement opt-out is better. But the proposal "does not address the current crisis." As so often happens, a proposed revision seeks to fight the wars of the past. The crisis is reflected in the hip-implant litigation. Clever attorneys are trying to create the functional equivalent of a mandatory, non-opt-out class. We need to address this in settlement review. "Fairness and adequacy" require non-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 all who remain class members by refusing to opt out. This creates a discrimination against those who opt out.

A third panel member suggested that the hip-implant ploy is brand new. "We should not fight a war before it starts." Generally the proposal "is a nice job in doing what the Committee is allowed to do: codify best practices." It would be desirable to be more daring. Express provision should be made for settlement classes; they are useful for the end game. Asbestos will go on for another 20 years "thanks to the fine work of the judiciary." The problem of reform efforts now is that defense counsel went too far in their efforts effectively to kill class actions by seeking such things as opt-in classes.

A fourth panel member thought the rule "a step forward, as a codification of practice with some additions." The proposal will

help courts that do not see many classes, and that tend to see settlements in bipolar terms drawn from simpler 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 a rule to reject it. It would be better, however, to expand proposed (e)(3) so that a (b)(3) class member can always opt out of a settlement.

A fifth panel member suggested that if the proposal largely tracks and formalizes existing practice, it would be better to "leave it alone." Tinkering affects the mind-set of lawyers and judges; they look for reasons for the change apart from confirming present practice. The judges he works with do these things anyway. The changes will inhibit settlement. Judges will think there must be a reason for these changes, and will "put the brakes on." But if the proposal really promotes substantive change, it should be considered on the merits. But "merely to clarify and formalize" is not worth it. Requiring disclosure of side agreements is a mistake. Side deals 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.

The sixth panel member responded that side agreements should be disclosed, and should be disclosed early. Disclosure is particularly important when side agreements deal with fees, or effect settlements outside the class settlement. But there are some problems with the rest of the proposal. Why require approval of dismissal or withdrawal before certification? And why require notice in that setting — if a class is never certified, who is it that gets notice? And an attempt to list factors is a problem; the listed factors tend to become treated as the only factors, but the list may miss something. The requirement of approval to withdraw objections is new, and it is good; some objections are made "for not meritorious reasons."

The first panel member observed that the argument against expressing present good practice in an expanded rule assumes that all judges are experienced in handling class actions. It is in fact very useful to have a rule that reflects good practices as a guide to judges and lawyers.

The panel then was asked expressly to discuss the settlement opt-out.

The first response was that generally knowledge of a settlement provides a better basis for deciding whether to opt out. But we should not require a second opt-out opportunity in all (b)(3) classes. The first alternative, expressing a presumption in favor of the second opt-out, "will become required." The second alternative, which seeks to address the opportunity in neutral terms, is better. But it would be still better to address this question only in the Note. Notice is expensive, especially if it is to be delivered by newspapers or TV; the cost of notice in Amchem was between ten and twelve million dollars. The class

action is an attorney vehicle; the idea that people worry about it is a dream. Notice to lawyers is important — the case is over, you need to decide whether to file an individual action. Opt-out campaigns "are political wars"; propaganda is unfurled by both plaintiff and defense lawyers. The second alternative is better. Remember that the fen-phen settlement had opt-out opportunities "every time you turned around," but it is a rare client who can afford "this lack of peace."

Another response was that in an ordinary case, "it's a pig in a poke before settlement." The ordinary class member does not have enough information at that point. A reasonable opt-out judgment can be made only when the terms of settlement are known. It would be better to allow the opportunity in all cases.

A third response was that the first alternative is better. It does include an escape clause. The class may have had notice of settlement terms during the first opt-out period, even though there was no formal agreement ready to be submitted for court approval. The first alternative, however, "maximizes consumer choice" of class members in the more general cases. Notice could be more modest. But it is better that this be in the text of the rule; we need it for judges who are new to class actions.

A fourth view was that the first alternative, strongly favoring settlement opt-outs, "is dangerously close to one-way intervention." The "good cause" standard for refusing a second opt-out is very vague; if it turns on the fairness of the settlement, that should be addressed in every case as a matter of settlement review anyway. The Note has it right: if the settlement terms themselves provide an opt-out opportunity, that is a factor favoring the fairness of the settlement. Informative notice is far more important at settlement than at the beginning; the Notes at least should speak to this point.

Another panelist favored the settlement opt-out. In the diet drugs litigation there were four opt-outs: (1) from the settlement; (2) when a class member tests positive in the medical monitoring program, opt-out is again possible even though there is no present injury; (3) if a class member develops a clinical condition, there is an opt-out; and finally, (4) there is an opt-out "if the company cannot pay at the end." At least one informed opt-out should be allowed; usually it is sufficient to provide this at the time of settlement.

The final panelist observed that in mass torts, the aggregate terms of a class settlement are made known; opt-out then is one thing. Or attention could be focused on opting out when each class member knows his personal award — it probably is wrong to permit deferral of the opt-out opportunity that long. Or attention could focus on the latent-claim class member who will not know "for 23 years" whether a presently known exposure in fact will result in injury; an opt-out then "would destroy most of these settlements." Opting out at the time the "aggregate deal" is announced is not so

much of a problem.

One of the earlier panelists observed that he might disagree about the back-end opt-out, but that is not what is proposed here. Nor are we talking about all mass-torts problems. The diet drug settlement was done under pressure that improved the settlement because higher legal standards were imposed post-Amchem. It may be that a class is certifiable only if there is a back-end opt-out.

It was rejoined that it is dangerous to think of the opt-out only in terms of mass torts.

An audience member noted that the settlement opt-out would apply to antitrust and securities classes. There is a history of successful settlements without opt-outs in these areas. It is a mistake to write a general rule that applies to all types of class actions. Indeed it might make sense to treat classes that deal with small claims that cannot sustain individual litigation as mandatory classes.

A panel member said that these considerations support the second alternative as the better option. Settlement opt-outs make sense only in some cases. One difficulty is that money spent on notice comes out of the actual class relief. The "levels of notice" should be described in the Committee Note. Some should be in newsprint in the general fashion used for legal notices; and there should be notice to attorneys. The "mass buy" of television or newspapers of general nationwide circulation is not appropriate in many classes. And simple notice, if any, is most appropriate on the occasion of pre-certification dismissal.

An audience member asked what are we trying to fix? The problem of early notice arises when a class is certified for litigation. Mass-tort settlement classes negotiate opt-outs; it is proper for the Note to treat this as a factor in evaluating fairness. There is an issue in a small fraction of classes where there was early notice; the suggestion that there might be no notice is troubling. A response was that this suggestion is only that if settlement is anticipated, one notice will do it if the first opt-out period and notice are deferred until the settlement terms are known, or settlement efforts fall through.

Another panel member responded that fairness is protected by judicial review.

A different panel member observed that when class members are heterogeneously situated, you cannot have a settlement that is fair to everyone. Notice at the time of certification will be used to lock everyone in. There is no problem in securities litigation, because for years the parties have come in with settlement and certification at the same time. If certification and settlement are separated, the expensive notice should be deferred to the time of settlement.

A panel member urged that the Note should refer to the need to consider subclasses at the time of settlement review.

A further suggestion from a different panel member was that people should not be asked to decide on opting out before knowing what they will get, at least in personal injury cases. Notice at the time of the "aggregate agreement" is not good enough. The total available in Agent Orange sounded like a lot, but an intelligent opt-out choice could not be made on the basis of knowing that alone.

An audience member thought that the problems of notice and opting out should be put in the larger context of notice problems. The Eisen decision should be confronted directly. Notice and opt-out exist because unscrupulous class and defense counsel sell valid claims down the river. Small claimants do not need individual notice.

Another audience member observed that the parties can and often do negotiate multiple opt-outs; this approach may be required in mass torts. There is, however, no need for a rule to accomplish this. For securities and antitrust litigation, the first notice tells class members that they will be bound if they do not opt out. If you mandate opt-out after settlement, would you also mandate it after summary judgment is granted? After trial? The second opt-out proposal "turns the rule on its head"; it is like one-way intervention. This can be dealt with adequately in the way counsel negotiate. The settlement opt-out interferes with negotiating settlements.

Still another audience member urged that we remember history. Earlier Committee deliberations included a proposal to encourage objectors. The settlement opt-out, particularly in the weaker second alternative, is a lot better than fueling objections to every settlement. The Note, however, should be revised to make it clear that settlements are favored. The Note now does not say that, and indeed seems to have a hostile tone. We should begin the discussion by stating that settlement is favored.

A further comment from the audience was that from the defendant’s view, finality is an important goal of settlement. There is a tension between the need for class members to base an opt-out decision on meaningful information and the defendant’s ability to settle. Of course a "walk-away" can be negotiated for the defendant. But even then, the defendant knows that there will be some opt-outs, and that they will have to be paid; the first settlement is not complete, and provides a floor for negotiations with the opt-outs. The cost of notice is "an overlay." The more flexible version of the second alternative is a lot more sensible. Even then, settlement will be more difficult.

A different audience member suggested that notice cost is a red herring. Current law requires notice of settlement. This proposal simply requires that the notice include one more item, the right to opt out of the settlement. The first alternative for settlement opt-out is better, and perhaps the right to opt out should be even more strongly framed. Although the opt-out reduces

the defendant's opportunity for global peace, it should be provided to support informed choice by class members.

A panel member responded that the quality of the notice is affected by including opt-out information; notice will be more expensive.

A different panel member rejoined that if we are precluding substantial damage claims, we should have good notice.

A Committee member observed that over the years, both plaintiffs and defendants have thought that this is an area where we can do some good. Fairness is a concern; we also need assurance of fairness for the court in the nonadversary setting of settlement review. One possibility is to appoint an objector; at least one participant in the discussions has favored that approach. Consideration of the court-appointed objector, however, generated much consternation. Trial and summary judgment are different from settlement; they were presented by adversaries and decided by the court.

A panel member responded that settlement classes are always adversarial — objectors, a co-defendant, or someone from the plaintiff's bar, does appear. The day-to-day problem is not the sweetheart settlement that no one objects to.

A different panel member objected that this observation applies only in the highly specialized mass-torts subfield. The FJC study found that 90% of the settlements reviewed were approved without objection and without change. Class settlements are fundamentally different from individual actions, where settlement is favored.

A panel member suggested that 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, and even apart from that a 20% or 40% opt-out rate would tell the court something. The settlement opt-out is useful.

An audience member asked why we need the first opt-out, if the limitations period is extended to the second opt-out? And also asked why notice should be given of a pre-certification dismissal that does not bind the class? A defendant who wants notice in such circumstances should pay for it.

A different audience member responded that the second notice might be more effective. The IOLTA cases say that clients have a property interest in pennies; class members have a property interest in small claims. Those who want global peace have an interest in the quality of the second notice. The problem is to ensure that settlement is adequate for the absentees. The first alternative, favoring settlement opt-out, "is a big improvement."

A panel member stated that the idea of a court-appointed objector "is horrible." "Any alternative is better." The best

approach is to list an opt-out opportunity provided by the terms of settlement as a factor supporting the fairness of the settlement. The second, more flexible settlement opt-out in the rule is the next-best alternative. And there is no authority to do anything before certification: a defendant should not be forced to pay for notice because the plaintiff brought a bad case.

Another panel member stated that the only real choice is between the first and second alternative versions of the settlement opt-out. The court-appointed objector system would degenerate into a civil-service bureaucracy or a buddy system, a nightmare. Market forces are better. The language of the first alternative might be softened a bit: 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.

A different panel-member view was that the parties should be fully informed in connection with settlement, but opt-out does not follow. We want defendants to be able to achieve global peace. There is a need to choose the lesser evil: is unfairness to class members so great? "I do not know the answer."

The panel was asked to identify any concerns they might have with the Committee Notes.

The first response found "some strange things" in the Notes. (1) The Note assumes the certification of settlement classes. They cannot be done any longer. (2) There is confusion about dismissal of individual claims without notice. (3) Individual premiums incident to settlement "are a real problem." (4) Notice in connection with involuntary dismissal is mentioned: why? (5) The Note can be greatly condensed. But the factors "are a good start"; it is better to have them in the Note than in a Rule.

The second response began by observing that we do not want the judge to be a fiduciary for the class, to be part of the strategy that causes the defendant to pay money. So page 54 refers to seeking out other class representatives when the original representative seeks to settle before certification; the present lawyers, or other lawyers, may seek out other representatives — the judge should not be involved. Page 68 is similar in suggesting that the court might seek some means to replace a defaulting objector; the court should not do that, but should instead provide a defined period — perhaps 30 days — for other objectors to appear. Generally, the Notes should be shorter. The factors for reviewing a settlement are good and well stated. And citing cases helps.

A third response began by noting that proposed Rule 23(e)(1)(C) speaks only of "finding" that settlement is fair, reasonable, and adequate; the Note, page 55, requires detailed findings. The detailed findings requirement should be stated in the Rule. The settlement-review factors properly belong in the Note. Factor (I) needs "some tweaking": it should say explicitly that it looks to results for other claimants who press similar

claims. The Note observes, page 65, that an objector should seek intervention in order to support the opportunity to appeal. Earlier, the Committee considered an explicit rule provision that would establish appeal standing without requiring intervention. It would be better to restore this provision; class-action practice is the one area of significant litigation where notice often goes to pro se parties who cannot be expected to reflect on such refinements as the opportunity to seek formal intervention in addition to the opportunity to present objections without intervening. Finally, page 67 refers to Rule 11 sanctions against objectors; it "comes across as a threat." "We should be creating a hospitable reception for objectors."

A fourth response began by referring to the draft Rule 23(e)(2) authority to direct that "side agreements" be filed. 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 it clear that these are examples of side agreements. Another shortcoming is that the "fairness" of a settlement is not defined. Is it the greatest good for the greatest number of class members, even though the settlement may be ruinous for some? The Note, if not indeed the text of the rule, should incorporate a notion of nondiscrimination. So the trick of imposing a lien on a defendant’s assets only for the benefit of those who remain in the class, without opting out — this is subordination of one group to another, and unfair.

A fifth response suggested that the list of settlement factors should be expanded to refer to the effect of the settlement on pending litigation.

A member of the Standing Committee observed that a "back-end opt-out" is not likely to be provided in antitrust or securities litigation, and asked whether future mass-torts settlements will be approved if there is no back-end opt-out? A panel member responded that in personal injury cases, 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 is enough. Another panel member suggested that we should not use asbestos as an example for all cases. In many cases, the biological clock ticks faster — there is a predictable, and finite, number of downstream claims, with a latency period of two years, or four years, not twenty. Defendants can deal with this kind of "extended global peace." The back-end opt-out can be worked out. A third panel member said that in a large heterogenous mass-tort class, back-end opt-out can address the constitutional needs. But if the class is more cohesive, the Telectronics decision in the Sixth Circuit accepted the idea of settlement without back-end opt-out; it reversed only because the class rested on an unsupported limited-fund theory. A fourth response was that it would be a mistake to make a back-end opt out a mandatory condition of settlement. A back-end opt-out was negotiated in Amchem pending appeal, anticipating a remand for further proceedings in the class action; the arrangement was defeated by the Supreme Court’s actual

disposition. The opt-out may not be needed if you know of the progression of the disease within a finite population.

An audience member said that the first sentence on Note page 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.

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, as Pointer and Bechtle. 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 create 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.

Panel 8: Reflections on the Conference

The moderator for Panel 8 was Professor Arthur R. Miller. The panel members included Professor Paul D. Carrington; Chief Judge Edward R. Becker; Judge Paul V. Niemeyer; Judge Sam C. Pointer, Jr.; and Judge Wiliam W Schwarzer.

The panel was introduced as the "greybeards" of federal civil procedure. "Our job is to help the Committee." Discussion should begin with the proposals actually published for comment; the nonpublished proposals should be deferred for later.

The first panel member thought "there is a lot of sensible stuff here." But caution is indicated for a variety of reasons. Rule 23 should be amended only if there is a real need. There are many cross-fires, and there can be important effects on substantive interests. The rulemaking process is too fragile to bring to bear. The package does not have any "hot button" issues, but caution is indicated. In 1941, Harry Kalven wrote an article about small claims that do not get litigated. That article was the inspiration for the eventual adoption of Rule 23(b)(3), and "that's why we're here." Perhaps the time has come to delete Rule 23(b)(3). (Another panel member interjected: "I can't believe you said that.")

The next panel member recommended that the Committee go forward, "with a couple of exceptions." The proposals have been attacked in ways that "I would not have been anticipated." But they are good. Codifying present good practice is a good thing; not all judges are as adept in managing class actions as the best. But the settlement opt-out may create more problems than it is worth. And the Notes are too long. The Rule 23(h) Note includes material that should be in the Manual. A Note should explain the reason for the rule. The Note can be shortened by cross-referring to the Manual. Lists of "factors" should not be put into the rules; they should be set out in the Note, or not at all. In response to a question about the "destabilizing effects" of rules amendments, this panel member responded: "I don't see them." Evidence Rule 702 was amended to codify the Daubert approach to expert-witness testimony, and it has worked.

The third panel member began by observing that "it is deja vu all over again." The history of the Advisory Committee's efforts deserves review. "History is history. Rule 23 is here." There is little reason to believe that the group that created Rule 23(b)(3) nearly forty years ago understood the power they were unleashing. "It has become a de facto political institution." Attorneys appoint themselves heads of their own little principalities. Some are good, and some bring abuses. How can we control or manage this? The proposals are not remarkable. But to get through the

full rulemaking process, "you cannot be remarkable." There are many interests; that makes it difficult to change rules, and even makes it difficult to get disinterested advice. An approach that codifies existing practice leads to a choice for the Advisory Committee: is it to be a leader or a follower? As with the Daubert approach to expert testimony, it is wise to be cautious about engraving current practices in a Rule. Rule 23 has a very sophisticated set of followers. That should be taken into account. As to more specific proposals, the Rule 23(c) proposal leaves some confusion about pre-certification discovery; that should be clarified. The attorney appointment and fee proposals should be collapsed into Rule 23(c). And there should be something that speaks to pre-certification appointment of counsel. The settlement-review proposal seems about right, apart from the settlement opt-out. The settlement opt-out might be reduced to one of the factors considered in reviewing fairness, or perhaps a compromise version could be retained in the rule. Finally, the Notes are "intelligent, complete, but longer than you need after the present process is worked through." There is some substance in them. The list of factors seems to work pretty well. But there are some inconsistencies. The Notes probably "are a little fulsome."

It was observed that "there has been an organic shift in Notes. The Rules also have grown longer." The earlier attitude was to be sparse, to give direction and describe intent. A panel member suggested that it is important to describe the Committee's purpose. Probably it is better to leave out advice on how to exercise the power. It was suggested that the Notes are now attempting to fill a new legislative history role. Another suggestion was that the proposed attorney-fee rule "has a quasi-public aspect." There is good reason to have something in the Rule; the question is how far to get involved in it.

Another panel member thought that the biggest problem is what will happen to the proposals on competing and overlapping classes. If they are going forward to publication, there will be trouble with the already published proposals if kept on a parallel track. The published proposals would not change much. The settlement opt-out would be a change; under present practice, settlement opt-outs are negotiated when appropriate. This proposal fails to distinguish between different forms of class actions. It will "generate a lot of heat. It is a problem." The other proposals are "largely instructive" to lawyers, trial judges, and appellate judges. If the nonpublished proposals are not going forward, it makes sense to go forward with the published proposals apart from the settlement opt-out. And the three criteria for selecting class counsel should not be in the text of the rule. Focusing on the amount of work an attorney has done will become a reward for racing to do a lot of up-front activity to win the appointment. The Notes are too long, and at times are self-contradictory or contradict something in the Rule That needs attention. Finally, the biggest problem arises from settlement classes. It is "amazing" that the

overlapping class materials should have been disseminated, even for discussion in this conference, without also including a settlement-class proposal.

Another panel member agreed that there should be a settlement-class proposal.

One of the earlier panel members observed that some in Congress view Rule 23 as "an end-run around Congress." The settlement class "is an entire agency. Amchem was dead on." This observation met the response that Amchem is consistent with smaller, cohesive settlement classes. "They're here, they exist. They're tough to draft." It remains difficult to figure out what the Amchem opinion means by saying that settlement can be taken into account. The rejoinder to this observation was that the problem with a settlement class is that it cannot be tried, so there is no constraint arising from the alternative prospect of litigation.

An academic panel member suggested that the problem with the current discussion is that it involves too many federal judges. The problems cannot all be solved by judges. 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.

The next panel member expressed general agreement that the proposals make sense. But the Rule 23(e) notes imply that there is such a thing as a settlement class; "not everyone agrees." There is no need to cover everything in Rule 23. There is plenty of law on attorney fees; you do not need a rule. The rest of it 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 amendments of Rule 26 are a good model; they are not short, but are a good source of guidance. These Notes are too much text, and resource about the law. The law may change. And the Notes also focus on the need for findings; that should be in the Rule, not the Notes. The mandatory settlement opt-out is a bad idea; it almost gets into the substance of the settlement.

An earlier panel member responded that the settlement opt-out is a good idea. Its virtues have been fully stated. 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."

The panel then was asked to address the overlapping class proposals.

The first response was that "This is not doable." It sparks too much reaction, and divides so deeply, that it is "dead from the beginning." The problem, to be sure, is serious: "universal venue" means unlimited repeats, and eventually the plaintiffs will win.

One fair day in court should be enough. A rough and quick response may be appropriate; that is what Congress can do. The question of Enabling Act authority is academic; the lawyers who are interested in class actions will fight and defeat the proposals no matter whether they are within Enabling Act authority.

The next response was that these proposals "have put the cooper over the barrel." The statutory approach is proper. But the statutes will not be enacted. But different statutory approaches may be feasible. A choice-of-law statute, federalizing choice of law, is doable. In terms of overlapping classes, we are now down to the "outlier judge, not outlier jurisdictions." A choice-of-law statute would enable more federal classes, reducing these problems.

Professor Miller observed that he had devoted five years to developing the proposals in The American Law Institute Complex Litigation project. It deals with all of these questions, including choice of law.

A panel member noted that the various overlapping class proposals had been created as illustrations to provoke exactly the conversations that have been occurring. They have served the purpose of uncovering the arguments of authority and usefulness that have been made at this conference.

A different panel member noted that a multiparty-multiforum bill has languished in Congress for ten years because agreement on precise terms has proved impossible.

Still another panel member suggested that it might be desirable to have more class actions in state courts if they could be limited to state-wide classes. The nasty problems emerge from nationwide classes in state courts; the Kamilowicz action is a particularly noisome example. A member of the audience was asked to respond to this suggestion. She thought it would interfere with a "universal choice-of-law system." Chapter 6 of the ALI study is good. If we had a uniform choice of law we would be much better off. Often it would limit state courts to state-wide classes. But the state that is the heart of where a product is made should be able to entertain a nationwide class. The difficulty that stands in the way is that "academics defeat reform."

It was observed that we are in a situation in which many people distrust state courts, but will not say it. The Shutts litigation in effect involved a national class action. Part of the opinion addresses choice of law. It was sent back to Kansas courts for guidance, and the state courts decided that all states have the same law as Kansas. Such results inspire cynicism.

A member of the audience responded that a federal court is obliged to look to state law. How can you not let a state court decide what state law is? You have to. And you may be able to extrapolate that to other jurisdictions. Why assume the federal court has the ultimate wisdom to decide the state law that should

control? It is overreaching for an MDL judge to assume control over state cases for the purpose of implementing an eventual class settlement. So a state judge acting in a case involving in-state defendants and in-state activities should not be preempted by federal courts for the purpose of implementing a national solution.

A panel member agreed that a state court should be able to apply state law to "state situations," but should not be able to apply its own state law to the entire country. The audience member responded that a state court is better able than a federal court to determine whether its own state law is the same as the state law of twenty other states.

The moderator concluded that the panel had offered no support for the nonpublished rules on overlapping classes. He went on to note that the 1963-1966 period of the Advisory Committee was also the period when state long-arm statutes were emerging. The Committee debated at length the possible adoption of long-arm provisions in Rule 4, focusing on the Enabling Act. One Committee member had direct back-channel advice from at least two Justices that a rule-based long-arm provision might exceed Enabling Act limits, and that it would be ill-advised overreaching to attempt the task. Later, the Committee again backed off a long-arm provision, adopting only a "100-mile bulge" that was "put in as a sort of test." "The debate today is fascinating."

The Conference concluded with one final expression of thanks to all the panelists and all others who attended.

Respectfully submitted,

Edward H. Cooper, Reporter