Committee on Rules
of
Practice and Procedure
Agenda Item 7

Washington, D.C.
June 10-11, 2002

9. Report of the Advisory Committee on Bankruptcy Rules

   A. **ACTION** — Approving and transmitting to the Judicial Conference proposed amendments to Rules 1005, 1007, 2002, 2003, 2009, 2016, proposed new Rule 7007.1, and Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, 17, and 19
   B. **ACTION** — Approving publication for public comment proposed amendments to Rule 9014
   C. Minutes and other informational items

10. Status Report on Local Rules Project

11. Report of Technology Subcommittee

12. Status Report on Attorney Conduct Rules (oral report)

13. Long-Range Planning

14. Next Committee Meeting (Phoenix, Arizona, January 16-17, 2003)

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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TO: Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure

From: David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure

Date: May 20, 2002

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met on January 22 and 23 at the Administrative Office of the United States Courts in Washington, D.C., and on May 6 and 7 in San Francisco.

The January meeting was held in conjunction with the second public hearing on proposed Civil Rules amendments that were published for comment in August 2001. The meeting focused on items that were carried forward on the Committee agenda for future action. The Committee asked for preparation of a resolution on possible legislative approaches to overlapping class actions, a matter that is presented for action with the report on the May meeting.

The May meeting was devoted almost entirely to discussion of the August 2001 proposals in light of the voluminous testimony and comments. As with earlier Civil Rules proposals, the testimony and comments were enormously helpful. Significant improvements in the published proposals are recommended, but none of the changes departs from the published proposals in a way that would require republication.

Part I of this report describes the three rules that were published for comment in August 2001 and are recommended for submission to the Judicial Conference and Supreme Court for adoption. A brief introductory summary of these rules is provided here. The format adopted for the detailed recommendations is guided by the nature of the changes. Rules 51 and 53 are completely rewritten. Rule 23 subdivision (c) is substantially rewritten, subdivision (e) is completely rewritten, and subdivisions (g) and (h) are new. The Rule 51 materials are relatively brief, but the Rule 53 and Rule 23 materials are lengthy. To facilitate discussion, each rule is introduced by a clean text of the rule and Committee Note as recommended for adoption. The

statement of changes since publication follows. The "recommendations" then restate the purpose of the proposed amendments and the reasons for the changes made since publication. The historic materials follow — first the summaries of testimony and comments and then the traditional overstrike, underline, and double-underline versions that show changes from the current rule and the changes since publication.

Rule 51 is completely rewritten, but little is new. The purpose of the revision is primarily to express in the rule the many practices that are not clearly expressed in the rule. Some of the changes are designed to confirm good practices that have been adopted in defiance of the present rule text. Many courts require submission of requests for instructions before trial begins, although Rule 51 now seems to direct that the earliest time is "during trial." Many courts recognize a "plain error" doctrine, although Rule 51 seems to forbid review. Other good practices have softened the requirement that there be both requests and objections. Comments on the proposed rule led to a revision of the "plain error" provision to bring it as close as can be to the plain error provision in Criminal Rule 52(b).

Rule 53 is completely rewritten as well. Present Rule 53 addresses only trial masters. A study by the Federal Judicial Center confirmed the belief that masters are frequently appointed for pretrial and post-trial duties. New Rule 53 brings pretrial and post-trial masters into the rule, establishing the standard for appointment. It carries forward the demanding standard established by the Supreme Court for appointment of trial masters, and eliminates trial masters from jury-tried cases except upon consent of the parties. Two major changes are recommended since publication. The standard for reviewing a master's findings or recommendations for findings of fact is set as de novo decision by the court, with limited exceptions adopted with the parties' consent and the court's approval. And in response to several strong and persuasive comments, it is recommended that subdivision (i), addressing appointment of a magistrate judge as master, be deleted. Other changes from the published rule also are recommended, as described in more detail with the separate Rule 53 recommendations.

The Rule 23 revisions address the process for managing a class action on the assumption that a class has been certified. They do not address the prerequisites or criteria for certification. Rule 23(c) changes address the time for determining whether to certify a class and strengthen the provisions for notice. The most important change since publication is to modify the proposal that notice be required in (b)(1) and (b)(2) class actions. Comments from many civil rights groups urged that mandatory notice, even if by relatively inexpensive means, could cripple many class actions.

Rule 23(e) is completely rewritten to strengthen the procedure for reviewing a proposed settlement. The recommendations for changes from the published version identify the most salient provisions. As published, Rule 23(e)(1) required court approval for voluntary dismissal

or settlement before a determination whether to certify a class. Testimony and comments underscored earlier doubts whether there is much that a court can do when the only parties before it are unwilling to continue with the action. This provision is amended to require court approval only for voluntary dismissal or settlement of the claims, issues, or defenses of a certified class. Rule 23(e)(2) authorized the court to direct the parties to file a copy or summary of any agreement made in connection with a proposed settlements. The comments and testimony provided strong support for establishing a mandatory requirement. As revised, Rule 23(e)(2) directs the parties to identify any agreement made in connection with a proposed settlement. Rule 23(e)(3), establishing a discretionary opportunity to opt out of a (b)(3) class settlement after expiration of the initial opt-out period, was published in two versions. The recommendation is to adopt in restyled form the second version, which says that the court may direct a new opt-out opportunity without establishing any presumption in favor of providing the opportunity. Rule 23(e)(4) describes the right to object and requires court approval for withdrawal of an objection. Only style changes are recommended.

Rule 23(g) establishes a formal requirement that appointment of class counsel be made upon certifying a class. The core of this rule reflects established practice that reviews the adequacy of class counsel as part of the Rule 23(a)(4) determination whether class representatives will fairly and adequately represent the interests of the class. Several changes are recommended in response to the testimony and comments. An explicit provision is added to authorize designation of interim counsel to act on behalf of a putative class before the certification decision. There are new and sharper statements of the distinction between actions in which there is only one applicant for appointment as class counsel and actions in which there are competing applicants. And the criteria for appointment are supplemented by provisions designed to reduce the risk that an entrenched and ingrown class bar will fence out counsel whose knowledge of the law and experience in the subject matter of the litigation promise effective class representation despite a lack of class-action experience.

Rule 23(h) establishes a procedure for acting on attorney fee requests. Only minor changes from the published version are recommended.

The Committee Notes for Rules 51, 53, and 23 have been dramatically shortened. The Standing Committee expressed concern about the role of Committee Notes at the June 2001 meeting and explored the same questions in more general terms at the January 2002 meeting. The published Notes prompted much helpful discussion in the testimony and comments, but can be reduced to more compact explanations of the changes effected by the amendments.

The Committee is not recommending any rules for publication in this report. Part II accordingly provides a brief list of some of the more prominent items on the Committee agenda.

Rule 51

I Action Items: A. Rules Recommended For Adoption

RULE 51

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

(a) Requests.

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

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

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

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

(b) Instructions. The court:

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

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

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

(c) Objections.

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

(2) An objection is timely if:

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

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

(d) Assigning Error; Plain Error.

(1) A party may assign as error:

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

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

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

Committee Note

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

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

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(2), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial.

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

The risk in directing a pretrial request deadline is that trial evidence may raise new issues or reshape issues the parties thought they had understood. Courts need not insist on pretrial requests in all cases. Even if the request time is set before trial or early in the trial, subdivision (a)(2)(A) permits requests after the close of the evidence

to address issues that could not reasonably have been anticipated at the earlier time for requests set by the court.

Subdivision (a)(2)(B) expressly recognizes the court's discretion to act on an untimely request. The most important consideration in exercising the discretion confirmed by subdivision (a)(2)(B) is the importance of the issue to the case — the closer the issue lies to the "plain error" that would be recognized under subdivision (d)(2), the better the reason to give an instruction. The cogency of the reason for failing to make a timely request also should be considered. To be considered under subdivision (a)(2)(B) a request should be made before final instructions and before final jury arguments. What is a "final" instruction and argument depends on the sequence of submitting the case to the jury. If separate portions of the case are submitted to the jury in sequence, the final arguments and final instructions are those made on submitting to the jury the portion of the case addressed by the arguments and instructions.

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

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

Subdivision (b)(3) reflects common practice by authorizing instructions at any time after trial begins and before the jury is discharged.

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

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

Many circuits have recognized that an error not preserved under Rule 51 may be reviewed in exceptional circumstances. The language adopted to capture these decisions in subdivision (d)(2) is borrowed from Criminal Rule 52. Although the language is the same, the context of civil litigation often differs from the context of

criminal prosecution; actual application of the plain-error standard takes account of the differences. The Supreme Court has summarized application of Criminal Rule 52 as involving four elements: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Johnson v. U.S.*, 520 U.S. 461, 466-467, 469-470 (1997). (The Johnson case quoted the fourth element from its decision in a civil action, *U.S. v. Atkinson*, 297 U.S. 157, 160 (1936): "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise substantially affect the fairness, integrity, or public reputation of judicial proceedings.")

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

The factor most directly implied by a "plain" error rule is the obviousness of the mistake. The importance of the error is a second major factor. The costs of correcting an error reflect a third factor that is affected by a variety of circumstances. In a case that seems close to the fundamental error line, account also may be taken of the impact a verdict may have on nonparties.

Changes Made After Publication and Comment

The changes made after publication and comment are indicated by double-underlining and overstriking on the texts that were published in August 2001.

Rule 51(d) was revised to conform the plain-error provision to the approach taken in Criminal Rule 52(b). The Note was revised as described in the Recommendation.

Recommendation

The Committee recommends adoption of Rule 51 substantially as published. This proposal drew few comments. Many supported this recodification of current best practices. The Civil Procedure Committee of the American College of Trial Lawyers, for example, found the proposal "a notable improvement over the existing text."

The "plain error" provision of proposed Rule 51(d) was rewritten to conform to the approach taken by Criminal Rule 52(b). Rather than state that a party may assign a plain error, the revised version states that a court may consider a plain error.

Changes were made in the Committee Note to state that Rule 51 "governs instructions to the trial jury on the law that governs the verdict." The Supreme Court's approach to "plain error" also is described. The Note also has been shortened by removing several passages that might seem to go beyond explaining the rule text.

Summary of Comments on Rule 51

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

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

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

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

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

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

Section of Antitrust Law, ABA, 01-CV-0-72: (1) Endorses 51(a). "Pretrial requests for jury instructions are especially helpful to parties preparing to try complex cases." They can help the court decide whether to bifurcate the trial, or set the stage for summary judgment or severance of claims or parties. At the same time, pretrial requests are not necessary in every case. And the (a)(2)

provisions for later requests are appropriate. (2) The changes included in 51(b) also are favored. Preliminary instructions at the outset of trial "may assist an antitrust jury by acquainting it with basic antitrust principles. Interim instructions, especially if made during an unusually lengthy or complex trial, may also be quite helpful * * *. Supplemental instructions given during jury deliberations may clarify issues for jurors." (3) Rule 51(c) is "a reaffirmation of existing law and practices. We concur * * *." (4) "We endorse proposed Rule 51(d)," which addresses the "potential pitfall" created by the present requirement that a party object to failure to give an instruction that has already been denied. And it codifies the plain error doctrine.

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

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

furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests.

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

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

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

(b) Instructions. The court:

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

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

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

(c) Objections.

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

(2) An objection is timely if:

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

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

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

(1) A party may assign as error:

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

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

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

Committee Note

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

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

Requests. Subdivision (a) governs requests. Apart from the plain error doctrine recognized in subdivision (d)(2~~3~~), a court is not obliged to instruct the jury on issues raised by the evidence unless a party requests an instruction. The revised rule recognizes the court's authority to direct that requests be submitted before trial. ~~Particularly in complex cases, pretrial requests can help the parties prepare for trial. Trial also may be shaped by severing some matters for separate trial, or by directing that trial begin with issues that may warrant disposition by judgment as a matter of law; see Rules 16(c)(14) and 50(a). It seems likely that the deadline for pretrial requests will often be connected to a final pretrial conference.~~

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

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

Subdivision (a)(2)(B) expressly recognizes the court's discretion to act on an untimely request. ~~Untimely requests are often~~

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

made on submitting to the jury the portion of the case addressed by the arguments and instructions.

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

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

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

Objections. Subdivision (c) states the right to object to an instruction or the failure to give an instruction. It carries forward the formula of present Rule 51 requiring that the objection state distinctly

the matter objected to and the grounds of the objection, and makes explicit the requirement that the objection be made on the record. The provisions on the time to object make clear that it is timely to object promptly after learning of an instruction or action on a request when the court has not provided advance information as required by subdivision (b)(1). The need to repeat a request by way of objection is continued by new subdivision (d)(1)(B) except where the court made a definitive ruling on the record ~~mollified, but not discarded, by new subdivision (d)(1)(B)(2)~~.

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

Many circuits have recognized that an error not preserved under Rule 51 may be reviewed in exceptional circumstances. ~~The foundation of these decisions is that a district court owes a duty to the parties, to the law, and to the jury to give correct instructions on the fundamental elements of an action.~~ The language adopted to capture these decisions in subdivision (d)(2)~~(3)~~ is borrowed from Criminal Rule 52. Although the language is the same, the context of civil litigation often differs from the context of criminal prosecution; actual application of the plain-error standard takes account of the differences. The Supreme Court has summarized application of Criminal Rule 52 as involving four elements: (1) there must be an

error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity, or public reputation of judicial proceedings. *Johnson v. U.S.*, 520 U.S. 461, 466-467, 469-470 (1997). (The Johnson case quoted the fourth element from its decision in a civil action, *U.S. v. Atkinson*, 297 U.S. 157, 160 (1936): "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise substantially affect the fairness, integrity, or public reputation of judicial proceedings.")

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

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

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

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

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

Rule 53
(54 & 71)

RULE 53. MASTERS

(a) **APPOINTMENT.**

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

(A) perform duties consented to by the parties;

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

(i) some exceptional condition, or

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

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

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

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

(b) ORDER APPOINTING MASTER.

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

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

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

(B) the circumstances — if any — in which the master may communicate ex parte with the court or a party, limiting ex parte communications with the court to administrative matters unless the court in its discretion permits ex parte communications on other matters;

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

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

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

(3) Entry of Order. The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.

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

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

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

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

(f) MASTER'S REPORTS. A master must report to the court as required by the order of appointment. The master

must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.

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

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

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

(3) Fact Findings or Recommendations. The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:

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

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

(4) Legal questions. The court must decide de novo all objections to conclusions of law made or recommended by a master.

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

(h) COMPENSATION.

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

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

(A) by a party or parties; or

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

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

COMMITTEE NOTE

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to

perform a variety of pretrial and post-trial functions. See Willging, Hooper, Leary, Miletich, Reagan, & Shapard, *Special Masters' Incidence and Activity* (FJC 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if the parties consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes. Rule 53(g) also changes the standard of review for findings of fact made or recommended by a master. The core of the original Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule.

SUBDIVISION (a)(1)

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

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

TRIAL MASTERS. Use of masters for the core functions of trial has been progressively limited. These limits are reflected in the provisions of subparagraph (a)(1)(B) that restrict appointments to exercise trial functions. The Supreme Court gave clear direction to this trend in *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); earlier roots are sketched in *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701 (1927). As to nonjury trials, this trend has developed through elaboration of the "exceptional condition" requirement in

present Rule 53(b). This phrase is retained, and will continue to have the same force as it has developed. Although the provision that a reference "shall be the exception and not the rule" is deleted, its meaning is embraced for this setting by the exceptional condition requirement.

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

The use of a trial master without party consent is abolished as to matters to be decided by a jury unless a statute provides for this practice.

Abolition of the direct power to appoint a trial master in a jury case leaves the way free to appoint a trial master with the consent of all parties. A trial master should be appointed in a jury case, with consent of the parties and concurrence of the court, only if the parties waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence in the manner provided by former Rule 53(e)(3). In no circumstance may a master be appointed to preside at a jury trial.

The central function of a trial master is to preside over an evidentiary hearing on the merits of the claims or defenses in the action. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The line, however, is not distinct. A pretrial

master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master might conduct evidentiary hearings on questions of compliance.

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

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

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

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

There is statutory authority to appoint a magistrate judge as special master. 28 U.S.C. § 636(b)(2). In special circumstances, or when expressly authorized by a statute other than § 636(b)(2), it may

be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). There is no apparent reason to appoint a magistrate judge to perform as master duties that could be performed in the role of magistrate judge. Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53 unless specifically authorized by statute; see 42 U.S.C. § 2000e-5(f)(5).

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

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

A master also may be appointed to address matters that blur the divide between pretrial and trial functions. The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. Review of the master's findings will be de novo under Rule 53(g)(4), but the advantages of initial determination by a master may make the process more effective and timely than disposition by the judge acting alone. Determination of foreign law may present comparable difficulties. The decision whether to appoint a master to address such matters is governed by

subdivision (a)(1)(C), not the trial-master provisions of subdivision (a)(1)(B).

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

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

SUBDIVISION (a)(2) AND (3)

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

consent, but with such assurances — and with the judge's own determination that there is no troubling conflict of interests or disquieting appearance of impropriety — consent may justify an otherwise barred appointment.

One potential disqualification issue is peculiar to the master's role. A master who is an attorney may represent a client whose litigation is assigned to the judge who appointed the attorney as master. Other parties to the litigation may fear that the attorney-master will gain special respect from the judge. A flat prohibition on appearance before the appointing judge during the time of service as master, however, might in some circumstances unduly limit the opportunity to make a desirable appointment. These matters may be regulated to some extent by state rules of professional responsibility. The question of present conflicts, and the possibility of future conflicts, can be considered at the time of appointment. Depending on the circumstances, the judge may consider it appropriate to impose a non-appearance condition on the lawyer master, and perhaps on the master's firm as well.

SUBDIVISION (b)

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

Rule 53(b)(2) requires precise designation of the master's duties and authority. Clear identification of any investigating or enforcement duties is particularly important. Clear delineation of topics for any reports or recommendations is also an important part of this process. And it is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties.

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

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

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

The provision in subdivision (b)(2)(D) that the order must state the standards for reviewing the master's orders, findings, or recommendations is a reminder of the provisions of subdivision (g)(3) that recognize stipulations for review less searching than the presumptive requirement of de novo decision by the court. Subdivision (b)(2)(D) does not authorize the court to supersede the limits of subdivision (g)(3).

In setting the procedure for fixing the master's compensation, it is useful at the outset to establish specific guidelines to control total

expense. The court has power under subdivision (h) to change the basis and terms for determining compensation after notice to the parties.

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

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

SUBDIVISION (c)

Subdivision (c) is a simplification of the provisions scattered throughout present Rule 53. It is intended to provide the broad and flexible authority necessary to discharge the master's responsibilities. The most important delineation of a master's authority and duties is provided by the Rule 53(b) appointing order.

SUBDIVISION (d)

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

SUBDIVISION (e)

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

SUBDIVISION (f)

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

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

SUBDIVISION (g)

The provisions of subdivision (g)(1), describing the court's powers to afford a hearing, take evidence, and act on a master's order, report, or recommendations are drawn from present Rule 53(e)(2), but are not limited, as present Rule 53(e)(2) is limited, to the report of a trial master in a nonjury action. The requirement that the court must afford an opportunity to be heard can be satisfied by taking written submissions when the court acts on the report without taking live testimony.

The subdivision (g)(2) time limits for objecting to — or seeking adoption or modification of — a master's order, report, or recommendations, are important. They are not jurisdictional. Although a court may properly refuse to entertain untimely review proceedings, the court may excuse the failure to seek timely review. The basic time period is lengthened to 20 days because the present 10-day period may be too short to permit thorough study and response to a complex report dealing with complex litigation. If no party asks the court to act on a master's report, the court is free to adopt the master's action or to disregard it at any relevant point in the proceedings.

Subdivision (g)(3) establishes the standards of review for a master's findings of fact or recommended findings of fact. The court must decide de novo all objections to findings of fact made or recommended by the master unless the parties stipulate, with the court's consent, that the findings will be reviewed for clear error or — with respect to a master appointed on the parties' consent or appointed to address pretrial or post-trial matters — that the findings will be final. Clear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request. Even if no objection is made, the

court is free to decide the facts de novo; to review for clear error if an earlier approved stipulation provided clear-error review; or to withdraw its consent to a stipulation for clear-error review or finality, and then to decide de novo. If the court withdraws its consent to a stipulation for finality or de novo review, it may reopen the opportunity to object.

Under Rule 53(g)(4), the court must decide de novo all objections to conclusions of law made or recommended by a master. As with findings of fact, the court also may decide conclusions of law de novo when no objection is made.

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

SUBDIVISION (h)

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

Payment of the master's fees must be allocated among the parties and any property or subject-matter within the court's control. The amount in controversy and the means of the parties may provide some guidance in making the allocation. The nature of the dispute also may be important — parties pursuing matters of public interest, for example, may deserve special protection. A party whose unreasonable behavior has occasioned the need to appoint a master,

on the other hand, may properly be charged all or a major portion of the master's fees. It may be proper to revise an interim allocation after decision on the merits. The revision need not await a decision that is final for purposes of appeal, but may be made to reflect disposition of a substantial portion of the case.

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

The provision of former Rule 53(a) that the "provision for compensation shall not apply when a United States Magistrate Judge is designated to serve as a master" is deleted as unnecessary. Other provisions of law preclude compensation.

Conforming Amendments: Rules 54(d), 71A(h)

Rule 54. Judgments; Costs

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(d) Costs; Attorneys' Fees.

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(2) ***Attorneys' Fees.***

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(D) By local rule the court may establish special procedures by which issues relating to such fees may be resolved without extensive evidentiary hearings. In addition, the court may refer issues relating to the value of services to a special master under Rule 53 without regard to the

provisions of ~~subdivision (b)~~ Rule 53(a)(1) ~~thereof~~ and may refer a motion for attorneys' fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

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Committee Note

Rule 54(d)(2)(D) is revised to reflect amendments to Rule 53.

Rule 71A. Condemnation of Property

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(h) Trial.

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In the event that a commission is appointed the court may direct that not more than two additional persons serve as alternate commissioners to hear the case and replace commissioners who, prior to the time when a decision is filed, are found by the court to be unable or disqualified to perform their duties. An alternate who does not replace a regular commissioner shall be discharged after the commission renders its final decision. Before appointing the members of the commission and alternates the court shall advise the parties of the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each such designee. The parties shall not be permitted or required by the court to suggest nominees. Each party shall have the right to object for

valid cause to the appointment of any person as a commissioner or alternate. If a commission is appointed it shall have the ~~powers~~ authority of a master provided in ~~subdivision~~ Rule 53(c) ~~of Rule 53~~ and proceedings before it shall be governed by the provisions of ~~paragraphs (1) and (2) of subdivision~~ Rule 53(d) ~~of Rule 53~~. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in ~~paragraph (2) of subdivision~~ Rule 53(e),(f), and (g) ~~of Rule 53~~. Trial of all issues shall otherwise be by the court.

Committee Note

The references to specific subdivisions of Rule 53 are deleted or revised to reflect amendments of Rule 53.

Changes Made After Publication and Comment

Subdivision (a)(3), barring appearance by a master as attorney before the appointing judge during the period of the appointment, is deleted. Subdivision (a)(4) is renumbered as (a)(3).

Subdivision (b)(2) is amended by adding new material to the subparagraph (A), (B,) (C), and (D) specifications of issues that must be addressed in the order appointing a master. (A) now requires a statement of any investigation or enforcement duties. (B) now establishes a presumption that ex parte communications between master and court are limited to administrative matters; the court may, in its discretion, permit ex parte communications on other matters. (C) directs that the order address not only preservation but also filing

of the record. (D) requires that the order state the method of filing the record.

Subdivision (b)(3) is changed by requiring an opportunity to be heard on an order amending an appointment order. It also is renumbered as (b)(4).

Subdivision (b)(4), renumbered as (b)(3), is redrafted to express the original meaning more clearly.

Subdivision (c) has a minor style change.

Subdivision (g)(1) is amended to state that in acting on a master's recommendations the court "must" afford an opportunity to be heard.

Subdivision (g)(3) is changed to narrow still further the opportunities to depart from de novo determination of objections to a master's findings or recommendations for findings of fact.

Subdivision (g)(4) is changed by deleting the opportunity of the parties to stipulate that a master's conclusions of law will be final.

Subdivision (i), addressing appointment of a magistrate judge as master, is deleted.

Recommendation

The Committee recommends adoption of Rule 53 with changes made to reflect the public comments and testimony. This complete revision of Rule 53 brings the rule into conformity with contemporary practice. Masters are now used for a wide variety of pretrial and post-trial tasks that are not described by the provisions for trial masters that constitute present Rule 53.

Revised Rule 53 makes several important changes in addition to capturing and regulating appointments of pretrial and post-trial masters. Under the new rule, a trial master may be appointed in a case to be tried to a jury only if the parties consent. The stringent approach to appointment of trial masters adopted by the Supreme Court is preserved for cases to be tried to the court. As described below, judicial responsibility for reviewing a master's findings is enhanced. The provisions describing the master's authority are simplified and made more flexible.

The committee recommends several changes from the text published in August 2001. In the order of appearance in Rule 53, they include these changes:

As published, Rule 53(a)(1)(3) barred a master from appearing as an attorney before the appointing judge during the period of the appointment. Comments on this prohibition emphasized the difficulties that might be created both in making desirable initial appointments and in responding to unrelated and unforeseen litigation that might arise during the period of the appointment. The committee recommends deletion of this provision, with a comment in the Committee Note that calls attention to the issue.

Several additions are recommended for Rule 53(b)(2), which sets out provisions that must appear in an order appointing a master. These additions were made in response to comments by the

Department of Justice, which has extensive experience in litigation before masters. One of these additions limits ex parte communications between master and court to administrative matters unless the court establishes broader limits in the order appointing the master. The "effective date" provision of Rule 53(b)(4) is redrafted to express the intended meaning more clearly, and this paragraph is renumbered as paragraph (b)(3).

The review provisions of Rule 53(g)(3) and (4) are changed substantially. Rule 53(g)(3) was initially published in alternative versions. The first version established a presumption of de novo review on matters of fact unless the order of appointment provided for clear-error review or the parties stipulated for finality. The second version attempted to establish a parallel to magistrate-judge practice, establishing a presumption of clear-error review for "non-substantive fact findings," and de novo review for "substantive fact issues." The committee recommends adoption of a new version that improves upon the first alternative. The new version requires de novo determination of objections to fact findings unless the parties stipulate with the court's consent that review is for clear error, or that the findings of a master appointed by consent or for pretrial or post-trial duties will be final. The Committee Note adds a reminder that the court may determine fact issues de novo even if no party objects. These changes reflect several appellate decisions that reflect substantial doubts about the authority of an Article III judge to delegate responsibility to a master. Similar doubts underlie the recommendation that (g)(4) be changed by deleting the provision that would allow the parties to stipulate that a master's conclusions of law will be final.

Rule 53(i) was published in a form that reflected the substantial tensions that surround appointment of a magistrate judge to act as special master. Several comments suggested that it is better not to address these questions in Rule 53. Both the Committee on

Administration of the Magistrate Judges System and the Federal Magistrate Judges Association recommended that subdivision (i) be abandoned. These recommendations were persuasive. The committee recommends deletion of Rule 53(i).

Rule 53 Comments

Summary of Comments on Rule 53

General

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

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

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

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

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

Margaret G. Farrell, Esq., 01-CV-092: Amendment is necessary to deal with issues not now addressed by Rule 53. The treatment of pretrial, trial, and post-trial stages recognizes that these distinctions are made by courts in present practice. Having studied these matters for the FJC, has concluded that it is wise to require courts to address discrete issues (such as ex parte communication) but at the same time allow judges considerable latitude and discretion. Finally, the Note recognition of the diverse roles and functions performed by special masters "is a valuable modernization of the rationale for the flexibility that Rule 53 has in fact provided." But it might be wise to address the appealability of an order appointing a special master. Mandamus is the only method now available before final judgment; the standards for mandamus are demanding, and the burdens of cost and delay of proceedings that lead to final judgment cannot be restored. An interlocutory appeal provision akin to Rule 23(f) might be wise.

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

Subdivision (a) - Appointment

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

Department of Justice, 01-CV-073: (Attaches the Department policy on the use of masters in cases involving the United States.) **(1)** The existing language of Rule 53(b) should be retained to emphasize the need to limit appointment of trial masters: such appointment "shall be the exception and not the rule." Masters should not be appointed to alleviate caseload problems, nor because a case presents difficult technical issues. Nor is it appropriate to appoint a master whose decision will be reviewed in substantial detail. Cost should be considered. **(2)** (a)(1)(C) is problematic for similar reasons: the reference to matters that cannot be effectively and timely addressed by a judge may be used to undermine the limits on appointment — (C) is not explicitly limited to pretrial and post-trial masters, and might be invoked to appoint a trial master without a need to show exceptional conditions. The rule should be revised to read: "address matters involving pretrial and post-trial duties that cannot be addressed effectively and timely * * *." Finally, the Department agrees that "[a]bsent some extraordinary situation, a master should not serve as a court-appointed expert in the same case."

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

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

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

Subdivision (b) - Order Appointing Master

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

Department of Justice, 01-CV-073: Subdivisions (b) through (f) may provide a helpful structure, but a number of specific concerns remain. **(1)** (b)(2)(A) does not refer to the parties' conduct of the hearing before the master, including the opportunity to be heard or to submit evidence. Present Rule 53(c) requires a record of evidence presented and excluded. The Rule "should require that the appointing order describe specifically the manner of the parties' presenting evidence and argument before the master." Due process requires the protection of notice and hearing on the record, especially if review is for clear error; see Ruiz v. Estelle, 5th Cir.1982, 679 F.2d 1115, 1162-1163. At least the Notes should reflect a presumption that if review is to be for clear error the appointing order must require the master to hold a hearing and take evidence unless the parties consent

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

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

Subdivision (c) — Master's Authority

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

Subdivision (f) - Master's Report

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

Subdivision (g) - Standards of Review

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

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

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

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

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

Department of Justice, 01-CV-057: **(1)** (g)(1) should say not that the court "may" but instead should say "shall afford an opportunity to be heard. **(2)** The parties should have the right to select de novo review, as incorporated in the order of appointment. The first published alternative "provides a more definitive statement of the factual burden of proof by which to apply a 'clear error' rule of review." The second alternative turns on the distinction between "substantive" and "non-substantive" issues: this distinction "creates a potential for ambiguity and confusion," but this alternative is "more versatile, addressing, for example, fact-finding concerning discovery conduct. On balance, the

Department prefers the first version." But it should be amended to express the parties' right to choose: (g)(3)(A) "thus would state that the court would decide all fact issues de novo unless 'the parties stipulate with the court's consent that the master's findings will be reviewed for clear error . . ."

Maritime Law Assn., 01-CV-081: Favor Version 1. But (1) the court's consent should not be necessary if the parties agree that the master's findings of fact will be final. At the same time, (2) when the parties agree that the findings will be final, the court should retain jurisdiction, as in arbitration, to ensure that the master has given the parties a fair hearing. Former Admiralty Rule 431/2 provided that in such circumstances the court would review the report according to the principles governing review of an arbitral award. Rule 53(g) should add a new "(6) If the parties have stipulated as provided above for the master's findings of fact to be final, such final findings shall be subject to review by the appointing court under 9 U.S.C. §§ 10-11 as if they were contained in an arbitration award."

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

Margaret G. Farrell, Esq., 01-CV-092: **(1)** It is not clear whether the default rule of clearly erroneous review "applies where a master makes findings or recommendations based on something other than a formal evidentiary hearing." In current practice, discovery/settlement masters and post-trial masters "do, in fact, make findings based on information — like the inspection of prisons — that is not gained at a formal evidentiary hearing." Due process problems are raised by limiting review to clear error. Some courts now provide for a de novo evidentiary hearing at the request of an objecting party when a master finds facts on the basis of an informal fact-finding proceeding. **(2)** Article III may not permit a clear-error standard of review for findings "of the merits of liability." Case law provides uncertain guidance. See U.S. v. Microsoft Corp., D.C.Cir.1998, 147 F.3d 935; In re Bituminous Coal Operators Assn., D.C.Cir.1991, 949 F.2d 1165, 1169; Stauble v. Warrob, Inc., 1st Cir.1992, 977 F.2d 690, 694, 695. (And Stauble should not be cited for its pretrial aspects [p. 137]: in the court of appeals the major issue was the master's trial role.

Subdivision (i) - Magistrate Judges

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

"could be changed to make clear that a magistrate judge retains his or her statutory contempt authority even when serving as a master." See § 636(e)(2), added in 2000.

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

Federal Magistrate Judges Assn., 01-CV-057: Recommends deletion of all of subdivision (i). Continued "inclusion of magistrate judges in this role would undermine the position and authority of magistrate judges as judicial officers and would be inconsistent with the best utilization for magistrate judges." The role of magistrate judges acting as judges has continued to expand. Although § 636(b)(2) provides for acts as special master under the Federal Rules of Civil Procedure, this statute was adopted before later expansions of magistrate judge authority, and "is now obsolete." Appointment of magistrate judges as special masters is becoming increasingly rare. Proposed Rule 53(a)(1)(c) limits appointment of special masters to matters that cannot be addressed effectively by a district judge or magistrate judge; this recognizes that a magistrate judge may appoint a master, either for such pretrial matters as discovery or when a magistrate judge is exercising consent jurisdiction for trial. Application of Rule 53 to magistrate judges would be inconsistent with the standards of review set in § 636, which provides de novo review on dispositive matters and "clearly erroneous or contrary to law" review on other matters. A magistrate judge appointed under Rule 53 would be reviewed by these standards only if adopted in the appointing order. The alternative of appointing a magistrate judge as master only when specifically authorized by a statute other than § 636(b)(2) would create confusion. Congress can enact specific statutes, such as § 2000(e)(5); that disposes of those specific matters.

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

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

RULE 53. MASTERS

~~**Rule 53. Masters**~~

~~**(a) Appointment and Compensation.** The court in which any action is pending may appoint a special master therein. As used in these rules, the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation shall not apply when a United States magistrate judge is designated to serve as a master. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.~~

~~**(b) Reference.** A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate~~

~~judge may be designated to serve as a special master without regard to the provisions of this subdivision.~~

~~**(c) Powers.** The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.~~

~~**(d) Proceedings.**~~

~~(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of~~

~~their parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.~~

~~(2) *Witnesses*. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.~~

~~(3) *Statement of Accounts*. When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.~~

~~(e) **Report.**~~

~~(1) *Contents and filing.* The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. In an action to be tried without a jury, unless otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.~~

~~(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.~~

~~(3) *In Jury Actions.* In an action to be tried to a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the~~

~~court upon any objections in point of law which may be made to the report.~~

~~(4) *Stipulation as to Findings.* The effect of a master's findings is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.~~

~~(5) *Draft report.* Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.~~

(f) Application to Magistrate Judges. A magistrate judge is ~~subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.~~

(a) APPOINTMENT.

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

(A) perform duties consented to by the parties;

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

(i) some exceptional condition, or

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

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

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

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

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

(b) **ORDER APPOINTING MASTER.**

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

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

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

(B) the circumstances~~;~~ — if any~~;~~ — in which the master may communicate ex parte with the court or a party, limiting ex parte communications with the court to administrative matters unless the court in its discretion permits ex parte communications on other matters;

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

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

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

(34) **Entry of Order.** ~~**Effective Date.** A master's appointment takes effect~~ The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.

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

(c) MASTER'S AUTHORITY. Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may impose upon a party any noncontempt sanction provided

by Rule 37 or 45, and may recommend ~~to the court for the court's approval~~ a contempt sanction against a party and sanctions against a nonparty.

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

(e) Master's Orders. A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

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

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

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

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

(3) Fact Findings or Recommendations.

[Recommended New Version] The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:

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

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

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

~~*(Version 2)* When a master has made or recommended findings of fact:~~

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

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

(4) Legal questions. The court must decide de novo all objections to conclusions of law made or recommended by a master.~~In acting under Rule 53(g)(1), the court must decide questions of law de novo., unless the parties stipulate with the court's consent that the master's disposition will be final.~~

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

(h) COMPENSATION.

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

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

(A) by a party or parties; or

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

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

reference to a master. An interim allocation may be amended to reflect a decision on the merits.

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

COMMITTEE NOTE

Rule 53 is revised extensively to reflect changing practices in using masters. From the beginning in 1938, Rule 53 focused primarily on special masters who perform trial functions. Since then, however, courts have gained experience with masters appointed to perform a variety of pretrial and post-trial functions. ~~A study by the Federal Judicial Center documents the variety of responsibilities that have come to be assigned to masters.~~ See Willging, Hooper, Leary, Miletich, Reagan, & Shapard, *Special Masters' Incidence and Activity* (FJC 2000). This revised Rule 53 recognizes that in appropriate circumstances masters may properly be appointed to perform these functions and regulates such appointments. Rule 53 continues to address trial masters as well, but permits appointment of a trial master in an action to be tried to a jury only if the parties

consent. The new rule clarifies the provisions that govern the appointment and function of masters for all purposes. Rule 53(g) also changes the standard of review for findings of fact made or recommended by a master. The core of the original Rule 53 remains, including its prescription that appointment of a master must be the exception and not the rule. ~~Rule 53 was adapted from equity practice, and reflected a long history of discontent with the expense and delay frequently encountered in references to masters. Public judicial officers, moreover, enjoy presumptions of ability, experience, and neutrality that cannot attach to masters. These concerns remain important today.~~

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

SUBDIVISION (a)(1)

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

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

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

Subparagraph (a)(1)(B)(ii) carries forward the approach of present Rule 53(b), which exempts from the "exceptional circumstance" requirement "matters of account and of difficult

computation of damages." This approach is justified only as to essentially ministerial determinations that require mastery of much detailed information but that do not require extensive determinations of credibility. Evaluations of witness credibility should only be assigned to a trial master when justified by an exceptional condition.

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

Abolition of the direct power to appoint a trial master in a jury case leaves the way free to appoint a trial master with the consent of all parties. ~~As in other settings, party consent does not require the court to appoint a master.~~ A trial master should be appointed in a jury case, with consent of the parties and concurrence of the court, only if

the parties waive jury trial with respect to the issues submitted to the master or if the master's findings are to be submitted to the jury as evidence in the manner provided by former Rule 53(e)(3). In no circumstance may a master be appointed to preside at a jury trial.

The central function of a trial master is to preside over an evidentiary hearing on the merits of the claims or defenses in the action. This function distinguishes the trial master from most functions of pretrial and post-trial masters. If any master is to be used for such matters as a preliminary injunction hearing or a determination of complex damages issues, for example, the master should be a trial master. The line, however, is not distinct. A pretrial master might well conduct an evidentiary hearing on a discovery dispute, and a post-trial master might ~~may often need to~~ conduct evidentiary hearings on questions of compliance.

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

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

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

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

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

~~judge is available. A magistrate judge, moreover, is less likely to be involved in matters that raise disqualification issues.~~

~~The statute specifically authorizes appointment of~~ There is statutory authority to appoint a magistrate judge as special master. 28 U.S.C. § 636(b)(2). In special circumstances, or when expressly authorized by a statute other than § 636(b)(2), it may be appropriate to appoint a magistrate judge as a master when needed to perform functions outside those listed in § 636(b)(1). ~~These advantages are most likely to be realized with trial or post-trial functions. The advantages of relying on a magistrate judge are diminished, however, by the risk of confusion between the ordinary magistrate judge role and master duties, particularly with respect to pretrial functions commonly performed by magistrate judges as magistrate judges.~~ There is no apparent reason to appoint a magistrate judge to perform as master duties that could be performed in the role of magistrate judge. ~~The situation might seem different as to trial functions, and as to post-trial functions not expressly enumerated in § 636(b).~~ Party consent is required for trial before a magistrate judge, moreover, and this requirement should not be undercut by resort to Rule 53 unless specifically authorized by statute; see 42 U.S.C. § 2000e-5(f)(5). ~~Subdivision (i) requires that appointment of a magistrate judge as master be justified by exceptional circumstances.~~

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

~~Despite the advantages of relying on district judges and magistrate judges to discharge judicial duties, the occasion may arise for appointment of a nonjudicial officer as pretrial master. Absent~~

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

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

A ~~P~~pretrial masters should be appointed only when the need is clear ~~needed~~. ~~The parties should not be lightly subjected to the potential delay and expense of delegating pretrial functions to a pretrial master. Ordinarily public judicial officers should discharge public judicial functions.~~ Direct judicial performance of judicial

functions may be particularly important in cases that involve important public issues or many parties. ~~Appointment of a master risks dilution of judicial control, loss of familiarity with important developments in a case, and duplication of effort.~~ At the extreme, a broad delegation of pretrial responsibility as well as a delegation of trial responsibilities can run afoul of Article III. ~~See *Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir. 1992); *In re Bituminous Coal Operators' Assn.*, 949 F.2d 1165 (D.C.Cir. 1991); *Burlington No. R.R. v. Dept. of Revenue*, 934 F.2d 1064 (9th Cir. 1991). The risk of increased delay and expense is offset, however, by the possibility that a master can bring to pretrial tasks time, talent, and flexible procedures that cannot be provided by judicial officers. Appointment of a master is justified when a master is likely to substantially advance the Rule 1 goals of achieving the just, speedy, and economical determination of litigation.~~

~~Despite the need for caution, the demands of complex litigation may present needs that can be addressed only with appointment of a special master. Some cases may require more attention than a judge can devote while attending to the needs of other cases, and the most demanding cases may require more than the full time of a single judicial officer. Other cases may call for expert knowledge in a particular subject. The entrenched and legitimate concern that appointment of a special master may engender delay and added expense must be balanced against recognition that an appropriate appointment can reduce cost and delay. Recognition of the essential help that a master can provide is reflected in the wide variety of responsibilities that have been assigned to pretrial masters. Settlement masters are used to mediate or otherwise facilitate settlement. Masters are used to supervise discovery, particularly when the parties have been unable to manage discovery as they should or when it is necessary to deal with claims that thousands of documents are protected by privilege, work-product, or protective~~

~~order. In special circumstances, a master may be asked to conduct preliminary pretrial conferences; a pretrial conference directed to shaping the trial should be conducted by the officer who will preside at the trial. Masters may be used to hear and either decide or make recommendations on pretrial motions. More general pretrial management duties may be assigned as well. With the cooperation of the courts involved, a special master even may prove useful in coordinating the progress of parallel litigation.~~

A master also may be appointed to address matters that blur the divide between pretrial and trial functions. The court's responsibility to interpret patent claims as a matter of law, for example, may be greatly assisted by appointing a master who has expert knowledge of the field in which the patent operates. **Review of the master's findings will be de novo under Rule 53(g)(4), but the advantages of initial determination by a master may make the process more effective and timely than disposition by the judge acting alone.** Determination of foreign law may present comparable difficulties. The decision whether to appoint a master to address such matters is governed by subdivision (a)(1)(C), not the trial-master provisions of subdivision (a)(1)(B).

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

Post-Trial Masters. Courts have come to rely ~~extensively~~ on masters to assist in framing and enforcing complex decrees~~, particularly in institutional reform litigation~~. ~~Current~~ Present Rule 53 does not directly address this practice. Amended Rule 53 authorizes appointment of post-trial masters for these and similar purposes. The constraint of subdivision (a)(1)(C) limits this practice to cases in

which the master's duties cannot be performed effectively and in a timely fashion by an available district judge or magistrate judge of the district.

~~It is difficult to translate developing post-trial master practice into terms that resemble the "exceptional condition" requirement of original Rule 53(b) for trial masters in nonjury cases. The tasks of framing and enforcing an injunction may be less important than the liability decision as a matter of abstract principle, but may be even more important in practical terms. The detailed decree and its operation, indeed, often provide the most meaningful definition of the rights recognized and enforced. Great reliance, moreover, is often placed on the discretion of the trial judge in these matters, underscoring the importance of direct judicial involvement. Experience with mid- and late twentieth century institutional reform litigation, however, has convinced many trial judges and appellate courts that masters often are indispensable. The rule does not attempt to capture these competing considerations in a formula. Reliance on a master is inappropriate when responding to such routine matters as contempt of a simple decree; see *Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1096-1097 (3d Cir. 1987).~~ Reliance on a master is appropriate when a complex decree requires complex policing, particularly when a party has proved resistant or intransigent. This practice has been recognized by the Supreme Court, see *Local 28, Sheet Metal Workers' Internat. Assn. v. EEOC*, 478 U.S. 421, 481-482 (1986). ~~Among the many appellate decisions are *In re Pearson*, 990 F.2d 653 (1st Cir. 1993); *Williams v. Lane*, 851 F.2d 867 (7th Cir. 1988); *NORML v. Mulle*, 828 F.2d 536 (9th Cir. 1987); *In re Armco, Inc.*, 770 F.2d 103 (8th Cir. 1985); *Halderman v. Pennhurst State School & Hosp.*, 612 F.2d 84, 111-112 (3d Cir. 1979); *Reed v. Cleveland Bd. of Educ.*, 607 F.2d 737 (6th Cir. 1979); *Gary W. v. Louisiana*, 601 F.2d 240, 244-245 (5th Cir. 1979).~~ The master's role in enforcement may extend to investigation

in ways that are quite unlike the traditional role of judicial officers in an adversary system. ~~The master in the *Pearson* case, for example, was appointed by the court on its own motion to gather information about the operation and efficacy of a consent decree that had been in effect for nearly twenty years. A classic example of the need for — and limits on — sweeping investigative powers is provided in *Ruiz v. Estelle*, 679 F.2d 1115, 1159-1163, 1170-1171 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983).~~

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

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

~~**EXPERT WITNESS OVERLAP.** This rule does not address the difficulties that arise when a single person is appointed to perform overlapping roles as master and as court-appointed expert witness under Evidence Rule 706. To be effective, a court-appointed expert witness may need court-enforced powers of inquiry that resemble the powers of a pretrial or post-trial master. Beyond some uncertain level~~

~~of power, there must be a separate appointment as a master. Even with a separate appointment, the combination of roles can easily confuse and vitiate both functions. An expert witness must testify and be cross-examined in court. A master, functioning as master, is not subject to examination and cross-examination. Undue weight may be given the advice of a master who provides the equivalent of testimony outside the open judicial testing of examination and cross-examination. A master who testifies and is cross-examined as witness moves far outside the role of ordinary judicial officer. Present experience is insufficient to justify more than cautious experimentation with combined functions. Whatever combination of functions is involved, the Rule 53(a)(1)(B) limit that confines trial masters to issues to be decided by the court does not apply to a person who also is appointed as an expert witness under Evidence Rule 706.~~

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

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

possible, the notice should describe the master's proposed duties, time to complete the duties, standards of review, and compensation. Often it will be useful to engage the parties in the process of identifying the master, inviting nominations, and reviewing potential candidates. Party involvement may be particularly useful if a pretrial master is expected to promote settlement.

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

Rule 53(b)(2) ~~also~~ requires precise designation of the master's duties and authority. ~~There should be no doubt among the master and parties as to the tasks to be performed and the allocation of powers between master and court to ensure performance.~~ Clear identification of any investigating or enforcement duties is particularly important. Clear delineation of topics for any reports or recommendations is also an important part of this process. And ~~I~~it ~~also~~ is important to protect against delay by establishing a time schedule for performing the assigned duties. Early designation of the procedure for fixing the master's compensation also may provide useful guidance to the parties. ~~And experience may show the value of describing specific ancillary powers that have proved useful in carrying out more generally described duties.~~

Ex parte communications between a master and the court present troubling questions. ~~Often~~ Ordinarily the order should

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

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

Subdivision (b)(2)(C) provides that the appointment order must state the nature of the materials to be preserved and filed as the record of the master's activities, and (b)(2)(D) requires that the order state the method of filing the record. It is not feasible to prescribe the nature of the record without regard to the nature of the master's duties. The records appropriate to discovery duties may be different from those appropriate to encouraging settlement, investigating possible violations of a complex decree, or making recommendations for trial findings. **A basic requirement, however, is that the master must make and file a complete record of the evidence considered in making or recommending findings of fact on the basis of**

evidence. The order of appointment should routinely include this requirement unless the nature of the appointment precludes any prospect that the master will make or recommend evidence-based findings of fact. In some circumstances it may be appropriate for a party to file materials directly with the court as provided by Rule 5(e), but in many circumstances filing with the court may be inappropriate. Confidentiality is ~~vitally~~ important with respect to many materials that may properly be considered by a master. Materials in the record can be transmitted to the court, and filed, in connection with review of a master's order, report, or recommendations under subdivisions (f) and (g). Independently of review proceedings, the court may direct filing of any materials that it wishes to make part of the public record.

The provision in subdivision (b)(2)(D) that the order must state the standards for reviewing the master's orders, findings, and recommendations is a reminder of the provisions of subdivision (g)(3) that recognize stipulations for review less searching than the presumptive requirement of de novo decision by the court. Subdivision (b)(2)(D) does not authorize the court to supersede the limits of subdivision (g)(3).

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

The provision in Rule 53(b)(3) for amending the order of appointment is as important as the provisions for the initial order.

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

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

SUBDIVISION (c)

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

SUBDIVISION (d)

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

SUBDIVISION (e)

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

SUBDIVISION (f)

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

be taken only for the most compelling reasons. Sealing is much less likely to be appropriate with respect to a trial master's report.

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

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

SUBDIVISION (g)

The provisions of subdivision (g)(1), describing the court's powers to afford a hearing, take evidence, and act on a master's order, report, or recommendations are drawn from present Rule 53(e)(2), but are not limited, as present Rule 53(e)(2) is limited, to the report of a trial master in a nonjury action. **The requirement that the court must afford an opportunity to be heard can be satisfied by taking written submissions when the court acts on the report without taking live testimony.**

The subdivision (g)(2) time limits for objecting to — or seeking adoption or modification of — a master's order, report, or recommendations, are important. They are not jurisdictional. ~~The subordinate role of a master means that a~~Although a court may properly refuse to entertain untimely review proceedings, ~~there must be power to~~ court may excuse the failure to seek timely review. The basic time period is lengthened to 20 days because the present 10-day

period may be too short to permit thorough study and response to a complex report dealing with complex litigation. ~~No time limit is set for action by the court when no party undertakes to file objections or move for adoption or modification of a master's order, report, or recommendations.~~ If no party asks the court to act on a master's report, ~~T~~the court ~~remains~~ is free to adopt the master's action or to disregard it at any relevant point in the proceedings. ~~If the court takes no action, the master's action has no effect outside the terms of the court's own orders and judgment.~~

Subdivision (g)(3) establishes the standards of review for a master's findings of fact or recommended findings of fact. The court must decide **de novo all objections to findings of fact made or recommended by the master** unless the parties stipulate, with the court's consent, that the findings will be reviewed for clear error or — with respect to a master appointed on the parties' consent or appointed to address pretrial or post-trial matters — that the findings will be final. Clear-error review is more likely to be appropriate with respect to findings that do not go to the merits of the underlying claims or defenses, such as findings of fact bearing on a privilege objection to a discovery request. **Even if no objection is made, the court is free to decide the facts de novo; to review for clear error if an earlier approved stipulation provided clear-error review; or to withdraw its consent to a stipulation for clear-error review or finality, and then to decide de novo or reopen the opportunity to object.**

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

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

In choosing between de novo and clear-error review, the court should heed the distinction between trial and the other duties that may be assigned to a master. Present Rule 53(e)(2) establishes a clear-error standard of review for a master's findings of fact in an action to be tried without a jury. The Supreme Court, however, has made it clear that the judge, not a master, should be responsible for deciding the facts that bear on liability. If exceptions are ever to be made, they can be made only in the most extraordinary circumstances. *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). Decisions by several courts of appeals suggest that Article III may prohibit an Article III judge from surrendering the Article III responsibility to decide ultimate issues of liability by limiting review of a master to a clear-error standard. See *U.S. v. Microsoft Corp.*, 147 F.3d 935, 953-956 (D.C.Cir.1998); *Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir.1992); *In re Bituminous Coal Operators' Assn.*, 949 F.2d 1165

(D.C.Cir.1991); *Burlington Northern R.R. v. Department of Revenue*, 934 F.3d 1064 (9th Cir.1991); *In re U.S.*, 816 F.2d 1083 (6th Cir.1987); *In re Armco, Inc.*, 770 F.2d 103, 105 (8th Cir.1985). However the Article III question is ultimately resolved, the very presence of substantial Article III doubts weighs heavily in favor of de novo fact determination. An obligation to decide fact questions de novo, to the extent that it prevails, ordinarily defeats any purpose in referring trial issues to a master. The result is more likely to add delay and expense, and to diminish the quality of the ultimate decision, than to enhance the process.

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

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

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

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

Under Rule 53(g)(4), the court must decide de novo all objections to conclusions of law made or recommended by a master. As with findings of fact, the court also may decide conclusions of law de novo when no objection is made.

Apart from factual and legal questions, masters often make determinations that, when made by a trial court, would be treated as matters of procedural discretion. The court may set a standard for

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

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

SUBDIVISION (h)

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

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

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

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

The provision of former Rule 53(a) that the "provision for compensation shall not apply when a United States Magistrate Judge is designated to serve as a master" is deleted as unnecessary. Other provisions of law preclude compensation.

~~SUBDIVISION (i)~~

~~This subdivision carries forward present Rule 53(f). It is changed, however, to emphasize that a magistrate judge should be appointed as a master only when justified by exceptional circumstances. Ordinarily a magistrate judge should not be appointed as a master to discharge duties that could be discharged in the capacity of magistrate judge. 28 U.S.C. § 636(b)(2) provides for~~

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

Rule 23

RULE 23

Rule 23. Class Actions

* * * * *

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

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

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

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

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

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

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

* * * * *

Committee Note

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

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made "at an early practicable time." The "as soon as practicable" exaction neither

reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. See Willging, Hooper & Niemic, Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26-26 (Federal Judicial Center 1996).

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

Other considerations may affect the timing of the certification decision. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(g), recognizing that in many cases the need to progress toward the certification determination may require designation of interim counsel under Rule 23(g)(2)(A).

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

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

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

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

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

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

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

The direction that class-certification notice be couched in plain, easily understood language is a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure raise the barriers high. The Federal Judicial Center has created illustrative

clear-notice forms that provide a helpful starting point for actions similar to those described in the forms.

RULE 23(e): REVIEW OF SETTLEMENT

Rule 23. Class Actions

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise.

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

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

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

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

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may direct that the Rule 23(e)(1)(B) notice state terms that afford a new opportunity to request exclusion to individual class members who did not request exclusion during an earlier period for requesting exclusion.

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

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

* * * * *

Committee Note

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

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

Rule 23(e)(1)(A) resolves the ambiguity in former Rule 23(e)'s reference to dismissal or compromise of "a class action." That language could be — and at times was — read to require court

approval of settlements with putative class representatives that resolved only individual claims. See Manual for Complex Litigation Third, § 30.41. The new rule requires approval only if the claims, issues, or defenses of a certified class are resolved by a settlement, voluntary dismissal, or compromise.

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

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

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

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

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

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

Paragraph (2). Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a statement identifying any agreement made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1). It aims instead at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.

Further inquiry into the agreements identified by the parties should not become the occasion for discovery by the parties or objectors. The court may direct the parties to provide to the court or other parties a summary or copy of the full terms of any agreement identified by the parties. The court also may direct the parties to provide a summary or copy of any agreement not identified by the parties that the court considers relevant to its review of a proposed settlement. In exercising discretion under this rule, the court may act in steps, calling first for a summary of any agreement that may have affected the settlement and then for a complete version if the summary does not provide an adequate basis for review. A direction

to disclose a summary or copy of an agreement may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure. And the court must provide an opportunity to claim work-product or other protections.

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

Paragraph (3) creates a new opportunity to elect exclusion for cases that settle after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. A decision to remain in the class is likely to be more carefully considered and is better informed when settlement terms are known.

The class embraced by a proposed settlement may be defined to include members who were not included in an earlier definition and who have not had the earlier opportunity to request exclusion that was

available to other class members. The new members must be allowed an opportunity to request exclusion. The need to afford some class members this first opportunity to request exclusion may weigh in favor of extending a new exclusion opportunity to other class members.

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

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

The terms set for permitting a new opportunity to elect exclusion from the proposed settlement of a Rule 23(b)(3) class action may address concerns of potential misuse. The court might direct, for example, that class members who elect exclusion are bound by rulings on the merits made before the settlement was proposed for approval. Still other terms or conditions may be appropriate.

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

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

Approval under paragraph (4)(B) may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

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

advantage of the district court's familiarity with the action and settlement.

RULE 23(g): CLASS COUNSEL

Rule 23. Class Actions

* * * * *

(g) Class Counsel.

(1) Appointing Class Counsel.

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

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

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,

- counsel's knowledge of the applicable law,

- the resources counsel will commit to representing the class;

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

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

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

(2) Appointment Procedure.

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

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rules 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

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

* * * * *

Committee Note

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

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

sets out the factors the court should consider in assessing proposed class counsel.

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

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

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

Paragraph (1)(C) articulates the basic responsibility of the court to appoint class counsel who will provide the adequate representation

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

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

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

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

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be

determinative in a given case. For example, the resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration to lawyers with the greatest resources.

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

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it provides the framework for appointment of class counsel in all class actions. For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information described in paragraph (g)(1)(C) is included. If there are other applicants, they ordinarily would file a formal application detailing their suitability for the position.

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

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

staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure.

Paragraph (2)(A) authorizes the court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class. Rule 23(c)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class certification, however, it will usually be important for an attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement is fair, reasonable, and adequate for the class.

Rule 23(c)(1) provides that the court should decide whether to certify the class "at an early practicable time," and directs that class counsel should be appointed in the order certifying the class. In some cases, it may be appropriate for the court to allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more

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

Paragraph (2)(B) states the basic standard the court should use in deciding whether to certify the class and appoint class counsel in the single applicant situation -- that the applicant be able to provide the representation called for by paragraph (1)(B) in light of the factors identified in paragraph (1)(C).

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

Paragraph (2)(C) builds on the appointment process by authorizing the court to include provisions regarding attorney fees in the order appointing class counsel. Courts may find it desirable to adopt guidelines for fees or nontaxable costs, or to direct class

counsel to report to the court at regular intervals on the efforts undertaken in the action, to facilitate the court's later determination of a reasonable attorney fee.

Rule 23(h): Attorney Fees

Rule 23. Class Actions

* * * * *

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

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

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

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

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

Committee Note

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

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

This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted

for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

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

Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court's responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors. One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. The Private Securities Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15

U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, results achieved is the basic starting point.

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

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

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

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

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

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

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

class actions, while Rule 54(d)(2) applies to matters not addressed in this subdivision.

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

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

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

should an objection be rejected, it may be necessary for the class member to seek to intervene in addition to objecting.

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

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

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

Changes Made After Publication and Comment

Rule 23(c)(1)(B) is changed to incorporate the counsel-appointment provisions of Rule 23(g). The statement of the method and time for requesting exclusion from a (b)(3) class has been moved to the notice of certification provision in Rule 23(c)(2)(B).

Rule 23(c)(1)(C) is changed by deleting all references to "conditional" certification.

Rule 23(c)(2)(A) is changed by deleting the requirement that class members be notified of certification of a (b)(1) or (b)(2) class. The new version provides only that the court may direct appropriate notice to the class.

Rule 23(c)(2)(B) is revised to require that the notice of class certification define the certified class in terms identical to the terms used in (c)(1)(B), and to incorporate the statement transferred from (c)(1)(B) on "when and how members may elect to be excluded."

Rule 23(e)(1) is revised to delete the requirement that the parties must win court approval for a precertification dismissal or settlement.

Rule 23(e)(2) is revised to change the provision that the court may direct the parties to file a copy or summary of any agreement or understanding made in connection with a proposed settlement. The new provision directs the parties to a proposed settlement to identify any agreement made in connection with the settlement.

Rule 23(e)(3) is proposed in a restyled form of the second version proposed for publication.

Rule 23(e)(4)(B) is restyled.

Rule 23(g)(1)(C) is a transposition of criteria for appointing class counsel that was published as Rule 23(g)(2)(B). The criteria are rearranged, and expanded to include consideration of experience in handling claims of the type asserted in the action and of counsel's knowledge of the applicable law.

Rule 23(g)(2)(A) is a new provision for designation of interim counsel to act on behalf of a putative class before a certification determination is made.

Rule 23(g)(2)(B) is revised to point up the differences between appointment of class counsel when there is only one applicant and when there are competing applicants. When there is only one applicant the court must determine that the applicant is able to fairly and adequately represent class interests. When there is more than one applicant the court must appoint the applicant best able to represent class interests.

Rule 23(h) is changed to require that notice of an attorney-fee motion by class counsel be "directed to class members," rather than "given to all class members."

Rule 23 Recommendations

A third phase involved a close look at mass-tort litigation, working in large part through the ad hoc Working Group on Mass Torts. The Report of the Advisory Committee and the Working Group, published on February 15, 1999, raises issues that continue to command a place on the Committee's agenda. Some of those issues may require legislative solutions. Recommendations with respect to consideration of legislation dealing with overlapping, duplicating, and competing class actions are advanced in Part I B of the present report. Other issues may be more susceptible to solutions by court rules. The Committee continues to study settlement classes, "futures" claims, and the possibility of adopting an opt-in class rule.

The present recommendations grow out of a more modest phase of the Committee's work. There is no attempt to change the criteria for class certification. The focus instead is on the process for applying current certification criteria, review of proposed settlements, appointment of class counsel, and making fee awards. These proposals do not raise sensitive issues about the role of class actions in compensating claimants whose claims do not support individual litigation or about public enforcement values. They are not calculated to alter the present balance between classes and class adversaries. The purpose is to improve the administration of Rule 23.

Rule 23(c) deals with the time for determining whether to certify a class, the contents of a certification order, and notice of certification. The Committee recommends adoption of Rule 23(c) as published, with some revisions.

The proposal to amend the present requirement that a class-certification determination be made "as soon as practicable" has been pursued for many years. The version published in 2001 departed slightly from the version published in 1996. It now requires that the certification determination be made "at an early practicable time."

There was extensive comment on this proposal, focusing on the extent of discovery that should be permitted before the certification determination. There is a clear tension between the desire to avoid precertification discovery that exhausts all subjects of discovery on the merits and the need in some cases to engage in discovery that supports an informed certification determination. This tension is addressed in the Committee Note. After considering the many concerns expressed in testimony and comments, the Committee recommends publication of the Rule 23(c)(1)(A) as published.

Rule 23(c)(1)(B) defines the contents of a certification order. Two changes of the published rule are proposed. First, the counsel-appointment provisions of Rule 23(g) are incorporated, calling attention to the need to appoint class counsel. Second, the direction that the order state when and how members can elect exclusion from a Rule 23(b)(3) class is eliminated in response to comments suggesting that this statement cannot effectively be made until a certification notice is prepared after the certification order.

Rule 23(c)(1)(C) as published changed the present rule that a class certification "may be conditional" to a statement that a certification "is conditional." This version reflected the common practice that treats this provision as an essentially redundant expression of the rule that a certification order can be altered or amended. Comments expressed fear that emphasis on the conditional nature of a certification order will encourage some courts to grant certification without searching inquiry, relying on later developments to determine whether certification is in fact appropriate. There also was a reminder that the original purpose of the present provision was to enable a court to place conditions on certification — the example in the Committee Note was a certification conditioned on the appearance of class representatives who would be more adequate than

present representatives. The Committee recommends deletion of any reference to the "conditional" nature of certification.

A change is recommended for Rule 23(c)(2)(A). The published version required certification notice in all forms of class actions. For (b)(1) and (2) classes, notice was to be "calculated to reach a reasonable number of class members." Many comments expressed strong resistance to any requirement of notice in (b)(1) and (2) classes. Most of the resistance arose from fear that many civil rights actions cannot bear the costs of even modest notice efforts, and would not be filed. The Committee considered several alternative formulations that would require notice but seek to address this concern. In the end, it concluded that there is no satisfactory rule language that would both require notice and ensure that worthy actions would not be stopped at the door. The Committee recommends that (c)(2)(A) be changed to provide simply that the court may direct appropriate notice to a (b)(1) or (2) class. The Committee Note is changed to direct attention to the balance between notice costs and benefits, and to suggest that low-cost means of notice be considered.

Rule 23(c)(2)(B) is recommended substantially as published. Minor changes are made to the provisions defining items that must be included in a certification notice. The notice must include the definition of the certified class, and must state when and how members may elect to be excluded from a (b)(3) class.

Rule 23(e). Rule 23(e) governs the requirement that a court approve settlement of a class action. Grave concerns have been expressed in recent years about the importance of searching review. One recent statement is provided in The Rand Institute for Civil Justice report, Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain. The Rule 23(e) revisions are designed to emphasize

and strengthen the review procedure, and also to add a new provision that authorizes the court to order a new opportunity to request exclusion from a Rule 23(b)(3) class that settles after the first opportunity to request exclusion has expired.

Rule 23(e)(1) states the requirement of court approval, directs notice to the class of a proposed settlement, and states the familiar "fair, reasonable, and adequate" standard for approval. One change is recommended from the published version. The published version adopted the rule, drawn by some cases from the ambiguity of present Rule 23(e), that a court must approve a voluntary dismissal, withdrawal, or settlement made before a determination whether to certify a class. The approval requirement reflected two primary concerns. Absent class members may rely on a pending class action to toll the statute of limitations. Class allegations may be added to draw attention to a case, to increase the pressure to settle, or to support forum shopping opportunities. It was hoped that the approval requirement would protect reliance and deter misuse. The comments, however, reflected the uncertainties expressed in the Committee Note. Many observers stated that reliance by absent class members seldom occurs, if indeed it ever occurs. As to the desire to deter misuse of class allegations, the problem is what effective response can be made. A court cannot effectively coerce continued litigation when all parties have agreed not to litigate further, and it may be unseemly to charge the court with searching out new representatives for the putative class. The Committee recommends changes in Rule 23(e)(1) that require court approval only for a settlement of the claims, issues, or defenses of a certified class.

Rule 23(e)(2) addresses the problem of "side agreements" that may have affected the negotiation of settlement terms but that do not define the terms presented to the court for approval. As published, Rule 23(e)(2) provided that the court may direct the parties to file a

copy or summary of any agreement or understanding made in connection with the proposed settlement. Many comments urged that filing should be made mandatory, pointing out that the court has little means to learn of side agreements and that the parties have every incentive not to file these agreements. The Committee recommends that Rule 23(e)(2) be modified to direct that the parties must identify any agreement made in connection with the proposed settlement. The reference to an "understanding" is deleted as too vague to enforce as a mandatory subject of identification. The Committee Note is revised substantially to reflect these changes.

Rule 23(e)(3) creates a new option that allows a court to provide a new opportunity to elect exclusion from a (b)(3) class if a settlement is proposed after expiration of the original time for electing exclusion. This proposal reflects concern that inertia and a lack of understanding may cause many class members to ignore the original exclusion opportunity, while the identification of proposed binding settlement terms may encourage a more thoughtful response. It also provides an opportunity to gain information that the court can use in evaluating the proposed settlement. Two alternative versions were published for comment. The first was a "stronger" version, directing that notice of the proposed settlement afford a new opportunity to elect exclusion unless the court finds good cause to deny the opportunity. The second version was more neutral, providing simply that the court may direct that the notice of settlement include the second opportunity. Many comments addressed both versions of the proposal. A cross-section of the bar supplied both support and opposition for the principle of a further opportunity to opt out. The common observation that the proposal may make it more difficult to reach a settlement agreement was divided between the view that the result will be better terms for class members and the view that good settlements may be defeated by a settlement opt-out opportunity. The Committee recommends adoption of the second version in restyled

form. It suffices to establish a discretionary authority to permit a settlement exclusion, relying on case-by-case determinations whether all of the surrounding circumstances suggest the need for this opportunity.

Rule 23(e)(4) expressly recognizes the right of a class member to object to a proposed settlement and requires that the court approve withdrawal of an objection. The Committee recommends adoption of the proposal as published, with a restyled version of the provision on withdrawal.

Rule 23(g). Rule 23(g) is new. For the first time, it provides an express procedural format for appointing class counsel. Until now, the adequacy of class counsel has been considered as part of the Rule 23(a)(4) determination whether the named class representatives will fairly and adequately protect the interests of the class. The role played by counsel is important, and often central, to class representation. Comments on Rule 23(g) commonly recognized the value of establishing explicit directions on appointment of class counsel. Differences were expressed on some of the details, as described below. The Committee recommends adoption of Rule 23(g) with the changes noted.

Criteria for appointing class counsel were originally published as Rule 23(g)(2)(B). They are relocated to become Rule 23(g)(1)(C), placing them at the beginning of the rule. The "bullet" factor looking to the work counsel has done in identifying or investigating potential claims is placed first in the list as a likely starting point. Concern that consideration of counsel's experience in class actions and complex litigation might contribute to entrenchment of a small specialized bar led to the addition of two new considerations: experience in handling claims of the type asserted in the action (recognizing that counsel who have litigated individual actions of this type may provide better

representation than counsel who specialize in class litigation generally), and knowledge of the applicable law. It is hoped that these new considerations will facilitate appointment of good attorneys who will expand the ranks of class-action counsel.

New Rule 23(g)(2)(A) reflects many comments on an issue that was reflected in the published Committee Note but not in the published rule. There must be a lawyer who can act on behalf of a proposed class before the certification decision is made. If nothing else, some lawyer must present the case for certification. In addition, motions to dismiss or for summary judgment are common, and discovery may be needed to support the certification determination. Ordinarily these needs are addressed by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty. Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made.

The published proposal generated many comments on the role of competition among lawyers in making an appointment of class counsel. The comments were fueled by two aspects of the published proposal. The provision that was published as Rule 23(g)(2)(A) provided that the court may allow a reasonable period after commencement of the action for applications by attorneys seeking appointment as class counsel. The Committee Note included reflections on the occasional reliance on "auctions" to solicit competing proposals for appointment. Although these proposals were meant to be neutral on the value of the auction process, they were read by many observers as an encouragement of competition in general and of auctions in particular. The comments frequently stressed the observation that in most class actions, it is difficult to find even one lawyer to represent the class. Competition is not a realistic possibility. Doubts also were expressed about the value of

auctions to secure the most effective class representation. These comments are reflected in the proposed revisions of Rule 23(g)(2). The subparagraph published as 23(g)(2)(A) is deleted. A new Rule 23(g)(2)(B) emphasizes the distinction between cases in which there is only one applicant for appointment as class counsel and cases in which there is more than one qualified applicant. When there is only one applicant, the court's responsibility is the familiar responsibility to ensure that counsel will fairly and adequately represent the interests of the class. When there is more than one applicant, the court is directed to appoint the applicant who is best able to represent class interests. The Committee Note is revised to reflect these changes, and to describe the circumstances in which a court may reasonably anticipate that there will be more than one applicant.

With these changes, the Committee recommends adoption of Rule 23(g).

Rule 23(h). Rule 23(h) also is new. The topic, the award of attorney fees in a class action, is not new. Rule 23(h) does not seek either to change well-established fee-award practices or to resolve identifiable disputes in current practice. Most particularly, it does not take sides in the debate between the "percentage" and "lodestar" methods of calculating fees. Instead, it seeks to establish a uniform procedural format for making fee awards.

The comments included some expressions of concern about the possible cost of notice to the class of an attorney-fee motion by class counsel. Although this concern is addressed in the Note, paragraph (1) was changed to remove the direction that notice be addressed to "all" class members, and to provide that notice be "directed," rather than "given," to class members. Two commas were added to paragraph (2) for clarification.

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

At an Early Practicable Time

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

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

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

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

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

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

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

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

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

another plaintiffs' lawyer thought that it is proper to separate discovery to support an early certification decision; "generally you can tell the difference."

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

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

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

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

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

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

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

Barry R. Himmelstein, Esq., S.F. testimony 16: The Note seems to express a preference for bifurcated discovery, first on certification then on the merits. This should be left to the judge's discretionary case management. Plaintiffs and defendants typically disagree about bifurcation. The line between certification and merits discovery is very fuzzy; bifurcation leads to discovery battles about what is appropriate to certification discovery. If plaintiff is left free, discovery will be sought "as to what we really need now to move the case forward." Given a deadline to move for certification, plaintiff will focus on the information needed to prevail on certification. (His written statement suggests that it may be desirable to set a deadline for certification that de facto requires plaintiffs' counsel to focus discovery on matters required for the certification motion.) Defendants typically object to discovery as not relevant before certification, and draw from their own information to show the reasons why certification should be denied. The plaintiff must be able to discover the defendant's information to be able to show why certification should be granted. (His written statement, 01-CV-008, adds that when discovery is successfully bifurcated, discovery on the

merits after certification often requires the producing party to go through the same documents twice, and produce the same witnesses for multiple depositions.)

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

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

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

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

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

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

Patrick Lysaught, Esq., for Defense Research Institute, 01-CV-033, 01-CV-034, pp 4-8: Opposes the change. The certification decision is critical; it determines the stakes, the structure of trial, the methods of proof, and the scope and timing of discovery and motion practice. Nothing should be done to foster delay in the certification decision. The Rule and Note seem to reflect a proper approach to balancing the need for discovery on certification issues with the need for prompt decision, but implementation of the Rule may not achieve this. Delay is unfair for another reason: it prolongs the tolling of limitations periods. Prompt decision also is entwined with the need to reduce competing class actions. One of the reasons for rejecting the 1996 proposal was the belief that all Rule 23 proposals should be considered in a single package. The Advisory Committee has indicated that it is working toward rules to address the overlapping class-action problem. Action on the timing of certification should be deferred until proposals are ready to address overlapping class actions directly.

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

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

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

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

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

Bruce Alexander, Esq., D.C. Hearing 310 ff. and Written Statement, 01-CV-041: Generally endorses (c)(1)(A). But the note about merits discovery should be clarified to recognize that good case management may require discovery that supports summary judgment on the individual claims before reaching the certification issue. There is no need to force discovery on certification issues when the case can be dispatched early by this simple means.

Professor Charles Silver, 01-CV-048: (1) There should be more guidance about the trial plan. There is a risk that a defendant will raise all sorts of issues to oppose certification that would not in fact be raised after certification — examples are counterclaims against class members (which never should be permitted in any event), or affirmative defenses. The court should not be required to resolve at this stage issues that may never need to be resolved, such as choice of law. A happy medium is the goal, a trial plan that ensures that parties and court have identified the major issues that are certain to be litigated. (2) The comment should state that it is proper to certify on fewer than all claims or legal theories, and that a decision to request such certification does not show the inadequacy of representation or create a risk that class members will be precluded from individual litigation of theories or claims not included in the class action. (3) Any mention in the Note of maturing litigation invites the mistake of focusing on cases actually tried. The Note should require a party who argues from the maturity of litigation "to present evidence including the entire claim market," settlements as well as adjudicated judgments. And it should be stated clearly that there is no maturity requirement, particularly with respect to small claims. (4) The comment that the court may not try the merits first and then certify a class is wrong. This is frequently done by "amending up." "There is nothing wrong with it, as long as the defendant is given the opportunity of having certification decided first." For that matter, there is no reason to allow the defendant to veto certification after decision on the merits. This is no more than an argument against nonmutual issue preclusion. The argument that the defendant would have litigated more vigorously if the stakes had been defined to be the class claim is no more persuasive here than with respect to nonmutual preclusion. Indeed, "a class action need not be a million-dollar slugfest and should not be when it is possible to keep costs low. In a perfect class action, every claim is identical to that of the named plaintiff."

Court Advisory Comm., S.D.Ga., 01-CV-053: This will not materially alter practice.

Committee on Federal Civ. P., Amer. Coll. Trial Lawyers, 01-CV-055: The new form "is only slightly clearer (although definitely more accurate) * * * ." The change is an improvement. The Committee should think about adding part of the Note to the Rule text: a certification determination should be made promptly after submission of sufficient information to permit a well-informed determination.

Federal Magistrate Judges Assn., 01-CV-057: This change is consistent with better practice; the Note clearly states that the change is not intended to permit undue delay.

Exxon Mobil Corp., 01-CV-059: Supports the change. But the Note should stress that the court should require the parties to justify the need for any certification-related discovery. The Note also should state more clearly that a motion to dismiss class claims should be considered before taking up the certification issue.

Bruce S. Harrison, Esq., D.C. Hearing Written Statement 01-CV-060: The Note to (c)(1)(A) should state that the pendency of competing state class actions is a ground not to defer a certification decision but to accelerate it.

National Assn. of Consumer Advocates, 01-CV-062: The rule effects a slight change of wording. The Note "is grossly inappropriate and overlong." "It is essentially a practice guide and practitioners will point to it as precedent. Even this seemingly innocuous rule change, therefore, becomes a platform for a specific theory and position on class action certification, rather than a clarification of what the rule is."

Allen D. Black, Esq., 01-CV-064: This change should not be made. Courts apply "as soon as practicable" with all needed flexibility. Discovery is allowed before the certification decision — "often too much in my view." In a few rare cases, courts have deferred class certification proceedings, where unusual facts warrant, until completion of all or a substantial amount of merits discovery. There is no evidence of abuse. Any beneficial effects to be served can be accomplished by adding language to the Note or to the Manual for Complex Litigation.

Equal Employment Advisory Council, 01-CV-065: Supports the proposal "to remove any residual sense of urgency * * * and to make it clear that motions to dismiss and for summary judgment may be entertained by the trial court prior to certification."

Alliance of American Insurers, 01-CV-068: Supports the change.

ABA Sections of Antitrust Law and Litigation, 01-CV-069: Supports the concept and Committee Note, but suggests more explicit changes to direct courts to do what the Note advises. Courts need flexibility in timing the certification decision to accommodate appointment of counsel, dispositive motions, and development of a record to support the certification decision. At the same time, the parties are entitled to an early decision that defines the scope and stakes of the litigation. "In whole, the commentary of the proposed Note is guidance that is much needed by district courts today." But "some district courts view such Notes in the same light as legislative history, giving it little or no weight." The Rule language does not seem to supersede local district rules that require early filing

of certification motions. More detailed instructions to district courts might be included in the Rule itself, "such as by requiring entry of a scheduling order for pre-certification proceedings that would deal on a case-by-case basis with the timing of the certification briefing and decision in the context of the sequence of other proceedings." It might be desirable to look to Rule 16(b). And there should be some method, similar to the discovery conference in Rule 26(f), to enlist the parties in advising the court on framing the pre-certification scheduling order. (The discussion of scheduling orders also is directed to the Rule 23(g) provisions for appointing class counsel. If an appointment procedure is adopted, "it should occur first and quickly, so that plaintiff's counsel — who presumptively will be class counsel if the class is certified — is appointed as the advocate for the putative class in the remainder of the certification proceedings.")

Association of the Bar of the City of New York, 01-CV-071: "The slight change in wording, on its face, would not seem to suggest any significant change in result." The Federal Courts Committee is opposed to non-substantive amendments of this nature. Stability in the rules is important. The Note, however, undertakes to talk at length about discovery, trial plans, and consideration of parallel actions. Notes should not be used in this way to import the Committee's views of best practice into the jurisprudence.

National Treasury Employees Union, 01-CV-078: Opposes the change. The current approach is not flawed. "The change is likely to lead to excessive discovery prior to class certification." Defendants will flood plaintiffs with excessive discovery requests; there is no sufficient limit on the scope and degree of pre-certification discovery requests. "Another concern is that pre-certification discovery could lead to a premature examination into the merits," jeopardizing the long-standing rule that certification should be decided without reference to the merits.

Washington Legal Foundation, 01-CV-082: "[I]t makes sense to remind federal judges that they should not render a class certification decision until they are in a position to make an informed decision * * *."

Mehri & Skalet, PLLC, 01-CV-083: "The potential concerns here lie not with the nuances of the wording of the Rule, but rather with the larger issue of whether courts are appropriately managing class certification discovery." The firm's experience with employment-discrimination, consumer-protection, and other class litigation shows that "delays in moving for certification frequently arise because defendants contest the discovery necessary to determine whether Rule 23's elements are satisfied." Discovery often is necessary, but "must not provide an excuse for defendants to drag out discovery disputes with an eye toward lengthy delays of the class certification decision." District judges should be instructed to manage discovery "with the goal of an informed, but expeditious resolution of the class certification issue." A case management plan aimed at this is desirable; an example order is attached. And the Note suggestion for consideration of summary judgment motions against named plaintiffs "should be tempered by acknowledgement that the class claims exist independently of the individual claims." Dismissal of the claims of a named representative does not preclude certification if new representatives can be found.

Mortgage Bankers Assn., 01-CV-087: Supports and encourages the change. But the Note should make clear that courts should manage pre-certification discovery "so that initially the parties focus

on that material necessary to fairly and efficiently prosecute motions relating to class certification." Phasing discovery can be quite effective. There is no need for unfettered class-wide merits discovery before a certification decision is made.

State Bar of California Committee on Federal Courts, 01-CV-089: Supports the change. It "gives courts some flexibility in allowing discovery on issues that may further illuminate issues bearing on certification." And the Note states that it is not intended to encourage or permit extensive discovery unrelated to certification.

Committee on Rules of Practice, W.D.Mi., 01-CV-090: The Rule language is relatively noncontroversial. The Note suggests a "cookie cutter" approach in which for all class actions, discovery is artificially bifurcated between certification issues and merits issues. This will protract litigation and discourage early settlement negotiations by emboldening defendants to provoke delay. The Note should be revised to leave control of discovery in the district court.

Lawyers' Committee for Civil Rights Under Law, 01-CV-091: (For 18 civil rights, public interest organizations, and bar associations; joined by law firms, practitioners, and professors.) "As soon as practicable" should be retained. Of course certification is not practicable until plaintiffs have fully sufficient responses to discovery regarding the identity of the class and class certification issues; in civil rights cases, in particular, almost all of this information is possessed by the party opposing the class. The FJC Empirical Study shows that present practice works well. Motions to dismiss or for summary judgment are often decided before a certification determination is made. The present priority on prompt certification helps to move civil rights actions toward conclusion. Delay is particularly important in the many actions seeking injunctive relief to protect against losses that cannot be compensated with money. The proposed Committee Note, moreover, suggests that delay may be appropriate to consider appointment of class counsel or in light of overlapping classes; that invites too much delay. "The proposed wholesale changes to Rule 23 dictate a 'one size fits all,' micro-management approach to class actions that is simply inappropriate to most civil rights class actions."

NASCAT and Committee to Support the Antitrust Laws, 01-CV-093: The current draft reiterates that consideration of the merits is not properly part of the certification decision, and that the change is not intended to support unnecessary delay. These revisions "adequately address our concerns" on these accounts. But the Note also suggests that it is possible to have controlled discovery on the merits, limited to aspects that support a certification determination. This is helpful as a suggestion to control precertification discovery. But it also suggestions a bifurcation of discovery that is rarely appropriate. There seldom is a bright line between merits and certification discovery. Artificial distinctions can defeat discovery of information needed for a certification decision, and lead to unnecessary delays and inefficient discovery. Flexible deadlines provide a better method.

David J. Piell, Student, 01-CV-094: "At an early practicable time" does not suggest that the court give any urgency to the certification decision. The incentive for delay lies with defendants, not class counsel. Defendants will argue that the changed language justifies further delay, no matter what the Note says. Precertification discovery should focus on the Rule 23(a) factors; "[g]oing much beyond

this requires delving into the merits." The suggestion that this change dovetails with the process for appointing counsel under 23(g) simply points to the flawed provisions of 23(g).

Steven P. Gregory, Esq., 01-CV-096: The change "may indicate to some courts that they should or at least may delay their certification decisions deeply into the litigation of the case * * *. All parties * * * are benefited in any class action by an early determination regarding certification."

Prof. Howard M. Erichson, 01-CV-097: (c)(1)(A) makes perfect sense and codifies best practice.

Other (c)(1)

Conference: (c)(1)(C) carries forward the present statement that a certification determination is conditional. "The word should be deleted. Certification is supposed to be 'for keeps.'" (This view was repeated later.)

Conference: Appointment of class counsel is tied to certification; the class-counsel rule should be added to subdivision (c).

Michael J. Stortz, Statement for S-F Hearing: Proposed Rule 23(c)(1)(B) requires the order certifying a class to "define the class and the class claims, issues, or defenses." Proposed Rule 23(c)(1)(A)(i) requires the notice to the class to describe "the claims, issues, or defenses with respect to which the class has been certified." The language should be made parallel. The order should describe the claims, issues, or defenses; the notice should set forth the class definition.

Barry R. Himmelstein, Esq., S.F. Hearing 19: It is not practicable to require that the certification order set an opt-out deadline. The court should be free to enter this order later. (His written statement amplifies: an opt-out date cannot be set until you know when notice is to be accomplished. Typically notice plans are not worked out among the parties until certification has actually been ordered.)

Mary Alexander, Esq., S-F Hearing 64: For ATLA. Supports requiring certification orders to define the class and identify class claims, issues, and defenses. Takes no position on (c)(1)(C) provisions for amending the certification order.

John Beisner, Esq., D.C. Hearing 15-16 (and written statement): (1) The (c)(1)(B) provisions should be made more pointed. Rule 23(f) appeals already are working to improve class-action jurisprudence. But appellate courts are finding that it is difficult to "figur[e] out what the District Court intended to treat on a class basis * * * I would urge that the proposed rule be clarified to specify that a District Court indicate which elements of the class claims and defenses thereto it intended to try on a class basis, thereby indicating by omission what elements of those claims would be left to be adjudicated on an individual basis." The Note should state that one purpose is to facilitate appellate review. (2) It is troubling to refer to certification orders as conditional — this may revive the discredited view that a court should err on the side of granting certification on the theory that it can be unwound later. The Note should refer to cases like Isaacs v. Sprint Corp., 7th

Cir. 2001, to stress that rigorous application of Rule 23 criteria remains important. The Note also might underscore even more emphatically the proposition that the authority to amend the order at any time before final judgment does not open the door to granting class certification after determining the merits in an individual action.

Victor E. Schwartz, for American Tort Reform Assn. and American Legislative Exchange Council, D.C. Hearing and Written Statement 01-CV-031: The requirement that the order define the class and identify class claims, issues, and defenses will clarify the issues for the parties and an appellate court. But it will expand the gulf between federal practice and the practice in some state courts.

Thomas Y. Allman, Esq., D.C. Hearing 106: The reference to the conditional nature of certification in (c)(1)(B) is good. But "you should not avoid the consequences of dealing with certification by calling it conditional." (His written statement adds that the Note should stress that actual, not presumed conformance with Rule 23 is essential. See General Tel. Co. v. Falcon, 1982, 457 U.S. 147, 160.)

Brian Wolfman, Esq., D.C. Hearing Written Statement 01-CV-043: (c)(1)(B) should be clarified by referring to the claims, etc., "with respect to which the class has been certified."

Michael Nelson, Esq., D.C. Hearing Written Statement 01-CV-021: It is proper to require that the certification order define the class and the class claims, issues, or defense. This facilitates appellate review. The Note should amplify the need for a clear statement of the matters to be adjudicated on a class basis. The notice requirements should parallel the order requirements, so that the notice defines the class, etc.

Walter J. Andrews, Esq., D.C. Hearing 281-282: (1) The statement that certification is conditional may encourage courts to err on the side of granting class status. That should be discouraged. But it is proper to recognize the need to modify class definition at the remedy stage. The Note should emphasize that plaintiffs must establish ultimately that the requirements for certification are met. (2) The order certifying a class should not only define the class but also define the elements of each class claim or issue that are certified for class treatment, making clear what issues plaintiffs will be required to prove individually. That will reduce uncertainty and increase the likelihood of settlement.

Bruce Alexander, Esq., D.C. Hearing Written Statement, 01-CV-041: The Note should emphasize that the conditional nature of certification does not relax the standards for certification.

Court Advisory Comm., S.D.Ga., 01-CV-053: Spelling out requirements for the certification order will generate disputes; there is no need for the specification.

Comm. on Civil Litigation, E.D.N.Y., 01-CV-056: (1) It is impractical to require that the certification order specify the class claims, issues, or defenses; often they are not then known. And this will frustrate litigants: at certification, defendants often prefer a narrow class definition, but at settlement they prefer a broad definition. This tilts the balance against certification. And the order

need not state the mechanics of opting out. (2) Courts have consistently held certification orders are conditional. There is no need to change.

Federal Magistrate Judges Assn., 01-CV-057: The change from "decision on the merits" to "final judgment" "would eliminate the ambiguity associated with determining when 'the decision on the merits' has occurred."

Allen D. Black, Esq., 01-CV-064: In general it is good to provide guidance in the Rule as to the contents of the certification order. But: (1) Need every order define the class claims, issues, or defenses? Ordinarily the order certifies a class for all claims asserted in the complaint; repetition in the order is superfluous. It is useful to spell this out in the order only if the class is certified as to fewer than all claims or issues; this might be said in the rule, or the rule might be left silent. (2) Stating "when" class members may request exclusion is difficult because at the time of the order it is difficult to know precisely when notice will go out. The class list must be compiled, disputes about wording must be resolved, and circumstances may change (as a settlement may be reached). The most that can be said is that exclusion must be requested within a reasonable time in response to the class notice; that need not be in the rule.

Alliance of American Insurers, 01-CV-068: Supports the requirement that the order define the class and the class claims, issues or defenses. Also supports the requirement that the notice state when and how class members can opt out. The changes "would bring more specificity to class certification orders." But recommends revision of the (c)(1)(C) provision for amending a certification order — it should state that the order can be amended at any time up to final judgment *in the trial court*. This change will make it clear that the parties cannot amend the class definition "throughout the appeals process."

Peter J. Ausili, Esq., E.D.N.Y. Committee on Civil Litigation, D.C.Hearing 205: It is impractical to insist that the certification order identify the class issues. The definition should be in terms of the transaction or occurrence in order to bring in claim preclusion. A defendant, for example, may argue for narrowly defined class issues at certification time, and then seek a broad definition on settlement.

Professor Charles Silver, 01-CV-048: The Note on the conditional nature of certification should address Rule 23(f): if a judge recertifies after an initial conditional certification, is there a second appeal opportunity? "One appeal is enough."

ABA Antitrust Law and Litigation Sections, 01-CV-069: (1) Supports (c)(1)(B)'s requirement that the certification order state when and how class members can elect exclusion. This embodies the better practice now followed. (2) Is concerned about the change in (c)(1)(C) that allows amendment of a certification order at any time before "final judgment." They are not aware of any case in which the present rule language has prevented necessary modifications based on developments in the litigation. The hypothetical of changes during the remedial phase has not seemed to be a real problem. There is a risk, despite the Note, that using the "final judgment" phrase will generate ambiguity because of the long association with appeal concepts. There may be no real-world reason to modify the present language. In addition, the amendments may seem to endorse the view that a court can conditionally certify a class without strict compliance with Rule 23 requirements. If there

really is a need to modify the present Rule, the Note should "make it clear that the change is not a basis for failing rigorously to apply the requisites of Rule 23 when class certification is first considered."

National Treasury Employees Union, 01-CV-078: Allowing amendment of the class definition at any time up to final judgment "would be a good change, because class definitions sometimes can be imprecise when crafted at an early stage in the litigation."

Mehrie & Skalet, PLLC, 01-CV-083: The substitution of "final judgment" makes it even more important that the Notes clarify that the certification decision does not turn on the merits of the dispute.

State Bar of California Committee on Federal Courts, 01-CV-089: Supports the provisions giving specific guidance on the content of the class-certification order. Also supports the amendment that refers to "final judgment," eliminating a possible ambiguity in the present reference to decision on the merits.

Committee on Rules of Practice, W.D.Mi., 01-CV-090: It is a mistake to require the certification order to definitively detail issues, claims, and defenses. The issues and claims evolve. And the requirement will complicate the certification decision by burdening both parties with the burden of defining issues and claims at an early stage where they cannot be definitively identified. Only a general statement of claims should be required.

Lawyers' Committee for Civil Rights Under Law, 01-CV-091: (For 18 civil rights, public interest organizations, and bar associations; joined by law firms, practitioners, and professors.) The present provision that certification "may be" conditional reflects the 1966 Committee Note statement that a court may rule that a class action may be maintained only if representation is improved through intervention of additional parties of a stated type, or for similar reasons. To make every certification conditional is to encourage constant relitigation of the certification issues, and even to invite "the unscrupulous to attempt to manipulate factors affecting class certification after the initial determination." There is a further special problem for civil rights cases. Plaintiffs and defendant may be able to agree on injunctive relief, while remaining far apart on monetary relief; they should have the flexibility to achieve interim injunctive relief, without fear that the injunction will be subject to later reconsideration because the certification was only conditional. And the provision permitting alteration up to "final judgment" does not define the ambiguous meaning of final judgment. And if a certification determination is always conditional, can it ever be suitable for Rule 23(f) appeal?

David J. Piell, Student, 01-CV-094: It should be made clear that (c)(1)(B) does not require immediate notice to the class. Often it may be wise to defer notice — settlement negotiations, for example, may begin in earnest only after the certification determination. It is unnecessarily costly and confusing to have an initial notice, followed perhaps promptly by a second settlement notice. The costs of an unnecessary certification notice, further, will impede settlement as plaintiffs seek to recover the costs from the settlement fund.

Prof. Howard M. Erichson, 01-CV-097: (c)(1)(B) provisions for the content of a certification order make perfect sense and codify sound practice.

Summary of Comments: Rule 23(c)(2) 2001

(b)(1), (2) Notice

Conference: Notice can be given now. The proposal for notice to a "reasonable number" of class members "is odd."

Conference: Notice in (b)(1) and (2) classes is to be applauded. But it is troubling to suggest that individual notice is not required; we should demand that. Still, notice need not be "as extensive" as in (b)(3) classes. It should be made clear that the defendant can be made to pay for the notice, or to include it in regular mailings to class members.

Conference: Notice to (b)(1) and (2) classes "should be meaningful."

Conference: The Committee Note, p. 49, says that notice supports an opportunity for (b)(1) and (2) class members to challenge the certification decision. "This should not be what you have in mind. Change it."

Mary Alexander, Esq., S-F Testimony 64: Notice is expensive, time-consuming, but necessary to protect the rights of individual litigants. Some notice processes are shaped so that class members do not even realize the notice describes a civil action in which their rights may be taken away. ATLA supports the plain language provision. It takes no position on (C)(2)(A)(ii) or (iii).

James M. Finberg, Esq., S-F Testimony 97 ff: Actions for declaratory and injunctive relief are often — perhaps almost always — brought by public-interest groups that have limited economic resources. Notice can be very expensive; the cost will deter many meritorious cases. As an example, consider the class action in California to challenge Proposition 187 that would limit health, education, and welfare benefits to immigrants. It is a very large class; it would be difficult to notify that class at the certification stage. The Notes recognize the burdens and suggest that courts look at the issue, but the language of the Rule is mandatory. There is no option to refuse to order any notice. It also says that notice must be calculated to reach a reasonable number of class members. But that could be so costly as to defeat the action. Perhaps the rule should say "shall consider directing," and also should allow the court to decide who must pay for the cost of notice as an initial matter. (His written statement, 01-CV-07, says the presumption should be that the defendant pay the notice costs.) Remember that Rule 23(e) requires notice of settlement. The settlement notice will give an opportunity to members of a (b)(1) or (b)(2) class to appear and challenge the settlement; at that stage, the burden of payment will be on the defendant, and will not deter filing. (In response to a question: There were several Proposition 187 cases. The one that went to judgment did not settle; so deferring notice to settlement would not work. The class won that one. Notice before settlement or judgment would support monitoring by class members, but is it worth the cost of deterring meritorious actions? (In response to another question: some notice, such as posting on the internet, is relatively inexpensive, but the rule seems to demand more by requiring notice to a reasonable

number of class members. Many members of the Proposition 187 class do not have access to computers; many do not speak English. Reaching even a high percentage of the class, though less than a majority, would be extraordinarily expensive.) The rule should be modified to give the court discretion to have minimal notice, or even no notice, in some cases.

James C. Sturdevant, Esq., S-F Testimony 117 ff: For Consumer Attorneys of California (p. 127). Began practice in public interest cases on behalf of people with entitlements under federal and state programs; they were mostly (b)(1) or (b)(2) classes. Since then, has tried consumer protection and employment class actions as (b)(3) actions. Mandatory notice in (b)(1) and (b)(2) classes will eliminate a number of cases, including "cases that are brought on a daily basis by public interest organizations challenging policies and practices of governmental agencies, both state and federal, which violated federal law or a mixture of state and federal law." One recent case against AT&T challenged an arbitration provision in a new agreement required by the detariffing of the telecommunications industry. The class included AT&T's California long-distance customers, some 7,000,000 to 9,000,000 persons. The case was filed on July 30; trial began November 13; evidence has been completed. Adding any form of notice cost to this action seeking predominantly injunctive or declaratory relief would have added tens or hundreds of thousands of dollars, perhaps even millions, to the cost, depending on the form of notice selected. Individualized notice would have cost at least $5,000,000. Publication might have been $30,000 to $60,000. Internet notice might be of some assistance, but only 40% to 45% of American households have internet connections, and of them notice would go only to those who were plugged into the particular website. There is no opt-out opportunity to protect. The determinations required to be made under Rule 23(a) to certify the class are protection enough for class members. Most of these true public interest cases "do not settle * * * until there is some certainty as to how the liability hammer is going to fall."

Jocelyn D. Larkin, Esq., S-F Testimony 139 ff: For The Impact Fund, which maintains its own class-action practice, and provides both grants and training to lawyers to bring other class actions. The focus is on civil-rights actions, particularly employment discrimination actions. The number of civil-rights class actions declined greatly between 1979 and 1989, and has essentially held steady since then despite significant enhancements of the civil rights statutes. (Her written statement, 01-CV-012, observes that one reason that class actions are less effective is that some courts have come to analyze civil rights class actions as if they were personal injury mass-tort classes; one court even drew an analogy to a tobacco class action.) In employment discrimination litigation against mid-sized companies, with classes of 100 to 800 members, class actions are important. One reason for this importance is that individual class members are reluctant to invite retaliation by filing suit; the anonymity of the class is important. The mandatory notice provision for (b)(2) actions "will deter the filing of many worthy civil rights class actions." The number one problem faced by civil-rights practitioners is resources. The clients cannot afford to advance the costs of notice. Our grants average $10,000; typically there is no other resource to pay for litigation costs. These may be small cases involving public benefits, environmental justice, criminal justice, voting rights, as well as the smaller employers. $10,000 is not adequate for deposition costs and experts. "Adding a big ticket cost like notice is simply going to mean they don't bring those cases." (In response to a question whether low-cost notice would satisfy the rule as proposed — whether, for example, notice to employees posted at the job site, or notice to a class of homeless persons posted at various places, would do: Where people are centralized, as in employment, perhaps that will do. But the more

worrisome cases are those that involve people who have applied for a job and are turned away; only fairly expensive notice can find them. Or a case in which a local public agency stopped taking applications from disabled people for public housing: notice to reach them would have to be fairly broad. Or, in response to a question, a class involving all blacks and hispanics in the City of New York who were allegedly stopped on the basis of racial profiling.) The Carlisle case also is troubling — it says that nothing in Rule 23 suggests that notice requirements may be tailored to fit the pocketbooks of particular plaintiffs.

In addition to cost, we must consider the practical reality: what is the benefit of notice? There is no right to opt out. The Committee envisions class members being able to monitor class representatives and class counsel, but "I must respectfully suggest that that's just not a reality. Class members in civil rights cases don't have the interest, the time, the resources or the capacity to monitor the progress of a class action or hire their own attorneys to do it. And that's not to suggest for a moment that class counsel should not be closely monitored in these cases. Judicial scrutiny of adequate representation is absolutely critical." And the representatives often do have an interest in monitoring their class counsel. In one recent example, the representatives in a gender discrimination case came to the Impact Fund because their lawyers had negotiated a settlement that they thought was wrong. We agreed, and were able to substitute in as class counsel. (Her written statement adds the observation that in civil rights litigation notice may be both expensive and ineffective: "the typical civil rights class member does not read the Wall Street Journal." Non-English speaking class members also pose a problem.)

So: "Don't change the rule because changing the rule will effectively close the door or may effectively close the courthouse doors to the least powerful members of our society."

(Her written supplement, 01-CV-012, adds that internet notice may not be much help: the "digital divide" is real. The poor, and members of minority groups of all income levels, have distinctively low access to the Internet. She adds other examples of diffuse classes whose members are hard to identify — people told by the hotel there are no available accessible rooms, or unable to attend a theater that is not accessible.)

John Beisner, Esq., D.C. Hearing Written Statement, 01-CV-027: (1) The success of a rule directing plain language and specifying elements of class notice will depend on additional specific guidance. The Federal Judicial Center forms are guides. But it might be desirable to add a limited collection of notice forms to the Appendix of Forms that accompanies the Rules. (2) Requiring notice in (b)(1) and (2) classes appears on balance to be a positive change. It would "halt" the strategy of transforming damages classes into these forms. The Note should make clear that the change is not intended to broaden use of (b)(2) classes; there is a circuit split on the extent to which damages claims may be added to a (b)(2) class, and the Note should state that the rule change is not intended to address this split. The Note, further, should state more clearly that the notice obligations are less onerous than in (b)(3) classes. And it is very troubling to suggest that a defendant can be required to use its own public communications mechanisms to assist in providing notice to the putative class. The notice burden lies with the purported class representatives. To require a defendant to include a class notice in a regular mailing, for example, raises due process issues because it requires the defendant to pay for prosecuting litigation against itself even though no merits determination has

been made. And, citing Pacific Gas & Electric Co. v. PUC, 1986, 475 U.S. 1, suggests there also may be a First Amendment problem in requiring a defendant to convey this "very negative message."

Bill Lann Lee, Esq., D.C. Hearing 20-40: Mandatory notice should not be required in (b)(1) or (b)(2) class actions. Judges have authority to order notice now under (d)(2), and are aware of the authority. Although the notice requirement is proposed for good motives, it will seriously hamper the prosecution of civil rights actions. Experience as Assistant Attorney General for the Civil Rights Division shows that private enforcement carries the principal burden in the civil rights arena. Congress foresaw the need for private enforcement by adding attorney fee provisions. Other countries, as South Africa, recognize the importance of class actions in enforcing civil rights. The number of private enforcement actions has dropped since the 1970s. Civil rights class actions tend to be brought under (b)(1) and (2). When notice is required courts uniformly have required plaintiffs to pay. Notice costs will deter many plaintiffs from bringing class actions. An example is provided by an action to address discriminatory funding of public transportation in Los Angeles. The plaintiffs unsuccessfully sought lawyers to represent them until the NAACP Legal Defense Fund took on the case. The out-of-pocket costs for discovery and the like were $150,000, and strained the budget. On settlement, notice was provided by publication in four local newspapers for three days and by posting short notices in such public places as bus stops. The cost of that limited notice program was $140,000. The prospect of paying that cost would have prevented filing the action; the result of the decree is estimated at $600,000,000 to $1,000,000,000 of enhanced spending on inner-city bus transportation. If there were no cost, the notice proposal would present a different question. The value of notice in these cases is symbolic; we do not need to incur the costs for symbolic reasons. Alternative means of notice may be effective, such as paycheck notices in an employment discrimination case, but no defendant has ever voluntarily offered to do that. A court might compel notice by modest means, but is not likely to shift the cost to the defendant. So it is not a sufficient remedy to state more clearly that the court should consider the impact of notice costs on the ability to maintain the action; the mandatory notice provision should be dropped. The increasing cost of litigating these actions probably accounts for the decreased filing rates. And individual actions do not provide an adequate alternative to class actions. Class actions tend to be noticed, and can accomplish actual tangible results. Opting out of a class action to pursue individual remedies may be a good thing, but that does not detract from the value of a larger remedy that affects a larger group of people. An alternative to mandatory notice might be to work through proposed Rule 23(g)(2), "to put potential class action counsel on notice that courts and this committee think communications with the class is a very important aspect of their representation."

Mr. Lee's written statement offers additional points. (1) Civil rights actions are appropriately brought under (b)(1) as well as (b)(2). (2) There are no studies indicating that class counsel have been inadequate in communicating with class members; what the cases reflect are disputes about efforts to communicate. (3) The concern with the ability of class members to monitor proceedings and to decide whether to participate individually arises from case-specific circumstances, not a problem inherent in (b)(1) and (2) classes. (4) The use of notice power under (d)(2) does not seem to have had a deterrent effect on filing. (5) Procedures for notice of settlement and the fairness hearing "in effect promote the interest of assuring that the class is kept informed."

Prof. Owen M. Fiss, D.C. Hearing 40-57: Proposes a two-notice regime. The first notice would go out prior to certification "to test for the adequacy of representation." This notice would be tested by the general formula of Mullane v. Central Hanover Bank & Trust: the best notice practicable under the circumstances. The second notice would go out after certification but before trial, to "seek to operationalize the right to opt out." The right to opt out should not be limited to (b)(3) classes. Rule 23 rests on "interest representation," and "any individual should have the right to disavow that representation." But the opt-out right might be limited to circumstances in which "the interest of the individual members of the class is of a sufficient magnitude and particularity to make opting out just and appropriate." Once the opt-out right is generalized, if perhaps limited, there is no remaining need to maintain the distinctions between (b)(1), (2), and (3) classes. Predominance and superiority should be required for all classes. The cost of notice in civil rights cases is a concern, but "we're also deeply committed to procedural justice." The cost of notice before certification need not be crippling. And there is more of a role for individual actions to vindicate civil rights than Mr. Lee's testimony suggests. An individual student, for example, is entitled to education in a desegregated school system as a matter of an individual remedy. Settlement, moreover, is a very special event; it should be limited to class members who choose to opt into the class. (In response to questions: Perhaps it is possible to discard opt-in, and even eliminate opt-out, when class members have identical and de minimis individual stakes; Eisen v. Carlisle & Jacquelin may be an illustration. That will require more thought.)

The written statement, prepared with John Bronsteen, 01-CV-023, amplifies several points. (1) The provision for the best notice practicable under the circumstances might include a check-list of factors: cost; the importance of reaching every class member — which will vary with the size of interest and the variation of interest among members; and the consequences for "maintainability of the class action." If expensive notice would likely cripple a class action to redress claims that could not be brought as separate individual suits, the judge should seek to avoid such stringent notice. (2) The right to opt out might be denied if a class member seeks to abuse the privilege — "for example, if all class members' interests are absolutely identical and all stand to benefit if the remedy sought is granted — say an injunction to end discrimination or institute an accelerated promotion policy — but some seek to opt out solely for the purpose of preserving their claim for a 'second bite at the apple' if the plaintiff class loses." (3) Notice of the right to opt out seems to be limited: "the judge should ascertain where [sic - whether?] there is a reasonable likelihood that a significant number of people will opt out, as when individual stakes are high and interests are heterogeneous."

Professor Judith Resnik, D.C. Hearing 58 ff.: There remains room for both mandatory and opt-out classes. But the distinction should not be drawn at the beginning of the action. There is no need to determine at the beginning whether the remedy will be injunctive, declaratory, or damages. The distinction should be drawn only when remedies are actually on the table. That may be when certification and settlement are proposed simultaneously, but even that line is not so bright: there may be "adjudications along the way and the settlement is being shaped there." Sampling notice should be considered. The notice proposal stems from a worry about monitoring. A class may include people with different views about the remedy, so monitoring is important. But monitoring does not require that the courthouse door be closed by the costs of individual notice. Initial sampling notice suffices. At the remedy stage, if it is decided that an injunction or limited "pie" require that the action be made mandatory, "at that point you need better notice." Who pays is now part of the

negotiation. In some cases, defendants are interested in "group-based processing. In addition, courts have an interest in class adjudication — "We want fewer of these cases and we need to resolve them en masse." The courts might absorb some of the notice costs. And costs can be reduced "using court-based data accessing capacities and e-mail and the like * * *." Even recognizing that not everyone is a computer user, this can help. (Her written statement provides similar suggestions. The notice draft retains the distinctions among (b)(1), (2), and (3) classes. The certification question should be divorced from the opportunity to request exclusion. The certification test should be addressed in Rule 23(a) to establish a "uniform standard of both the need and desirability of class certification." It should not be required that a class action be superior; it should be enough that it is a useful way to proceed, "suitable to the claims presented." Purposes could be "to facilitate access and quality representation for small claimants, or to buffer against disparate outcomes for classes of similarly situated plaintiffs, or to create enforcement rights in a wide set of claimants." Present subdivision (b) would be replaced by provisions on appointment and compensation of class counsel.)

Norman J. Chachkin, Esq., NAACP Legal Defense & Educational Fund, D.C. Hearing: The problems of (b)(2) class actions are not illuminated by the Advisory Committee's extensive study — supported by the FJC and RAND — of mass-tort and consumer class actions. In (b)(2) civil rights action there is no lack of communication between unnamed class members and class counsel. Some of the communication involves class members who wish to add to the class litigation individual problems that they are encountering with the defendant. But any attorney serious about representing a (b)(2) class must be in communication with, and accessible to, class members. Most of these actions result in settlement. It is difficult to present the pros and cons of a settlement to class members unless there has been effective communication with class counsel before the settlement is proposed. All of the current proposals should be recommitted for further study to the extent that they involve (b)(1) and (2) classes. The advice in the Note that the costs of class notice should not defeat a "worthy" class is merely advisory. There is, moreover, a great deal of latitude for the individual judge to weigh the costs and advantages of notice; this "could even permit personal or ideological opinions to affect procedural decisions." The (b)(2) class was added in 1966 to emphasize the suitability of class actions in civil rights and race discrimination claims; that is still a valid, necessary, and worthy purpose. In the real world, we cannot achieve as much reform and enforcement of constitutional and statutory rights through individual actions as we achieve through class actions. Inadequate representation can be cured by decertification when it becomes apparent, or by collateral attack. Rule 24 establishes a right to intervene on showing inadequate representation. A further problem is that notice is to be given only after the certification decision. Once notice is given, the class certification issues will have to be revisited. The resulting problems of manageability will be worsened by the provision that allows a class member to appear through counsel without satisfying Rule 24 intervention standards. Most of the Rule 24 cases involving attempted intervention "involve disagreements with the litigation judgment of class counsel, and almost without exception, although there are some few exceptions, District Courts have determined that that disagreement doesn't affect the substantial substantive interests of absent class members and it doesn't justify complicating the litigation by allowing individuals to intervene." So, p. 103, "a mere disagreement over whether you should file a summary judgment motion this week or take another deposition is not the sort of thing that meets the Rule 24 requirements." The notion of permitting exclusion from a (b)(2) class also is puzzling: if a class action were brought to desegregate a public school, could a class member ask "'to continue to go to school in the system

that's operated in violation of the United States Constitution.'" The Committee also should not attempt to address the ongoing development of decisional law on the extent to which damages can be sought incident to a (b)(2) class, as in Title VII actions. If the costs of notice were substantially lower, notice would not be as much of an issue. But the important time for notice is the time of settlement: that is when class members have the most important contribution to evaluating the adequacy of representation. Finally, courts hear from class members in (b)(2) actions. They get lots of letters that they put in the file and send to counsel to be dealt with as counsel wish. "There's not a lack of initiative being taken, in my experience, by unnamed class members who are dissatisfied with what's happened."

The written statement, 01-CV-051, adds more. The FJC Study shows the median cost of class notice in four districts was $36,000; in two districts it was $75,000 and $100,000. There is no experience to suggest that class members have often attempted to relitigate the certification issues; in any event, notice prior to certification would be needed to support such efforts. There has been some challenge to adequacy of representation, but that is relatively infrequent and commonly involves mere disagreements about litigation strategy. (Pages 12-13 illustrate cases denying intervention; the parenthetical descriptions suggest strong reasons for granting intervention in at least several.) "In the class context class counsel's responsibility is to the class, and is not mechanically dependent upon the desires of the named plaintiffs." Indeed, "'class counsel is entitled to be free from harassment by class members. All of his judgments cannot be challenged in court.'" Defense counsel will take advantage of a right to appear by encouraging disruptive class members to participate and undermine the class proceeding. On the other hand, defendants too may suffer if class members who appear contribute in such a way as to be entitled to attorney-fee awards.

Brian Wolfman, D.C. Hearing and Written Comment: Notice in (b)(1) and (2) classes is desirable, although cost is a problem. It should be directed to "a reasonable number of class members comprising a fair cross-section of the class." Notice to only a reasonable number may not suffice if there are divergent interests. If there are formal subclasses, notice should go to a fair cross-section of each subclass. This seems to be similar to what others have called "sampling" notice. The Note should state that opt-out rights are due when some of the relief is damages: "Due process, and possibly Rule 23 as currently written, demands that result."

Leslie Brueckner, Esq., D.C. Hearing 146-155: Has just won a state-wide (b)(2) class action to defeat a mandatory arbitration clause that had been inserted in a consumer contract by a long-distance provider. It is likely that anticipating the cost of giving notice to the class would have prevented filing the action. The alternative of writing protections into the rule so that the judge must consider whether notice costs are inimical to bringing the action are "too little, too late." If there is a chance that significant notice costs will be imposed, lawyers will not file. Although the power is there now in (d)(2), it is used so rarely that practitioners do not anticipate being required to fund notice costs. The deterrent effect will be increased by the proposal to require notice of attorney-fee applications. Although there would be no added notice cost in cases that settle, civil rights cases often are litigated to judgment, and then there would be the cost of an additional notice not required for any other purpose. Sampling notice would be an improvement, but even that would exert a substantial chilling effect. What sample would suffice? In what form would notice be given? "[I]t's simply too uncertain and will have a huge negative impact on civil rights cases." Reforms in this area might be

justified, but further study is needed. The RAND study has not looked at this issue. (Her written statement, 01-CV-020, urges withdrawal of any notice requirement. Notice is required in (b)(3) actions to preserve opt-out rights. (b)(1) and (2) classes are analogous to interpleader or quasi-in-rem actions in which circumstances dictate the need for unitary disposition regardless of class-member consent. The Note does not provide sufficient protection. It quotes the Mullane case statement that notice reasonably certain to reach most of those interested in objecting suffices. It states that notice to all identifiable class members is required when there is no substantial burden. This is too much. There is no showing of abuses in this area, and the homogeneity of interests in (b)(1) and (2) classes is sufficiently strong to be adequate safeguard.)

Peter J. Ausili, E.D.N.Y. Civil Litigation Committee, D.C. Hearing 206: Mandatory notice should not be required in (b)(2) actions; it may be unduly expensive, and thwart some meritorious class actions. (The written statement, 01-CV-056, adds that notice to the class is appropriate in (b)(1) actions.)

Ira Rheingold, Esq., (National Assn. of Consumer Advocates), D.C. Hearing 261 ff.: Notice should not be required for non-damage classes. The reason is cost. Consumer class actions often do not make a lot of money. They present the same problems as civil rights actions: the anticipated cost of notice will have a chilling effect. If notice is needed in a (b)(2) action, courts now have the authority to order it. (This theme is repeated in the written statement, 01-CV-062. Many advocates conduct good, beneficial actions under (b)(2) and are not getting rich but are helping many people. Imagine a case in which 10,000 people nationwide are injured to the extent of $5 each, a typical consumer class action; the cost of notice could exceed the potential recovery.)

Patrick Lysaught, Esq., for Defense Research Institute, 01-CV-033, 01-CV-034, 046, 047: Generally this is a positive proposal. But the Note should make two things clear: this is not intended to foster increased use of (b)(2) classes for claims that seek damages, and it is not intended to reduce the notice requirements for (b)(3) classes. The Note, further, seems to endorse a requirement that the defendant use its usual communications methods to reach a plaintiff class. This is a bad idea as presented. It implies that the defendant may be made to bear the cost of notice; it is not likely to be effective notice, because it will not attract attention in the same way as a separate formal notice; and it may cause class members to give greater credence to what seem to be the defendant's self-accusations of wrong conduct. On the other hand, it may be sensible to require that a company make available to the class a regular means of communication used by the company to reach class members.

Walter J. Andrews, Esq., D.C. Hearing Statement, 01-CV-036: It is a positive change to require notice in (b)(1) and (2) class actions. But the Note should stress that the notice requirement is not intended to broaden the use of (b)(2) classes. And the Note reference to use of a defendant's regular communications is a problem. Even if the issues of cost are addressed, the Note should emphasize that notice is the plaintiffs' burden and that use of the defendant's resources is discouraged.

Professor Charles Silver, 01-CV-048: "The inability to opt out of a mandatory class action makes monitoring more important in these cases than in opt out class actions. All of the conflicts that inhere in (b)(3) class actions also inhere in (b)(1) and (b)(2) class actions." They are more dangerous

because exclusion is not possible. "Only monitoring is possible, and monitoring cannot occur without good notice. Consequently, courts should be especially careful in mandatory class actions to see that all persons with sizeable interests receive notice and an opportunity to participate." But the discussion of notice to fewer than all class members makes a point that should be extended to (b)(3). The present (b)(3) requirement of individual notice is wrong, and "the Supreme Court compounded the error in Eisen." Due process is a functional standard; individual notice is required only for class members with large claims, important interests, and relevant information. The cheapest possible notice should be provided all other class members. Newspaper publication never should be required; internet publication is much cheaper.

Exxon Mobil Corp., 01-CV-059: Supports mandatory notice. But the Note should state that the burden of notice is on class representatives. The defendant should not be saddled with the burden simply because it uses mass mailings in its business; due process and First Amendment implications must be considered.

Allen D. Black, Esq., 01-CV-064: It is a good idea to require modest notice in (b)(1) and (2) actions. But the Note ventures on dangerous ground when it invites challenges to the certification, encouraging relitigation of the certification question. That sentence should be deleted.

Equal Employment Advisory Council, 01-CV-065: The Council is an association of employers that, collectively, employ more than 20,000,000 workers in the United States. It opposes notice in (b)(1) and (b)(2) actions. There is no right to request exclusion to require notice. Notice will not help class members, but "is likely only to confuse and frustrate them." The class representative is responsible for representing and communicating with the class; if the representative fails, certification is not appropriate. Notice, further, will enlarge the size of the class as "individuals who never before thought they were victims of employment discrimination may recast their experiences to make themselves part of the class." The provision that describes a right to enter an appearance through counsel will only further complicate the litigation. Even a matter as simple as a request for an extension of time requires, in many courts, consultation with counsel for opposing parties: many lawyers representing many class members will increase the difficulty of simple procedural steps. Many lawyers also will expand the number of parties that can file discovery requests and motions. The Note proposal that a defendant might be required to include notice in a regular communication with class members puts an unfair added burden on the defendant — it is likely to put the burden of cost and notice in defendants in all cases, since defendants do regularly communicate with their employees.

Alliance of American Insurers, 01-CV-068: Supports notice in (b)(1) and (2) class actions.

ABA Antitrust Law and Litigation Sections, 01-CV-069: "In most instances," requiring notice in (b)(1) and (2) classes "serves the salutary purpose of giving such class members the opportunity to monitor class proceedings." But there is a tension, recognized in the Note, arising from recognition that notice costs may deter some plaintiffs from filing actions seeking only injunctive relief, particularly civil rights actions. It would help to include a safety valve giving "the district judge discretion to vary the form and content of the notice * * * to comport with the special needs of a particular case." The Note suggests that notice could be included in a regular communication.

Ordinarily it is the defendant who regularly communicates with class members — examples are an employer or a credit-card company. The Note is ambiguous on who should bear the costs. The Note should be modified by deleting the reference to regular communications or by clarifying them.

Association of the Bar of the City of New York, 01-CV-071: Mandatory notice will reduce the number of class actions, especially in such fields as civil rights, consumer, and environmental cases, because of the prohibitive cost of notice. Courts have authority to order notice under present (d)(2). The requirement for notice of settlement makes it in the interest of class counsel to keep class members informed.

Civil Division, U.S. Department of Justice, 01-CV-073: There is no advantage in notice to class members who cannot request exclusion. The district court has authority under (d)(2) to direct notice in appropriate circumstances. Notice will be costly, and may generate confusion. In addition, it may invite filing individual actions — prisoner litigation is an example. Matters will be complicated still more if the separate litigation is filed in a different district and is not subject to control by the class-action court.

National Assn. of Protection & Advocacy Systems, 01-CV-077: (An association of state protection & advocacy systems for persons with disabilities.) The protection & advocacy systems file most of their class-action enforcement actions under (b)(2). ADA Title III, for example, provides for declaratory and injunctive relief but not damages. There is no right to exclusion, so no need for notice. The provision "will deter the filing of worthy disability-based civil rights cases by resource-strapped civil rights practitioners. * * * Similarly, the P&A systems have limited resources to fund potential class action litigation." Increased costs will deter filing or strenuous prosecution of worthy civil rights actions.

National Assn. of Treasury Employees, 01-CV-078: "This section ignores the significant differences between b(3) and b(1) and b(2) cases. The Supreme Court underscored this difference in Eisen, where it noted that subdivision (c)(2) does not apply to (b)(2) classes. There is no right to opt out. The apparent purpose of the notice proposal is to encourage class members to monitor the progress of class actions. But requiring notice often will mean that there is no action to monitor, as notice costs will preclude nonprofit groups from filing. Class counsel already serves the monitoring role, as do the named plaintiffs. "The judge, of course, has the ultimate monitoring responsibility," as shown by the requirement that a settlement be approved. Rule 23(d)(2) already gives sufficient notice authority.

David H. Williams, Esq., 01-CV-079: Writes from experience with (b)(2) classes challenging improper deprivations of government benefits, most often Medicaid assistance. The costs of notice are significant since no funds are being recovered for the class. The only practical ability to monitor the progress of the action is given by the ability to appear through counsel; that is rarely a viable option. "A more practical monitoring tool might be giving class members a means to contact class counsel." Class notices will not often do this, since the proposed rule does not require the relevant information. "Confused and anxious class members can be counted on to call court staff." Notice, further, will promote reliance on the class action, including reliance by persons who are not within the class and who should be pursuing relief by alternative means. It creates the need for further

notice if the case is involuntarily dismissed, to protect members who relied; and since only "reasonable" notice is required, there is no way to determine which class members may have relied. Finally, there is a danger that a notice requirement will make emergency relief unavailable: a class must be certified to support interlocutory relief on a class-wide basis. An immediate 23(f) appeal of the certification order may "overload[] what must be accomplished to grant the emergency relief."

Mehri & Skalet, PLLC, 01-CV-083: (1) Drawing from extensive employment discrimination and consumer protection class-action experience, agrees with the testimony opposing the change "and we strongly agree that no good can come of it." The informed judgment of the district court under Rule 23(d)(2) suffices. An excellent example of wise judicial discretion is found in the cases that require notice and opt-out rights in "hybrid" (b)(2) classes that include significant damages elements. It is illogical to respond to the problems of mass-tort cases by adopting a notice requirement that will severely damage (b)(2) classes. A better approach is to strengthen the methods of communication with the class throughout the litigation. (2) It is wrong to permit a class member to enter an appearance at the certification stage. The defendant could exploit this procedure to defeat certification. "Further, the broader interests of the class may be easily sabotaged by [a] small group of individuals with antagonistic goals." The problem is akin to the problem of standing to appeal; class members have been required to intervene to achieve appeal standing, for fear "that individuals with interests adverse to the class, or with non-typical claims, will interfere with or complicate the litigation." The purpose of the class action is to render manageable litigation that involves numerous members of a homogeneous class. Those individuals who seek to appear most likely "are trying to place their individual interests ahead of the class." They present the same risks as the risks presented by some objectors.

Prof. Susan P. Koniak, 01-CV-086: (These comments offer a very broad spectrum of issues that are summarized here because they are brought to bear on the question of mandatory notice in (b)(1) and (b)(2) class actions.)

There is a justified public crisis of confidence in class-action procedure. The proposals do not adequately protect the interests of absent class members. Class members need protection from class counsel; from the defendant and its lawyers; and from the overworked judges "who do not function as adequate fiduciaries for absentees." "The instances in which class representation is now permitted do not match any principled justification for disposing of the rights of individuals without their explicit consent." Every reasonable effort to notify those individuals should be required.

The "efficient" functioning of the judicial system is not alone justification for class procedure. The principled purpose underlying (b)(3) classes was that small claims otherwise would receive no hearing; it is proper to protect against loss of the deterrent function of the law. But transferring (b)(3), and later (1) and (2), to mass torts is not principled. The acceptance of "side deals" as in Ortiz and Amchem in the lower courts illustrates the unfairness of the procedure.

"[T]he lines between the (b) categories are so ephemeral that until those categories get fixed it is simply unjust to tie important procedural rights to these categories." It is vitally important to clearly understand categories that determine important procedural rights, but that we do not understand. Plaintiffs' and defendants' lawyers alike benefit from the uncertainty: the defendants

can bargain for a "locked-in" class, and by paying more for global peace create an incentive for class counsel to go along. "[T]here is presently no theory that adequately explains why absentees in the (b)(1) and (2) categories are due so much less process than absentees in (b)(3) classes. That makes Rule 23 arbitrary." Rule 23 should "include a strong presumption that absent class members in any (b) category receive the best practicable notice and a right to opt-out." A district court must provide a clear justification for deviating from the presumption, and there should be de novo appellate review.

The Ninth Circuit decision in Epstein v. MCA, 1999, 179 F.3d 641, creates great doubts about the freedom of class members to remain aloof from a class action that does not provide adequate representation. It seems to preclude collateral attack so long as a class member could have made an objection in the class action. "This Committee should make clear that Epstein does not preclude a collateral attack in one federal court on the adequacy of representation provided absentees in an earlier class action in state or federal court, and at a minimum in the latter situation, i.e., two federal court proceedings. * * * If you do not believe it is important that absentees retain the right to right to remain absent, I believe Rule 23 should be amended to require that all absentees receive individual notice to inform them that they will be bound with no recourse, if they fail to travel across the country (if need be) to monitor what is happening and to ensure that the representation they receive is adequate."

Lawyers' Committee for Civil Rights Under Law, 01-CV-091: (For 18 civil rights, public interest organizations, and bar associations; joined by law firms, practitioners, and professors.) **(1)** The FJC Empirical Study of class actions contradicts anecdotes and other unsupported assertions regarding class-action practice. A number of the problems addressed by the proposed amendments are not problems at all, or are not problems with class-action practice generally. The perceived problems do not appear in civil rights actions, and the proposed solutions would have untoward effects. For the 12-month period ending September 30, 2000, 273 civil rights class actions were filed in federal courts, 11.4% of all federal-court class actions. Together with securities class actions, nearly 40% of class actions fall into circumstances that the FJC study described as routine, easy, and well-established applications of Rule 23. It is a mistake to restructure practice in ways that affect these successful experiences. The economics of civil rights class-action practice are an important consideration. There is no economic competition among lawyers for these cases; it is all too difficult to recruit lawyers. Statutory fee awards tend to award compensation that would be fair for a case without any risk; there is a risk, and the awards are correspondingly inadequate to entice representation. (The report attaches a report by Professor Stewart J. Schwab analyzing Administrative Office Data that show the low success rates in federal-court civil rights actions.) Requiring notice at the time of certification will greatly increase the costs of bringing these actions — in some cases without extensive discovery or expert witness costs, the cost of notice will match or exceed the cost of litigation. No real need or interest is served by notice. In school desegregation, employment or housing discrimination, voting rights, and other cases, class members receive notice of the litigation as members of the community involved: "The drafters of the 1966 Amendments understood that this would be the case * * *." Mandatory notice after certification cannot serve a constructive purpose. The suggestion that it supports an opportunity to challenge certification invites relitigation without benefit. "The factors determining (b)(2) class certification depend on the claims asserted, the conduct of the defendant, and objective characteristics of affected class members, not

the subjective views of individual class members." The party opposing the class, moreover, can be expected to raise whatever issues counsel against class certification, including conflicts among class members. Rule 23(d)(2) provides authority for directing notice in "the rare case" where class members cannot be expected to be aware of the action or there is some particular reason. (2) 23(c)(2)(A)(i) subtly adds a further new requirement for (b)(2) classes by providing notice of the right of a class member to enter an appearance through counsel. This contradicts the intervention provisions of Rule 24 and is "logically flawed. It is not the notice currently supplied to (b)(3) classes that gives rise to the right to individually appear through counsel, but the right to opt-out of the class. Members of (b)(3) classes that do not opt-out have no such right in the absence of appropriate grounds for intervention under Rule 24, and logic provides no basis to afford that right to members of (b)(2) classes." This amendment could result in (b)(2) actions "becoming no more than cumulative individual actions with multiple counsel acting on behalf of multiple individuals." If substantial interests are not represented, Rule 24 intervention provides protection.

NASCAT and Committee To Support the Antitrust Laws, 01-CV-093: Generally support notice in (b)(1) and (2) classes, but room should be made to accommodate plaintiffs who cannot afford notice. The court should have discretion to balance the benefit of notice against the cost and the ability of plaintiffs to pay, "permitting the court in exceptional circumstances to wholly dispense with notice."

Prof. Howard M. Erichson, 01-CV-097: At least some notice should be required in (b)(1) and (2) class actions. In some cases "a reasonable number" may be very few class members when greater notice would be cost-prohibitive. Indeed, there should be greater flexibility to dispense with notice to all identifiable class members in (b)(3) classes, as contemplated in earlier Advisory Committee proposals. The Note might address the timing of notice: in (b)(1) and (2) classes, notice is most important at the settlement or remedy phase, when it is more realistic to expect class-member participation. Monitoring of the action's progress up to that time is likely to be rare.

Association of Trial Lawyers of America, 01-CV-098: Generally, ATLA favors as much communication as possible by attorneys with all class members throughout the pendency of a class action. But the cost of notice could force counsel to abandon class actions. "Depending on the type and extent of the notice directed, the cost of the notice could easily exceed a proper award of damages and/or legal fees." This result might make it more expensive to pursue a class action than to enforce rights through individual actions. Defendants could use a notice requirement to avoid the court's consideration of the merits. "We can only suggest that, if class action defendants are truly concerned about the adequacy of communications between the plaintiff class and its attorneys, they might pay for such notice themselves, especially when they know that their liability is clear." At a minimum, it should be "much clearer that in (b)(1) and (b)(2) actions it is not necessary to provide notice in the same ways and to the same extent as in (b)(3) actions. Notice by the most economical means should be the standard, and the rule should be structured in such a way that class action defendants cannot use it aggressively to induce plaintiffs to abandon legitimate cases."

Todd B. Hilsee, D.C. Hearing 238-241: The "reasonable number" term is vague. How many is that? Should it be measured as reaching a particular percentage of the class, given the ability of communications professionals to determine what percentage of a class will be reached by various methods of notice? But it is difficult to be precise; what is reasonable depends on the circumstances.

It would be foolish to spend $3,000,000 to give notice of a $3,000,000 settlement. But a "reasonable number" is not a useful phrase.

Bruce Alexander, Esq., D.C. Hearing 310 ff. and Written Statement, 01-CV-041: Notice to members of a (b)(1) or (b)(2) class is a good thing. But the Note on including notice with a defendant's regular communications to the class is not. Communicating with the class is the responsibility of class counsel. Sadly, many class counsel do not want to have anything to do with communicating with their clients — they do not want their name, address, or phone numbers on any communication lest class members call for an explanation of what is going on. Even the simple addition of a "stuffer" increases costs. But other burdens are far greater. Recipients will conclude that a notice mailed out by the defendant is a sign that the defendant is liable or has admitted liability. Sending notice will be further complicated because it is not likely that the class definition will coincide completely with any established mailing list. Mistakes will occur in attempting to focus the class communication. Moreover, inquiries about the notice will naturally be made to the defendant. The defendant will have to establish special systems to respond to the inquiries, including training people who can respond appropriately. "There is simply no good substitute for a separate mailing with separate controls, properly targeted, with a separate return address and with a separate number to call or place to write with inquiries."

Bruce S. Harrison, Esq., D.C. Hearing 335-338: In response to a question, observed that notice to class members has never been a problem in over 50 employment class actions he has litigated. Notice was given; plaintiffs' counsel did not object to providing notice. The cases were all money damages cases.

Keith L. Fisher, Esq., State of Wisconsin Investment Bd., 01-CV-066: "Because class members in these cases do not have the right to protect their individual interests by opting out, their ability to monitor the cases is all the more important." The notice requirement should be no less demanding than the requirement in a (b)(3) class. "This is not to say that district judges cannot balance the cost of providing notice with the benefits, and require a lesser manner of notice in those instances where providing individual notice is not economically feasible."

Other Notice

Conference: There should be automatic review of the notice plan in a nonadversarial setting as part of the case-management plan.

Conference: To be effective, notice should be directed individually to class members as a letter from the court.

Conference: No one will argue with a "plain language" requirement. "Almost every notice is unintelligible to the ordinary person." Lawyers, anxious to protect themselves, draft impenetrable language. Plain language is achieved only when the judge writes the notice. The Rule might focus on encouraging the judge to write the notice, or else to appoint someone — preferably not a lawyer — to write it.

Conference: We should consider imposing notice costs on defendants in (b)(3) class actions. And we should consider softening the requirement of notice to every individual (b)(3) class member; in some small-claims classes, representative notice is enough. (A panel member noted that the Advisory Committee had abandoned this idea in face of the difficulty of deciding which class members would get notice.)

Barry R. Himmelstein, Esq., S.F. Hearing 15, 19-: It is not practical to require that the order granting certification also direct appropriate notice to the class, (c)(2)(A)(i). That is practical when the parties have worked out a settlement and agreed on notice before certification. But if there is a contested certification the defendants are not willing to work with the plaintiffs on notice until certification is granted. Publication often is important. The AARP publication is very effective, but it has a two-month advance booking requirement. It is proper to require that notice be covered by a court order, but not practical to require that the order issue at the time certification is granted.

James M. Finberg, Written Statement for S-F Hearing: The FJC notices appear to attach opt-out forms, objection forms, and claim forms to the notice. Only claim forms should be attached. My practice is to contact people who have opted out; in the overwhelming majority of instances, they did not understand what they were doing; they did not understand that by opting out they lost the right to participate in the settlement. They are misled to believe that they must complete the opt-out form to be able to participate in the settlement. The same is true for the objection form. The sample notice forms also are too long. Class members will feel overwhelmed and will not try to read the notice. In addition, it costs more to print and mail a long form. The maximum length should be four printed pages. (The written statement 01-CV-07, is similar.)

Brian Wolfman, D.C. Hearing Written Statement 01-CV-043: The notice provision refers to a right to appear through counsel. It should say "with or without counsel," so that objectors know they can object without having to retain a lawyer. The Notice also should include an opt-out form; parties often do not use them, and courts have not demanded them. Instead, the parties craft procedures that make it onerous to opt out. And the notice should not be drafted in terms that discourage opt outs, as often happens when the parties draft the notice to explain the disadvantages of opting out without noting the advantages. "[A]n easy-to-use form is the best means for insuring that class members can exercise their opt-out rights if they wish to do so." Rule 23(c)(1)(A)(i) should include, p 3, lines 36-37, this phrase: "including an explanation of the consequences of exclusion on members of the class."

Michael Nelson, Esq., D.C. Hearing Written Statement 01-CV-021: The notice should state the class definition, issues, and defenses in the same terms as the certification order.

Stephanie A. Middleton, Esq., D.C. Hearing Written Statement 01-CV-032: The Note seems to endorse requiring the defendant to assist in providing notice to the putative class "and to pay for the prosecution of the litigation against itself when no determination of the merits has been made." This is troubling.

Alliance of American Insurers, 01-CV-068: Approves plain language and the added categories of information specified for notices. This information is typically found in class notices.

Peter J. Ausili, Esq., E.D.N.Y. Civil Litigation Committee, D.C. hearing 206: The list of factors to be put in the notice may discourage inclusion of other information that should be there. The notice should indicate the relief sought, identify the opposing parties including class representatives and class counsel, provide the names and addresses of class counsel, and describe succinctly the substance of the action and the parties' positions. (The written statement, 01-CV-056, adds that including the class claims, issues, and defenses is not appropriate — it is too early to know them at the time of notice. If there is to be a definition, it should be in terms of transaction or occurrence to assure that claim preclusion fully applies.)

Todd B. Hilsee, D.C. Hearing 219-241: Plain language alone is not enough. Notice must satisfy three criteria: (1) It must get to the class. "Net reach" and "frequency of exposure" analyses by communications professionals can determine this for various methods of notice. It is difficult to speak in general terms about the possibility of reaching a large percentage of class members by low-cost means such as press releases and internet notices. Something like an ad in USA Today does not reach many people — our figures show a maximum opportunity to reach 3% of a target audience. (2) The notice must be noticed. (3) The notice must be read and understood — this is the part addressed by the plain language requirement. As to being noticed, the Rule might require notice "**designed to be noticed**." Prominent headlines, appropriate envelope call-outs, and other inviting and well-known design features are important. Even the sample summary notice developed by the FJC will not work as a model for publication: parties will struggle to include too much information, and then present it all in small type in the back pages to save money. "The main message, who is affected, and why it is important to them must be the first item that draws their attention." It is useful to mention the court, as on the envelope, because that lends credibility. There also is a risk that notices may be designed not to be noticed: a party wants to minimize negative publicity, or to reduce class participation — even plaintiffs may want to avoid a costly campaign or the potential for handling responses or opt-outs. The idea of "sampling notice" is relevant only if you have names and addresses; even then, it is difficult because experience does not yet enable us to determine whether many or very few of those who actually get notice will respond to it. So too, an opt-in system is difficult because there is no way to determine whether those who do not opt in are in fact not interested in participating. It is important to use notice professionals, not lawyers. And the notice must not look like advertising — Postal Service statistics show that 87% of mail that is perceived as advertising is not read. (His written statement, 01-CV-030, suggests that the FJC sample notices are too long and complicated; the color-coded forms are too much for anything but very big cases. He has been working with the FJC to help improve the samples.)

Court Advisory Comm., S.D.Ga., 01-CV-053: The courts already approve notices to the class. Rather than spell out notice items, the rule should read: "The notice shall contain such information to class members as the court determines is necessary to describe the action, its consequences for the class, and the right of a class member to participate in or be excluded from the case."

Bruce S. Harrison, Esq., D.C. Hearing Written Statement 01-CV-060: (c)(2)(A) should require that the notice advise potential class members of the existence and status of any competing class actions.

Prof. Susan P. Koniak, 01-CV-086: The notice description of the right to appear in a class action should not refer to "counsel as if counsel were necessary to appear as an objector or supporter of the

class action litigation or settlement." There is a particular problem that a pro se objector may not understand that an appearance may waive some jurisdictional objections: "the notice must explain in plain English that showing up may cost you and explain what that cost is. Not an easy task in plain English, although possible." It would be better to adopt a rule that any appearance is "special," "so that any objections to the jurisdiction of that court are not deemed waived because the spider told the fly to come into his web."

Plain Language

Conference: This adds nothing. Plain language is sought now.

Jocelyn D. Larkin, Esq., S-F Testimony 146: For The Impact Fund. The notice language change is welcome.

ABA Antitrust Law and Litigation Sections, 01-CV-069: "[T]he laudable goal of easy-to-understand notices should be reinforced by inclusion of this requirement in the rule."

Victor E. Schwartz, Esq., for American Tort Reform Assn. and American Legislative Exchange Council, D.C. Hearing and Written Statement, 01-CV-031: Plain language is "probably more important to lay people than any other proposal you have here." But there should be more direction as to notice elements. The notice should inform class members of "what do they get"?; what class lawyers will get if the action is successful; and any costs or burdens on class members. It also should describe any counterclaim or notice of intent to assert a counterclaim against class members, and the address of counsel to whom class members may direct inquiries.

David Snyder, Esq., and Kenneth A. Stoller, Esq., D.C. Hearing 174: Agree with plain language in class-action notices. (The same statement is made in the Written Statement, 01-CV-022.)

David E. Romine, Esq., D.C. Hearing 243: Endorses the plain language requirement.

Ira Rheingold, Esq. (National Assn. of Consumer Advocates), D.C. Hearing 266: Plain language is extremely important. But Mr. Hilsee's testimony suggests that the proposal may need a little more work. (The written statement, 01-CV-062, expands on this: the FJC sample forms are long. They should not become the standard, but "should be the exception." Items that should be included in a short introductory statement that prefaces the body of a more detailed notice are detailed in the NACA Guidelines, 176 F.R.D. at 400-401.)

Patrick Lysaught, Esq., for Defense Research Institute, 01-CV-033. 034, 046, 047: Plain language is good. The success of the rule will depend on the clarity of the sample notices being prepared by the FJC. Because the second opt-out provision of proposed (e)(3) should be rejected, the items included in the notice should include a statement that class members who do not opt out of a (b)(3) class will be bound by any settlement negotiated by counsel and approved by the court as fair, reasonable, and adequate.

Comm. on Civil Litigation, E.D.N.Y., 01-CV-056: The Committee "is not aware of problems created by the wording in notices and hence sees no need for the plain language requirement."

Allen D. Black, Esq., 01-CV-064: Favors plain language, but is not sure the rule does enough. "Dense, long, and over-detailed notices are a real problem today. Empirical study of the forms most likely to convey core information to human being class members might be useful. The cause of the problem is that lawyers draft the notices, and work too hard to protect themselves and their clients by including everything. The suggestion that there be an introductory summary helps, "but is not a cure all. The body of the notice remains too dense to be meaningful to most class members. And in my experience, even the introductory summaries are frequently opaque." The FJC samples move in the right direction, but are still too dense. Perhaps responsibility for clarity could be put on the court. Expanded use of websites might be a good solution: a very short and simple notice could be sent, designed to capture attention and convey essential core information. Or a short and plain notice could include an 800 telephone number to call for more information; a neutral entity would be needed to staff the phone bank. However that may be, the Committee Note should deal with remedies for inadequate notice: it could say that only severely inadequate notice, in effect no notice at all, justifies collateral attack on the judgment, while slight deficiencies can be ignored.

Keith L. Johnson, Esq., State of Wisconsin Investment Bd., 01-CV-066: Expresses concern that the effort to provide notice in plain language will lead to less information in class notices. The Note "should encourage courts to tailor the tone and content of the notice to the expected ability of members of the particular class to comprehend the notice and the complexity of the case." And offers several suggestions for the content of settlement notices; these suggestions are summarized with Rule 23(e)(1).

Civil Division, U.S. Department of Justice, 01-CV-073: "[S]upports improving the clarity of class certification orders and notices."

Washington Legal Foundation, 01-CV-082: "Nor can it hurt to specify that class-action notices must be in 'plain, easily understood language.'"

Mehri & Skalet, PLLC, 01-CV-083: Supports the change. But adds that local rules in some courts have hampered direct communication by class counsel with members of employment discrimination and consumer protection classes. And "there are well-documented examples of defendants communicating information to class members to discourage them from participating in the lawsuit." There should be better legal protections against communications between defendants and members of a putative class.

Federal Trade Commission, 01-CV-085: "[E]nthusiastically endorses this provision as an important step toward ensuring that consumers are better informed and, as a result, better able to make rational decisions regarding the exercise of any legal rights affected by the class action." And commends the FJC for its efforts to develop sample notices, and in particular for its efforts to test notices empirically through focus groups.

Professor Susan P. Koniak, 01-CV-086: "The plain language requirement is a long overdue and quite welcome amendment." But each notice should include an opt-out form, with a preaddressed and postage-paid envelope.

State Bar of California Committee on Federal Courts, 01-CV-089: Supports the plain language requirement.

David J. Piell, Student, 01-CV-094: The plain language proposal is an example of the "no brainer" amendment that simply diminishes the force of the rule as a whole. There is no need to tell the courts to make this obvious effort.

Summary of Comments: Rule 23(e) 2001 General

Conference: The proposal largely codifies existing practice. Let it be assumed that a settlement satisfies the requirements of Amchem and Ortiz; that it is not possible to adopt rules that make more drastic changes; that the Notes are fine; and that the settlement opt-out is a distinct problem. On those assumptions,it must be decided whether proposed (e)(1), (2), and (4) are an improvement. The first statement was that there are no major problems; the notice provision in (1)(B) is an improvement; it is proper to spell out the standard for approval; it is good to require findings. But there are some problems with the Note.

Conference: What is attempted is sensible. But the proposal does not address the "current crisis." It addresses past wars. Clever attorneys in the hip-implant litigation are attempting to create a non-opt-out class. And a settlement rule must address the need to achieve fairness and avoid discrimination. A matrix settlement will create disadvantages for some, who should be free to opt out. "The fact that a majority of class members want a settlement does not justify giving the class an impregnable first lien, but only for those who remain class members by refusing to opt out."

Conference: The proposal generally is a nice job in doing what the Committee is allowed to do — codify best practices. "It would be desirable to be more daring." Reform efforts have been killed by the excessive demands of defense counsel, seeking such things as opt-in classes. The hip-implant ploy is new; we should not fight a war before it starts.

Conference: The rule is "a step forward, as a codification of practice with some additions." It will help courts that do not often encounter class actions, and that tend to view settlement from the bi-polar view taken in simple litigation. It is difficult to believe that the lien ploy adopted in the hip-implant litigation will be approved; there is no need yet to think about shaping the rule to reject it.

Conference: If the proposal largely tracks and formalizes existing practice, it would be better to leave it alone. Changes lead lawyers and judges to look for reasons beyond confirming existing practice. Judges will think they are being asked to "put the brakes on." But if substantive change is intended, it should be considered on the merits.

Conference: Why require approval of dismissal or withdrawal before certification? And why require notice if a class is not certified: who gets the notice? And an attempt to list factors is a problem; the list tends to be treated as describing the only factors to be considered, but is not likely to be complete.

Conference: It is good to express present good practice in an expanded rule. This is a useful guide to judges and lawyers.

Conference: Notice of pre-certification dismissal, if any, should be simple.

Conference: The Note should refer to the need to consider subclasses at the time of settlement review.

Conference: Notice and opt-out exist because unscrupulous class and defense counsel sell valid claims down the river. Small claimants do not need individual notice.

Conference: Settlement is an area where both plaintiffs and defendants have agreed for years that Rule 23 could be amended. We need assurances of fairness in the nonadversary setting of settlement review. One possibility is to appoint an objector, but consideration of that approach caused real consternation. Trial and summary judgment are different from settlement; they were presented by adversaries and decided by the court.

Conference: Settlement classes are always adversarial: someone always appears from the class as an objector, or a member of the plaintiffs' bar appears, or a co-defendant objects. "The day-to-day problem is the sweetheart settlement that no one objects to."

Conference: That observation applies only in mass torts. The FJC study showed that 90% of the settlements reviewed were approved without objections and without change. "Class settlements are fundamentally different from individual actions, where settlement is favored."

Conference: Why give notice of a pre-certification dismissal that does not bind the class? A defendant who wants such notice should pay for it.

Conference: There is no authority to do anything before certification; a defendant should not be forced to pay for notice of a pre-certification dismissal because the plaintiff brought a bad case.

Conference: There is confusion about dismissal of individual claims without notice. Why mention notice in connection with voluntary settlement? The Note can be greatly condensed; but the listed factors "are a good start," and it is better to have them in the Note than in the Rule.

Conference: We do not want the judge to be a fiduciary for the class, "part of the strategy that causes the defendant to pay money." Page 54 of the Note refers to seeking out other class representatives when the original representative seeks to settle before certification; the present lawyers, or other lawyers, may seek another representative, but the judge should not be involved. Page 68 is similar

in suggesting that the court might seek some means to replace a defaulting objector; at most, the court should set a defined period for other objectors to appear. Generally, the Notes should be shorter. But the factors for reviewing and approving a settlement are good and well stated. Citing cases helps.

Conference: Proposed 23(e)(1)(C) speaks only of "finding" the settlement is fair, reasonable, and adequate; the Note, p. 55, requires detailed findings. The detailed findings requirement should be stated in the Rule. The settlement-review factors properly belong in the Note, but factor (I) needs "some tweaking": it should say explicitly that it looks to results for other claimants who press similar claims. The Note observes, p. 65, that an objector should seek intervention in order to support the opportunity to appeal. It would be better to adopt an explicit rule provision — similar to a draft considered by the Advisory Committee — that would support class-member appeal without intervention. Class members often act pro se; such refinements on objection procedure as the need to seek intervention in order to protect appeal rights are inappropriate. And the p. 67 reference to Rule 11 sanctions against objectors "comes across as a threat"; we should be hospitable to objectors.

Conference: The "fairness" of a settlement is not defined. Should it be the greatest good for the greatest number of class members, even though the settlement may be ruinous for some? The Note, and perhaps the Rule text, should incorporate a test of nondiscrimination. The "trick" of imposing a lien on the defendant's assets only for the benefit of those who remain in the class is subordination of one group to another, and unfair.

Conference: The Note list of settlement-review factors should expand to include the effect of the settlement on pending litigation.

Conference: The first sentence on Note p. 55 says that notice may be given to the class of a disposition made before certification; it is not possible to give notice to a class that does not exist.

Conference: The settlement-review proposal seems about right.

Conference: The Note focuses on the need for findings; this should be in the Rule.

Michael J. Stortz, Written Statement for S.F. Hearing: It is proper to confirm the rule that a putative class representative does not have a right to dismiss prior to certification; requiring approval may deter forum shopping through filing multiple actions and dismissal of those that develop unfavorably. But the Note overstates the prospect that class members may rely on the filing. Reliance is plausible only with the actions that warrant news coverage and class members sophisticated enough to understand the significance of certification. It would be improper to establish a presumption that notice of pre-certification dismissal be provided class members. As to tolling the statute of limitations, a denial of certification also terminates the tolling, but there is no requirement that notice be provided when certification is denied. The Note sentence stating that the court may direct notice of dismissal to alert class members should be deleted.

Barry R. Himmelstein, Esq., S.F. Hearing 19- The requirement that the court approve pre-certification "withdrawal" of part of a class claim may interfere with the right to amend the complaint as a matter of course under Civil Rule 15(a). Class actions often are complicated actions, made more complicated by interlocking state and federal cases, choice-of-law rules, MDLs, fast-developing fact situations, and even continuing legal research. After filing it may prove wise to eliminate a particular theory. A RICO theory, for example, may seem to jeopardize certification if a court applies an individual reliance requirement; rather than run this risk, it may be wise to withdraw that theory by amending the complaint. It may advance the class position, not harm it, to withdraw a theory that may prevent certification. "It is best to bypass marginal theories if their presence would spoil the use of an aggregation device that on the whole is favorable to the holders of small claims. So a class action complaint is very much a work in progress." Generally there is a motion to dismiss; that does not cut off the right to amend. An answer will come months later, after a ruling on the motion. "A lot happens before then. And plaintiffs' lawyers of various jurisdictions who have been pursuing various theories come together and, hopefully, try and put together the best combined work product for their clients." We should not have to explain the reasons for changing theories "and have to explain our strategy and legal theories to the defendants." Clarification of the Rule and Note would help. Court approval should be required if class action allegations are amended out entirely, but not for one amendment as a matter of right. We need a bright-line rule. That means that the rule should not distinguish between a minor amendment and a major amendments such as one that drastically narrows the class definition. If there are side-deals going on, the defendant will want total withdrawal of class allegations because settlement with any class claims remaining will require judicial scrutiny. Proposed Rule 23(e)(2) requires that information about side deals be available to the judge. "The judge will find out about it sooner or later and if you try to pull something, * * * you will be held accountable."

John P. Frank, Esq., 01-CV-03; again in S-F Hearing 92 ff: (The specific focus is on settlement review, but the underlying theme is broader:) Administrative Office Reports show 2,393 class actions in federal courts for the year 2000. The proposed Rule 23 revisions add many "decision points" that will each demand more time and attention from the judge: withdrawal of a claim demands approval; notices of settlement must be evaluated; there must be a determination whether a settlement is reasonable and adequate; proposals for exclusions from the class must be reviewed; if an objection is withdrawn, the court must determine whether the objector has been undesirably bought off; and so on. It is often suggested that Congress should have a serious judicial impact statement before acting on legislation that adds significant burdens to the federal courts. The Committee should have before it some substantial basis for evaluating the impact of these proposals. "Such an analysis may suggest to you that the time has come to consider that class actions ought to be moved out of the court system entirely, put either into existing administrative agencies or creating new ones."

Lawrence M. Berkowitz, Esq., 01-CV-05: The problem with requiring court approval of every precertification settlement or dismissal of class claims "would be that plaintiffs would file class actions in order to gain settlement leverage for their individual claims. On the other hand, defendants are encouraged to simply 'buy off' a class representative and/or his or her attorney in order to avoid a class action. There ought to be some adverse consequences in the Rule to prevent these actions by plaintiffs or defendants or their counsel."

Mary Alexander, Esq., S-F Hearing 65: ATLA generally supports the concept of judicial involvement and scrutiny. Although often exaggerated in debate, there are some problems and abuses in class actions, "and many of these involve settlements and the settlement process." ATLA also supports (e)(1)(B) requiring notice of a settlement that would bind class members.

Jocelyn D. Larkin, Esq., S-F Hearing 146: For The Impact Fund. The settlement review and other proposals are welcome.

John Beisner, Esq., D.C. Hearing Written Statement: (1) (e)(1)(A) does not change current law, but the Note implies an intent to crack down on named-plaintiff-only settlements. All too often a named plaintiff adds a class allegation simply to draw attention, without any intention to pursue class claims. The Note should recognize the need to resolve such cases on a named-plaintiff-only basis. It may be difficult to articulate this proposition, but if it is not stated indisputably nuisance class actions will loom larger. (2) The Note to (e)(1)(B) should be clearer about the circumstances that might justify notice to the class of a pre-certification dismissal: only if irregularities are spotted, such as collusive agreements to dismiss, should notice be required. (3) The (e)(1)(C) hearing requirement is consistent with current practice and should be adopted. The requirement that the court make findings is important. The factors described in the Note "track existing law on class settlement reviews and appear to reflect appropriate lines of inquiry."

Prof. Judith Resnik, D.C. Hearing p 63: In the course of discussing court appointment of class counsel, observes that some cases characterize the court as fiduciary for the class at the time of settlement. "There, I think the language is a little loose and you might not really want to use the word 'fiduciary.'"

Thomas Y. Allman, Esq., D.C. Hearing 110: Rule 23(e) "is an excellent rule." Professor Fiss is wrong to insist that a settlement is simply a contract. The involvement of the district court makes the judgment a judgment. Amchem has not impeded the ability to settle. "Where you have a settlement, manageability drops out and the question is, is it fair and adequate * * *." (His written statement adds that active participation by the district court is essential to allay lingering suspicions about the collusive nature of national class-action settlements, particularly when there are competing plaintiff groups and a defendant eager to settle. When a settlement does not bind the class, however, it is unnecessary, even futile, to require formal notice to putative class members or to require a full hearing.)

Brian Wolfman, Esq., D.C. Hearing 120: Notice of the settlement should be individualized notice, particularly when there is a claim procedure or some other procedure that will extinguish class members' rights for failure to become involved. There have been cases of publication notice at the settlement stage "with an enormous adverse effect on class members."

Mr. Wolfman's written statement, 01-CV-043, adds many further observations. **(1)** Generally supports proposed (e). **(2)** The introductory paragraph of the Note should drop the confusing reference to settlements presented to the court as a settlement class but found to meet the requirements for certification for trial. There is no need to mention that here. **(3)** Why does

(e)(1)(A) refer to "withdrawal"? The Note should clarify this. **(4)** The Note discussion of payments to a representative to stave off the class action seems to encourage the buy-off by observing that it would be wrong to force continued class proceedings with an unwilling representative and a defendant eager to buy out. The reference to seeking another representative suggests a process that would make a buy-out unlikely unless there is an understanding that plaintiffs and their lawyers will go away. An agreement by a lawyer to restrict future practice in this way runs into Model Rule 5.6(b). Rule 23(e) "should prohibit [this type of conduct] as part of the process in which the court reviews the propriety of dismissal of a putative class action." The "plaintiff should not be allowed to do an about-face for personal gain, leveraged only by his or her class allegations." **(5)** Notice in a reasonable manner to those who would be bound by a settlement does not refer to "withdrawal"; the Note should explain that this is because a withdrawal does not bind the class. **(6)** The line between notice and no notice is not properly drawn. Dismissal of "all" class claims does not bind the class. If class members have not known of an action before withdrawn, there is no reliance and no need for notice. But if there is reliance, notice should be required even if there is no preclusive effect — this can happen when class members have been notified or have otherwise learned of the class allegations and have reason to believe their interests are being represented. **(7)** (e)(1)(B) raises and does not answer an important question of settlement notice. To require "reasonable notice" overlooks the need for "best practicable" notice, no matter what type of notice occurred earlier at certification. "Because settlement is the point at which absentees' rights are extinguished, that often will be the point where notice to the class is most valuable." This is particularly important when the notice is the means used to "register" class members or to receive their claims "and thus actually furnish them the relief that the settlement provides." It makes no difference whether the class is a (b)(1), (2), or (3) class. (e)(1)(B) "should state that when the settlement notice would effectively dis[sic for ex]tinguish the substantial property interests of the absentees, the notice requirements of proposed Rule 23(C)(1)(A)(iii) apply." "Reasonable manner" is not understood in this sense. **(8)** (e)(1)(C) codifies existing practice; it is a useful reminder. The Note list of factors "will be useful to courts, particularly those that do not often consider class action settlements." Two of the factors should be clarified. (H) refers to claims by other classes and subclasses — if it is intended to refer to claims in separate actions, it should say so. (I) refers to results achieved for other claimants; if it is intended, as it seems, to refer to results achieved outside the class action, it should say so. And the Note reference to the need to make findings should be brought into the Rule — it might be wise to refer explicitly to Civil Rule 52. **(9)** Later, in discussing 23(h)(3), states that the Note should stress the importance of combining into one hearing consideration of the fairness of a proposed settlement and attorney fees: "the fee determination cannot be made separately because it is a critical consideration in the court's overall fairness and adequacy of representation determinations."

Lewis H. Goldfarb, D.C. Hearing 138-140: The Committee Note at p. 54 speaks to court approval of pre-certification dispositions in terms that imply that class members can be bound be a disposition reached before class certification. That cannot be. This language will lend impetus to the incentives of lawyers to piggyback on government investigations. One client had resolved a government investigation and begun "giving redress to owners" when class actions were filed and the class lawyers asked the court to give them 25% out of the class redress "and to put their names in the notices that the government had already approved to be sent out in order to get a piece of the action."

Michael Nelson, Esq., D.C. Hearing 165-166: Something should be done to control voluntary dismissals before certification. (This statement is tied to concern that plaintiffs' lawyers may repeatedly file, decide that the court is unfavorable, and dismiss for the purpose of filing the same action in another court.) (His written statement, 01-CV-021,states explicitly that requiring approval of pre-certification dismissal may deter forum shopping. But the Note overstates the possible impact on class members. Unless there has been substantial news coverage, it is unlikely that putative class members will rely on the filing to toll the statute of limitations. We do not require notice when a court refuses to certify a class, an event that ends the tolling; there is no more reason to require notice when the plaintiff voluntarily dismisses and the court approves the dismissal.)

David E. Romine, Esq., D.C. Hearing 242 ff.: The RAND study included five federal-court class actions; it concluded that the settlement reviews in four of them were strong and effective. The study's conclusion that there is a need for better settlement review draws more from the state-court class actions included in the study. The FJC study also seems to suggest that federal settlement review is adequate. Settlement rates for class actions were approximately the same as for other actions; the majority of class-action settlements were preceded by some ruling on the merits such as a motion to dismiss. The problem in federal courts is a matter of public relations and public education. It would be a mistake to add further settlement review requirements. These would impose costs of delay; the procedural requirements will take time. Monetary costs also result, because lawyers will spend time on the review.

Patrick Lysaught, Esq., for Defense Research Institute, 01-CV-033, 034, 046, 047: (1) (e)(1)(A) does not provide any criteria for evaluating a pre-certification settlement or withdrawal. The action may have been filed with class allegations only to enhance the ability to extract an unjustified settlement; it may have been filed in good faith, but the class allegations are later withdrawn because they prove insupportable. There should be further guidance to help the courts in identifying and assessing abuses. (2) (e)(1)(B) makes it clear, in line with the better present view, that pre-certification dismissal does not require notice to the class. DRI supports this. (3) (e)(1)(C) for the most part adopts the best current practice. The requirement of detailed findings is a critical step in the process and important for appellate review. The 19 factors for review are generally consistent with current law, but the Note should state more clearly that these factors are not exclusive and that the importance of each factor depends on a case-specific analysis.

Bruce Alexander, Esq., D.C. Hearing Written Statement 01-CV-041: The Notes to (e)(1) should encourage courts to grant a voluntary dismissal expeditiously if the class has not been certified; the only check should be a determination that there is no material prejudice to putative class members.

Professor Charles Silver, 01-CV-048: (1) The comment that notice should be "reasonable" is important, if reasonableness is measured by the size of claim, likelihood that an individual possesses valuable information, and likelihood that an individual has interests in common with others. (2) There is no need for notice when a class action is "involuntarily dismissed on the merits." (3) The suggestion that class members may rely on a class action, and deserve notice of dismissal is unpersuasive. "Knowledge of class actions is extraordinarily limited, even after notice is sent." A class member who wants protection can file an individual action and abate. If dismissal occurs after certification, class members are aware of the action and aware that they can enter an appearance.

(4) Settlements involving non-cash relief should be discouraged. It might be required that the court insist on a cash offer as well. The cash-relief package would be used to measure fees. Class counsel could then argue for approval of the in-kind relief package as worth more to the class — perhaps because of tax advantages — but would have a heavy burden of proof.

Court Advisory Comm., S.D.Ga., 01-CV-053: (Refers to 23(d), seeming to mean (e)(1)(A):) Voluntary dismissal should be permitted as provided in Rule 41(a)(1). "We do not favor a mandate that notice to an alleged but yet uncertified class must be given * * *."

Comm. on Civil Litigation, E.D.N.Y., 01-CV-056: Current Rule 23(e) is sufficient; there is no need to change. The Notes suggest changes of meaning not found in the rule text — this is not a proper approach to rule making. "The Committee particularly objects to the laundry list of factors" that bear on settlement review.

Federal Magistrate Judges Assn., 01-CV-057: The non-exclusive list of settlement-review factors in the Committee Note "presents important guidance to the court and counsel * * *."

Exxon Mobil Corp., 01-CV-059: Supports mandatory notice of settlement after class certification. But the Note should say that notice is required of pre-certification dismissal only in exceptional circumstances. Individuals may file class allegations for tactical reasons — "perhaps to get a higher level of attention from the management of a corporate defendant." These actions usually are resolved at an early stage before any steps are taken toward certification. The potential cost of notice might interfere with such prompt disposition. And the concern that class members "may have relied" is too broad, "since rarely will the court know that no class member has deferred litigation in reliance upon the class action."

National Assn. of Consumer Advocates, 01-CV-062: Makes several observations in the course of describing the virtues of consumer class actions. In describing successful actions, it is noted that in some of them the final settlement followed an initial settlement that was rejected by the trial judge — "current provisions for reviewing class action settlements will work if the trial court applies them." The NACA has adopted guidelines for honest and effective conduct of class actions, see 176 F.R.D. 375. In recent years there has been "a steady and marked increase in the sophistication and oversight with which courts — both federal and state — approach class actions, including issues concerning class action certification and evaluation of class action resolutions and settlements." The courts are developing a more sophisticated jurisprudence and do not need guidance from amended rules. Courts may adhere too closely to the rules, with an adverse effect on continuing development of jurisprudence based on experience. The laundry list of factors in the Note to (e)(1)(C) is an example of the risk of excessive rules commentary.

Allen D. Black, Esq., 01-CV-064: (1) The Rule should require that settlement be fair, reasonable and adequate "to members of the class." Too often settlements are opposed as not fair to persons other than class members, often non-settling defendants but at times complete strangers to the litigation. The Note should reflect this rule change. (2) "Overall, the tone of the Committee Note strikes me as unduly hostile to class action settlements." It should say that settlements are favored in the law. The statement on p. 61 that a settlement does not carry the same reassurance of justice as an

adjudicated resolution "is particularly egregious." (3) In addressing notice of dismissal prior to certification, the Note should mention issues of cost and other practical considerations — for example, a class list may not be readily available.

Equal Employment Advisory Council, 01-CV-065: (These comments reflect a misreading of the (e)(1) proposal, and may reflect a need to clarify the rule or Note.) (e)(1)(A) requires notice of dismissal to all class members even though the case was never certified as a class action. This is not appropriate. It would prolong even nonmeritorious litigation. And it drastically reduces the incentive to settle with individual class members. There is no reason to fear reliance by putative class members; in a (b)(1) or (b)(2) class, indeed, the only source of reliance would be the proposal that notice be provided to class members — that proposal itself is a bad idea.

Keith L. Fisher, Esq., State of Wisconsin Investment Bd., 01-CV-066: (1) The comments on (c)(2) include lengthy suggestions for information that should be included in settlement notices, including the procedural posture of the case, whether there have been substantive rulings, the evidence bearing on key allegations, the defendants' ability to pay including insurance coverage, whether individual defendants will contribute to the settlement, whether the defendant has adopted changes of policy to prevent future wrongdoing, the risks of not settling, an explanation that attorney fees will reduce net recovery, the terms of attorney fees, the number of firms sharing the fees, the work performed by each firm for the class, the factors that account for varying allocations to class members, and when payments are likely to be distributed. (2) The (e)(1)(C) standard for approval is an important step toward heightened judicial scrutiny. The requirement of detailed findings also is important: "Encouraging judges to address these findings will deter inadequate settlements * * *."

Alliance of American Insurers, 01-CV-068: Supports changes that require approval of settlement or withdrawal of class claims; require notice of a proposed settlement that would bind the class; require settlements be fair, reasonable, and adequate; and require hearings on settlement.

ABA Antitrust Law and Litigation Sections, 01-CV-069: (1) "[T]hese proposals for settlement review are a welcome clarification of what is, and is not, required in the murky world of pre-certification settlements and dismissals." But the Note reference to notice of a precertification dismissal should be deleted. There may be inherent power to order notice, but the Note may create confusion as to the purpose of the amendment. (2) As to settlements that would bind a class, the rule incorporates existing best practices. The most important purpose is to set forth in detail what courts must do. Not all courts may be as experienced as those that routinely proceed in the manner directed by the Rule. "We strongly support this incorporation of best practices into the Rule." The Note provides "ample comfort that the factors enumerated * * * are but examples * * *."

Association of the Bar of the City of New York, 01-CV-071: Attaches a September 19, 2000 letter suggesting that a draft rule that included a list of factors to consider in reviewing a settlement would only exacerbate the effects of attempting to codify best practices. Courts are likely to take the list as exclusive, no matter what the Rule says.

Civil Division, U.S. Department of Justice, 01-CV-073: "The Department does not take a position on the proposed provisions concerning court approval of the dismissal or withdrawal of class claims or issues."

National Treasury Employees Union, 01-CV-078: The Note refers to the number and force of objections. Confusion about settlement terms or about important court rulings may lead to many forceful objections that lack substance. The court should focus on "the quality and substance" of the objections.

Mehri & Skalet, PLLC, 01-CV-083: A number of the 23(e) changes "are an appropriate codification of existing law," such as formalizing the "fair, reasonable, and adequate" standard and requiring a hearing.

Beverly C. Moore, Esq., 01-CV-084: (1) The amendment does not deal with coupon settlements. Coupon settlements are receding; apparently defense proponents "and their willing plaintiff counsel fee recipients, have been 'shamed' out of this device, but only to some degree." The rule ought to require a "final accounting" of how many cash dollars actually flow to class members. (2) It should be required that the settlement notice inform class members of the relationship between the settlement amount and the amount that could reasonably be expected at trial. PSLRA notices are required to state this, but the notices show only that both parties cannot agree to what these figures are. The Note should urge that specific estimates, or informed guesstimates, be provided. (3) The Note proposes a list of settlement-review factors that is both over- and under-inclusive. Maturity is not a review factor, but a certification superiority factor. The very novelty of a case may militate in favor of settlement — who is to know what will happen on the merits? There are too many factors, and they repeat. The main factor is the comparison of settlement benefits to likely trial results. Too many judges will feel compelled to make meaningless pro forma specific findings as to each factor. And the Note should say that a settlement is less than fair and adequate if it has a claim procedure requiring class members to provide information the defendant already has, or if damage checks could be mailed without any claim procedure. (4) Approval of pre-certification dismissal is most needed when the defendant buys off the plaintiff. The court should be authorized to condition approval "on the plaintiff giving notice to at least a sample of class members, inviting the substitution of new representative plaintiffs."

Federal Trade Commission, 01-CV-085: Supports (e)(1)(C), "believing that close judicial scrutiny is the most effective means of protecting the interests of injured class members. But the rule should be changed to direct specific assessment of the realistic value of "coupon" settlements. The Note should list factors that bear on the value, including the history of coupon redemption rates in similar cases, whether the defendants will track redemption data, whether all class members will be entitled to use coupons, whether redemption is easy, what time and product restrictions limit redemption, whether coupons must be issued until a minimum redemption level is reached, whether coupons benefit the defendant by bonus sales more than they benefit the class, whether there are significant restrictions on transfer, how the face value of the coupon relates to the purchase price of the product, and how coupons are distributed.

Prof. Susan P. Koniak, 01-CV-086: (1) Notice at the time of settlement should be a matter of right, directed to all class members, not shaped in the court's discretion. (2) The notice must include information on what others in and out of the class are getting from the class settlement or any side deal. This will further the purposes attempted to be served by Model Rule of Professional Responsibility 1.8(g), which requires a lawyer who simultaneously settles the claims of two or more clients to inform each client of what each is getting. (3) The decision in Matsushita Electrical Indus. Co. v. Epstein, 516 U.S. 367, has been interpreted by the Ninth Circuit in a way that permits counsel to bring a class action on one claim (violation of state fiduciary responsibility law) "with the intent of settling a different set of claims — claims that would have prevented certification entirely or under the subsection of (b) that counsel desired to use." There is a risk that this approach will be generalized. "Rule 23 should make clear that it is improper for a court to approve a class action settlement that releases claims that have not been certified as appropriate for class action treatment, even if the class receives notice that the claims will be released."

Committee on Rules, W.D.Mi., 01-CV-090: To require approval of precertification settlement "undermines the objective of eliminating improvident certifications * * *." It often happens that soon after filing it becomes apparent that certification is not appropriate, for want of numerosity or failure to satisfy some other requirement. In turn, that realization often results in "a quiet and prompt resolution of what was initially pleaded as a class action." The amendment creates a disincentive to prompt resolution and burdens the court with added work merely because the initial complaint included class allegations.

NASCAT and Committee To Support the Antitrust Laws, 01-CV-093: (1) The requirement that the court approve withdrawal of class claims may thwart the policy of Rule 15(a). The right to freely amend to withdraw some class claims will be burdened, and counsel may be required to disclose confidential thought processes. To the extent that the plaintiff must make a record of reasons to drop a claim, there may be untoward difficulty if further discovery shows reason to reinstate the claim. Defendants, on the other hand, will not have to seek permission to amend the answer. Plaintiffs will be left with an incentive to stick with the original claims, imposing unnecessary work on them and on defendants as well. The January 2002 drafting suggestions propose additions to the Note to address this problem. They represent progress, but remain vague: what is a "central part" of a claim? The footnote states that concern is directed toward amendments that leave only an insignificant class claim, or one that manifestly could not be certified. The better approach is to limit the rule to complete withdrawal of all class claims, and note that the court has inherent power to control attempts to skirt the rule. (2) Notice of voluntary pre-certification dismissal should be directed only in an unusual case in which putative class members may have relied. Unless there was notice of the class action, reliance is unlikely. So it is suggested in the January 2002 footnotes, and they are supported. Today courts ask about the time that elapsed from filing and whether the filing attracted media attention; that is good practice.

David J. Piell, Student, 01-CV-094: Several of the Note criteria for evaluating a settlement cause concern. The court will find it difficult to be impartial with respect to (B) and (E) — for example, it has an interest in avoiding lengthy trial proceedings. The cost of trial is not an appropriate consideration where there will be fee shifting. The extent of participation in settlement negotiations by court or a court-appointed officer is also a problem: if the judge is involved, objective review is

unlikely; even if it is a court-appointed officer, the judge is under pressure to accept the officer's recommendation. Factor (G) calls for findings similar to those required by Ortiz to approve a limited-fund class — that is a lot of work for something that is only one factor. The standard should be simpler: what do similar cases settle for absent class treatment? Could a class member recover more in individual litigation, after paying fees? How many class members have opted out of the settlement, and what percentage of the class are they? How much effort is required to participate in the settlement — some claims administrators have an incentive to prolong the proceedings, especially if affiliated with the bank that holds the settlement fund.

Prof. Howard M. Erichson, 01-CV-097: Requiring approval of pre-certification settlements or dismissals should be adopted. This wisely resolves an issue that has caused confusion.

Side Agreements

Conference: It is a mistake to require disclosure of side agreements. Side agreements "often fuel settlement." They will not remain secret. Judges will look into the deals. "But you need empirical evidence that these deals are promoting unjust settlements."

Conference: Side agreements should be disclosed, and should be disclosed early. This is particularly important when the agreements deal with fees, or effect settlements outside the class settlement.

Conference: Individual premiums incidental to settlement "are a real problem."

Conference: Some lead plaintiffs now ask attorneys to indemnify them against liability for costs. There may be a simple money buy-out of an objector. The Note should make clear that these are examples of side agreements.

Mary Alexander, Esq., S-F Hearing 65: ATLA is less concerned than some about so-called side agreements. "We wonder just how practical or appropriate it is for federal judges to try to police such agreements unless there really are serious allegations of wrongdoing and meritorious dissatisfaction by class members."

John Beisner, Esq., D.C. Hearing Written Statement: In concept, disclosure is laudable. But definition of what must be disclosed is critical. The Note should state that the intent is to "get on the table directly related undertakings." As one example, a defendant may be engaged in simultaneous negotiations with named plaintiffs in private class actions, with federal regulators, and with state attorneys general. Need all of these arrangements be disclosed? Or a defendant may be negotiating with class counsel on other matters — individual actions, or other class actions: critics of a settlement may argue that all of the negotiations are interrelated and should have been disclosed. "The Note also should address the ramifications of the failure to disclose these other agreements on a settlement that has been approved."

Prof. Owen M. Fiss, with John Bronsteen, D.C. Hearing Written Statement, 01-CV-023: "[T]he proposal that the court may (why not 'must'?) require disclosure of any agreement or understanding" would help.

Prof. Judith Resnik, D.C. Hearing Written Statement, 01-CV-044: Full disclosure of "side agreements of all kinds" should be required.

Brian Wolfman, Esq., D.C. Hearing 120-122, 126-129: There should be mandatory disclosure of all side deals. How much are class representatives getting? How have lawyers agreed to split the fees — are there arrangements that will bloat the fees to pay off people who otherwise have no interest in the case? "And what additional deals does the defendant have with the lawyers or with class members inside or outside the case"? There is no justification for secrecy. In addition, objectors' deals should be subject to disclosure and approval "even when a settlement is pending on appeal." The suggestion that disclosure should be limited to directly related agreements is difficult to understand. If there are agreements between the defendant and class members "that truly have nothing to do with the rights asserted in the complaint or released in the settlement," there would be no point in disclosure. But if the agreement is related in any manner to the class action, it potentially impinges on class interests and should be disclosed. Confidentiality should be a concern only with respect to trade secrets or other items that would be subject to protection in discovery. Summaries might be appropriate if the agreements are very long, but that is "not my experience. My experience in doing these cases is that there are agreements to pay certain members outside the class, to pay certain counsel to go away." Absentees should be informed of these agreements.

(The written statement, 01-CV-043, says expressly that side-agreement filing should be mandatory. And the full agreement, not a summary, should be filed. "Based on our experience representing objectors, there is no way to know which settlements may be masking relevant side-agreements unless the parties disclose them." So it was only after the Amchem settlement was rejected that the settling parties disclosed that defendants had agreed to pay "what turned out to be millions of dollars of class counsel's costs in litigating the fairness of the settlement, even in the event that the settlement was not approved." This agreement was collusive. There is no countervailing benefit to non-disclosure. The proposal calls for agreements to be filed: this means, properly, that they will be available to everyone, including class members. It also means that they must be served; the Note should reiterate the service requirement. If there is work-product material in the agreement — a not likely event — there should be full disclosure to the court, even if publicly-filed versions are purged of the work-product. "[C]onfidentiality should never be granted for side-deals involving payments to similarly-situated plaintiffs" (as in Amchem and Ortiz), "incentive" payments for named plaintiffs, and other arrangements that may trade away class benefits. But confidentiality may be proper as to a settlement condition that allows a party to withdraw if a limit of numbers or value of opt-outs is exceeded — the numbers may be protected until the opt-out period expires, but the condition itself should be disclosed.)

Leslie Brueckner, Esq., D.C. Hearing Written Statement, 01-CV-020: Parties should be required to disclose: the rule should provide they must file a copy of any agreement made in connection with a proposed settlement. The court, for example, should know of the extent to which a defendant has agreed to settle an inventory of class counsel's individual cases in exchange for an agreement to file

and settle a class action. The Note seems to give complete freedom, speaking of considerations that should guide counsel in disclosing agreements. "The difficulty here is that counsel for the settling parties have every incentive not to disclose the existence of related agreements * * *."

Walter J. Andrews, Esq., D.C. Hearing 282-284, 285-291: The filing requirement should not include confidential insurance agreements between insurers and their policy holders; Rule 23(e)(2) should exempt all underlying insurance agreements. These agreements may resolve many different sorts of issues between insurer and insured: whether or not there is a duty to defend; who will choose or direct counsel; what is the amount or applicability of insurance, deductibles, or self-insured retentions; whether there are multiple occurrences (a very common subject of dispute). The insured tells the insurer that settlement is possible, and they work out an agreement as to what the insurer is willing to contribute, subject to a reservation of rights. Although it might be useful for the court to know what assets are realistically available for settlement, there is a risk of abuse: "once that gets out, then the plaintiffs are going to believe that there's an even more attractive target to go after * * *." It would be some help to provide for disclosure in camera or under seal, at least if the information actually remains protected. (The written statement, 01-CV-036, adds that apart from that problem, the rule does not address the question whether failure to disclose a side agreement may be grounds for upsetting the settlement after it has been approved and reduced to judgment.)

Leslie Brueckner, Esq., D.C. Hearing 156-157: Disclosure of side deals is important, but the proposal lacks teeth. There is no affirmative obligation to disclose. "[T]hose agreements most likely to influence the court's thinking regarding a proposed settlement are those least likely to be disclosed to the court." There should be mandatory disclosure.

American Ins. Assn., D.C. Hearing Written Statement 01-CV-022: Insurance agreements should be exempted from the scope of "related undertakings," to preserve the confidential relationship between insurers and policyholders.

Bruce Alexander, Esq., D.C. Hearing Written Statement 01-CV-041: A few words should be added: "any agreement or understanding among any of their parties or their counsel made in connection with the proposed settlement * * *." [There is no further explanation.]

Patrick Lysaught, Esq., for Defense Research Institute, 01-CV-033, 034, 046, 047: The proposal seems to be designed to ensure a record of the complete agreement. Such disclosures should be automatic. But disclosures should be expressly limited to "matters directly related to the class settlement at issue." There may, for example, be overlapping actions pending simultaneously; the defendant may be negotiating separate settlements in each action, and the terms of each settlement may indirectly affect the terms of other settlements, but there is no reason to require disclosure of the indirectly related matters. To the contrary, there is no reason to create a device that enables counsel in other actions to obtain leverage or information used in separate settlement negotiations.

Professor Charles Silver, 01-CV-048: The comment on agreements to divide fees, as the attorney-appointment and fee provisions, "reflects an unwarranted preference for regulation over private arrangements." The fee should be set up front; the court should not care how, given this incentive, counsel maximizes the value of representation by working with other lawyers. The comment about

accepted conventions that may tie agreements made after settlement to settlements needs to be clarified.

Federal Magistrate Judges Assn., 01-CV-057: Proposed (e)(2) "will correct the problems associated with 'side agreements,' which are often not disclosed to the court, but are part and parcel of the overall settlement."

Allen D. Black, Esq., 01-CV-064: (1) The Note reference to "complete" copies or summaries of agreements is puzzling: I had read "summary" in the black letter to refer to oral agreements, and "copies" to require complete copies of any written agreement. (2) on p 59, third line from the bottom, the reference should be to counsel who have "litigated" class actions; "[v]ery few counsel have actually tried a class action." (3) p. 62 of the Note makes an important point that a class member may not purport to opt out a whole class of other class members; somewhere the Note should make the same point with respect to litigation class opt outs.

Equal Employment Advisory Council, 01-CV-065: "The proposed subsection is so broad that it is incomprehensible." It would seem to apply to a contract setting forth defense counsel fees, "or a document setting forth remedial measures the defendant company undertakes after a lawsuit is filed. Agreements or understandings like these do not relate to the terms of the settlement agreement * * *." Such documents, further, are likely to contain confidential information.

Keith L. Johnson, Esq., State of Wisconsin Investment Bd., 01-CV-066: Endorses (e)(2). Nondisclosure may be appropriate for "blow provisions" — the agreement that defendants can avoid the settlement if an excessive number of class members opt out; and "an agreement on valuation of other pending insurance claims as part of the settlement."

Alliance of American Insurers, 01-CV-068: Supports the (e)(2) provision that a court may direct the parties to file, etc.

ABA Antitrust Law And Litigation Sections, 01-CV-069: "We suggest that the language be revised or clarified to require, if the court so directs, disclosure of any side agreements involving objectors, insurance carriers and others who, although not technically parties, may nonetheless be subject to the court's jurisdiction or under the control of a party." (There is no further explanation.)

National Assn. of Protection & Advocacy Systems, 01-CV-077: (e)(2) filing should be made mandatory. "The permissive nature of the proposed rule opens it to abuse because of possible collusion between settling parties' counsel."

Beverly C. Moore, Jr., 01-CV-084: The (e)(4) requirement that withdrawal of an objection be approved serves the same purpose as the (e)(2) side-agreement provision, and should be included in it. "A concern arises only if the objector receives something in return for the withdrawal." Even then, there is no problem if the payment is not at the expense of the class but is merits-based; disclosure is all that is needed. The element of real concern often is a fee payment to some competing group of class counsel who have brought a similar case in some state court; there even are cases where competing counsel first filed the competing case after the settlement was announced.

Settling counsel have no choice but to pay, in order to avoid the protracted delays that result from objections. "Surely this needs to be disclosed as a 'side agreement' — and disapproved by the settling court." The recent practice of awarding fees in a lump sum to lead class counsel, to be allocated by lead counsel as seems fit, increases the need for disclosure. "The 'side agreement' disclosures most likely to be sought by settling defendants or objectors are how the total fees are to be divided among class counsel * * * . This will become fodder for more 'scandal.' * * * Critics will claim to have found instances of 'you scratch my back in this case, and I'll scratch your back in another."

Federal Trade Commission, 01-CV-085: Active judicial oversight requires that the court be fully informed as to the context of any settlement. For that reason, the FTC supports (e)(2).

Prof. Susan P. Koniak, 01-CV-086: (1) The unfairness of mass-tort class actions is shown by the "side deals" approved by lower courts in Amchem and Ortiz: in Ortiz, one-third of those injured were left outside the class and provided much better deals. And courts routinely allow selective extension of opt-out deadlines so the settling parties can "get rid of annoying objectors who might otherwise cause trouble at the fairness hearing or on appeal." (2) (e)(2) should mandate that settling parties disclose "all agreements, formal and informal, between them that were made contemporaneously with the settlement or dismissal of a class action. Moreover, the rule should provide strong and mandatory sanctions for failing to disclose such deals." The urge to cheat is great. (3) In addition, the settling parties should be required to disclose material facts about the settlement negotiation, the settlement itself, and the relationships among class counsel, the defendants, and objectors; the sanctions for failure to disclose such facts should be discretionary because the scope of the disclosure obligation is mushy. (4) "Disclosure to the court is not enough. The absent class deserves to know of any conflicting interests of its counsel." The class should have access to the content of the deals, the actual terms, not just a summary. An exception could be made that requires disclosure only of the existence of an agreement that allows the defendant to withdraw if an opt-out threshold is reached, without disclosing the threshold itself.

David J. Piell, Student, 01-CV-094: This is a welcome addition, but does not go far enough. What is the sanction for failure to disclose? Can the judgment be reopened? Can class members who opted out because the settlement was inadequate choose to come back in when an enhanced settlement results? Guidance should be provided, including a statement whether it is proper to deny any sanction if the failure to disclose resulted from a good-faith belief that the agreement was not "in connection with" the settlement.

Objections

Conference: The requirement of approval to withdraw objections is new, and is good; some objections are made "for not meritorious reasons."

Barry Himmelstein, Esq., Written Statement for S-F Hearing: The Committee Note appears "overly solicitous of objectors." "[M]ost objectors are relatively ill-informed about the merits of a proposed settlement. * * * When class counsel are forced to defend the settlement by highlighting the genuine weaknesses in the case, they are accused of selling out the class." The suggestion that the parties

might provide objectors access to discovery materials might help bridge the information gap, but the result is likely to be delay and waste. The objectors "want to be paid for their duplicative efforts." It makes little sense to invite duplication. "Allowing objectors to invest substantial attorney time in performing a seemingly legitimate task virtually guarantees that their objections will be pursued tenaciously, regardless of their merits, delaying by months or years the final resolution of the litigation and distributions to the class."

Michael J. Stortz, Esq., Written Statement for S-F Hearing: The Note observes that discovery in parallel litigation may provide information to support objections. But the objector may take advantage of discovery in the settlement class proceeding to further objectives in an overlapping state-court class action. It should be confirmed that a federal court that provides discovery to an objector has authority to limit the objector's pursuit of similar discovery in parallel state-court proceedings.

Mary Alexander, Esq., S-F Testimony 66: For ATLA. Supports the objection provisions. (e)(4)(B) "judicial scrutiny of withdrawn objections would provide some protection against the possibility of collusion."

John Beisner, Esq., D.C. Hearing Written Statement: (1) (e)(4)(A) "appears to confirm current procedure." But the Note is troubling to the extent that it tends to encourage settlement challenges and to urge support for challengers. The Note might state "that courts should make inquiry about whether objections and/or discovery are being used to secure unwarranted leverage by counsel or certain class members for personal benefit." (2) (e)(4)(B) "appears to be appropriate, confirming current practice (albeit a practice that is not invoked in all cases)."

Prof. Judith Resnik, D.C. Hearing Written Statement, 01-CV-044: The rule should go further "by making discovery presumptively available * * *." In addition, the goal of making information available to the judge to assess a settlement supports "paying the fees of responsible objectors."

Norman J. Chachkin, D.C. Hearing Written Statement 01-CV-051: The Note should make clear the requirement that a class member win intervention in the district court in order to support appeal from an order rejecting an objection. That is the general rule, and is correct; free appeal could result in an avalanche. If intervention is denied, the class member can appeal the denial.

Thomas Y. Allman, Esq., D.C. Hearing Written Statement, 01-CV-026: It is wise to require approval for the withdrawal of objections, but for a reason not expressed in the Note. Approval will support involvement of the district court in the review process. There is a need for aggressive court involvement as to all objections that have been made.

Brian Wolfman, Esq., D.C. Hearing 121-125, 130-131: Objectors' deals should be disclosed even when reached on appeal. Objectors must be provided substantial procedural support; unfortunately the proposed rule does not do that. Objectors should be provided access to all settlement documents. Settling parties should be required to file and serve the full justification for the settlement prior to the objection debate — now, they often hold back evidentiary support for the settlement until after the objecting date, and indeed until right before the fairness hearing. The rule should require that

objectors be given a stated ample time to file. (The written statement, 01-CV-043, brings these together: Often settling parties submit the settlement for preliminary approval without any notice to interested parties, and with only a bare-bones joint memorandum. Class members are given notice and only a few weeks to respond. Class counsel commonly refuse to provide information to objectors on a timely basis. "The game is 'hide the ball.'" Objectors should be afforded a minimum of 45 days to object after settlement proponents file full supporting materials.) The rule should establish a right to take discovery, even about the settlement terms. But discovery into the negotiation process is not appropriate in most circumstances. The requirement in many circuits that an objector intervene in order to establish a right to appeal should be deleted; the Supreme Court has taken up the issue (Devlin v. Scardelletti, 01-417), but if it adheres to the intervention requirement the rule should be changed. The intervention requirement is inapposite: the class member is a party in the sense of being bound by res judicata, and is not seeking to participate in trial. And this is a trap for the unwary, particularly for the pro se objector, without establishing any but paperwork benefits. It is possible that this is a question for the Appellate Rules; the Advisory Committees may want to work that out between themselves. The Note, finally, refers to Rule 11 sanctions; that should be deleted entirely, for it will chill participation by objectors.

The written statement, 01-CV-043, **(1)** disagrees with the Note statement that the need to support objectors may be reduced when there is an opportunity to opt out of the settlement. The right to adequate representation is independent of an opt-out opportunity. **(2)** "Finally, we are dismayed about the way in which the Committee Note discusses the use of objections to exert improper influence in class action settlements." The problem of exerting improper "hold-up" strategic pressure can be addressed by requiring full disclosure of all deals with objectors and approval by the court. That approach does not disarm objectors. **(3)** The Note also seems to give credence to complaints about "professional objectors"; this suggestion is unfounded. There is nothing wrong with a lawyer making a living by representing objectors — the only private practitioner we know of who frequently appears has made meritorious objections in many cases. This reference should be deleted. (e)(4)(B) states the proper approach. **(4)** Objectors and everyone else are subject to Rule 11. Objectors are no more prone to violate Rule 11 than anyone else; indeed close-to-the-line conduct appears more often among settling parties and their counsel. **(5)** The (e)(4)(B) requirement that the court approve any deal with an objector "must be strengthened to have its desired effect." The rule should explicitly require that all withdrawals and related agreements be submitted on the record, so that class members can comment. **(6)** The Note suggests that there is little need for concern if an objector settles on terms that reflect factors distinguishing the objector from class members. It should say that this situation will be very rare, lest the extortion flourish. The settlement itself should fairly resolve differences among class members who are not similarly situated. And in (b)(3) cases, the right to opt out affords protection. **(7)** "Finally * * * the failure of * * * (e)(4)(B) to apply to appellate proceedings is a serious error, which could render it nearly meaningless." The Duhaime case cited in the Note involved a buy-off on appeal. There is no rule requiring disclosure to the court of appeals, so no basis for the Note's suggestion that the court of appeals could look into the deal.

Appendix C to the written statement is a November 23, 1999 letter to Hon. Anthony J. Scirica and Hon. Paul V. Niemeyer. The letter urges adoption of provisions requiring disclosure of — and court approval for — all "side agreements." "In our experience, the practice of paying objectors to

go away, without disclosure or approval, has become commonplace." Such payments may be viewed as "bribes" paid by defendants, "extortion" practiced by individual class-member objectors, or both. They are improper for several reasons. They create a de facto method of opting out of the class. They defeat the purpose of achieving like treatment for similarly situated class members. They are available to "lawyers and clients who know how to game the system." Requiring disclosure and approval will improve the objection process.

Leslie Brueckner, Esq., D.C. Hearing Written Statement 01-CV-020: **(1)** (e)(4)(A) restates existing law and is appropriate. **(2)** But the Note suggestion that there is less need to support objectors if there is a settlement opt-out should be deleted. It is difficult for class members to understand the terms of a proposed settlement, much less the risks of litigation. The opt-out provides scant protection, particularly in small-claims cases. Objectors often will be the only means to expose the weaknesses of the settlement. **(3)** The Note also refers to Rule 11; this could chill willingness to object. Objectors are too important to the process to deter in this way. **(4)** (e)(4)(B) addresses the important need to require disclosure of "side deals" made to persuade objectors to withdraw, and to give courts authority to disapprove these deals. That can happen only if the court is informed about the deals. The deals may provide important information about conflicts within the class or weaknesses in the settlement. Some side deals are proper — as the Note says, the objector may be in a position different from other class members. But other deals reveal the strategic value of objections, or an attempt by the settling parties to purchase silence. The Note, further, seems to imply that the court can require an objector to persist with the objection unwillingly. "This, of course, is not and cannot be the law." The provision should be rewritten: "A class member who seeks to withdraw, or declines to pursue, an objection to final approval of a settlement must provide the court with a copy of any agreement(s) made in connection therewith, and may retain any benefits provided in such agreement(s) only with the court's approval."

Michael Nelson, Esq., D.C. Hearing Written Statement 01-CV-021: An objector may use discovery in the settlement proceeding to further goals in an overlapping state action. "[W]here a federal court provides the settlement objector with the right to discovery, it should also have the authority to limit that objector's ability to pursue similar discovery in parallel state class actions."

Peter J. Ausili, Esq., E.D.N.Y. Civil Litigation Committee, D.C. Hearing 208: Expressed concerns about the standards for discovery by objectors, including the reference to a strong preliminary showing of collusion and other improper balance. And the provision requiring approval before objections are withdrawn is uncalled for. Courts can deal appropriately with these matters now. (The written statement, 01-CV-056, adds that the broad grant of discovery will "promote delay, add to cost and encourage strategic behavior.")

David E. Romine, Esq., D.C. Hearing 251, 260-261: The objector language in the Note is troubling because it suggests that there should be more objector discovery than current law provides. If indeed the Note is intended to change the law, it is unwise — greater objector discovery would only increase costs and delay.

Patrick Lysaught, Esq., for Defense Research Institute, 01-CV-033, 034, 046, 047: (1) As to (e)(4)(A), the Note should make it clear that a strong preliminary showing must be made to justify discovery into the negotiation process. It also should make it clear that there must be a prima facie showing of a good-faith basis for objecting before allowing "new" discovery that goes beyond access to discovery materials already produced in this or related litigation. And guidelines should be provided for the court and objectors as to the "proper bases and criteria for asserting appropriate objections." Although objections should be encouraged, not discouraged, it is important "to ferret out in a cogent, rational and understandable way unfounded objections at an early stage." (2) As to (e)(4)(B), the Rule does not — and cannot — deal effectively with potential objectors who are bought off before any objection is filed, nor with objectors who simply fail to pursue an objection once made. Again, there is no guidance as to what constitutes a proper objection. The Note should provide guidance as to what is a proper basis for objection and what kind of prima facie supporting evidence is sufficient. It might be better to require automatic disclosure by all parties to a class settlement, including class members, as to any premium derived through separate negotiations that is different from the benefits provided other class members.

Professor Charles Silver, 01-CV-048: The Note paragraph on discovery by objectors "is highly dangerous and should be deleted." A class member with a large claim has a sufficient incentive to review all the discovery or take new discovery, but such a person can self-protect by opting out. A class member with a small claim who demands to see extensive discovery documents and to depose everyone "is acting irrationally and probably is an extortion artist." The suggestion that discovery might be tied to a showing of collusion "is objectionable because all settlements are collusive." And the note on objector fees is dangerous, especially in referring to changes in the settlement that benefit the class. "The standard extortionist tactic is to threaten to appeal unless class counsel cuts the fee and to request a portion of the fee reduction as compensation." At most, an objector should win a fee only for wringing extra dollars out of the defendant, and even that is dangerous because it will lead defendants to hold back in the initial settlement agreement.

Court Advisory Comm., S.D.Ga., 01-CV-053: It is unnecessary to require court approval to withdraw an objection. The court is free to inquire as to any accommodation that may have been made with the objector, and to determine whether any action was taken to the prejudice of the class.

Allen D. Black, Esq., 01-CV-064: "Strategy" is a good thing. The Note should not refer to "strategic" objectors; it should point out directly "that an objection may have practical or 'blackmail' force far beyond its merits, if any."

ABA Antitrust Law and Litigation Sections, 01-CV-69: "We favor these proposals."

Association of the Bar of the City of New York, 01-CV-071: Attaches a September 19, 2000 letter that urges deletion of a draft rule provision providing that mandatory discovery be available to objectors. There is a growing entrepreneurial use of objections by professional objectors. Mandatory discovery is "a tool far in excess of what they already possess and well beyond the course of prudence."

Joseph L.S. St.Amant, Esq., 01-CV-075: (This comment is summarized more extensively with the general comments.) The Note to 23(e) should discuss application of the rule — if it is to have any or not — to cases on appeal. "The most pressing problem is whether appeals from decisions denying certification can be settled on an individual basis without court approval."

National Assn. of Protection & Advocacy Systems, 01-CV-077: The Committee Note may chill desirable objections by saying that courts should be vigilant to avoid encouraging unfounded objections and that Rule 11 sanctions are available. "The very mention of Rule 11 will likely chill the willingness of class members to lodge objections * * *." "P&As consider it part of their federal mandate to protect the rights of persons with disabilities to challenge the adequacy of proposed nationwide class action settlements." Many settlements "routinely fail to include provisions representative of the various classes or types of disabilities."

National Treasury Employees Union, 01-CV-078: "Requiring court approval for withdrawal of all objections seems excessively rigid." The purpose seems to be to monitor changes in the settlement; that can be served by requiring approval only when withdrawal is conditioned on modification of the settlement.

Mehri & Skalet, PLLC, 01-CV-083: "We agree with the discussion in the proposed Notes regarding objectors, including the problem of objectors acting to obstruct beneficial relief to the class. We particularly agree with the requirement that an objector purporting to act on behalf of the class be held to the same fiduciary standard as a class representative."

Beverly C. Moore, Jr., Esq., 01-CV-083: "As long as an objector is a member of the class and thus has standing, he should be allowed to object and appeal." Legitimate objectors face real problems. Even plaintiffs' counsel object to objector discovery. The filing of settlement papers and fee petitions is orchestrated so that there is not adequate time to object. The problems said to be posed by professional objectors are not impressive. Class counsel in competing class actions are a frequent source of objections; their objections often are legitimate challenges to a low-ball settlement, but too often are rejected.

Prof. Susan P. Koniak, 01-CV-086: (1) It has been suggested that an absent class member can be precluded from collateral attack on a class-action settlement and judgment if another class member objected. "The idea that 'objectors' who are not required to meet any of Rule 23(a)'s requirements are somehow able to bind other absentees should be clearly and firmly rejected in the advisory committee's notes." (2) "The fairness hearing is now an unregulated arena." Do settlers have a right to discovery? To be served with all relevant documents in the case, including side deals? Can an objector call witnesses? Cross-examine witnesses? Must testimony or affidavits be presented to support an objection? How do pro se objectors participate? "Perhaps the Rule need not address all these questions." (3) Some objectors appear only to "get[] a payment from the settling parties to go away. Those payments should be outlawed." And objectors should have to explain any withdrawal of objections. Side deals should have to be disclosed, both at the trial stage and at the appellate stage. But the Committee Note should not refer to objectors who are out for personal gain. Objectors are no more likely to abuse the process than professional class-action lawyers or defense counsel. And any reference to Rule 11 sanctions should be removed from the Note. Rule 11

sanctions are less deserved for objecting counsel than for others: "No other group of lawyers are expected to operate with no procedural rules to help them get the information they need to function properly and no rules to delineate when, how and to what extent they are entitled to participate or to complain about not being allowed to participate." (4) The Committee Note recognizes the important contributions of objectors. "But nice words are no substitute for procedure." Rule 23 should establish "some framework for the procedure to be followed in fairness hearings with particular attention to the participation of objectors."

NASCAT and Committee To Support the Antitrust Laws, 01-CV-093: The published proposal is better than earlier draft rules that spoke to discovery for objectors. But the Note states that an objector can obtain discovery by showing reason to doubt the reasonableness of a proposed settlement. Skillful counsel often can do that. An objector should be required to show "both a strong reasonable basis to doubt the reasonableness of a proposed settlement and that such doubt cannot be resolved on the record before the court." The same showing should be required to have access to discovery already had in the litigation. The Note suggests that the parties may provide such access; this expression may be read to recommend that discovery materials be provided in the ordinary course. But routine access to discovery in the class action may impose cost and delay, particularly in complex cases with hundreds of thousands of pages of documents. There also may be serious confidentiality concerns. This suggestion should be deleted from the Note.

David J. Peill, Student, 01-CV-094: Why have different standards for discovery in connection with the reasonableness of settlement terms and discovery into the settlement-negotiation process? What is a "strong preliminary showing"? If the court has enough information to determine whether the settlement is fair, reasonable, and adequate, it should have enough information so that there is no need for discovery by objectors. And the reference to Rule 11 sanctions in the Note should not be at the expense of inherent court powers that "are more effective in dealing with abusive objectors."

Steven P. Gregory, Esq., 01-CV-096: The Note sets too low a standard for discovery by an objector. Objections, even frivolous objections, can cause unnecessary delay in awarding benefits to class members. "A better approach might be to require a 'compelling reason' rather than simply a 'reason.'"

Settlement Classes

Conference: The proposals fail to address settlement classes

Conference: Express provision should be made for settlement classes. "They are useful for the end game." Asbestos litigation will go on for another 20 years because the settlement-class effort was scuttled by the courts.

Conference: The Committee Note to draft 23(e) assumes the certification of settlement classes. "They cannot be done any longer."

Conference: It is amazing that overlapping class proposals have been considered, even in a tentative way, without also including a settlement-class proposal.

May 20, 2002

Conference: There should be a settlement-class proposal.

Conference: Some members of Congress view Rule 23 as an end-run around Congress. The settlement class "is an entire agency. Amchem was dead on."

Conference: Amchem is consistent with smaller, cohesive settlement class. "They're here, they exist. They're tough to draft." It remains difficult to understand what Amchem meant in saying that settlement can be taken into account.

Conference: The problem with the settlement class is that it cannot be tried, so there is no constraint arising from the alternative prospect of litigation.

Conference: Judges cannot solve all problems. Settlement classes "overstrain" the Enabling Act. "We used to take seriously the ideas of self-government and jury trial in civil cases. Settlement classes disregard these ideas."

Conference: The Rule 23(e) Committee Notes imply that there is such a thing as a settlement class; "not everyone agrees."

Mary E. Alexander, Esq., Statement for S-F: ATLA policy expresses deep concern over adjudication of the rights of future claimants through settlement-only classes.

James M. Finberg, S-F Hearing 103-104, 106-107: Ortiz is based on due process; it applies to state courts equally with federal courts. There should not be any difference in the ability to settle whether the action is in state court or federal. Probably there are more objections to settlements now than formerly. It is clear that a class can settle claims that are in the exclusive jurisdiction of another court, so global settlements can still be reached in state or federal courts. There is more attention paid to sub-classing and making sure there is a representative who would have standing to allege the claim of each category of persons involved. But I do not work with cases that involve future damages; they may present greater difficulties.

Anna Richo, Esq., S-F Hearing 138-139: Rule 23 should be amended to require opt-in for trial of individual cases, or better to eliminate class certification for trial purposes for any personal injury claim, with the exception of claims arising out of mass disasters. Certification of a dispersed mass tort class for settlement, on the other hand, would be desirable. There should be a separate mass-tort settlement class rule.

John Beisner, Esq., D.C. Hearing Written Statement: pp. 15-18 suggest creation of a distinct certification standard for proposed settlement classes. The proposal is presented as modest: there is no need to address futures claims, nor to revisit "limited fund" classes. One benefit would be to stop the tendency of some courts to cite settlement class certifications as precedent for certification of a litigation class, even though "the level of debate is quite different." The preoccupation with class certification prerequisites is distracting attention from the primary line of investigation, which should be whether the proposed settlement is fair to all purported class members, whether there is

a risk of collusion, or a risk that some individuals will gain benefits at the expense of other class members. One source of the problem is that the provisions of Rule 23(a) and (b) are designed to protect defendants as well as plaintiff class members. Commonality, typicality, predominance, and superiority protect defendants against attempts to rely on class-wide proof when the law requires individualized proofs of claim or defense. A settlement is different because the defendant has agreed to a conditional surrender of the right to insist on individual proofs of defense or individual proofs of injury and damages. When individualized proofs are required, a litigation class should not be certified. The variability of plaintiffs' damages should not be subsumed into a litigation class — although, perversely, it may be — but when there is a settlement, the inquiry should be whether the proposed settlement presents "a fair approach to dealing with the fact that the fair value of the unnamed class members' claims may vary significantly?" The rule should require that the settlement class have sufficient unity to make it fair to bind absent class members. But the predominance test should be qualified, looking to ensure that class members are afforded due process, "taking full account of the fact that as part of the proposed settlement, the defendants are waiving the due process protections that they would be afforded under a non-settlement class certification analysis."

Committee on Fed. Civ. P., Amer. Coll. Trial Lawyers, 01-CV-055: Considers (e)(1) salutary, and "would welcome the opportunity to review a proposal that addresses settlement classes separately." Is "open to the prospect of allowing settlement classes that do not necessarily satisfy all of the criteria of litigating classes."

Summary of Comments & Testimony: Rule 23(e)(3) 2001

Conference: The stronger alternative is better.

Conference: It would be better to provide that a (b)(3) class member always can opt out of a settlement.

Conference: Knowledge of a settlement provides a better basis for deciding whether to opt out. But we should not allow opt-out from every (b)(3) settlement. The first alternative, which presumes there should be an opt-out, will come to require opt-out. The second alternative, cast in neutral terms, is better. It would be still better to address the issue only in the Note. Notice is expensive; if it is delivered by TV and national print media, it can cost ten million dollars or more. "The class action is an attorney vehicle; the idea that people worry about it is a dream." What is important is notice to lawyers, not class members. Opt-out campaigns "are political wars." Propaganda is unfurled on all sides. The fen-phen settlement has opt-out opportunities "every time you turned around," but few defendants can afford to settle on terms that offer so low a level of peace.

Conference: Before settlement, it's "a pig in a poke." The ordinary class member does not have enough information to determine whether to request exclusion. A reasonable opt-out decision can be made only when the terms of settlement are known. It would be better to allow the opportunity in all cases.

Conference: The first alternative is better. It does have an escape clause. The class may have had notice of proposed settlement terms during the original opt-out period, even though there was not

yet a formal submission for approval. But this first alternative "maximizes consumer choice" in more general cases. Notice could be more modest. It is better to have this in the text of the rule, for the benefit of judges who are "new to class actions."

Conference: The first alternative is dangerously close to one-way intervention. The "good cause" test for denying opt-out is very vague; to the extent that it turns on the fairness of the settlement, the court should approve only a fair settlement in any event. If settlement terms afford an opportunity to opt out, that is one factor to consider in favor of approval; that is as far as this should go. And the Note should say clearly that informative notice is far more important at the time of settlement than at the beginning of the action.

Conference: The diet drugs litigation allowed four opt-out events for each class member. "At least one informed opt-out should be allowed; usually it is sufficient to provide this at the time of settlement."

Conference: The time of the opt-out is important. In a mass tort, probably it is sufficient to provide an opt out when the aggregate settlement terms are known. That is not likely to be a problem that seriously impedes settlement. It would be possible to defer the opt-out until the individual class member knows what he is going to get under the settlement, but that is probably wrong. It would destroy most mass-tort settlements if latent-injury class members were allowed to decide to opt out "23 years later" when injury becomes manifest.

Conference: The back-end opt-out may be important in mass torts; indeed it may be that a class is certifiable only if a back-end opt-out is provided. The diet drug settlement was done under pressure that improved the settlement because of the higher legal standards that flowed from the Amchem decision. But that is not what 23(e)(3) proposes. (It was rejoined that it is dangerous to think of opt-out only in mass-tort terms.)

Conference: The settlement opt-out would apply to antitrust and securities classes. There is a history of successful settlements in these areas without opt-outs. It is a mistake to write a general rule that applies to all types of class actions. Indeed it might make sense to deny any opt-out opportunity at any time from a class that deals with small claims that would not support individual litigation.

Conference: These considerations support the second alternative as the better option. Settlement opt-out makes sense only in some cases. One problem is that the money spent on notice comes out of actual class relief. The Committee Note should describe "levels of notice." In some cases, it should suffice to publish notice in the manner generally used for legal notices. Often the "mass buy" on television and in newspapers of general circulation is not warranted. Notice to attorneys should be provided.

Conference: What needs to be fixed? Mass-tort classes negotiate opt-outs; it is proper for the Note to treat this as a factor bearing on fairness. There may be an issue in a small fraction of cases where the notice is published early and the opt-out period expires.

Conference: The problem of early notice and expiration of the opt-out period could be solved by deferring the first notice and opt-out period until there is a settlement agreement.

Conference: The need for fairness to class members is adequately protected by judicial review.

Conference: When the class is heterogeneous, it is not possible to shape a settlement that is fair to all class members. Notice at the time of class certification will be used to lock class members in. There is no problem in securities litigation because for years the practice has been to seek certification at the same time as a settlement is presented. If certification and settlement are separated, the expensive notice should be deferred to the time of settlement.

Conference: People should not be asked to decide whether to request exclusion until they know what they are going to get, at least in personal-injury cases. Notice at the time of the "aggregate agreement" is not enough. The total available in the Agent Orange settlement sounded like a lot at the time, but an intelligent opt-out choice could not be made on the basis of knowing that alone.

Conference: Multiple opt-outs often are negotiated in mass tort settlements, and such terms may indeed be required. But there is no need for a rule to accomplish this. But for securities and antitrust cases, a settlement opt out turns the rule on its head. Class members are told at the time of certification that they will be bound unless they opt out. If you allow an opt out on settlement, why not also after granting a motion to dismiss for failure to state a claim, or after granting summary judgment? Indeed, why not after trial? The settlement opt out interferes with negotiation settlements. Adequate protection can be found in the negotiation process.

Conference: The settlement opt out became increasingly attractive to the Advisory Committee as it struggled with proposals to enhance support for objectors. The settlement opt out is a lot better than fueling objections to every settlement. But the Note should be revised to make it clear that settlements are favored; as presently drafted, it seems to have a hostile tone.

Conference: From the defendant's perspective, there is a tension between the ability to settle and a class member's ability to base an opt-out decision on meaningful information. A defendant can negotiate a "walk-away," but knows that if the settlement sticks there will be some opt-outs who must be compensated and who will treat the settlement terms as the floor for bargaining. The second alternative is more flexible and thus more sensible, but it too will make settlement more difficult.

Conference: Concern about notice costs is a red herring. Notice of settlement is required today. The settlement opt out simply requires that one more item be included in the notice. The first alternative is better; indeed, it might be better to adopt an even stronger presumption in favor of opt out. The defendant's path to global peace is made more difficult, but informed choice by class members is more important.

Conference: But the notice will be more complex and thus more expensive if it includes a settlement opt out.

Conference: If we are precluding substantial damage claims we should have good notice.

Conference: The "pig-in-a-poke" problem is most significant with small-claims classes. Class members have no stake at the beginning. The opt-out could lead to better recovery in another class; even apart from that, a 20% or 40% opt-out rate would tell the court something. The opt out is useful.

Conference: Why do we need the first opt out, if the limitations period is extended to the second opt out ?

Conference: The second notice may be more effective. The IOLTA cases say that clients have a property interest in pennies; so class members have a property interest in small claims. Those who want global peace have an interest in effective notice. This helps ensure that settlement is adequate for the absentees. The first alternative, favoring the opt out, "is a big improvement."

Conference: The idea of a court-appointed objector "is horrible. Any alternative is better." The best approach is to list an opt-out alternative provided by the settlement itself as a factor favoring fairness. The next-best approach is the second settlement opt-out alternative.

Conference: The only real choice is between the two settlement opt-out alternatives. The court-appointed objector system would degenerate into a "judge's buddy" system or a civil-service bureaucracy. "Market forces are better." Perhaps the first alternative should be softened: a settlement opt out is required "unless the court finds that a second opportunity is not required on the facts of the case." This would be stronger, and better, than the second alternative.

Conference: The parties should be fully informed in connection with settlement, but opt out does not follow. Defendants should be able to achieve global peace. Is unfairness to class members so great an evil as to require the opt out? "I do not know the answer."

Conference: (Several views in a single dialogue:) A back-end opt out is not likely to be provided in securities or antitrust cases, but can a mass-tort settlement be approved without one? The risk of latent injury is a real problem. But if injury is apparent at the time of settlement, an informed initial opportunity to opt out after settlement terms are known suffices. Asbestos should not be used as an example for all cases. In many cases "the biological clock ticks faster" — it will be two years, or four, to identify all "downstream claims. Defendants can deal with this kind of "extended global peace." The back-end opt out can be worked out. In a large heterogeneous mass tort, the back-end opt out "can address the constitutional needs." But if the class is more cohesive, settlement without a back-end opt out may be appropriate. It would be a mistake to require a back-end opt out in all mass torts; if the disease affects a finite population and its progression is known, back-end opt out may not be needed.

Conference: Settlement opt out may cause more problems than it is worth.

Conference: The settlement opt out might be reduced to a factor considered in evaluating fairness, but perhaps a compromise version could be retained in the Rule.

Conference: It does not make sense to go forward with the settlement opt-out.

Conference: Settlement opt-out is a bad idea; "it almost gets into the substance of the settlement."

Conference: The settlement opt-out is a good idea. It legitimates the decision. Rule 23(b)(3) was written for small-stakes cases. If it is used for cases that involve significant individual claims, class members should know what is at stake before being asked to decide whether to opt out. There should not be an absolute right to opt out. "But a willing seller is needed."

Michael J. Stortz, Esq., Statement for S.F Hearing: The second alternative "properly takes a neutral position, leaving the issue of a second opt-out to the trial court's discretion." The first alternative "does not take into account the myriad circumstances in which a settlement on behalf of the class may be reached. Practice under the new Rule 23(e) should be permitted to develop * * *."

Barry R. Himmelstein, Esq., S.F. Hearing 24-: Either alternative is suitable. "I prefer to leave things to judicial discretion when there is a choice." Settlements can be done with a settlement opt out, but the more usual occurrence is that settlement and certification occur at the same time so the first opt-out opportunity remains available. The second opt-out opportunity is "just fine. I like to give people the option to stay in or get out. I'm not trying to hold them in against their will. Relatively few people generally do opt out unless they have serious personal injuries and I have questions about whether class certification is appropriate for those kinds of claims anyway."

Mary E. Alexander, Esq., S-F Hearing 65-: ATLA supports Alternative 2 settlement opt outs. The opt out can be difficult for practitioners on both sides, but "litigants' choice is most more to [her written statement, 01-CV-016, says "paramount to"] administrative convenience and the management of the litigation." (Her written statement notes concern that class-action settlements do not afford class members "real choice as to whether to accept a settlement.")

Gerson Smoger, Esq., S-F Hearing 91: For ATLA. It is terribly unfair to have the only opportunity occur before settlement of a (b)(3) class. "Nobody attends to it. Nobody looks at it." Most people do not understand what the notice means, and there is no reward even in seeking out your local lawyer for an explanation. Often I have people come to me after the class is closed and a settlement is effectuated, "and now they have no choice and they disagree with the settlement. They want to have their day in court. They want to be able to choose their own lawyer, but they are foreclosed." We support Alternative 2. And we must be careful to protect the small-claim class "because those are the essence of the purpose of this system."

Anna Richo, Esq., S-F Hearing 138: The opt-out option on settlement is appropriate.

Jocelyn D. Larkin, Esq., S-F Hearing 146: The Impact Fund welcomes a number of the proposals, including "the option for second notices and opt-out. These are already part of our practice for the post part. We understand them."

Alfred W. Cortese, Jr., Esq., S-F Hearing 163 ff: It would be better to have opt in for trial, the way it was before we had opt-out settlements. We should be weaned from settling these cases because they just get worse and worse. Amchem and Ortiz have not made a difference: "If you put enough money on the table, somebody is going to find a way" to settle. The second opt out, however, is the more benign of these proposals.

John Beisner, Esq., D.C. Hearing Written Statement: "[T]here are valid arguments on both sides of the debate regarding the merits of this amendment." If it is to be adopted, the second alternative is better.

Prof. Owen M. Fiss, D.C. Hearing 46-57: Settlement is troubling. The representational relationship does not rest on actual consent. Settlement is a contract. "People do not enter contracts by simply not responding to a notice. People are not bound by contracts simply because a number of people, even same members of the class, have entered a contract." Settlement should bind only class members who opt into the class. The practical consequences would be to "put a lot of settlements off the board." But "the requirements for procedural justice gives us no alternative." The alternative proposed in (e)(3) should be made mandatory, and should apply to all forms of class actions. (In response to questions, suggested that it might be possible to allow settlement without the opt-in limit, and perhaps even without allowing opt out, if the interests of class members are "so identical and so de minimis" as to justify binding them.)

His written statement, with John Bronsteen, adds: "If settlements were confined to those who opt in, then plaintiffs would lose their incentive to bring class lawsuits that are unlikely to prevail at trial."

Prof. Judith Resnik, D.C. Hearing Written Statement 01-CV-044: "[I]t is at settlement that the question of the remedy becomes clear, and it is at settlement that the decision need be made about whether to permit opt outs."

Thomas Y. Allman, Esq., D.C. Hearing 113-114: Agrees with Professor Fiss. It is not clear that an opt-in regime for settlements would destroy the ability to settle, but assuming it would, "[t]hat would be a good result." The suggestion should, however, extend to trial as well: a class should include only those who opt in. (His written statement finds the second alternative formulation of (e)(3) "more appropriate." A settlement opt out is not needed if settlement is reached after trial on the merits; it is sound if settlement is reached before there has been significant discovery on the merits.)

Brian Wolfman, Esq., D.C. Hearing 116 ff: We need pay more attention to the characteristics that distinguish class actions from bipolar litigation. Clients cannot be expected to monitor the work of class lawyers, and lawyers' interests are not naturally aligned with class-member interests. Expanded opt-out rights enhance members' abilities to monitor their lawyers' work. In addition, the prospect of opt outs will encourage the parties to negotiate a settlement more favorable to class members.

Notification at the certification stage is not much help. But notice at the time of settlement can work. (The written statement, 01-CV-043, strongly agrees with Alternative 1. Notice of settlement is required in any event, so notice cost objections are reduced on that score. This is not the occasion to reconsider the question whether individual notice should be required for all class members when individual claims are small.)

Lewis H. Goldfarb, Esq., D.C. Hearing 134: The Committee should consider opt-in rules for the classes where there are no real plaintiffs involved in the litigation. Abuses through such actions are "a serious problem for industry."

Prof. Ian Gallacher, D.C. Hearing 141-146: All (b)(3) classes should be converted to opt in. This is better seen as a joinder device than as a tool of social policy. In practice, virtually all of these actions require a plaintiff to opt in by mailing materials to indicate participation in a class remedy, or by using a coupon that has been mailed out. There is no showing that it is too difficult for holders of small claims to bring suit. There are many more lawyers available today than in 1966, and they are ready and capable of bringing small claims in small claims courts. More importantly, the fact that people do not bring small claims does not show an incapacity to act; we often see that people decline to participate in class-action judgments even when little effort is required. Nor need we worry about one-way intervention; setting a time limit to intervene is sufficient. (His written statement, 01-CV-037, adds that the reasons for adopting an opt-out rule in 1966 were "uncomfortably paternalistic" and seem to transcend Enabling Act boundaries by making it easier for "one group to assert claims." It is asserted by plaintiffs that (b)(3) classes are a tool of social policy to enforce ethical behavior by business. Rule 23's function as a joinder rule is undermined by the opt-out approach. Opt-in classes under the FLSA, or the 100-member signature requirement for Magnusson-Moss Act classes, show that opt in is not necessary. Class members may be harmed by opt out, being bound by inadequate judgments. Opt in also avoids the problems that arise from tolling state statutes of limitations for non-federal claims.)

Leslie Brueckner, Esq., D.C. Hearing 160-161: Wholeheartedly endorses the second opt out, whichever provision is adopted. Notice costs are no deterrent — there must be notice of the settlement anyway. And there is not likely to be a significant deterrent to settlement: defendants continually tell us that there is a hydraulic pressure to settle. The incentives to settle are sufficient. (The Written statement, 01-CV-020, is more forceful. The First Alternative is better, but there should be an unconditional right to opt out of a settlement; there should be no "good cause" exception. The Note links the good-cause determination to the adequacy of the settlement. The court's appraisal of the settlement should not override the preference of class members to pursue individual relief; there are due process concerns about forcing an individual to accept a settlement. The opt out will not increase notice costs; notice of the settlement must be given in any event. Finally, the Note suggests that an opt-out opportunity may reduce the need to provide procedural support for objectors. This language should be deleted. Objectors are important, indeed often crucial to settlement review.)

Michael Nelson, Esq., D.C. Hearing Written Statement 01-CV-021: Prefers the second alternative. The first "fails to account for the many circumstances under which settlement may take place."

David Snyder, Esq., and Kenneth A. Stoller, Esq., D.C. Hearing 174: Prefer the second alternative. The written statement, 01-CV-022, "finds merits in the competing arguments" whether there should be any second opt out. If there is, it is uncertain which alternative will provide maximum protection to both plaintiffs and defendants. As a general matter, insurers require the earliest possible sense of class size in order to establish appropriate claim reserves.

Robert Scott, Esq., Lawyers for Civil Justice, D.C. Hearing Written Statement 01-CV-038: (b)(3) should be converted to opt-in procedure, or to require that the class lawyer obtain written authorization from each putative class member before filing an class action. "The sorry experience with class actions since 1966, particularly in the last ten years, has amply demonstrated the need for this Committee to urge Congress to return the legal system to the resolution of justiciable disputes among real parties in interest who care enough to affirmatively elect to be included in the litigation." In addition, there should be a mechanism for opt-out settlements "by creating a settlement device or 'bill of peace' to allow defendants to invoke a court process for consolidating all litigation and settling all claims."

Stephanie A. Middleton, Esq., D.C. Hearing Written Statement 01-CV-032: The second opt out is troubling "because it interferes with a defendant's ability to 'buy peace'and a plaintiff who does not 'opt out' in the beginning should have to live with the decisions made by his attorneys."

Peter J. Ausili, Esq., E.D.N.Y. Civil Justice Committee, D.C. Hearing 209: The second opt out has little value. A small claim provides little incentive to opt out. A person with a large claim should investigate and determine whether to opt out at the first opportunity. In addition, the rule does not address the preclusive effect of rulings made after expiration of the initial opt out period and the time of the later opt out. (The written statement, 01-CV-056, adds that a settlement opt out would "simply shift the balance of power away from the class representative and to objectors.")

Walter J. Andrews, Esq., D.C. Hearing 284-286: The possibility of opt-outs makes settlement more difficult. Plaintiffs should not have a second opportunity to opt out: this allows them to litigate once, and then a second time if not satisfied with the class-action resolution. This will have a particularly adverse impact on insurers by "introduc[ing] an expensive level of volatility and unpredictability into the establishment of reserves" for class actions.

Bruce Alexander, Esq., D.C. Hearing 310 ff. and Written Statement, 01-CV-041: A second opt out "breeds laziness and free rider issues." It encourages class counsel to communicate even less with class members. The unintended effect will be even less interest by the litigants in the litigation. Class members who do not opt out at the first opportunity can protect their interests by objecting to the settlement. It would be a good idea to substitute an opt-in system for the present opt-out system. With an opt-in class, you know what is really at stake. Experience shows that many class members, when they find out about the class, resent it — they find the supposed benefits undesirable, or find the process obnoxious.

Hon. William Alsup, 01-CV-04: "I wholeheartedly support the proposed Rule 23 revisions. I vote for the 'good cause' version of the settlement opt-out provision."

Linda A. Willett, Esq., 01-CV-028: The underlying structural defects of Rule 23 should be dealt with by requiring "that the default mechanism of all 23(b)(3) class actions be 'opt-in' and that a statutory mechanism be created that would allow for strictly regulated 'opt-out' settlements."

Patrick Lysaught, Esq., for Defense Research Institute, 01-CV-033, 034, 046, 047: Strongly opposes; the second alternative is less harmful if any is to be adopted. Limiting the second opt out to (b)(3) classes "undermines the philosophical underpinnings allegedly supporting the need for a second opt-out." Just as members of a (b)(1) or (b)(2) class, members of a (b)(3) class are protected by the opportunities to object to class definition, class representation, and the terms of settlement. So too they are protected by the requirement of court approval after careful judicial inquiry. The second opt out could be the death knell of settlement. Those who opt out will treat the settlement as the starting point for individual negotiations. This procedure is unfair: it allows class members deliberately to remain in the class, examine the terms of the settlement, and then choose to opt out to gain the advantages of the settlement as leverage for their own claims.

Professor Charles Silver, 01-CV-048: The p 64 comment that class members may not understand the terms of settlement should be dealt with by making easy education possible, as a website or phone bank; encouraging objections is not desirable, particularly when a small-claims class is likely to generate only strategic objections.

Sheila Carmody, Esq., 01-CV-050: It is not unfair to require persons who claim to have been injured to take an affirmative step. The Committee should recommend "that the default mechanism of 23(b)(3) actions be opt-in."

Court Advisory Comm., S.D.Ga., 01-CV-053: Favors alternative two; flexibility is preferred.

Committee on Fed. Civ.P., Amer. Coll. Trial Lawyers, 01-CV-055: prefers Alternative 2. A presumption, subject to defeat for good cause, is not needed. The proximity of prior notice, the size of the settlement, or other circumstances may make a second notice not desirable. There is no need to litigate "good cause." But in other circumstances a second notice may be desirable — "for example, the parties may urge a second notice to minimize the number of objectors."

Federal Magistrate Judges Assn., 01-CV-057: Supports Alternative 1. it is "preferable to Alternative 2 which is more permissive by its terms and fails to provide the court with the discrete guidelines furnished by Alternative 1."

Exxon Mobil Corp., 01-CV-059: Opposes (e)(3). It will seriously erode one of the few benefits of (b)(3) class litigation: "resolution of the claims on a broad class-wide basis." After expiration of the first opt-out period, the defendant will know who has opted out and can estimate its potential exposure outside the class action. If a settlement opt out is permitted, unnecessary uncertainty is created. Nor is there any reason to give class members a second opportunity to opt out. It is easy to envision opt-outs organized by counsel who were unsuccessful in seeking appointment as class counsel; the result may be unfair bargaining advantages for the settlement opt-outs, or settlements that are unfair to them in individual proceedings because class-court approval is not required. But if there is to be an (e)(3), the second alternative is preferred.

Allen D. Black, Esq., 01-CV-064: On p 63 it is pretentious to speak of a decision "confided" to the judge. Say "committed" or "entrusted."

Equal Employment Advisory Council, 01-CV-065: Association members employ more than 20,000,000 workers in the United States. The second opt-out proposal is addressed in terms that seem to say that the purpose of the first opportunity to request exclusion is to afford a binding choice whether to remain in the class and accept the outcome. A second notice serves no purpose, unless in special circumstances such as fraud or a natural disaster it is reasonable to believe that class members never got the first notice.

Keith L. Johnson, Esq., State of Wisconsin Investment Bd., 01-CV-066: The first alternative is better. The settlement opt out is important; at the time of the first opportunity, class members "usually do not have enough information * * * to know whether the class representative and class counsel will pursue the case to a satisfactory conclusion." The mere existence of a right to opt out will deter inadequate settlements. The second alternative is inferior because the parties — who commonly draft a proposed approval order — will draft an order that does not allow opt out. "[I]n order to encourage a practice that the parties will usually disfavor, the rule should not merely be neutral on this issue."

Alliance of American Insurers, 01-CV-068: Opposes the second opt out because it "necessarily increases the cost of class action litigation and also serves to prolong the litigation." If anything is to be done, Alternative 2 is better "since it is more neutral * * * and does not express a preference for a second opt-out opportunity."

ABA Antitrust Law and Litigation Sections, 01-CV-69: Opposes both alternatives. Begins by recognizing that this proposal has generated a split of opinion, and that the split does not divide along plaintiff-defendant lines. The purpose to advance informed opt-out decisions and enhance fairness is laudable. But "the proposal ignores both the theory and policy of class representation as well as significant problems * * *." The Note recognizes that a settlement opt out is not likely to have real value to class members whose small claims do not support individual litigation. As to theory, representation extends to all phases of the litigation, including settlement. The initial notice should make it clear that settlement is one possible outcome. There is no distinction between resolution by settlement and resolution by judgment for purposes of a second opt out. A settlement out out "demeans the meaningfulness of the first opt-out right as an exercise of the class member's free will." Further, the efficacy of class actions will be undermined. Class members with larger individual claims frequently are represented by counsel, who will seek to take a free ride on the efforts of class counsel in discovery and motion practice, and then opt out; if they cannot opt out, they will have an incentive to object vigorously to an inadequate settlement, enhancing the settlement for all class members. Allowing an opt out, on the other hand, may drive down the value of the class settlement in the expectation "that large individual purchasers will more often than not opt out once the class sets the settlement floor." Finally, the amendment fails to address the issue-preclusion effects of rulings made between the initial class certification and the exercise of the second opt out. Alternative 2 may "lead to the expedient of ordering a second opt-out opportunity as a makeshift solution to a questionably adequate settlement." Nor is even Alternative 2 necessary to support negotiation of settlements on terms that authorize opt outs. The recent diet drugs settlement allowed

a different form of opt out, to be exercised in the future on the basis of changes in a class member's physical condition; that illustrates that power is there now.

Association of the Bar of the City of New York, 01-CV-071: This amendment does little to alter current practice. Today it is common to find class notices sent out contemporaneously with settlement notices; most class members have an opportunity to opt out after settlement terms are known. Alternative 2 is the better choice; it allows for case-by-case analysis. The good cause requirement in Alternative 1 will generate needless litigation.

Civil Division, U.S. Department of Justice, 01-CV-073: Does not support a second opt-out. This would diminish a defendant's incentive to seek peace through settlement; litigating to judgment would give preclusion. "[E]ffective negotiations can only proceed based on a reasonable expectation that the composition of the class will not change prior to entry and approval of the settlement." The fact that settlements often are negotiated before class certification is not relevant, because in that setting the defendant has no reasonable expectation as to which class members would be bound by the settlement. Once the opt-out period has expired, on the other hand, "the settling defendant has a valid expectation that all members of the class are bound." The possibility of negotiating terms that allow the defendant to withdraw if the number of opt-outs exceeds a stated threshold is not much help; it may be difficult to reach such an agreement. It also will be difficult for class counsel to negotiate a settlement in face of the potential for sizeable opt-outs. But if an opt out is adopted, the second alternative is better. It would be still better to require the proponent of an opt out to show good cause.

Prof. Martin H. Redish, for Lawyers for Civil Justice, 01-CV-074: Urges abandonment of the opt-out provision for (b)(3) classes, in favor of establishing an opt-in procedure. The core of the argument is that legislatures — both Congress and state legislatures — make conscious choices about enforcement mechanisms when establishing rights. Public enforcement means may be chosen. Private enforcement means may be chosen. The choice has a great impact on the substantive right underlying the remedy. A choice of private enforcement is politically more attractive: it is presented as a means of providing compensation to individuals who believe that compensation is sufficiently important to justify litigating to win compensation. "Under a purely private, incentive-based remedial model * * * the legislature's primary goal must be assumed to be compensatory, rather than behavior-changing, since pursuant to this framework, government exercises no control over the decisions of private victims to sue * * *." The advancement of the public interest is subordinate to the primary goal of victim compensation. But the (b)(3) opt-out model, because of inertia, transforms the private remedy into a "bounty hunter" model. The bounty-hunter model relies on the economic incentives of attorneys, not victims, "without regard to the goal of vindicating individual plaintiffs' rights." The effect is illustrated by the numerous "coupon" settlements. The result is similar in many ways to a "purely public-regarding enforcement mechanism," akin to a qui tam action. As a matter of legislative policy, the bounty-hunter model may at times be attractive. But it should not be accomplished by rulemaking. Whether or not this pervasive effect on substantive rights violates the Enabling Act, there is a tension that should be addressed by moving to an opt-in model. The opt-out model relies on a paternalistic view that may have been acceptable in 1966, but that is incompatible with fundamental notions of liberal democratic theory as we now understand it. It is highly unlikely that those who wrote the 1966 rule "ever envisioned the dramatically negative

practical consequences to which that process has today given rise." And there is a tension with due process: the effect is to destroy an individual right because "another unrelated litigant has had the opportunity to litigate the same claim." The constructive consent reflected by failure to opt out is not sufficient to waive the constitutional right to be heard.

Special Committee on Federal Practice, Illinois Bar Assn., 01-CV-076: "A reasoned determination of the fairness of a class action settlement will take into account many factors." (Examples are given, substantially parallel to the examples in the Committee Note.) "Alternative 1, providing for a presumption in favor of an opt-out opportunity, increases the probability for an individual member to assess the relevance of these factors * * *. The court * * * will unlikely possess the specific knowledge of the nature and extent of the individual circumstance of a member." Adoption of Alternative 1 "may also be a driving force for the settlement to be more inclusive, attending to the issues that may relate to certain subclasses of the class." Notice cost is not an issue since there must in any event be notice of the settlement. The overriding principle is that a class member should be able to review a settlement with personal counsel, preserving the right to seek individual redress if that seems better.

National Assn. of Protection & Advocacy Systems, 01-CV-077: Prefers the first alternative as "most protective of class members' interests." But the Committee should eliminate Note language that an opportunity to request exclusion may reduce the need to provide procedural support to objectors. Objectors often play a pivotal role in the settlement review process; member protection and advocacy systems have increasingly found that not only must they bring class actions, but they also must object to settlements that, focusing on only some types of disability, fail to provide adequate protection for persons with other disabilities.

Washington Legal Foundation, 01-CV-082: Supports the second alternative. A settlement opt out may be valuable, particularly where facts relevant to the opt-out decision come to light only after expiration of the initial opt-out opportunity. But there is no reason to create a presumption in favor of opt out. Opt out is desirable if a proposed settlement "creates a significant hardship for individual class members." But ordinarily the opportunity to object provides sufficient protection.

Mehri & Skalet, PLLC, 01-CV-083: The need for a settlement opt out "is certainly open to question, given the inherent power of the court to provide opt-out rights in appropriate cases or circumstances where opt-out rights are not specified." Exercise of this power is shown in some (b)(2) cases.

Prof. Susan P. Koniak, 01-CV-086: Rule 23 should provide "every absent class member * * * a right to opt-out of the settlement contract. Surely, there is no reason not to guarantee this to all (b)(3) class members and given that the categories of (b) are so porous, it is only fair that similar opt-out rights at the time of settlement be the default rule for all absent class members."

State Bar of California Committee on Federal Courts, 01-CV-089: Supports the first alternative. Class members may not have had the incentive to opt out before settlement terms are known. The first alternative "creates a stronger incentive for courts to review settlement terms carefully. In order to make a 'good cause' determination, a court will likely scrutinize settlement terms to assess

whether they are fair to all class members. If the court is at all uncertain about terms, the court will likely permit the opt-out * * *."

Committee on Rules, W.D.Mi., 01-CV-090: A settlement opt out undermines the class-action goal of judicial efficiency. The defendant "can ride the hope" that so many class members will opt out as to destroy the class by defeating numerosity. This hope may further encourage unsanctioned and improper communications by the defendant with class members. And "the amendment all but eviscerates the 'objection' process." A dissatisfied class member will exit, not object, depriving other class members of the benefit of the objections that would have been made were exit not possible.

David J. Piell, Student, 01-CV-094: The Note refers to classes certified for settlement. Amchem, and see Hanlon v. Chrysler, 9th Cir.1998, 150 F.3d 1011, make it clear that settlement classes cannot be certified. But Alternative 1 is superior. The right to opt out is essential once a settlement is proposed — that is the point of tolling the statute of limitations once a class action is filed. Class members should not be forced to guess whether counsel will adequately represent the class in settlement.

Robin F. Zwerling, Esq., 01-CV-095: (e)(3) must be amended or clarified to reflect the problem of sequential settlements with different defendants. The problem is illustrated by an action now pending on appeal in the 2d Circuit. Members of the class in an alleged $700 million ponzi scheme initiated parallel individual litigation but failed to opt out of the class. The class settled with an insurance company; the individual plaintiffs participated in distribution of that settlement. The class then settled with another defendant, an auditor. The individual plaintiffs objected to the settlement and sought to opt out of the class; the district court, invoking its original ruling that a plaintiff must opt out for all purposes or remain in the class for all purposes, refused to permit exclusion. It explained that a plaintiff should not be permitted to remain in the class as to defendants against whom her claims are relatively weak, while opting out to pursue relatively stronger claims against other defendants. That ruling is on appeal; the settling defendant has said that it will back out of the settlement if exclusion is allowed, arguing failure of an assumed condition precedent by material change in the class from whom it sought peace. To address this problem, the Committee should (1) adopt Alternative 2; (2) make it explicit that there is only one subsequent opportunity to opt out of a settlement, limited to the first settlement reached; and (3) make it explicit that selective opt-outs as to only one defendant are not permissible.

Prof. Howard M. Erichson, 01-CV-097: Alternative 1 is better. There are some risks in the settlement opt out, including the risk that a lawyer with a large number of individual clients will threaten to opt them out to win leverage to benefit them at the expense of other class members. Defense interests are likely to oppose this provision because it gives plaintiffs another bargaining chip. "But the benefits strongly outweigh the risks." The opt-out opportunity protects against collusive or inadequate settlements that protect defendants and enrich class counsel at the expense of the class.

Rule 23(g) and (h) Comments

Proposed Rules 23(g) and (h)

Rule 23(g) -- in general

Conference: This is an extremely important and useful provision. It underscores the fiduciary obligation of counsel to the class, and the fiduciary obligation of the court to make sure that counsel discharge that duty.

Conference: Is there a danger here of emphasizing the judge's investment in the counsel selected? Will that affect the judge's attitude toward other things?

Conference: Maybe it would be better to have two judges involved, one to select counsel and the other to handle the case. At least, having somebody other than the assigned judge screen counsel for quality could be desirable.

Conference: Regarding the Committee Note, I have a real question whether it serves a purpose. Lawyers cannot find these notes. What real effect or value do they have? Is the Note as binding as the Rule?

Conference: West puts the Note right in the pamphlets with the rules. Justice Scalia's attitude toward this sort of material is not true of all judges. At the least, the Note serves an educational function.

Conference: As a judge, I look at the Notes all the time.

Conference: The Enabling Act authorizes adoption of rules, and says nothing about notes. A Note cannot be adopted or changed without a simultaneous amendment to the Rule, and even if one tried to change a Note without changing a Rule it would require going through the entire Enabling Act process.

Conference: The Rule 23(g) notion that the judge picks the class lawyer reflects what many judges do; it is important to say it in the rule. The actors who are not much regulated are the judges. The premise of Rule 23(g) is that there is not much client control. But the rule does not require a hearing or findings. There are other settings in which judges pick lawyers. For example, judges appoint counsel from a list or panel for impecunious criminal defendants. But the initial selection of eligible lawyers is not left up to individual judges.

Conference: The CJA approach raises difficulties. For one thing, these people generally have not been paid adequately. It would be a mistake to get the government into this.

Joseph Grundfest, S.F. Hg. (pp. 30-45) & 01-CV-009: I rise in favor of the appointment competition which tends to work very well in various aspects of our economy. What is needed is a market check

to achieve the benefits of competition in selection of counsel. An auction is only one method for doing so. Proposed Rule 23(g) recognizes that competition for appointment may be useful, and "has the far, far better of the argument" than the recent draft Third Circuit report. The "benchmark" of 25 to 30 percent simply is not relevant. It came from 19th century individual cases, and does not work here. "You are still paying a 19th century price given everything else that's happened in the world since then for a particular item?" Law firms are quite willing to work for much less than that amount, and there is no ground for saying that their results are "totally inferior." If I were writing the rules, I would be more aggressive than this proposal, particularly urging the use of market check mechanisms in selection and compensation of counsel. I think this approach applies across the board, even if that seems a bit "imperialistic." At least, this could be applied in consumer fraud actions, mass tort cases, and the like. But perhaps it would not work in civil rights cases. In any event, it would be important to limit consideration to "qualified counsel," so there should be a two-step process by which selection is done, looking first to quality screening and then to selection from among those left using market mechanisms.

Mary Alexander, S.F. Hg. (pp. 55-73) & 01-CV-016 (president-elect of ATLA, presenting its position): ATLA is wary of the notion of federal courts appointing class counsel. Litigants are entitled to retain their own counsel, and they should not have that right extinguished by a court order that effectively replaces their counsel with one or more attorneys they don't know. Absent evidence of unfitness that would justify limiting an attorney's right to practice, a litigant's choice of counsel should be left alone. It would also be wrong if this lawyer were selected by something like an auction method, giving the clients the lowest bidder in place of the lawyer they have selected. ATLA does support having judicial oversight, but is concerned about the low bidder phenomenon. Thus, having the judge scrutinize the background and experience of the lawyer is fine.

Gerson Smoger, S.F. Hg. (pp. 73-91): There is a risk of cronyism, or apparent cronyism, in having the judges appoint the lawyers. The ones that are likely chosen are lawyers familiar to the particular judge that has the power to make the appointment. Once the judge makes such a selection, it will be hard not to feel invested in the attorney's efforts (pp. 90-91).

John Frank, S.F. Hg. (pp. 92-97): The problem with these changes is that they introduce too many new decision points. Those, in turn, afford opportunities for counsel to wrangle, and then require judges to resolve the wrangling. I am not persuaded that the additional effort and cost that will result is justified by the advantages of the proposed amendments. A better solution to the problems of the contemporary class action would be to move the (b)(3) class action out of the court system altogether and into some sort of administrative agency.

James Finberg, S.F. Hg. (pp. 104-05): Agrees with Prof. Grundfest that in securities litigation market forces can be extremely useful, in part because there is a good supply of qualified counsel there. In fact, in those cases classes have benefitted from getting a larger share of the payouts due to competition. In employment discrimination cases, however, these dynamics don't apply, and market forces don't work as well.

James Sturdevant, S.F. Hg. (pp. 120-29): The language of 23(g) is troubling in that it seems to encourage judges to foster competition for appointment as class counsel. In particular, the focus on

the resources counsel will commit to the action seems to point in that direction. Where other firms have notice of the filing of a case, this may encourage the judge to invite other counsel to come in or to allow some sort of bidding process.

John Beisner, D.C. Hg. (pp. 7-21) & 01-CV-027: Clearly the provision on appointment of class counsel is appropriate to the extent that it confirms the authority of courts to deal with situations in which multiple counsel are attempting to represent the same classes. The need is less pronounced, however, where multiple counsel are not vying for the position of lead counsel, and the question is merely whether some other counsel should be brought in to replace the lawyers who initially filed the suit. Conceptually, the idea that the court would select plaintiffs' counsel in every case is troubling, and it might create an appearance that the court has a vested interest in ensuring that the selected plaintiffs' counsel succeed. The basic problem is that the process seems to contemplate that "trial courts would routinely recruit and select class counsel, possibly long after the question whether a certifiable class even exists has been resolved." I am not in favor of having a court that basically has one class action before it with one counsel or group of counsel undertaking efforts to go out and find other counsel to handle the litigation.

Judith Resnik, D.C. Hg. (pp. 58-75) & 01-CV-044: "I agree with the Committee's decision to recognize the central role that judges now play in shaping the market of lawyering for aggregate litigation." But who rides herd on the judges as they perform this task? If one looks for precedents for the judge as employer, the ones that occur to me ar the hiring of magistrate judges, attorneys appointed under the CJA, and the selection of members for the committees in bankruptcy. These examples, particularly the bankruptcy one, illustrate the high potential risk of apparent or actual patronage activities by judges. Given the public criticism we've seen of the large sums paid lawyers in class actions, judges are at risk of having antagonism about these matters rub off on them.

Victor Schwartz, D.C. Hg. (pp. 76-63) & 01-CV-031: The adoption of Rule 23(g) might widen the gulf between how class actions are addressed in federal courts and the way in which they are handled in some state courts. State court rules don't usually give the judge this important power. And a few state court judges who have this power have not used it to help assure that class counsel are appointed on the basis of both merit and fair and open market competition.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: Rule 23(g)(1) restates nearly-universal practice without any significant modification. Rule 23(g)(2), however, goes beyond current practice and seems unwise to us. The "real meat of the Rule" is in the Note, and the committee might want to ask whether it wishes to promulgate a rule principally to inform the courts and the litigants of the views set out in the Note. We believe that some of the points in the Note should be incorporated in the rule.

Peter Ausili (E.D.N.Y. Comm. on Civ. Lit.), D.C. Hg. (pp. 203-18): The Committee was concerned about utilizing a bidding process and putting the judge in that particular role. It felt that it was early and unwise at this time for the court to adopt essentially a competitive bidding procedure for selection of the client's counsel.

David Romine, D.C. Hg. (pp. 242-62) & 01-CV--49: The amendment adds procedural steps to class actions that require findings and increase the occasions for judicial activity. This is a cost that should be taken into account.

Ira Rheingold (Exec. Director, Nat. Assoc. of Consumer Advocates), D.C. Hg. (pp. 262-76) & 01-CV-062: NACA considers Rule 23(g) probably the most problematic of the proposed rule changes. Although we welcome anything that ensures that consumers obtain competent and able class counsel, we are concerned that the proposal appears unnecessary and unlikely to improve things. In effect, the rule moves toward the idea of auction or having judges choose the attorney. This will have a chilling effect on having cases brought. It will be "virtually a wide open invitation to law firms who have nothing to do with the development of the case to step forward and claim to be more appropriate counsel by virtue of prior experience." The protection that litigation provides to consumers is due largely to the new theories developed by creative lawyers, but the new rule will discourage such attorneys from pursuing their theories because somebody else may commandeer the case. There could be a "feeding frenzy" and it will lead to "cherry picking." The proposal would be all right if there are genuinely competing counsel, but if there is just one lawyer and nobody else has come forward, the court should only analyze the adequacy of that lawyer and not look to a competitive situation.

Walter Andrews, D.C. Hg. (pp. 276-93) & 01-CV-036: The appointment rule is a good idea, but only when there is genuine competition for the position. Otherwise, it may have a negative effect on case management and efficiency and seems unnecessary.

Hon. William Alsup (N.D. Cal.), 01-CV-004: Having worked hard on at least six class actions over the last 26 months of my tenure as a district judge, I wholeheartedly support the proposed Rule 23 revisions.

American Insurance Association, 01-CV-022: AIA finds merit in the competing arguments as to whether courts should encourage a competitive appointment process for all class actions (which might ensure more reasonable fee arrangements), or only for potential conflict situations (e.g., existing competition for leadership among multiple counsel to represent the same classes). Regardless of which proposal is adopted, AIA believes that the amendments should provide guidance as to how counsel "vacancies" will be advertised, and how the costs will be borne.

Patrick Lysaught (Defense Research Inst.) 01-CV-033, 01-CV-034,01-CV-046,01-CV-047: The proposed rule makes sense in that it is inconceivable that a class can exist, discovery can be pursued, the matter tried, a settlement negotiated, and the objectives of the case generally pursued unless and until there is an attorney or law firm appointed to represent the interest of the class members.

Prof. Charles Silver, 01-CV-048: I am strongly opposed to any effort to foster competition for class counsel, for there really is no analogue in the private market. Rule 23 should instead attempt to promote a referral market in class actions by encouraging deficient lawyers to transfer cases to better lawyers. Fee-sharing arrangements, or other agreements that foster this sort of activity, should be promoted.

David Hudson, Chair, Court Advisory Committee, U.S. Dist. Ct., S.D. Ga., 01-CV-053: The Committee opposes the proposed rule that would mandate the trial court to appoint class counsel in every case. There is no need to mandate court involvement in the relationship between the named plaintiffs and their counsel who file the case. The proper role for the court is as now provided in Rule 23(a)(4) to satisfy itself that "the representative party will fairly and adequately protect the interest of the class." Courts already take into account the factors listed in the proposed rule. The proposed rule is an invitation for ancillary proceedings between groups of lawyers seeking the trial court's appointment, and an apparently unnecessary restriction on the discretion of the court under current Rule 23(a)(4).

Gregory Joseph, Amer. Coll. of Trial Lawyers Comm. on Federal Civil Procedure, 01-CV-055: We are aware that the proposed amendment to Rule 23(g) is consistent with the use of auctions, and express no view on the auction mechanism but do agree that Rule 23 should be broad enough to encompass it.

Edwin Wesely, Chair, Comm. on Civil Lit., E.D.N.Y., 01-CV-056: The Committee opposes this provision. Unlike most of the Rule 23 changes, this would effect significant changes in class action practice and represents a definite tilt toward selection of class counsel through competitive bidding. The Committee believes that approach is unwise for several reasons. It is premature for the drafters to endorse the activist bidding model embraced by Judge Kaplan in In re Auction House Antitrust Litig., 197 F.R.D. 71 (S.D.N.Y. 2000). The bidding model could create conflicts of interest for the court by thrusting upon it an inappropriate mixture of roles -- neutral arbiter on the one hand and litigation strategist on the other hand.

Federal Magistrate Judges Assoc. Standing Rules Committee, 01-CV-057: The FMJA Rules Committee supports the proposed changes to Rule 23.

David Rubenstein, President, Virginia Project for Social Policy and Law, Inc., 01-CV-063: Opposes the Rule 23(g) proposal. It is totally unworkable to have the court appoint counsel, for no attorney or firm will go to the trouble to develop a class action if there is a significant chance that the court will not appoint him or her class counsel. Worthy cases involving possible injuries to the public therefore will not be developed or filed. The present rule, which allows the court to decline to certify the class if it has doubts about counsel's adequacy, is sufficient. In addition, because class counsel may not have a preexisting relationship with the class plaintiffs, this proposal interferes with the attorney-client relationship. The class plaintiffs may even disapprove of the court's choice, and this would jeopardize the ability of the class action "team" (lawyers and plaintiffs) to work best in combination for the protection of the class. Moreover, the court will be in the business of "bidding" cases in seeking the appointment of class counsel. This will put the court in the position of evaluating the abilities of one attorney or firm against another. The court will have to consider the merits of the case and other difficulties in its litigation, before any motion to certify is filed, based on "bids" submitted by some firms who have not been connected with the filing of the action. By selecting the firm appointed as class counsel, the court is not only certifying that counsel is adequate, as required under the current rule, but also that it is best suited to handle the case, even though the court cannot fully understand the case at this early stage of the litigation. The court should not interfere with the work of putative class action attorneys, or with their relations with their clients,

and should not be in a position of asserting that one firm is best to handle a case without a full review of the claims and assessment of the case.

Allen Black, 01-CV-064: In general, I support an amendment to address the appointment of class counsel in Rule 23. I also support the notion that price should be one among many factors considered by the court in appointing class counsel (and not the primary factor).

Thomas Moreland, A.B.C.N.Y. Federal Courts Committee, 01-CV-071: We believe that this proposed rule would unnecessarily interfere with the attorney-client relationship. Counsel who had no role in the investigation or initiation of the case could seek to impose themselves upon a representative plaintiff or class simply because they have prior experience in handling class actions and the ability to devote significant resources to the case. This procedure can therefore go beyond any current rule. In most cases, selection of counsel should be made in the first instance by the plaintiff who has developed a relationship with counsel. There is nothing more central to the adversary process than this relationship.

Robert McCallum, Jr., U.S. Dep't of Justice, 01-CV-073: The Department supports the Committee's conclusion that the amended Rule should describe the role of class counsel and procedures for resolving attorney fee awards.

Washington Legal Foundation, 01-CV-082: WLF has no objections to Rule 23(g). It might actually represent a slight improvement in the way federal class actions are litigated.

ABA Sections of Antitrust Law and of Litigation, 01-CV-069: The provisions concerning appointment of counsel are the most controversial amendments proposed for Rule 23. Nonetheless, on balance we believe that the district courts must have a role in the appointment of counsel for a putative class, and that the rules should provide guidance on how district courts are to perform that role. We agree that the courts owe a duty to the members of the classes that they have created to police this atypical attorney-client relationship to ensure that class counsel "fairly and adequately represent the interests of the class." For this reason, we support the proposal to add Rule 23(g)(1). But we have not reached consensus on Rule 23(g)(2). We note the apparent emphasis on the proposed terms for cost and attorney fee awards in the procedure for selecting counsel. The Note predicts that information about costs and fees will "frequently" be useful to the court. We are concerned that district courts may read the proposed rule and Note together as endorsing auctions as the preferred or only method for selecting class counsel. But the best analysis of the auction process -- the Third Circuit Task Force report -- recommends that bidding should be not be used in the typical case.

Alliance of American Insurers, 01-CV-068: The Alliance supports adoption of Rule 23(g) because it might cause competing plaintiffs' counsel to fight matters out between themselves and the judge, rather than putting defendants in the middle.

Nat. Ass'n of Protection & Advocacy Systems, 01-CV-077: NAPAS strenuously objects to the attorney appointment rule. The proposed rule creates an application process which invites competition in every single class action. Although this may have merit in some areas such as

product liability or securities, it invites disaster in the context of civil rights class action litigation. Except for a few notable large Title VII employment discrimination class actions, civil rights litigation is generally brought by small practitioners, legal service organizations or public interest law firms. In a competitive process, such small firms will undoubtedly lose out to larger firms which generally will have available more extensive resources to commit to the case. This will lead to something like ambulance chasing and cause a "radical change." Unscrupulous counsel in search of a share of the damages pot need only wait in the wings to learn of the class action, and then file an application to serve as class counsel. Theoretically, the courts could scrutinize such applications, but this would not improve the quality of class counsel in class actions.

National Treasury Employees Union, 01-CV-078: The rule seeks to promote competitive applications, particularly in proposed Rule 26(b)(2)(A). This would subject counsel to a pure bidding process that will sometimes lead to selection of poor class counsel based on the lowest bid rather than on more dispositive factors. The most important and necessary aspect is that counsel be able to fairly and adequately protect the interests of the class. Appointment of class counsel based on the lowest bid will not always foster this purpose, as appointed counsel could then have an incentive to settle the case as quickly as possible, perhaps on less favorable terms than could otherwise be obtained. Having the judge approve the fee award adequately protects against excessive fees.

David Williams, 01-CV-079: Requiring that the courts always appoint class counsel may be an unwise nationwide experiment. Courts can already choose class counsel when there are multiple counsel pursuing the same or parallel actions. The amendment would go beyond that and require that the court always appoint class counsel. It is suggested that various counsel should bid for the case, but there are no objective criteria for determining the winning bids, or other procedures to dilute the judge's personal preferences. This may create an appearance of patronage. Also, the rule should require that the order appointing class counsel include provision for the compensation of the filing attorneys if they are not appointed class counsel. Otherwise, they are expected to undertake the substantial work of investigating and filing the suit without any provision for payment.

Mehri & Skalet, 01-CV-083: The Committee may be acting appropriately in codifying existing law, but it is creating serious potential problems when it seeks to go beyond current law and practice. The rule's proposed requirement that class counsel fairly and adequately represent the class, and criteria for selection of counsel, are appropriate codifications of the implicit authority courts have to protect the interests of the class. The Note also provides a sound explanation of the role of class counsel and class counsel's relationship to class members. The problem comes in the Committee's apparent enthusiasm for, and encouragement of, competition for class counsel, and the use of competitive bidding. When one attorney puts time and money into developing a case, another could often offer a cheaper "rate" because he or she would be able to avoid these up front costs.

Federal Trade Commission, 01-CV-085: Rule 23(g)(2) recognizes the possibility of competition for class counsel. The Commission supports this provision and believes that competition should be encouraged whenever appropriate. Competition enhances the incentives of class counsel to obtain the best possible outcome for injured class members, and is also likely to encourage class counsel

to offer more favorable fee arrangements. We recommend that reference to use of a competitive application process be moved from the Note to a similar exhortation in the text of the rule.

W.D. Mich. Committee on Rules of Practice, 01-CV-090: "[T]he introduction of a class counsel appointment process for all class actions equates the appointment of the counsel to a barnyard auction that invites a parade of horribles and in the process will further erode the integrity of the legal profession in the eyes of the public to be served." The current method of choosing the class lawyer is not broken, and the amendment proposes instead a "best bid" concept that will reflect poorly on a profession already under fire. It creates an auctioneer atmosphere and lets the judge exercise his discretion to choose among the lawyers in appointing class counsel. This could lead to arbitrary appointments that will produce yet another topic for appellate review. It will also interfere with the ability of the victimized class representative to select counsel of his or her choice, subject only to a determination by the court that counsel is suitable to represent the other members of the class. The result will be to deter lawyers who are not "big players" in class action practice from offering representation to victimized plaintiffs.

Lawyers' Committee for Civil Rights Under Law (and 16 other groups), 01-CV-091: This proposal for having the court appoint class counsel in every case is unwarranted and will have the inevitable effect of deterring attorneys from considering the investigation and commencement of class actions where that substantial investment of time and resources could be forfeited to a late arriving contestant for the position of class counsel. (Note that, at p. 19, the statement also observes that "[c]ivil rights enforcement cases do not, for the most part, present an economically appetizing opportunity for lawyers," and cites "the general absence of economic competition among lawyers for the opportunity to prosecute civil rights class actions.") This proposal will intrude into the attorney-client relationship and create additional proceedings that will delay certification and the resolution of the merits. The reference to consideration of fees in connection with appointment introduces the suggestion that it could be made on the basis of the "lowest bidder," a result that will surely be sought by defendants in fee-shifting cases. The existing standards under Rule 23(a)(4) that look to the qualification of counsel in determining adequacy of representation are sufficient.

Nat. Assoc. of Securities & Commer. Law Attys & Comm. to Support the Antitrust Laws, 01-CV-093: This proposal seeks to graft onto the rest of class actions jurisprudence a practice that is fundamentally at odds with the "empowered plaintiff" model Congress embraced in the PSLRA. Indeed, the proposal does not even refer to the plaintiff, let alone assign him or her any role in retention of counsel or management of the litigation. The Note also says that attorneys who have not even filed a case on behalf of any plaintiff may make an application to be appointed lead counsel, and that class counsel should report to the court, not the class representative. This can be seen as a radical departure from the traditional role and responsibilities of the court. It is dubious whether judges should be making such judgments for the class, as opposed to protecting against bad decisions on such matters. Rather than risking distorting the separate roles played by the court and other fiduciaries, it might be better to find out if a rule can be designed for all class actions that would focus on the attributes of the plaintiff. Leaving things to the judge invites favoritism by the court, for judges may in some instances tend to favor firms with which they are familiar. By asking the judge to attend to such things as whether there is overstaffing, the rule asks the judge to become involved in strategic decisions commonly made by plaintiffs and their counsel. This invites "the type

of bureaucratic micro-management of markets that have given command economies a bad name." Although the Note is silent on the merits of attorney auctions, given the structure of the proposed rule the issue whether those would be a healthy development cannot be so neatly sidestepped.

David Piell, 01-CV-094: Proposed Rule 23(g) is making a rule out of something judges can already do. While the bidding system has worked for some of the judges who have tried it, inclusion in the rule, optional as it may be, will no doubt increase the pressure on judges to use that approach. Nowhere in the rule or comments does it state how the instigating attorney is to be compensated for investigation expenses and other costs incurred up to the point where other class counsel is selected. The solution to this problem -- having successful counsel pay reasonable fees and expenses after winning the bidding process -- is also problematic for it would create additional champerty.

Steven Gregory, 01-CV-096: Rule 23(g) would serve to enhance the reputations of, and enrich, large national class-action law firms while chilling the ability of smaller law firms to file and prosecute class action cases. It would thereby reduce the pool of qualified, experienced, and competent class counsel in the U.S. "It shocks me that such a radical change in Rule 23 would be considered by the committee as it runs directly counter to the egalitarian spirit of government in the United States." Moreover, the rule could leave the plaintiff represented by a lawyer who is a stranger.

Prof. Howard Erichson, 01-CV-097: This is "a modest package of proposals." But I worry that this proposal assumes a certain model of class litigation, typical of securities, mass torts, and other high-stakes litigation, in which the potential rewards generate duplicative or overlapping class actions with plenty of interested lawyers. Faced with multiple firms seeking to represent essentially the same class, a court naturally must appoint lead counsel for the class. Surely there are class actions in which the monetary stakes are not so high, for example in civil rights or other areas of public interest litigation. If a single class action is filed by a class representative and his or her lawyer or public interest organization, rather than competing class actions filed by multiple firms, the court's role should be to assess the adequacy of both the class representative and class counsel in deciding whether to certify the class. I do not see the advantage of codifying judicial appointment of counsel as part of basic class action procedure applicable whether or not there are competing class actions. I worry that proposed Rule 23(g) would encourage courts to seek counsel applications even in cases where justice would be better served with a simple determination of adequacy. My objection is not to the word "appoint" but rather to the implicit expectation that in every class action judges will take open applications for the role of class counsel. The rule could instead require a court to appoint class counsel in every case, so long as it makes clear that in the non-multiple class action scenario the appointment process should generally be limited to an assessment of counsel's adequacy under Rule 23(a)(4).

Assoc. of Trial Lawyers of America, 01-CV-098: ATLA supports healthy competition in legal services, but it is important that a small group of law firms not come to dominate class action practice in the federal courts. The rule poses dangers. Overly aggressive competition for class counsel appointment can work to the detriment of the class. Lawyers may seek to "poach" cases initially investigated, researched and filed by other attorneys. Something like that can happen today,

but the rule would seem to encourage it. There is also a risk of collusion; the defendant may encourage more tractable lawyers to apply for the class counsel position. A third danger is favoritism; lawyers who frequently handle class actions could seek to develop relationships with judges which would position them to receive appointments for which they were not well-suited. Auctions, in particular, pose considerable risks.

Rule 23(g)(1)(A)

Conference: The exclusion of cases in which a statute provides otherwise is not needed. There is no conflict between Rule 23 and the PSLRA. Under the statute, the lead plaintiff nominates class counsel, but appointment is by the court and consistent with the requirements of Rule 23. If there is a difference between the statute and the proposed amendment to the rule, it is that the rule provides a different time line in (2)(A).

Conference: The Note uses the term "lead counsel" for designations before class certification. In some ways, the Note seems to refer to "temporary" or "interim" class counsel, which is not exactly the same. So with "liaison counsel," another term used in the Note. It is important to be careful about terms. Perhaps the term "class counsel" should be defined more precisely in the Note.

Conference: There is an interrelation between the Manual for Complex Litigation and this proposed rule. Nothing in the Manual really defines lead or liaison counsel. Practitioners know what these terms mean.

Conference: Counsel may also organize using an "executive committee," and courts will usually accept a lot of leeway in describing leadership arrangements. This is important; the politics of the class-action bar are involved.

Conference: For these purposes, lead and liaison counsel are just subsets of class counsel, perhaps with different responsibilities. There is often a blending of types of cases, with MDL cases, individual mass tort claims, and class actions all gathered together.

Conference: Another term that has been used to cover all these situations is "common benefit lawyer."

Conference: The court's role is less important when there is a potentially "empowered plaintiff" to take real responsibility for the selection of counsel. The PSLRA learning is that entities like institutional investors can be trusted to do a good job. But that would not be true in mass tort cases.

Conference: This question of "empowered plaintiff" focuses in part on the exclusion in the rule for cases in which a statute directs otherwise. Antitrust, intellectual property, and other types of cases hold potential for action by an empowered plaintiff. But in consumer and mass tort cases, that would not be so. This is where the factor of client input can be considered.

Conference: In the real world, you could say there are sophisticated players out there in many areas. For example, there are consumer groups. I don't believe that an injured plaintiff has to choose class counsel. Leave it to the judge. Even in the securities class action situation, what really happens is that attorneys hustle state attorneys general and pension funds. With consumers, one could round up thousands of them to aggregate the largest group and get the lead position.

Norman Chachkin (NAACP), D.C. Hg. (pp. 84-104) & 01-CV-051: For civil rights and employment discrimination suits, this additional step is unnecessary and creates a disincentive to pursue class discovery and the risk of inappropriate interference by the court (and possibly defense counsel) with the selection of plaintiffs' counsel.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: Because Rule 23(g)(1) really adds little to current practice, we question the need for it. The Note, however, says that class counsel must be appointed for each subclass when the court subclasses. That should be in the rule itself; unfortunately, courts do not routinely appoint separate sub-class counsel, and when they do they don't insist that counsel for the different sub-classes be truly independent of each other.

Rule 23(g)(1)(B)

Conference: There are state rules of professional responsibility that address questions of proper fees, fiduciary duties to clients, and selection of counsel. Rule 23(g) may depart from some of these rules in some ways. There is a sense in which the rule creates a separate track for class counsel.

Conference: The invocation of a duty to the class as a whole is sufficient to draw attention to the need to scrutinize the arrangements made by class counsel.

Conference: The discussion of the relationship with ordinary professional responsibility directives is a bit troubling. It is not clear what should be done about conflicts of interest.

Conference: The draft rule does not address conflicts of interest. The Note is not clear, and perhaps the Committee should figure out whether it means to tolerate conflicts of interest that would otherwise require disqualification.

Conference: The Note statement is important and should be retained. It provides a good discussion, and the cases discussed show why analysis of conflicts cannot be exactly the same in class actions as in other cases.

Conference: It is dangerous to say, as the Note does, that individual class members cannot insist on the "complete fealty" of class counsel. The Note should say instead that the duty is owed to the entire class, not to individual class members.

Mary Alexander, S.F. Hg. (pp. 55-73) & 01-CV-016 (president-elect of ATLA, presenting its position): We support the notion that class action counsel must adequately and fairly represent the

interests of the class, but emphasize that individual interests are paramount. The federal courts should not, however, intrude into the area of attorney discipline, which belongs with the state court.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: Here again, the rule itself states a noncontroversial and accepted proposition, so that there seems no reason to adopt it. The key point is the Note, which explains that counsel's duties run to the class as a whole, not to the class representatives. The observation that the class representative cannot approve or disapprove a settlement should be in the rule, along perhaps with the statement that the representative cannot "fire" class counsel.

Leslie Brueckner (TLPJ), D.C. Hg. (pp. 148-61) & 01-CV-020: TLPJ has no objection to Rule 23(g)(1), which merely codifies the courts' current authority to appoint class counsel at the time of class certification and class counsel's existing obligation to fairly and adequately represent the interests of the class.

Prof. Charles Silver, 01-CV-048: This relies on a dangerous fiction. A class has no interest apart from the interests of individual class members. I do not see the point of pretending otherwise. If what is meant is that class counsel should pursue the shared interest in maximizing claim values, than the Note should say that. The lawyer cannot represent the "best interests of the class." All that should be done is to make the point that the usual conflict of interest rules do not apply to class counsel, who must instead be governed by due process principles that allow many trade-offs.

Allen Black, 01-CV-064: The discussion starting at the bottom of page 72 and going over page 73 of the Note concerning the relationship between class counsel and absent class members is very important, and should be kept in the Note as the revision process goes forward.

Keith Johnson, Chief Legal Counsel, St. of Wis. Invest. Bd., 01-CV-066: Establishing an explicit standard that class counsel must fairly and adequately represent the class is a positive step. SWIB strongly supports this provision, which will underscore the fiduciary obligations that class counsel owe to the class.

David Williams, 01-CV-079: The proposed rule sets an improperly low floor as to the obligation of class counsel. It echoes the standard for judging whether a class action settlement is within the bounds of reasonableness. Shouldn't representation of a class be better than merely "fair and adequate"?

Rule 23(g)(2)(A)

Conference: The question of timing seems key, but there is really no problem. You can have class counsel before class certification. You can also have the court appoint, or the court designate, lead counsel during that pre-certification period. The key point is that there must be somebody recognized as authorized to do the job that needs to be done before certification. The court should appoint lead or liaison counsel as soon as possible, but usually that can be resolved by agreement of

the attorneys and the court need not tarry long over the question. Perhaps it would be best to recognize a position of "interim class counsel."

Conference: The rule should include the statement on page 74 of the Note that counsel appointed as lead counsel before class certification has preliminary authority to act for the class, even if not to bind the class.

Jocelyn Larkin (the Impact Fund), S.F. Hg. (pp. 139-56) & 01-CV-012: Under the proposed rule, the lawyer who files the case cannot act on behalf of the class without an order from the court. This will invite defendants to communicate improperly with class members because they are not represented by counsel, and will cause a three to six-month delay before counsel can start doing class certification discovery.

John Beisner, D.C. Hg. (pp. 7-21) & 01-CV-027: If this amendment is adopted, the rule needs to be clearer on the timing question, with more precise guidance about when counsel appointments should be made. Either the appointment should occur near the outset of the litigation or it should occur at the time the class is certified. The appointment should not be made in the middle of the class certification process.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: The Note says that ordinarily the court "should" allow a reasonable time for applications. This is odd. Since the rule is entirely discretionary, it is peculiar for the Note to adopt a tone of command. Then the Note says this normal attitude should not prevail when there is already a settlement at the time the case is settled. If competition is the goal, this seems backward. If there is ever a case where it makes sense to allow competing counsel to try to show that they can get better results, the one in which the lawyers who filed the case have already made a deal with the defendants seems to be the prototype. The suggestion that auctions may be advisable is too open-ended and premature. Auctions make sense only in a relatively few cases; usually the lawyers don't know enough to bid intelligently. Moreover, the Committee should give weight to the Third Circuit Task Force report on the advisability of auctions.

David Romine, D.C. Hg. (pp. 242-62) & 01-CV-49: Appointment of class counsel should be done much earlier than the time of class certification because you need class counsel to represent the class at the time they're getting the discovery to put together the class certification motion. In the MDL setting, this has worked under various titles -- lead counsel, class counsel, liaison counsel -- and everybody knows what's going on. Something like that is necessary so that person or firm can coordinate the discovery that's needed for certification. Once that is done, moreover, there should not be a two-step approach in which the question of appointment of class counsel is reopened later. The initial appointment should be final.

Ira Rheingold (Exec. Director, Nat. Assoc. of Consumer Advocates), D.C. Hg. (pp. 262-76): There is a danger in moving toward formalizing the way in which the selection of class counsel is done at an early point. Usually as things are done now the lead attorney is called putative class counsel or lead counsel, and the case simply moves forward.

Walter Andrews, D.C. Hg. (pp. 276-93) & 01-CV-036: The provision on appointment of counsel is a good idea, but the appointment should be done only at the time of class certification. To appoint class counsel at the outset of the litigation or during the limited certification discovery period would unnecessarily impose on defendants the burden of dealing with and responding to shifting certification theories and discovery requests. This is consistent with good case management practices. There should be no problem with defendants saying that discovery is limited to the named plaintiff until the case is certified unless counsel are designated "class counsel." Usually courts are pretty open about formal recognition of the plaintiffs' lawyer during the pre-certification situation.

Patrick Lysaught (Defense Research Inst.) 01-CV-033, 01-CV-034,01-CV-046,01-CV-047: It is important to recognize the need to designate a lawyer to act on behalf of the class before certification is decided. Class certification is a critical part of the process, and it more often than not makes sense to appoint counsel to manage the issues on behalf of the proposed class as lead counsel or "conditional class counsel." It should be made clear that the rule does not mean that class counsel is to be selected only after certification of the class. In most cases, appointment for some purposes needs to be made so that discovery and other precertification issues can be managed. A two-step process for appointment may be the best approach, and the Note should more clearly reflect this administrative need.

Prof. Charles Silver, 01-CV-048: "I strongly dissent from this proposal to 'allow a reasonable period after the commencement of the action for attorneys seeking appointment as class counsel to apply.' Anything this proposal might accomplish could be handled better by encouraging attorneys to refer class actions to better lawyers or to bring better lawyers into these cases."

Allen Black, 01-CV-064: As a practical matter, class or lead counsel must be appointed well before class certification in order to coordinate strategy, discovery, briefing, and argument of the class certification motion. That can be the most important aspect of the litigation from the perspective of the class. One way to make this clear is to add the following to Rule 23(g)(2)(A): "As soon as practicable after the commencement of an action pleaded as a class action, the court shall appoint class counsel to manage the litigation on behalf of the putative class." If that were done, the Note should explain that "as soon as practicable" is intended to allow sufficient time (a) to see what other similar or overlapping actions may be filed, and for action by the JPML if appropriate, and (b) to allow attorneys seeking appointment as class counsel to apply. Another way to deal with the problem would be to say in Rule 23(g)(2)(A) that the court should deal with the appointment of class counsel at an early conference under Rule 16. I do not like the example given at p. 76 of the Note about when the court should not defer appointment of class counsel for time for competing applicants. In my view, the circumstances described -- where one plaintiff's lawyer has negotiated a settlement so quickly as to have something in place prior to the counsel appointment process -- is inherently suspicious as a possibly sweetheart deal. In that sort of situation, the court should want to get the views of competing counsel before acting.

Thomas Moreland, A.B.C.N.Y. Federal Courts Committee, 01-CV-071: Many of the factors enumerated in the proposed rule already are factors which the courts must consider in deciding motions for class certification. But the proposed rule contemplates that courts must evaluate some of these issues prior to the motion for class certification. For example, the requirement that the court

entertain applications to be class counsel within "a reasonable period after the commencement of the action" certainly would mandate selection of class counsel prior to the filing of a motion for class certification. Accordingly, the court would be forced to determine who appropriate class counsel is before any discovery on certification. Such a procedure would deny the court a full record and could foreclose an argument by defense counsel that class certification should be denied due to the inadequacy of class counsel.

ABA Sections of Antitrust Law and of Litigation, 01-CV-069: The proposed rule is inappropriately silent on the timing of the appointment procedure. The Note compounds the problem, implying that the appointment should occur at certification. Counsel competing to be class counsel cannot be expected to cooperate in the class certification proceedings. The language in the Note about interim designation of lead counsel seems destined to add another layer of delay in an already complex process. Modification of this provision, perhaps as part of an expansion of Rule 23(c)(1) to require a pre-certification scheduling order, is necessary to clarify that if an appointment procedure is deemed appropriate, then it should occur first and quickly so that plaintiff counsel is appointed to handle the case. In the civil rights arena particularly, class action practitioners on the plaintiff side express well-founded concerns about the inevitable delay that will result from the application procedure, even when there are no competing applications. These practitioners correctly point out that in all but the largest civil rights cases, the issue typically is too few lawyers seeking to become class counsel, not too many of them. There is also a significant chance that satellite litigation over counsel appointment will exacerbate the delay and divert resources that would benefit the class more if instead devoted to prosecuting the case. The proposed Note indicating that the appointment of counsel would ordinarily be subject to an appeal under Rule 23(f) heightens these practitioners' concerns. We suggest that the rule give the district court discretion to dispense with the application procedure altogether in appropriate cases. As the Note is now written, it appears to limit the occasions on which a district court should forgo the application process to cases in which a proposed settlement has been negotiated prior to the filing of the action. We believe that an application procedure is unnecessary in cases in which it is unlikely that there would be competing applicants to serve as putative class counsel, such as civil rights cases seeking primarily injunctive and declaratory relief. The urgency of the relief sought should also be a factor in determining whether to dispense with the application process to avoid delaying the progress of the action.

David Piell, 01-CV-094: There are severe timing problems. The Note says that usually the court should defer selecting class counsel until there is time to apply, but adds that this need not be done if the parties have already reached a settlement. That is the worst time to protect against competition. "Defendants never settle for a reasonable amount prior to filing of the action, let alone certification of a class." Moreover, accepting applications for the class counsel position during the pendency of the class certification motion would be a waste of the court's time since we don't know then whether the class will be certified. Potential applicants then have no idea of the class's size and other requirements, and they will accordingly be prone to place bids high enough to prevent them from losing money in all but the rarest of cases.

Rule 23(g)(2)(B)

Conference: There is nothing wrong with the specified criteria, and they do provide guidance. But the list might be too confining. For example, it might also include absence of conflicts, the existence of side agreements, the relationships counsel have with class members and possible conflicts that could result from those. For instance, the problem of "play to pay" may be important when potential lead plaintiffs hold political office. Because no list can do it all, it probably would be better to make a more general statement in the rule saying that the court should ensure that class counsel can fairly and adequately represent the class.

Conference: I'm opposed to specificity. This is like the Sentencing Guidelines. The class is like a ward of the court, and the rule should not confine judges.

Conference: The attempt to identify specific factors may unduly emphasize those factors. There should be room for the law to grow. The factors that are important depend partly on the type of case that is involved. Focusing on fee arrangements and experience are more important in some areas than others. "Client empowerment" is also important.

Conference: The draft has advantages. Not all judges have lots of class-action experience, and an essentially standardless rule would not provide assistance or guidance to them. Perhaps it would be better to add more factors, such as the "expertise" of the applicant, the absence of conflicts, and fee arrangements.

Conference: An appellate court judge asked whether the draft rule is written to be enforced by appellate courts. The authorization to consider whatever other topics seem important provides authority that would be hard to police on appeal. The more specific the rule, the more it might be invoked on appeal. It is not clear if the relationship between appointment and class certification would support an appeal of the appointment issue alone, and it does not seem likely that the courts of appeals will be eager to review orders appointing class counsel.

Conference: Regarding the choice between the Rule and the Note for given topics, it is troubling that sometimes courts don't fully explain their selection of class counsel. Perhaps the Rule should require findings, and the Note should mention the types of topics that might be addressed in findings.

Conference: The last sentence on p. 80 says that the district court should ensure that there is an adequate record of the basis for the selection of class counsel. That should be moved into the rule.

Conference: If there is concern about putting a wedge between client and counsel, is that different from the determination under Rule 23(a)(4) that a given proposed class representative is not satisfactory because counsel has drawbacks? Won't that also drive a wedge between counsel and client? Is the amendment meant to divide the inquiry, so that (a)(4) looks at the client and (g) the attorney? Then does this magnify the risk of this sort of wedge?

Conference: Regarding consortiums of counsel, the question looks to the same issue whether the objective is to select "adequate" counsel or "the best" attorneys. If some lawyer is selected, why should that lawyer be forbidden to farm out work in a responsible way? It is impracticable to rule out the possibility of consortium activity. Requiring that each lawyer be individually appointed creates risks. Even ruling a consortium out may simply push the arrangement under ground, as the lawyers "make deals" anyway.

Conference: Often there will be chaos on the plaintiffs' side unless there is a consortium. The plaintiffs' bar has become much more sophisticated at working out these issues, and so have judges. There never is a real problem of involving too many lawyers, because the judge can control it later by rationing attorney fees. The newcomer or "little guy" therefore gets a chance.

Conference: In the real world, the consortium issue never presents a problem. There is plenty in the Manual for Complex Litigation to provide direction for the court on these matters.

Conference: Side agreements are an important factor, but it should not be in the rule as a mandatory criterion. Caselaw will adequately cover these issues.

Conference: There is a need to encourage lawyers who have clients to take them to lawyers who are best able to represent them. It is important to ensure therefore that the class is represented by good lawyers, who can bear the risk of investing heavily in developing a case that may fizzle out.

Conference: This attorney's experience from the defense side with over 200 class actions in the last two years alone has failed to show even one in which a client sought out class-action counsel. There are two worlds of class actions. One involves claims with real clients who actually oversee the litigation. But matters are different in the other world, from which these 200 cases were drawn. These cases are developed by lawyers, sometimes working in teams. They may even have a syndicate agreement. He has seen one that designated two lawyer members of the group as responsible for hiring clients. Part of the problem in this world is that there is no real client.

Conference: The requirement of making findings and conclusions should apply both in Rule 23(g) and Rule 23(h) (which does have such a requirement).

Barry Himmelstein, S.F. Hg. (pp.15-30) & 01-CV-008: In assessing the resources that proposed class counsel will commit to the action, it is important to appreciate that the economics are vastly different for plaintiff and defense lawyers. Often defendants are represented by several law firms that have hundreds of lawyers each, billing monthly and being paid regularly. Our firm, at 64 lawyers, is one of the largest plaintiffs' class action firms in the nation, but as a defense firm it would be considered small. The court should be on the alert to whether the firm seeking appointment has committed too much to the suit. "A firm that must commit too much of its resources to a single case in order to staff it properly cannot afford *not* to settle it -- a fact not lost on defense counsel." Counsel should therefore be free to associate other counsel. Flexibility is important, and even if a single firm is appointed after competition for the position the court should not necessarily look

askance at cooperation among those who formerly competed for the position. The Note is not insensitive to these concerns, but could stand to be amplified on these points.

Mary Alexander, S.F. Hg. (pp. 55-73) & 01-CV-016 (president-elect of ATLA, presenting its position): The selection of the attorney for the class should not be influenced by the fee-related matters alluded to in proposed 23(b)(2)(B) and (C). The critical thing is that parties are represented by lawyers whom they know and trust.

James Finberg, S.F. Hg. (pp. 104-05): In employment discrimination cases, the amount of pre-filing work that is involved means that lawyers will insist on more security that they will indeed have a role in the case than in securities litigation. For example, in the Home Depot gender discrimination case on which he worked, his firm sent legal assistants to hundreds of stores to take counts of what gender workers were and what positions they held. They also interviewed hundreds of witnesses before filing the case. Throwing that type of case open to auction might discourage people from putting that type of investment up front. That is particularly significant because there are fewer qualified firms for that sort of case than in the securities area, so there is simply less of a market.

James Sturdevant, S.F. Hg. (pp. 120-29): The appointment criteria could deter the filing of statewide or nationwide consumer class actions by small firms, particularly those without "overwhelming resources to handle cases." The problem is that at some stage the judge will inquire into the resources and, possibly, invite some sort of bidding process. Then a relative handful of firms in the country will bid, and they will get the cases. Small firms, individual practitioners, and public interest organizations will not have the same incentive to spend the time needed to develop these cases. Judges now inquire into the things listed in proposed (g), and the process already works well without an amendment. The problem comes from the mandatory requirement for the court to consider the resources the attorneys will commit to the case. This requirement can cause serious difficulties in certain types of cases. The current treatment under Rule 23(a)(4) is sufficient. Using the word "must" in proposed (g)(2)(B) creates something different that can cause a problem.

Jocelyn Larkin (the Impact Fund), S.F. Hg. (pp. 139-56) & 01-Cv-012: Based on her experience at the Impact Fund talking to civil rights lawyers from across the country, adequate resources is the number one problem faced by civil rights practitioners. The Fund makes grants that average about $10,000 to support this litigation, but that does not remove the concern. There is no other organization that does the same sort of thing as the Fund. Often those who apply for grants are trying to scrape together $100,000 needed to cover deposition costs and experts. Mr. Sturdevant covered points that concern her. From her standpoint, the current system, keyed to (a)(4), works fine. The proposed rule invites competition and creates the risk that somebody new will step up and claim the fruits of years and years of labor. Even more important, it will threaten to disrupt attorney-client relationships that have developed over years. The trust between clients and lawyers is critical in these cases, for civil rights plaintiffs will not sue unless they really trust their lawyers. In one recent gender discrimination case, for example, a group of class representatives came to the Fund because the lawyers had negotiated what they thought was a bad settlement. The Fund agreed and was able

to substitute in as class counsel. The class representatives there had a very strong interest in what was going on in the litigation and let the Fund know when the lawyers were not doing a good job.

Bill Lann Lee, D.C. Hg. (pp. 21-40) & 01-CV-024: Rather than requiring notice of class certification in (b)(2) class actions, the Committee should reflect on the possibility that the interest in better informing the class may be advanced through proposed Rule 23(g). The rule authorizes a court to "consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." This might be a place to include in the Note discussion of the issue of communications with the class, but stressing the need in some cases to ensure possible participation in the case by class members.

Judith Resnik, D.C. Hg. (pp. 58-75) & 01-CV-044: Not all class actions require displacement of litigant choice. The way the rule is currently drafted, it totally ignores that there may be an identifiable plaintiff who has walked into the court with a lawyer, and that no other lawyer is interested in getting near the case. So there should be a presumption in favor of the attorney-client relationship at least in cases of that sort. Perhaps a paradigm of that sort of thing occurs when a public interest organization represents a class concerned about certain matters of common interest. In that sort of case, scrutiny under the current approach using Rule 23(a)(4) should suffice. More generally, litigants should be involved in the selection of the lawyer. The "empowered client" model of the PSLRA may not be a useful transplant in many cases, but thinking about clients is more than appropriate. The rule should require inquiry into what class members want in the way of a lawyer. And the question of fees should be built into the selection process.

Norman Chachkin (NAACP), D.C. Hg. (pp. 84-104) & 01-CV-051: There should be deference to the choice of class counsel made by the class representatives, and also to the work done by counsel in preparing for class certification. But the rule doesn't give any weight to the established relationship between counsel who file the suit and the representative plaintiffs. The Note even says that counsel can't act on behalf of the class until being appointed. This will lead defense counsel to say that discovery must be limited to the circumstances of the named representatives rather than the other class members. Defense counsel might also try to prompt other lawyers to come in and seek to represent the class. "Nor is there anything in the proposed rule that would prevent a district court from selecting counsel other than the filing counsel because of perceived superior trial or settlement experience in complex litigation."

Thomas Allman, D.C. Hg. (pp. 104-115) & 01-CV-026: The proposed rule seems flexible enough to allow for further development of principles to guide appointment. I suggest that one of the criteria for the selection process would be creativity in coordination with overlapping or competing state-court class actions.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: This rule adds something by strongly suggesting that the courts should be more active than they are at present in encouraging bidding for the position of class counsel, either by adoption of a formal bidding process or by encouraging lawyers to file motions seeking appointment even though they did not file the case originally. But the provision is too vague. It does not say whether courts should conduct an auction, or whether the competing lawyers must have class members as clients to qualify. It also does not

say what happens to lawyers who filed the case if they are not appointed to represent the class. Unless that point is addressed, it appears that the court may simply "dump" the lawyers who originally filed the case even though their work might have gotten the case going in important ways. Accordingly, the rule should provide that the initiating lawyer should be paid a fee if the case settles or succeeds after judgment. The Note says that the court may consider side agreements regarding fees, but that is not required. We believe that knowledge of such agreements is critical to an understanding of whether the class will be adequately represented. The cases are split on whether such side agreements must be disclosed in all cases. Although there may be reason to keep such agreements confidential early in the case, at some point (and certainly at the time of settlement), that information must be made public.

Leslie Brueckner (TLPJ), D.C. Hg. (pp. 148-61) & 01-CV-020: TLPJ objects to the appointment procedure because it would interfere with attorney-client relations and could result in increasing monopolization of the class action bar and less innovative litigation by smaller practitioners. The rule appears to authorize a court to appoint as class counsel any lawyer it chooses, without regard to whether the lawyer represents any individual clients. There is simply no justification for auctioning off the role of class counsel to another set of attorneys who had nothing to do with putting the case together and had no prior relationship with the clients who decided to bring the litigation in the first place. The mere risk that an auction might occur may be sufficient to deter small practitioners from taking these cases. Part of her job as a TLPJ staff attorney is to recruit lawyers from across the country to take cases, and she has experience with how they approach the issue of cost when deciding whether to take cases. The emphasis on counsel's experience in handling class actions and the resources committed to the case would work against small or relatively new practitioners. Even the prospect of litigating the class counsel appointment issue would deter prospective counsel. If small practitioners are pushed out of the class action field, fewer innovative actions will be brought. Existing law adequately ensures that the class is properly represented.

David Romine, D.C. Hg. (pp. 242-62) & 01-CV-49: We typically have an attorney-client relationship with the plaintiff when we file a case, and it's troubling to me that some other law firm that does not have a relationship with this person could come along and take that away.

Ira Rheingold (Exec. Director, Nat. Assoc. of Consumer Advocates), D.C. Hg. (pp. 262-76): It is little solace to attorneys contemplating taking innovative consumer litigation to know that one factor -- and the second one, at that -- is the work the individual put into investigating the claim in this case.

Prof. Charles Silver, 01-CV-048: "There should be no investigation into the 'resources counsel will commit to representing the class.' Instead, class counsel should have to demonstrate the financial ability to bear a threshold level of out-of-pocket expenses, e.g., $250,000. Important evidence of this would be the fact of having spent at least this much in a prior litigation."

Patrick Lysaught (Defense Research Inst.) 01-CV-033, 01-CV-034,01-CV-046,01-CV-047: The potential downside of this rule is that courts may exclude from consideration as class counsel attorneys who initiated the proceedings but who do not have the experience, reputation or clout that

a small group of plaintiffs class action lawyers seem to possess. That could well lead to domination of class actions by a limited group of lawyers who, while they may have significant experience in class actions, did not uncover and initiate the claim. The development work that precedes the filing of the initial case should be accorded significant weight in selection of counsel for the class. Appointment should not become either a bidding or beauty contest unrelated to the interests of the class. The perception and very real possibility that class action litigation will be controlled by a few national firms who swoop in and offer their experience as class counsel should be avoided. Greater weight should be accorded to the second factor. The first and third seem to favor the limited group of prominent plaintiff class action firms. One approach would be to create a presumption that the attorney who investigated the underlying facts and initiated the class action should be class counsel, unless there is a showing that this lawyer cannot adequately represent the class.

Gregory Joseph, Amer. Coll. of Trial Lawyers Comm. on Federal Civil Procedure, 01-CV-055: The Committee generally views this proposal favorably. It is concerned, however, that the appointment procedure set forth may contemplate receipt by the judge of ex parte submissions by plaintiffs' counsel that attempt, subtly or otherwise, to spin the merits of the case. Ex parte submissions should not address the merits, except to the extent that is unavoidable. In that event, the court should be encouraged to view the merits submissions with appropriate skepticism. We recommend that, as a matter of principle, only those portions of ex parte submissions that need remain under seal should remain sealed. In our view, any portions of such submissions that address the merits ordinarily would not fall in that category.

Allen Black, 01-CV-064: As presently drafted, the proposed rule would eliminate from consideration any attorney seeking appointment as class counsel who had not previously had appropriate experience. Because the rule as drafted is mandatory, the court would have no choice but to refuse to appoint a "first timer" as class counsel. This is bad policy. A lawyer who is an expert in a substantive field might nevertheless never have handled a class action. If the rule were to focus on "ability" rather than "experience," this problem would be solved. In addition, I think that the Note at p. 79 should add something like the following: "A small firm may be able to organize a consortium of cooperating firms in such a way as to staff the case adequately."

Keith Johnson, Chief Legal Counsel, St. of Wis. Invest. Bd., 01-CV-066: The addition of Rule 23(g)(2)(B) is a positive development. SWIB applauds the authority of courts to direct potential counsel to propose terms for attorney fees and costs, and the reference in the Note to the risk of overstaffing and ungainly counsel structure, the recognition in the Note that competing counsel may join forces to avoid competition rather than to provide needed staffing, the suggestion that the court may require firms to apply separately for the lead counsel role, and the authority of the court to include provisions regarding fees in the order appointing counsel. Because fees are so important, however, we think that considering them should be mandatory rather than optional. In addition, we think that reference to the problem of "pay to play" -- campaign contributions or other financial conflicts that might affect a class representative's selection of counsel -- should be given more specific recognition. The rule and Note do not do enough to recognize the role that the class representative should play in selecting the class lawyer. Some class representatives will engage in a process like any other clients to make a responsible selection, and courts should refrain from unnecessarily interfering with a healthy attorney-client relationship lest they undermine the lead

plaintiff's ability to work well with and effective manage lead counsel. When the class representative has made a responsible choice of class counsel, the courts should defer to that choice.

ABA Sections of Antitrust Law and of Litigation, 01-CV-069: Plaintiff lawyers are understandably concerned about a rule that would permit a court to take a case away from them even though they have invested considerable time and resources to investigate and develop the case. If too many plaintiff lawyers had too many cases taken away from them, the private attorney general function would be seriously undermined. In addition, civil rights practitioners correctly point out that the factors set forth in proposed Rule 23(g)(2)(B) do not require consideration of the existing attorney-client relationship between the filing plaintiff's lawyer and the putative class representatives. Often the named plaintiff is willing to serve as a class representative only because of his or her trust in the lawyer bringing the action. We urge the Committee to add another factor that must be considered -- the existing attorney-client relationship between the putative class representatives and the lawyer who filed the action. On the flip side, defense counsel are understandably concerned that the district judge who delves into the specifics of a case sufficiently to make an informed decision about the appointment of class counsel inevitably will be invested in his or her choice. Some of the references in the Note to ongoing monitoring and ex parte and perhaps sealed communications that could occur between chosen class counsel and the district court are "truly frightening to defendants and their counsel." We believe that these references in the Notes must be deleted because of the unacceptable appearance of partiality such communications will create. We also suggest that the Note be modified to include instead a strong admonition about the need to avoid any actions that might create an appearance of partiality. In many cases, an application procedure will result in healthy competition among candidates wanting to serve as class counsel. We agree that fees and costs properly may be considered during the appointment process in some cases, and recognize that the proposed amendment provides flexibility for the courts to consider the compensation issue. But we suggest that the Note make it clear that the fee structure is only one of the many factors to consider in naming class counsel, and that the primary standard is fair and adequate representation of the class.

Nat. Ass'n of Protection & Advocacy Systems, 01-CV-077: In civil rights actions, it is imperative that class counsel have a close relationship of trust with both the representative plaintiffs and the protected class affected by the lawsuit. Only with counsel familiar with the needs of the protected class can we ensure the drafting of fair and adequate settlements detailing appropriate injunctive relief necessary to remedy civil rights violations. But the application procedure could mean that the individuals who retained counsel to file a class action would find themselves represented by someone entirely different. Counsel competition will deter the small practitioner who, although extremely knowledgeable in the substantive area of the law, may lack the class action experience or resources to qualify under the factors enumerated in the proposed rule. The prospect of litigating the class counsel issue will pose yet another financial barrier that may deter smaller firms from pursuing civil rights class actions. Under existing law, the court is adequately equipped to scrutinize class counsel. Creating the proposed selection procedure invites abuse.

National Treasury Employees Union, 01-CV-078: Two additional factors should also be considered. The first is counsel's relationship to the class. The second is counsel's familiarity with the particular

subject matter of the litigation. For example, union attorneys should be given special consideration for representing their members in class actions because they have a strong incentive for securing a good result for the class given their on-going relationship with the class members.

Mehri & Skalet, 01-CV-083: The proposed rule's criteria for selection of class counsel are appropriate codifications of the implicit authority courts have used to protect the interests of the class.

Beverly Moore, 01-CV-084: The most troublesome situation is where some small, young, but innovative firm has spent much time and money developing a new case, only to find itself ousted by a larger and wealthier firm with a longer track record. The number of times a firm has previously been lead or co-lead counsel will give it an experience leg up in the next lead counsel battle. This will foster an existing trend toward concentration of firms doing this work that could become a permanent feature of class action practice if "lead counsel" becomes a normal thing.

Lawyers' Committee for Civil Rights Under Law (and 16 other groups), 01-CV-091: It is not proper that the choice of counsel can be made without respect to the choice or desires of the representative parties who have taken on the burdens of class litigation, and have sought out and engaged counsel based on the objectives they seek in the litigation and the type of representation and services they expect for the class. Substituting a focus on financial arrangements is not proper.

David Piell, 01-CV-094: There are many unanswered questions. For instance, what role do defense counsel have in advising the court on an applicant's qualifications to be class counsel? What power does a court have to investigate the qualifications of counsel beyond the representations made to it by each applicant? These questions need to be answered before any rule is promulgated. Regarding the factor that looks to counsel's commitment of resources, how can that take account of the possibility that the court will redefine the class during the litigation? And how is counsel to address this question? Perhaps counsel should indicate the percentage of office resources that will be committed, or the number of attorney hours per month. Whatever the answer, this criterion has the effect of freezing out firms not already wealthy from class action practice. The Note says that the court can order a consortium of attorneys to file separate applications. This discriminates against small firms who pool resources to handle these cases. The Committee should consider "the scenario where the consortium of attorneys attempts to circumvent a court order prohibiting consortium bids by forming a firm that only handles this case." On the factor looking to work developing this case, how much weight should the court give to this in selecting counsel? "The Committee needs to recognize the reality that attorneys are usually the ones deciding to pursue claims as a class. Clients do not walk into the attorney's office and say 'I want to file a class action, so that I'll have no control over the litigation, and so that your goal will not be maximizing my recovery but the class's.'"

Rule 23(g)(2)(C)

Conference: It is important not to separate the appointment of class counsel from the fee arrangements, especially in (b)(3) common-fund cases. In most cases for damages, the total recovery is essentially split somehow between class and counsel. Fee terms are therefore central, and should be considered and discussed in every case.

May 20, 2002

Conference: There is a lot of controversy about whether fees should be made a part of the selection process or otherwise considered ex ante. The Third Circuit Task Force Draft Report recognizes some of these tensions. There is room for continuing development; it is too early to bind judges by a rule. Often the judge will confront problems in trying to compare fee arrangements at the outset. But in some cases this activity is important to selecting class counsel. This can be discussed in the Note without putting it into the rule as a mandatory selection criterion.

Conference: Fees should turn on results, not an auction. In an auction, many foolish bids will be made. Lawyers need to make an in camera presentation to the judge in a bidding process. That can be unfair to the defendant.

Conference: The selection should not go to the law bidder, and beauty contests can favor those who can't or don't carry out their impressive representations. There's always somebody who will promise to do good work for less. Judges can too easily read the permissive "may" in a rule as "must."

Conference: As a federal judge, I have "less confidence in the omniscience of federal judges." Making bidding the cornerstone or critical is a mistake. This rule is supposed to be universal, and to apply to class actions that are quite dissimilar to each other. Indeed, many of the considerations expressed in the Note apply equally to securities fraud actions governed by the PSLRA. The Note should make it clear that the same factors weigh in approving the lead plaintiff's choice of counsel under that Act. We should avoid the particulars in the text of the Federal Rules; they belong better in the Note. Those are helpful to both judges and lawyers.

Conference: I suggest that (C) be made mandatory. In ordinary practice, that is essentially what's done with individual representation. The lawyer doesn't tell the client that the fee will be worked out later. Why not do the same in class actions?

Conference: Class counsel have an interest in appointment on terms that set fees in advance. On the defense side, there are beauty contests as well. Why not recognize that clients can and do compare lawyers, and often rely heavily on fee terms once those deemed not good enough are screened out?

Conference: There will be collusion among plaintiff attorneys to avoid beauty contests. Any up-front fee negotiation must contemplate the possibility of back-end revision depending on how events play out.

Conference: Regarding the Note material on monitoring of counsel by the court (pp. 79-80), the Rule and Note are just fine. Periodic reports to the court are possible, but the utility of this activity may vary widely from case to case. Being more specific here would be futile.

Conference: I would distinguish monitoring fees and monitoring lawyering activity. Clearly the PSLRA contemplates monitoring but that is usually to be done by the empowered lead plaintiff.

Conference: Why is the court monitoring only plaintiff's lawyers? Who is monitoring defendant's lawyers? That often drives what plaintiff counsel must do. A sufficient measure of judicial oversight should result from the monitoring that is implicit in Rule 16 supervision of the case, and that applies to all the players.

Conference: Fee setting after the fact is very difficult; it takes a lot of time. We should regulate it in advance to reduce the amount of time required later. We do not want an impression of lawyers fixing fees. For better or worse, "judges are not identified with money." We need the insulation of a rule that gives more guidance: (1) Class action appointment should be in one rule. (2) This rule should cover class-action counsel, and also common-benefit attorneys, lead counsel, and any attorney who confers benefits on the class. (3) Some information about fees should be included in the appointment process to make the after-the-fact chore easier. The judge could require counsel to use computer data-basing whenever fees will be calculated using a lodestar. (4) A schedule for expenses could be set, perhaps by the A.O. as a general matter, regulating such things as fees for copying, hotel charges, and the like. (5) The text of the rule should take account of client concerns; the judge should be described as a fiduciary for the class.

Barry Himmelstein, S.F. Hg. (pp. 15-30) & 01-CV-008: The qualitative aspect of selecting class counsel is really more important than the percentage fee that's awarded. With different lawyers you can end up with a wildly different result; one will get a $100 million settlement, and the other a $25 million settlement. Once a percentage is set at the beginning, however, the court should simply award it at the end, and if the plaintiffs' lawyers get a lot of money that is fine.

Joseph Grundfest, S.F. Hg. (pp. 30-45) & 01-CV-009: Recent experiences in which lead plaintiffs negotiate rates, or in which judges have used auctions, show that the rate that actually obtains is well below the "normal" 30% figure that we hear about. At the end of the case, the courts have an incentive to clear their dockets and not to inquire too deeply into a matter to which no objection has been raised. The best thing would be to have competition at the outset and determine a percentage fee at that point. The court would retain authority to alter the fee at the end, but that authority should not be used very often. The "benchmark" is outdated, and "it's very important to break the back of the benchmark." Maybe, after we have more experience, we will come to a new benchmark. Even if the case "hits gold instead of bedrock," the strong presumption should be against changing the fee later.

James Sturdevant, S.F. Hg. (pp. 120-29): If in a consumer case, the firm that filed the case responds to a request from the court to forecast or estimate fees by saying that it cannot confidently do so, that might prompt a bidding situation. That would be undesirable and a deterrent to firms to take cases in the first instance.

Judith Resnik, D.C. Hg. (pp. 58-75) & 01-CV-044: If the court is to function as a surrogate client, it is odd that consideration of fee arrangements at the appointment stage is not mandatory. At least, arrangements could be considered for recording of the costs and hours from the outset that would facilitate the task of later reviewing them, should that become necessary. The A.O. could develop schedules of appropriate charges for various kinds of expenses that could be implemented from the outset. Perhaps the schedules that apply to judges when they travel would be a good starting point.

The same sort of thing could be done for photocopy costs and the like. In addition, the rule should take on assessing litigants for ongoing costs and the question of when lawyers are paid, and the assumption that the lawyers are paid in full, possibly before the class collects most of what it is to receive, should be examined.

Prof. Charles Silver, 01-CV-048: "The proposal to set fees early is excellent. I have argued for this in published works and have convinced five Texas state court judges to do this." The object when setting fees should be to mimic the market. Rather than simply having judges "direct counsel to propose terms," the Note should give concrete guidance as to the evidence needed to show that requested terms are reasonable. This should include empirical studies of fees paid in similar cases pursuant to fee agreements."

Rule 23(h) -- in general

Conference: This is a valuable tool. In a sense, the rule is a vehicle for the Note. It recognizes that there may be fee awards to lawyers other than class counsel, including an unsuccessful rival for appointment as class counsel or an objector to a settlement or attorney fee motion. This simple rule will allow the Note material to become part of the federal jurisprudence. All judges will have the Note, and it will promote uniformity. At the same time, some of the Notes are too long, and there is a risk in citing cases.

Conference: The draft is a "great step forward." It is important to have a rule. For new practitioners, and even for established practitioners, the rules should reflect where we are now in practice, and provide a foundation for the next few years of growth.

Conference: It is appropriate to address fee awards in the rule because the fee decision is the most important decision the judge makes in most class actions. Federal courts in general are moving toward appropriate resolutions, but state courts are not. The federal rules can help state courts, and slow the present rush of counsel to file in state courts "for clear sailing on fees."

Conference: I have "no objection to having a rule like this in general." Indeed, I was surprised to discover that Rule 23 does not already include such provisions. Courts generally know what to do, but codification is o.k. The abuses that have been seen, particularly in state courts, are being addressed. But the rule should not include language that will interfere with victims' access to the courts. Free access to court remedies "is one of the things that make our country great." This rule has aspects in the Note that don't adequately acknowledge the risks associated with taking cases like these. The comment in the Note on page 88 that the risks borne by class counsel are "often considered" is not strong enough. They should always be relevant. Why does the rule say that the court "may" award a reasonable fee? It should say that the court "must" do so. The language about a "windfall" for counsel is unjustified. The client can have a windfall if the lawyer is underpaid. Certainly anything less than 15% is a windfall to the client.

Conference: Rule 23(h) serves a real need. The defendant does not care what the class lawyer gets. It wants a package that achieves maximum res judicata, and is focused on the overall cost of that package. The judge should focus on what the package is worth to the class and to society. Maybe some claims present high risk, but that's because the lawyers make up claims out of whole cloth. Even then, the risk of complete loss is minimized by lawyers who file 20 or 30 actions. In this context, it is proper to say that the court "may," not "must," award a reasonable fee.

Conference: These comments show how difficult the Committee's task really is. There is no one size that fits all class actions, and each of the foregoing perspectives is legitimate to some extent, and in regard to some class actions. The current draft "is unexceptionable." It does a necessary job in a straightforward form. The references in the Note to equity are troubling, however; the length of the chancellor's foot should not make a difference. The reality is that it is "just not possible" for the judge to determine the adequacy of a fee request in retrospect; that is one of the things that has driven the exploration of auction methods. Rule 23(h) is well-crafted, although the Note might be shortened a bit. One difficulty is the suggestion at pp. 83-84 of the Note that an award may be made for benefits conferred on the class by an unsuccessful rival for appointment as class counsel. The unsuccessful applicant knowingly ran a risk, and it is rare for an unsuccessful applicant to contribute to a successful result. Finally, it is a fiction to think that the one-third percentage fee is the norm. That share is drawn from ancient origins in representation of individual plaintiffs in personal-injury litigation. There is no reason to suppose that it should apply in the quite different setting of contemporary class actions.

Conference: It is difficult to know what percentage is appropriate, and particularly when there is important equitable relief. A lodestar analysis may not suffice, however, when there is significant risk, for that should be compensated. But the lodestar should not be used if it encourages elaborate structural relief that is in fact worth little to the class.

Conference: The Supreme Court has ruled that on occasion the attorney fee can exceed the dollar amount recovered; "you cannot commodify value." There is a social utility to enforcing the law.

Conference: The RAND study found cases in which injunctive relief was assigned a dollar value after a presentation. In one case, fees were based in large part on the value of the injunction obtained in the case.

Conference: In injunction cases, the defendant does not provide adversariness on attorney fees. The incentives are the same as in damages actions; the defendant trades off agreement on fees for a less effective and less costly injunction. Also, the market referent here is misleading. There is actually no market; it was created by litigation. The basic question is to get a proper assessment of the real risks confronted by the attorney.

Conference: The argument that the judge has a "fiduciary" duty to the class is troubling. The judge who manages a class action is not a fiduciary, but a judge. The proposed Note does not suggest such a duty of the judge, and it should not. The judge's duty is to be a judge -- to try to assure that counsel

fulfills the fiduciary role. Fees create a conflict between counsel and the class, and the judge has a judicial responsibility, not a fiduciary responsibility, to determine a reasonable fee.

Conference: "Fiduciary" is not the right term. But the judge does have an obligation to see that the fee is fair.

Barry Himmelstein, S.F. Hg. (pp. 15-30) & 01-CV-008: The Note (see p. 89) should not say that, if the judge concludes in hindsight that this was a very strong case, therefore there was a low risk of failure and the attorneys should not be paid well for their effort and risk. If the fee is measured by the lodestar method, there should nonetheless be the possibility of enhancement, although in that sort of case a percentage approach could be employed without concern about enhancement. Lawyers who take big risks, as our firm does, should be rewarded. "If the partners in my firm aren't making more than the partners in a big defense firm, something is wrong because they are not taking these chances." Multipliers serve to compensate for delays in payment, as well as risks of nonpayment. They are needed.

Mary Alexander, S.F. Hg. (pp. 55-73) & 01-CV-016 (president-elect of ATLA, presenting its position): We support the judicial review of attorney fees as a means of assuring that each class members receives value for the work performed. Hardly anyone can object to the concept that fees should be reasonable, or the court's inherent authority over fees.

John Beisner, D.C. Hg. (pp. 7-21) & 01-CV-027: The amendment appears to confirm current best practices. As presently drafted, however, it could effect some unintended changes. The Note stresses that the rule does not undertake to create any new grounds for an award of attorney fees, but it should be more emphatic on this point. The Note should stress that it is not intended to effect any change in attorney fee availability or amounts, perhaps by referencing recent decisions against awards.

Victor Schwartz, D.C. Hg. (pp. 76-63 & 01-CV-031: I favor the proposal to ensure that there's more scrutiny of attorney fees. There have been too many situations in which the class members got little or nothing and the attorneys got a great deal. There is little doubt, however, that the adopting of this rule will provide further incentives for some plaintiffs' lawyers with interstate class actions to do everything possible to keep their cases in state courts. They will want to avoid this rule.

Norman Chachkin (NAACP), D.C. Hg. (pp. 84-104) & 01-CV-051: There is no good reason for a rule such as this in civil rights and employment discrimination cases, for in those cases the fee is awarded under a fee-shifting statute pursuant to the lodestar approach. But the adoption of a rule suggests that there should be a change in practice, and there is no reason for one.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: Although proposed Rule 23(h) largely codifies current practice, we believe that it will benefit class members, particularly if modified as we suggest. At the outset, we think that the phrase "or by agreement of the parties" should be deleted as unnecessary and potentially misleading. One of the exceptions to the American

Rule is that there can be a fee award if the parties so agree, so saying that an award is "authorized by law" is sufficient. If the rule remains as currently written, courts may infer that the contractual basis for an award is entitled to special deference, and that they should simply award the amount the parties agreed to without further inquiry. We have seen class counsel argue that, where there is a fee agreement with the defendant, there is no basis for the court to scrutinize the fees. Courts have rejected such arguments, but the arguments persist. The Note says that all agreements are subject to scrutiny, but that "weight" can be given to a defendant's agreement not to challenge a fee up to a certain sum. Because the defendant is normally indifferent to the amount of the fee, no weight should be given to its indifference. Similarly, counsel's agreement on fees with the named plaintiff should not matter. Whether or not the named plaintiff has agreed to a one-third fee has no bearing on the proper fee for class counsel. (A different situation is presented under the PSLRA, which operates on a congressional assumption of an "empowered plaintiff.") The long discussion of fee determination principles in the Note is untethered to any provision in the rule; unless the principles are themselves to be included in the rule, they should perhaps be removed from the Note. For example, the Note says that the fee award should be tied to the actual relief provided to class members. If that is the Committee's position, it should be in the rule, as it is incorporated into the PSLRA. Similarly, the rule could direct that a portion of the payment to counsel be held back pending completion of the claims procedure to ensure attention to the fairness and efficacy of that procedure. On coupons, the disapproval of coupons for which there is no secondary market should be made stronger. Perhaps the focus, at least in percentage fee terms, should be on the value of the coupons actually redeemed or used. That would deter counsel from accepting a settlement in which coupons of minimal value are put up by defendant.

Hon. William Alsup (N.D. Cal.), 01-CV-004: Having worked hard on at least six class actions over the last 26 months of my tenure as a district judge, I wholeheartedly support the proposed Rule 23 revisions.

American Insurance Association, 01-CV-022: AIA agrees with the proposal for requiring motions for attorney fee awards and permitting objections and hearings. These practices should result in more clearly justified fee requests.

Patrick Lysaught (Defense Research Inst.) 01-CV-033, 01-CV-034,01-CV-046,01-CV-047: DRI supports the proposed addition of Rule 23(h), but only if it is made clear that the rule does not expand the availability of attorney fees and that it is not intended to overturn appellate decisions taking a hard line on when such fees may be recovered. The Note should be expanded to recognize those decisions.

Prof. Charles Silver, 01-CV-048: The Committee has "wimped out" on the fee formula. "Everyone knows that the lodestar method is an inferior fee formula and should be abandoned in cases where the percentage method can be applied. . . . [I]t violates the Due Process Clause to use the lodestar when the percentage approach is available." The Committee should help the lodestar into its grave.

The percentage approach should be endorsed and followed. Once the fee is set, it should be enforced even if the recovery is unusually large. Re-bargaining the fee on the back end should never occur. Also, using the word "reasonable" in Rule 23 is dubious because when Congress has used it in fee-shifting statutes it has been taken to mean use of the lodestar. If this word is used, "there must be an express disavowal of any intention of following Congress' lead. I would simply strike the word."

David Hudson, Chair, Court Advisory Committee, U.S. Dist. Ct., S.D. Ga., 01-CV-053: It is the experience of this Committee that all class action cases in which attorney fees are awarded required without exception notice to the class, a hearing, and approval by the court. In the event the Rules Committee is aware of some practice in federal court where this is not required, then perhaps addressing these requirements in the proposed new rule is warranted.

Gregory Joseph, Amer. Coll. of Trial Lawyers Comm. on Federal Civil Procedure, 01-CV-055: The Committee believes that the proposed amendment to Rule 23(h) is sound. We note that the introductory language refers to an award of fees pursuant to "agreement of the parties." Since any award of fees must be "authorized by law," the disjunctive reference could be deleted as superfluous. Otherwise, the right to object might be construed as permitting the party to renege on an agreement to pay a certain fee, or at least not to object to an award up to a certain amount.

Edwin Wesely, Chair, Comm. on Civil Lit., E.D.N.Y., 01-CV-056: The Committee acknowledges that the courts have a special obligation in reviewing and administering fee requests. However, this text, to the extent it embraces the lodestar and percentage of recovery methods for awarding fees, is largely a restatement of present practice and hence unnecessary. To the extent the rules authorizes fee awards based solely on competitive bidding, the Committee is uncomfortable. The Note appears substantive. There should not be an attempt to effect procedural changes through the Note rather than the rules themselves.

Federal Magistrate Judges Assoc. Standing Rules Committee, 01-CV-057: The FMJA Rules Committee supports the proposed changes to Rule 23.

Allen Black, 01-CV-064: I support the notion of including within Rule 23 a provision dealing with the award of attorney fees. But the rule should say that the court "shall" award a reasonable fee, not just that it "may" do so. The rule as drafted seems to leave it within the court's discretion not to award a reasonable fee. "We have seen a number of appellate decisions reversing such actions by district courts." In addition, I would add the following regarding coupon settlements: "If the class is made up of distributors who buy products from the defendants routinely on an on-going basis, the coupons may be of real value to the class." On p. 88, the second full paragraph says that a significant risk of non-recovery has "sometimes" been important in determining the fee. I think it would be fairer to say that the risk factor has "almost always" been important.

Jeffrey Norris, President, Equal Employment Advisory Council, 01-CV-065: EEAC supports the increased judicial supervision over attorney fee awards and costs to counsel. Although the proposed rule does not establish any new rules for awarding attorney fees and costs, its inclusion in the class

action rule reinforces the significant role the court has in overseeing such awards. One thing that should be emphasized is focusing on the actual benefits to the class resulting from settlements. Agreements that call for future payments or coupons or other nonmonetary benefits may not actually result in significant actual benefits to class members.

Robert McCallum, Jr., U.S. Dep't of Justice, 01-CV-073: The Department supports the Committee's conclusion that the amended Rule should describe the role of class counsel and procedures for resolving attorney fee awards.

Washington Legal Foundation, 01-CV-082: WLF supports each of the specific provisions of proposed Rule 23(h). It applauds the notion that notice of the fee request must accompany any notice of a proposed settlement. The rule will increase significantly the likelihood that class members will learn of the requested fee and thus be in a position to object if they so desire.

ABA Sections of Antitrust Law and of Litigation, 01-CV-069: We support the proposed amendment, and believe its adoption will be an important step toward improving public confidence in the judicial process with respect to class actions. The Committee chose the right course in not attempting by rule to resolve the current circuit court split between the percentage-of-the-fund method and the lodestar method for determining class action attorney fees. There is too often a perception under current practice in settled class actions that the court accepts the agreement of the parties regarding the amount of class counsel's fee without examining whether the fee is commensurate with the benefit provided to the class. Whether or not that perception is accurate, we believe a rule amendment mandating careful judicial scrutiny of all fee applications in class actions will lead to greater public confidence in the judicial process, and also prevent some of the perceived abuses. Although no measuring system is perfect, the Note sets out appropriate factors for the district court to consider and gives the district court sufficient leeway to fashion fair and equitable awards. We agree with the Committee on the "singular importance of judicial review of fee awards to the healthy operation of the class action process." The straightforward provisions of proposed Rule 23(h) appear well designed to facilitate such judicial review.

Federal Trade Commission, 01-CV-085: The Commission supports the inclusion of this provision in Rule 23 and believes that requiring formal findings of fact and conclusions of law, as well as the overall encouragement of close judicial scrutiny of fee petitions, will ensure that appropriate fees are awarded. We urge the Committee to consider including language in the Note specifically pointing to the existence of previous or parallel government actions as a factor to be considered in assessing the reasonableness of a fee request. In light of the substantial work often undertaken by the government in prosecuting a case, some courts have already held that the existence of a related government action is a factor that may properly be considered in reducing class counsel's fee. The existence of government involvement also bears on other factors considered, such as the level of risk shouldered by counsel. In two recent class actions that built on FTC enforcement actions, the Commission opposed class counsel's fee petitions as unreasonably high.

Prof. Susan Koniak, 01-CV-086: Currently, courts often measure the attorney's fee in light of a fund designated for the class that will not, in large measure, actually be paid to the class members. After a claims procedure of some sort, much of the money actually returns to the defendant's coffers.

When the settlement provides that defendant gets back money not claimed by the class, class counsel's fees should be calculated by the amount actually received by the class, not the illusory larger "recovery." The fact this would delay the award to counsel is not important; why shouldn't the lawyers wait for their money until the class members get theirs? The alternative of relying on expert forecasts on the level of claiming activity should be discouraged in the rule.

Lawyers' Committee for Civil Rights Under Law (and 16 other groups), 01-CV-091: This rule is unnecessary in light of the provisions of Rule 54(d)(2). The only substantial addition it makes appears to be the requirement that notice of the fee motion be given. That is not a good change. Although the proposed rule appears only to establish a procedure for the determination of fees and costs, the note speaks more directly to the substantive standards regarding determinations of the merits of fee applications. The Note should not be used for expressions of substantive legal standards, and it should be deleted.

David Piell, 01-CV-094: The introduction of Rule 23(h) at the same time as Rule 23(g) seems to obliterate the latter. Why should the court bother with the task of bidding for class counsel, and what meaning does the bid have, if at the conclusion the court is going to reevaluate the value of counsel's work and determine the appropriate fee using hindsight? The Note is problematic on fee measurement. The lodestar should not be used as a cross-check on the percentage measurement. The only reason for using the lodestar is to avoid an unreasonably low fee for counsel. An individual plaintiff could not opt for hourly billing after seeing what the percentage approach will yield for counsel, and neither should a class get that option. "While to the lay observer, class counsel's fee award is excessive, the average person does not understand that class litigation takes years of work, that class counsel has to advance all the costs of litigation, and that often multiple competing class actions against the same defendant(s) on the same issue will be occurring. The result of this last consideration being that class counsel can have the misfortune of losing their investment in the class action because another firm was willing to settle for less."

Prof. Howard Erichson, 01-CV-097: The provisions on attorneys' fees are appropriate, and it makes sense to include them in Rule 23. Perhaps the Note should emphasize the problems created by the use of the lodestar rather than percentage fees, particularly is encouragement of overstaffing with unwieldy conglomerations of lawyers.

Rule 23(h)(1)

Conference: The principal problem now is that there is no adequate basis for objectors to know the basis of the fee application in time to object. The time periods for disclosure and objecting often make informed objections impossible. The net recovery by the class is important. The amount requested should be in the notice to the class. The application should be available to class members for at least 30 days. A lot of money is involved, and the application may present complex issues. Often an objector has to fight counsel to get the documents. Any side deals should be disclosed in the fee application.

Conference: An aggressive attitude toward disclosure and scrutiny of side agreements is not warranted. In a Wall Street firm, the "rainmaker" lawyer shares in the profits, even without doing the main legal work, as a recognition of the importance of the job of getting the legal work. So here, the lawyer who initially gets the case may take it to a class-action firm. That firm cannot know at the outset how much time the case will take, or the risks involved. Some things are quite independent of the rational disposition of the case. For example, if the defendant simply has cash-flow problems, it may not be able to settle at the time. Substantive law may change, making the case harder to win.

Conference: There is no real problem with disclosure of side agreements. Often these are buy-off deals with objectors. None of the possibly valid fee-sharing issues suggested by an analogy to the rainmaker in a law firm applies there.

Conference: Side agreements are a problem. If the total fee is to a consortium and is reasonable, perhaps the court need not be concerned with the division within the group. There may be some "hard stuff" going on within the consortium, but the judge would be well advised to stay out of it.

Conference: If the fee basis is the lodestar, the judge should know about the side agreements. Even if a percentage fee is used, that need exists if the lodestar is used as a cross-check.

Conference: There are concerns about the nature of the notice of the fee motion to the class members, and the cost that will result from having to give this notice.

Victor Schwartz, D.C. Hg. (pp. 76-63) & 01-CV-031: It is of paramount importance to notify the class members about fee hearings so that they may be informed before the class attorneys' fees are set in cement.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: We agree with the thrust of this subsection because it explicitly requires that fees be sought by motion and that the class members be notified. We find the reference to Rule 54(d)(2) a bit curious, since we almost never see that rule invoked except in statutory fee-shifting cases. In any event, Rule 54(d)(2) cannot apply to class actions in all respects. For example, the 14-day deadline serves no purpose in the class action context. In order to avoid possible confusion, the rule should say that the time limit of Rule 54(d)(2)(B) does not apply. In addition, the Committee should explain why the rule incorporates Rule 54(d)(2). Regarding notice, we think that the full motion for fees should be served on all absentees who have entered an appearance through counsel or otherwise. In our experience, class counsel often resist providing this information to potential objectors.

Leslie Brueckner (TLPJ), D.C. Hg. (pp. 148-61) & 01-CV-020: TLPJ urges the Committee to eliminate the requirement that notice be given to the class with regard to the attorney fee motion. We have no problem with the requirement that the motion be served on the parties. But the provision could be read to require that all class members must be served with a copy of the motion. The motions are often not filed with the court until some time after the notice of proposed settlement

is given to the class, and a separate notice would therefore be required, although there would usually not be too much problem when the notice can be included with the Rule 23(e) notice to the class. But having a potentially double round of notice would be undesirable. This could have a huge negative impact on civil rights cases and consumer cases. In litigated cases, this would require an additional notice, but if the cost of giving notice were itself a recoverable cost that would remove some of the possible deterrent effect of having to give the notice since it would only be required when the case was won and a fee award almost certain. But to take comfort in that, the witness would want the rule to say that the costs of giving notice to the class would be taxable as costs. Moreover, the requirement of notice actually is harmful to the class if the cost of giving notice must be deducted from the recovery for the class.

Allen Black, 01-CV-064: I am not sure why Rule 23(h)(1) is drafted so as to import explicitly all the procedural and other baggage of Rule 54(d), only to disclaim applicability of some of the baggage in the very next words of the rule. These proceedings strike me as sufficiently different from Rule 54(d) proceedings to be treated without reference to that rule.

Keith Johnson, Chief Legal Counsel, St. of Wis. Invest. Bd., 01-CV-066: SWIB strongly supports Rule 23(h)(1) in its entirety. All of the items covered by the proposed rule are critical to obtaining fair fee awards. Given the conflicting interests of class counsel and class members when it comes to fee awards, these processes are of the utmost importance to ensure that fee awards are fair and are considered in light of full scrutiny by class members. Indeed, the proposed rule does not go far enough. Most settlement notices do not provide meaningful information about fee awards, but only provide the maximum amount the parties have agreed to submit to the court without opposition from the defendant. Class members can be protected from excessive fee awards only by meaningful disclosure. Information about the proposed fee award and about counsel's effort to earn it is critical to class members' ability to assess fee petitions. In many cases, counsel's detailed submissions to the court regarding fees are not made until after the deadline for class members to opt out or to object. Thus, they cannot obtain timely information that would indicate whether the fee award is justified. The rule and Note do not address this. We urge the Committee to review the rule and require that the papers in support of the fee award be filed at least ten days before the deadline for objections and opting out.

Washington Legal Foundation, 01-CV-082: WLF recommends that the rule provide for notice of the motion at least 60 days in advance of the proposed hearing. WLF's experience is that the norm is to provide very little advance notice of fee hearings. Mandatory 60-day advance notice should eliminate this problem yet will impose minimal hardship on the attorneys seeking a fee award.

ABA Sections of Antitrust Law and of Litigation, 01-CV-069: The provisions regarding notice and the right to object bolster the rule's function in raising public confidence regarding the award of class action attorney fees. Particularly when class actions are settled, class counsel and the defendant are not adversaries with respect to the fee application. The requirement of notice will facilitate the adversary process by providing class members with the information they need to determine whether they believe the fee sought is reasonable in terms of the benefit obtained for them.

Alliance of American Insurers, 01-CV-068: The Alliance opposes the requirement that notice be provided to class members regarding attorney fee motions by class counsel because this would result in greater administrative expenses in defending class action litigation. It is unclear whether the notice envisioned would be part of the settlement notice or whether it would be a separate notice. It is unclear what, if any, benefit would be derived by disclosing counsel fees to the class members. The Alliance believes that a thorough and comprehensive examination of counsel fees by the court would achieve the goal of protecting class members. An acceptable alternative, however, would be for the proceedings regarding fee awards to take place after settlement, with any expenses associated with the required notice borne by the plaintiffs.

National Treasury Employees Union, 01-CV-078: The proposed rule regarding notice of the fee motion does not recognize that attorney fees may be provided for in the settlement agreement itself. The motion for approval of the settlement should be deemed to satisfy the notice requirement. Requiring a separate notice for the fee motion is wasteful.

David Williams, 01-CV-079: The amendment's premise -- that class members always have an interest in the fee arrangements -- is incorrect. That interest may exist when payment is from a common fund, but it does not always exist. Yet the notice requirement is premised on class members' supposed universal interest in the fee award. Cases in which the class members do not have any such interest include (a) those in which judgment has already been obtained in favor of the class and class counsel are to be paid under a fee-shifting statute, (b) cases that settle, with fee issues reserved for later, separate treatment, and (c) cases in which the fee methodology has already been pre-determined under new Rule 23(g). If the parties are capable of settling these fee claims, why require the court to determine the fee? Notices to the class in such instances will create more confusion than benefit.

W.D. Mich. Committee on Rules of Practice, 01-CV-090: The amendments in this area are simply unnecessary. Details about the nature of the attorney fees being sought can be incorporated in the notices sent to class members under the other provisions of Rule 23. Introducing an entirely separate notice procedure for approving attorney fees creates delay and redundancy that is both expensive and inefficient.

Lawyers' Committee for Civil Rights Under Law (and 16 other groups), 01-CV-091): The mandatory notice to the class regarding the fee motion imposes yet another unnecessary and unjustified burden in civil rights class actions. Most civil rights class actions are maintained under federal statutes that provide for judicial awards of fees to prevailing plaintiffs from the adverse party. As a consequence, the fees don't diminish the recovery for the class and notice to class members would serve no purpose. To the extent that attorney fees are included in a proposed settlement, the interests of class members in the fee amount are adequately served through notice of the proposed settlement and the opportunity to object to it. But attorney fee proceedings in civil rights class actions often occur after the approval of the settlement, and requiring a notice then serves no legitimate interest.

Rule 23(h)(2)

Conference: There should be an opportunity for discovery for objectors. The rule has evolved from a draft that required a hearing to the present proposal that only permits a hearing. It would be better to say something to the effect that the court "shall ordinarily" have a hearing. It is too easy to shovel these issues under the rug without a hearing.

Conference: In one case in the RAND study, after objectors appeared to oppose the amount agreed to be paid the lawyers, much more of the benefits of the deal were shifted from the class attorneys to the class.

Conference: Why should class members get to object when the fee is not coming out of a common fund? That would seem none of their business.

Barry Himmelstein, S.F. Hg. (pp. 15-30) & 01-CV-008: On the question whether discovery should be available to those who object to fees, it makes sense to say (as the Note does) that the completeness of the fee motion is a factor to be considered in deciding whether to order discovery. But that determination should be made with regard to the method of determining fees that the court will be employing. If it is the percentage method, that would have a great bearing on whether discovery would be authorized. Even if the lodestar were used as a cross-check in such a case, the level of detail that would be needed for that cross-check purpose would not be as great as would be needed if the lodestar were the main method of setting the fee.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: This provision is a positive addition to the rule because it underscores that all class members have an interest in any fee request, whether made by class counsel or the objector's counsel, or whether the fee is nominally "separate" from the relief to be accorded the class in a settlement. The Note raises some concerns. Regarding pro se objectors, who often are not familiar with technical procedures, it should say that their objections must be accepted even if they are submitted in an informal format, and that class counsel are responsible for seeing that they are filed. We suggest the following language: "For these purposes, an objector represented by counsel would ordinarily have to file a formal objection with the clerk of court, rather than by letter to counsel or the court. For objectors not represented by counsel, those less formal means will suffice." We also agree that the need for discovery depends largely on how fully fee-seeking counsel have been in disclosing relevant information. Fee-sharing arrangements among counsel, "clear sailing" arrangements with the defendant, and arrangements for payments to named plaintiffs should be disclosed in all cases, however.

Gregory Joseph, Amer. Coll. of Trial Lawyers Comm. on Federal Civil Procedure, 01-CV-055: The opportunity for a party from whom payment is sought to object might invite improper behavior in cases in which a party has agreed not to object, or at least not to object up to a certain amount. Could the permissive "may" in subpart (2) trump the agreement even though the rule itself says that an award can be premised on an "agreement of the parties"?

Prof. Charles Silver, 01-CV-048: "Fee objections are pointless. When fees are handled right to start with, their only purpose is to enrich strategic objectors who threaten to 'hold up' settlements by

appealing unless they are paid to disappear." The Committee should not carve an objector's rights to fees in stone. The standard extortionist tactic is to threaten to appeal unless class counsel cuts the fee and to request a portion of the fee reduction as compensation. That should never be sufficient to justify fees for objectors. They should only be compensating for wringing more from defendants.

Keith Johnson, Chief Legal Counsel, St. of Wis. Invest. Bd., 01-CV-066: SWIB applauds the Committee's recognition that it may be appropriate to award fees to counsel whose work produced a beneficial result for the class, including attorneys who represented objectors that improved the settlement or reduced the fee award. Only by making it possible for objectors to recover the costs of their efforts can we overcome the strong disincentive for class members to speak up in opposition to excessive fees or inadequate settlements.

Washington Legal Foundation, 01-CV-082: WLF sees no reason to require class members to seek to intervene in order to preserve the right to appeal a fee award. Unless class members are allowed to appeal fee awards, there may be nobody to appeal unjust fee awards.

ABA Sections of Antitrust Law and of Litigation, 01-CV-069: The right to object bolsters the rule's function in raising public confidence. It will help present the issue to the court in the adversary context our justice system has typically regarded as optimal. By the time a settlement is proposed, class counsel and the defendant are not really adversaries on the fee application.

Alliance of American Insurers, 01-CV-068: The Alliance supports the provision allowing objections by any class member or party from whom payment is sought.

National Treasury Employees Union, 01-CV-078: Providing a right to object to the fee motion separate from the right to object to the terms of a proposed settlement does not seem warranted in all cases.

Rule 23(h)(3)

Conference: The rule requires findings on the fee motion, but not a hearing. We should use this rule to impose more regulation on district judges as they shop for, and as they pay, class counsel.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: We support this provision. Although a hearing need not be held in every case, the court should hold a hearing at least in cases where a fee objection has been filed. The Note should stress the importance in the Rule 23(e) settlement context of combining into one hearing the court's consideration of the overall settlement and the fee request.

David Romine, D.C. Hg. (pp. 242-62) & 01-CV-49: This provision will burden courts. This is the only motion for which courts must make findings. That is an undue burden.

General Comments

Keith Johnson, Chief Legal Counsel, St. of Wis. Invest. Bd., 01-CV-066: SWIB strongly supports the proposal to require that courts make findings in connection with the award of attorney fees, and supports inclusion in the Note of factors that courts should consider in assessing the reasonableness of fee awards.

ABA Sections of Antitrust Law and of Litigation, 01-CV-069: The requirement of specific findings on the reasonableness of the fee will provide for effective appellate review. Perhaps more importantly, such findings will provide a public education function in class action cases, which often are followed closely in the media. In those cases in which large fee awards relative to the benefit to individual class members are appropriate, written findings from the court awarding the fee will help to educate the public regarding why such a fee is appropriate in that particular case.

Alliance of American Insurers, 01-CV-068: The Alliance supports the requirement for findings under Rule 52(a) and for a hearing on the fee motion.

Rule 23(h)(4)

Conference: The Rule 23(h)(4) provision for reference to a special master is too broad. It refers to issues related to the amount of the award. It would be better to refer to the need for an accounting or a difficult computation, as the proposed Rule 53 revision at page 120 of the publication does.

Brian Wolfman (Public Citizen), D.C. Hg. (pp. 116-32) & 01-CV-043: We oppose this provision concerning reference of the fee amount determination to magistrate judges or special masters. Except for the most mundane issues, it is important for the judge who handled the case to be fully involved in this activity. In settled cases, in particular, the determination of a proper fee is intimately tied to the assessment of the settlement.

Rule 23 2001 Proposals: General Comments

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

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

Conference: The group that recreated Rule 23 in 1966 did not know what powers they were unleashing. "It has become a de facto political institution." The proposals are not remarkable, but

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

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

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

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

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

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

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

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

John Frank, Esq., S-F Hearing pp. 92 ff: I dissented from the adoption of Rule 23(b)(3) in 1966. It should be repealed and replaced by administrative agencies appropriate to the subject matter. It simply produces a commercial transaction, blessed by the courts, in which defendants buy res judicata from the plaintiff for a considerable sum of money. The published proposals produce a

number of decision points. Each will require time. Anything that adds time to the judicial process must be evaluated to ensure that the gain is worth the cost.

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

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

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

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

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

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

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

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

Association of the Bar of the City of New York, 01-CV-071: There is a statement the reflects other comments not separately noted. The Committee Notes "go far beyond the particular rule changes they purport to elucidate. Instead of explaining the amendments and the reasons for their enactment, the Notes purport to take jurisprudential positions on the way class actions should be conducted and resolved. Because of their breadth, the Notes — more than the rule amendments themselves — are likely to be cited by parties as precedent to support their positions." Examples are found in the notes to (c)(1)(A) (discovery in connection with certification) and (e)(1)(C) (factors for reviewing settlement). "Because the Notes carry weight with the courts, it is important * * * that their content and scope be limited to explaining the purpose of the amendments proposed, and not be used to import into jurisprudence the Committee's views of best practice."

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

information. One district court, further, has held that the FTC is precluded by the res judicata effects of a class-action judgment from seeking additional relief on behalf of class members; the FTC should know of this danger. On the other hand, the FTC may be able to settle its own action on terms that integrate with the class action.

Lawyers' Committee for Civil Rights Under Law, 01-CV-091: (For 18 civil rights, public interest organizations, and bar associations; joined by law firms, practitioners, and professors.) Raises several questions that are not addressed by the published proposals: **(1)** Rule 23 should be amended to make clear the propriety of certifying civil rights class actions for compensatory and punitive damages. Some courts refuse (b)(2) certification for classes that seek significant damages awards, and others refuse (b)(3) certification because common questions do not predominate, or because class treatment is not superior in seeking to establish a pattern or practice of discrimination. "Such misguided interpretations of Rule 23 turn expanded civil rights remedies [the addition of damages relief] against the victims of discrimination * * *." It should be made clear that Rule 23 permits certification of civil rights actions that seek both equitable and damages relief. **(2)** Rule 23 should be amended to state that prior to certification unnamed class members are "represented" for purposes of the Model Rule 4.2 prohibition on communications by counsel opposing the class with class members. Present practice, launched by cases seeking to restrict communications by class counsel with class members, authorizes limitations on communications only when there is a clear record and specific findings that weigh the potential abuse against the rights of the parties and then seeks to limit speech as little as possible. Protection of class members from communications from opposing counsel is critical, "particularly regarding waiver or compromise of their claims. * * * Both courts and commentators have recognized that putative class members should not be required to evaluate waivers or releases without the assistance of counsel." The Rule 4.2 approach will provide protection even when class counsel is not aware of the communications and not in a position to seek control. Class counsel will continue to be able to communicate with class members, and counsel for different proposed representative class plaintiffs also will remain free to communicate with class members. This approach would not establish an attorney-client relationship with class members for any other purpose. **(3)** The 2000 discovery amendments threaten to make it more difficult to pursue civil rights litigation. The 2001 proposed Rule 23 amendments "add entire new proceedings, require new decisions and new notices, authorize new appearances, and encourage the relitigation of certification decisions, mandating a much greater direct involvement of judges * * *." But judges, burdened with the new responsibilities for managing discovery, have no time for added Rule 23 responsibilities. The result will be further delay in the prompt disposition of class actions. Delay is particularly undesirable in actions that seek injunctive relief. **(4)** There is an alarming trend toward displacing employment discrimination litigation by arbitration. The character of arbitration proceedings that may preclude resort to class actions remains to be resolved. It is important that Rule 23 establish clear, functional standards for federal civil rights claims, "[f]or it is against these standards that arbitration regimes will be measured to determine whether a mandatory arbitration agreement affects only a change in forum, or will affect substantive rights." **(5)** The Advisory Committee should devise means to achieve "earlier and fuller input from the civil rights community regarding the agenda, problems, and proposals to be considered by the Advisory Committee."

Prof. Howard M. Erichson, 01-CV-097: The current (b)(1), (2), and (3) typology should be preserved. (b)(1) and (2) "essentially replicate Rule 19 compulsory joinder in cases where the

necessary parties are so numerous that actual joinder would be impracticable." Properly — narrowly — construed, they define situations with a class of necessary parties. The language of (b)(2) overemphasizes remedy, and might be changed to make it clear that not every action demanding primarily injunctive or declaratory relief need be a mandatory class action. Medical monitoring actions are an example of classes that might be treated as opt-out.

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

Conference: The proposals fail to address mass torts.

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

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

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

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

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

General Practice

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

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

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Overstrike-Underline Version

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 23. Class Actions

* * * * *

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

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

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

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

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

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

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

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

- the nature of the action,

- **the definition of the class certified,**

- the **class** claims, issues, or defenses ~~with respect to which the class has been certified~~,

- ~~the right of~~ that a class member ~~to~~ may enter an appearance through counsel if the member so desires,

- that the court will exclude from the class any member who requests exclusion, ~~the right to elect to be excluded from a~~ **the** ~~class certified under Rule 23 (b)(3),~~ **stating when and how members may elect to be excluded,** and

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

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

~~(iii) In~~ For ~~any class action maintained certified under subdivision~~ Rule ~~23~~(b)(3), the court shall must ~~direct to~~ class ~~the members of the class the best~~

~~notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.~~

* * * * *

Committee Note

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

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

Rules 26-26 (Federal Judicial Center 1996). ~~The Federal Judicial Center study showed many cases in which it was doubtful whether determination of the class-action question was made as soon as practicable after commencement of the action. This result occurred even in districts with local rules requiring determination within a specified period. These seemingly tardy certification decisions often are in fact made as soon as practicable, for practicability itself is a pragmatic concept, permitting consideration of all the factors that may support deferral of the certification decision. If the "as soon as practicable" phrase is applied to require determination at an early practicable time, it does no harm. But the "as soon as practicable" exaction may divert attention from the many practical reasons that may justify deferring the initial certification decision. The period immediately following filing may support free exploration of settlement opportunities, although settlement discussions should not become the occasion for deferring the activities needed to prepare for the certification determination. The party opposing the class may prefer to win dismissal or summary judgment as to the individual plaintiffs without certification and without binding the class that might have been certified. Time may be needed to explore designation of class counsel under Rule 23(g).~~

Time ~~also~~ may be needed ~~for discovery to support~~ to gather information necessary to make the certification decision. Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the "merits," limited to those aspects relevant to making the certification decision on an informed basis. Active judicial supervision may be required to achieve the most effective balance that expedites an informed certification determination without forcing an artificial and ultimately

wasteful division between "certification discovery" and "merits discovery." ~~of the dispute. A court must understand the nature of the disputes that will be presented on the merits in order to evaluate the presence of common issues; to know whether the claims or defenses of the class representatives are typical of class claims or defenses; to measure the ability of class representatives adequately to represent the class; to assess potential conflicts of interest within a proposed class; and particularly to determine for purposes of a (b)(3) class whether common questions predominate and whether a class action is superior to other methods of adjudication. The most~~ A critical need is to determine how the case will be tried. ~~Some~~ **An increasing number of** courts ~~now~~ require a party requesting class certification to present a "trial plan" that describes the issues ~~that~~ likely ~~will~~ **to** be presented at trial **and tests whether they are susceptible of class-wide proof.** ~~; a desirable — and at times indispensable — practice~~ **Such trial plans** ~~that often requires better knowledge of the facts and available evidence than can be gleaned from the pleadings and argument alone. Wise management of the discovery needed to support~~ **for** ~~the certification decision recognizes that it may be most efficient to frame the discovery so as to reduce wasteful duplication if the class is certified or if the litigation continues despite a refusal to certify a class.~~ See Manual For Complex Litigation Third, § 21.213, p. 44; § 30.11, p. 214; § 30.12, p. 215.

~~Quite different reasons for deferring the decision whether to certify a class appear if related litigation is approaching maturity. Actual Developments in other cases may provide invaluable information bearing on the desirability of class proceedings and on class definition. If the related litigation involves an overlapping or competing class, indeed, there may be compelling reasons to defer to it. If related litigation remains in a relatively early stage, on the other hand, the prospect that duplicating, overlapping, or competing classes may result in conflicting or disruptive~~

~~**developments may be a reason to expedite the determination whether to certify a class.**~~

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

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

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

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

The authority to amend an order under Rule 23(c)(1) before final judgment does not restore the practice of "one-way intervention" that was rejected by the 1966 revision of Rule 23. ~~A court may not decide~~

~~the merits first and then certify a class. It is no more appropriate to certify a class after a determination that seems favorable to the class than it would be to certify a class for the purpose of binding class members by an adverse judgment previously rendered without the protections that flow from class certification.~~ A determination of liability after certification, however, may show ~~the~~ a need to amend the class definition. ~~In extreme unusual circumstances,~~ dDecertification may be warranted after further proceedings. ~~show that the class is not adequately represented or that it is not proper to maintain a class definition that substantially resembles the definition maintained up to the time of ruling on the merits~~.

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

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

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

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

The direction that class-certification notice be couched in plain, easily understood language is ~~added as~~ a reminder of the need to work unremittingly at the difficult task of communicating with class members. It is ~~virtually impossible~~ difficult to provide information about most class actions that is both accurate and easily understood by class members who are not themselves lawyers. Factual uncertainty, legal complexity, and the complication of class-action procedure ~~itself~~ raise the barriers high. ~~In some~~ **many** ~~cases,~~ **it has proved useful to provide** ~~these barriers may be reduced by providing an introductory summary that briefly expresses the most salient points, leaving full expression to the body of the notice.~~ The Federal Judicial Center has ~~undertaken to~~ created illustrative clear-notice forms that provide a helpful starting point for actions similar to those described in the forms. ~~Even with these illustrative guides, the responsibility to "fill in the blanks" with clear language for any particular case remains challenging. The challenge will be increased~~

~~in cases involving classes that justify notice not only in English but also in another language because significant numbers of members are more likely to understand notice in a different language.~~

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

~~Subdivision (c)(2)(A)(ii) requires notice calculated to reach a reasonable number of members of a Rule 23(b)(1) or (b)(2) class. The means of notice designed to reach a reasonable number of class members, should be determined by the circumstances of each case. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950): "[N]otice reasonably certain to reach most of those interested in objecting is likely to safeguard the interests of all * * *." Notice affords an opportunity to protect class interests. Although notice is sent after certification, class members continue to have an interest in the prerequisites and standards for certification, the class definition, and the adequacy of representation. Notice supports the opportunity to challenge the certification on such grounds. Notice also supports the opportunity to monitor the continuing performance of class representatives and class counsel to ensure that the predictions of adequate representation made at the time of certification are fulfilled. These goals justify notice to all identifiable class members when circumstances support individual notice without substantial burden. If a party addresses regular communications to class members for other purposes, for example, it may be easy to include the class notice with a routine distribution. But when individual notice would be burdensome **or intrusive**, the reasons for giving notice often can be satisfied without attempting personal notice to each class member even when many individual class~~

~~members can be identified. Published notice, perhaps supplemented by direct notice to a significant number of class members, will often suffice. In determining the means and extent of notice, the court should attempt to ensure that notice costs do not defeat a class action worthy of certification. The burden imposed by notice costs may be particularly troublesome in actions that seek only declaratory or injunctive relief.~~

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

RULE 23(e): REVIEW OF SETTLEMENT

Rule 23. Class Actions

* * * * *

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

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

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

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

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

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

(3) ~~*[Alternative 2]*~~ In an action previously certified as a class action under Rule 23(b)(3), **the court may direct that** the Rule 23(e)(1)(B) notice ~~may~~ state terms that afford **a new opportunity to request exclusion to** individual class members **who did not request exclusion during an earlier period for requesting**

exclusion ~~a second **further** opportunity to elect exclusion from the class.~~

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

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

* * * * *

Committee Note

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

Paragraph (1). Subdivision (e)(1)(A) expressly recognizes the power of a class representative to settle class claims, issues, or defenses. ~~The reference to settlement is added as a term more congenial to the modern eye than "compromise." The requirement of court approval is made explicit for pre-certification dispositions~~

dismissals, to assure judicial supervision over class-action practice and to protect the integrity of class-action procedure. The new language introduces a distinction between voluntary dismissal and a court-ordered dismissal that has been recognized in the cases. Court approval is an intrinsic element of an involuntary dismissal. Involuntary dismissal often results from summary judgment or a motion to dismiss for failure to state a claim upon which relief can be granted. It may result from other circumstances, such as discovery sanctions. The distinction is useful as well in determining the need for notice as addressed by paragraph 1(B).

The court-approval requirement is made explicit for voluntary pre-certification dismissals to protect members of the described class and also to protect the integrity of class-action procedure. **If a pre-certification settlement or withdrawal of class allegations appears to include a premium paid not only as compensation for settling individual representatives' claims, but also to avoid the threat of class litigation, the court may seek assurances that the class-action allegations were not asserted, or withdrawn, solely for strategic purposes, and that the rights of absent class members are not unfairly prejudiced.** Because **When special circumstances suggest that** class members may **have** rely**ied** on the class action to protect their interests, the court may direct **consider whether some reasonable form of** notice of the dismissal **is warranted** to alert class members that they can no longer rely on the class action to toll statutes of limitations or otherwise protect their interests. As an alternative, the court may provide an opportunity for other class representatives to appear similar to the opportunity that often is provided when the claims of individual class representatives become moot. Special difficulties may arise if a settlement appears to include a premium paid not only as compensation for settling individual representatives' claims but also to avoid the threat of class litigation. A pre-certification settlement does not bind class members, and the

~~court cannot effectively require an unwilling representative to carry on with class representation. Nor is it fair to stiffen the defendant's resolve by forbidding payment of a premium to avoid further subjection to the burdens of class litigation. One effective remedy again may be to seek out other class representatives, leaving it to the parties to determine whether to complete a settlement that does not conclude the class proceedings.~~

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

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

Subdivision (e)(1)(B) carries forward the notice requirement of present Rule 23(e)~~, but makes it mandatory only for settlement, voluntary dismissal, or compromise of the class claims, issues, or defenses. Notice is required~~ when the settlement binds the class through claim or issue preclusion; notice is not required when the settlement binds only the individual class representatives. Notice of a settlement binding on the class is required either when the settlement follows class certification or when the decisions on certification and settlement proceed simultaneously. ~~both when the class was certified before the proposed settlement and when the decisions on certification and settlement proceed simultaneously — the test is whether the settlement is to bind the class, not only the individual class representatives, by the claim- and issue-preclusion effects of res judicata. The court may order notice to **members of** the **proposed** class of a disposition made before a certification decision, and may wish to do so if **special circumstances show** there is reason to suppose that other class members may have relied on the pending action to defer their own litigation. **The court may also require** Nnotice also may be ordered if there is an involuntary dismissal after certification**, although such orders are unusual.**; o**O**ne likely reason would be concern that the class representative may not have provided adequate representation.~~

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

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

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

The court~~, further,~~ must make findings that support the conclusion that the settlement is fair, reasonable, and adequate ~~meets this standard~~. The findings must be set out in sufficient detail to explain to class members and the appellate court the factors that bear on applying the standard~~: "The district court must show that it has explored these factors comprehensively to survive appellate review." *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454, 458 (9th Cir. 2000)~~.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

~~Apart from these factors, s~~Settlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal ~~an effort to homogenize conflicting~~ divergent interests of class members and ~~with that~~ demonstrate the need to redefine the class or to designate subclasses. ~~Redefinition of the class or the recognition of subclasses is likely to require renewed settlement negotiations, but that prospect~~

~~should not deter recognition of the need for adequate representation of conflicting interests. This lesson is entrenched by the decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).~~

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

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

Further inquiry into the agreements identified by the parties should not become the occasion for discovery by the parties or objectors. The court may direct the parties to provide to the court or other parties a summary or copy of the full terms of any agreement identified by the parties. The court also may direct the parties to provide a summary or copy of any agreement not identified by the parties that the court considers relevant to its review of a proposed settlement. **In exercising discretion under this rule, the court may act in steps, calling first for a summary of any agreement that may have affected the settlement and then for a complete version if the summary does not provide an adequate basis for review.** A direction to disclose **a summary or copy of an agreement** may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure. **And the court must provide an opportunity to claim work-product or other protections.**

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

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

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

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

The class embraced by a proposed settlement may be defined to include members who were not included in an earlier definition and

who have not had the earlier opportunity to request exclusion that was available to other class members. The new members must be allowed an opportunity to request exclusion. The need to afford some class members this first opportunity to request exclusion may weigh in favor of extending a new exclusion opportunity to other class members.

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

~~Objectors may provide important support for the court's inquiry~~ **review of a proposed settlement**, ~~but attempts to encourage and support objectors may prove difficult. An opportunity to elect exclusion after the terms of a proposed settlement are known provides~~ **is** ~~a valuable protection against improvident settlement that is not provided by an earlier opportunity to elect exclusion and that is not reliably provided by the opportunity to object. The opportunity to opt out of a proposed settlement may afford scant protection to individual class members when there is little realistic alternative to class~~

litigation, other than by providing an incentive to negotiate a settlement that — by encouraging class members to remain in the class — is more likely to win approval. **In some settings, however, a sufficient number of class members may opt out to support a successor class action.** The protection is quite meaningful as to **The decision of most class members to remain in the class after they know the terms of the settlement may provide a court added assurance that the settlement is reasonable. This assurance may be particularly valuable if** class members whose **have** individual claims **that** will support litigation by individual action, or by aggregation on some other basis, including another class action, in such actions, the decision of most class members to remain in the class may provide added assurance that the settlement is reasonable. The settlement agreement can be negotiated on terms that **protect against the risk that a party will become bound by an agreement that does not afford an effective resolution of class claims by** allow**ing** any party to withdraw from the agreement if a specified number of class members request exclusion. The negotiated right to withdraw protects the class adversary against being bound to a settlement that does not deliver the repose initially bargained for, and that may merely set the threshold recovery that all subsequent settlement demands will seek to exceed.

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

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

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

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

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

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

Paragraph (4). Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C). ~~The court has discretion whether to provide procedural support to an objector. If the disposition would not bind the class, requiring approval only under the general provisions of subdivision (e)(1)(A), the court retains the authority to hear from members of a class that might benefit from continued proceedings~~

~~and to allow a new class representative to pursue class certification. Objections may be made as an individual matter, arguing that the objecting class member should not be included in the class definition or is entitled to terms different than the terms afforded other class members. Individually based objections almost inevitably come from individual class members, but~~ **Unless a number of class members raise objections, they** ~~are not likely to provide much information about the overall reasonableness of the settlement unless there are many individual objectors. Objections also may be made in terms that effectively rely on class interests; the objector then is acting in a role akin to the role played by a court-approved class representative. C~~ **Such c**~~lass-based objections may be the only means available to provide strong~~ **present the most effective** ~~adversary challenges to the reasonableness of the settlement. — the parties who have presented the agreement for approval may be hard-put to understand the possible failings of their own good-faith efforts. It seems likely that in practice m~~**M**~~any objectors will argue in terms that seem to involve~~ **invoke** ~~both individual and class interests.~~

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

~~The important role~~ **objectors** ~~played by objectors may justify substantial procedural support. The parties to the settlement agreement may provide access to the results of all discovery in the class action as a means of facilitating appraisal of the strengths of the class positions on the merits. If settlement is reached early in the progress of the class action, however, there may be little discovery.~~

~~Discovery in — and even the actual dispositions of — parallel litigation may provide alternative sources of information, but may not. If an objector shows reason to doubt the reasonableness of the proposed settlement, the court may allow discovery reasonably necessary to support the objections. Discovery into the settlement negotiation process should be allowed, however, only if the objector makes a strong preliminary showing of collusion or other improper behavior. An objector who wins changes in the settlement that benefit the class may be entitled to attorney fees, either under a fee-shifting statute or under the "common-fund" theory.~~

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

~~The important role that is played by some objectors~~ **play in some cases** ~~must be balanced against the risk that objections are made for strategic purposes. Class-action practitioners often assert that a group of "professional objectors" has emerged, appearing to present objections for strategic purposes unrelated to any desire to win significant improvements in the settlement. An objection may be ill-founded, yet exert a powerful strategic force. Litigation of an objection can be costly, and even a weak objection may have a potential influence beyond what its merits would justify in light of the inherent difficulties that surround review and approval of a class settlement. Both initial litigation and appeal can delay implementation of the settlement for months or even years, denying the benefits of recovery to class members. Delayed relief may be particularly serious in cases involving large financial losses or severe personal injuries. It has not been possible to craft rule language that~~

~~distinguishes the motives for objecting, or that balances rewards for solid objections with sanctions for unfounded objections. Courts should be vigilant to avoid practices that may encourage unfounded objections. Nothing should be done to discourage the cogent objections that are an important part of the process, even when they fail. But little should be done to reward an objection~~ **should not be rewarded** ~~merely because it succeeds in winning some change in the settlement; cosmetic changes should not become the occasion for~~ **on the basis of insignificant or cosmetic changes in the settlement.** ~~fFee awards that~~ **made on such grounds** ~~represent acquiescence in coercive use of the objection process. The provisions of Rule 11 apply to objectors, and courts should not hesitate to invoke Rule 11 in appropriate cases.~~

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

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

~~Quite different problems arise if settlement of an objection provides the objector alone terms that are more favorable than the terms generally available to other class members. An illustration of the problems is provided by *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1 (1st Cir. 1999). The different terms may reflect genuine distinctions between the objector's position and the positions of other class members, and make up for an imperfection in the class or subclass definition that lumped all together. Different terms, however, may reflect the strategic value that objections can have. So long as an objector is objecting on behalf of the class, it is appropriate~~

~~to impose on the objector a fiduciary duty to the class similar to the duty assumed by a named class representative. The objector may not seize for private advantage the strategic power of objecting. The court should approve terms more favorable than those applicable to other class members only on a showing of a reasonable relationship to facts or law that distinguish the objector's position from the position of other class members.~~

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

RULE 23(g): CLASS COUNSEL

Rule 23. Class Actions

* * * * *

(g) Class Counsel.

(1) Appointing Class Counsel.

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

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

(C) In appointing class counsel, the court

(i) must consider:

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

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

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

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

(2) Appointment Procedure.

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

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rules 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

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

* * * * *

Committee Note

Subdivision (g). Subdivision (g) is new. It responds to the reality that the selection and activity of class counsel are often critically important to the successful handling of a class action. Until now, courts have scrutinized proposed class counsel as well as the class representative under Rule 23(a)(4). This experience has recognized the importance of judicial evaluation of the proposed lawyer for the class, and this new subdivision builds on that experience rather than introducing an entirely new element into the class certification process. Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision

will guide the court in assessing proposed class counsel as part of the certification decision. This subdivision recognizes the importance of class counsel, states the obligation to represent the interests of the class, and provides a framework for selection of class counsel. The procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. The new subdivision also provides a method by which the court may make directions from the outset about the potential fee award to class counsel in the event the action is successful.

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

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

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

Paragraph 1(B) recognizes that the primary responsibility of class counsel, resulting from appointment as class counsel, is to

represent the best interests of the class. The rule thus establishes the obligation of class counsel, an obligation that may be different from the customary obligations of counsel to individual clients.

Appointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel. In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole.

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

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

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

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

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. For example, the resources counsel will commit to the case must be appropriate to its needs, but the court should be careful not to limit consideration to lawyers with the greatest resources.

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

Paragraph (2). This paragraph sets out the procedure that should be followed in appointing class counsel. Although it affords substantial flexibility, it provides the framework for appointment of class counsel in all class actions. For counsel who filed the action, the materials submitted in support of the motion for class certification may suffice to justify appointment so long as the information

described in paragraph (g)(1)(C) is included. If there are other applicants, they ordinarily would file a formal application detailing their suitability for the position.

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

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

Paragraph (2)(A) authorizes the court to designate interim counsel during the pre-certification period if necessary to protect the interests of the putative class. Rule 23(c)(1)(B) directs that the order certifying the class include appointment of class counsel. Before class certification, however, it will usually be important for an attorney to take action to prepare for the certification decision. The amendment to Rule 23(c)(1) recognizes that some discovery is often necessary for that determination. It also may be important to make or respond to motions before certification. Settlement may be discussed before certification. Ordinarily, such work is handled by the lawyer who filed the action. In some cases, however, there may be rivalry or uncertainty that makes formal designation of interim counsel appropriate. Rule 23(g)(2)(A) authorizes the court to designate interim counsel to act on behalf of the putative class before the certification decision is made. Failure to make the formal designation

does not prevent the attorney who filed the action from proceeding in it. Whether or not formally designated interim counsel, an attorney who acts on behalf of the class before certification must act in the best interests of the class as a whole. For example, an attorney who negotiates a pre-certification settlement must seek a settlement is fair, reasonable, and adequate for the class.

Rule 23(c)(1) provides that the court should decide whether to certify the class "at an early practicable time," and directs that class counsel should be appointed in the order certifying the class. In some cases, it may be appropriate for the court to allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating competing applications in such a case is to afford the best possible representation for the class. Another possible reason for deferring appointment would be that the initial applicant was found inadequate, but it seems appropriate to permit additional applications rather than deny class certification.

Paragraph (2)(B) states the basic standard the court should use in deciding whether to certify the class and appoint class counsel in the single applicant situation — that the applicant be able to provide the representation called for by paragraph (1)(B) in light of the factors identified in paragraph (1)(C).

If there are multiple adequate applicants, paragraph (2)(B) directs the court to select the class counsel best able to represent the interests of the class. This decision should also be made using the factors outlined in paragraph (1)(C), but in the multiple applicant

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

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

RULE 23(h):ATTORNEY FEES AWARD

Rule 23. Class Actions

* * * * *

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

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

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

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

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

Committee Note

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

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

This subdivision does not undertake to create new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted

for the class before certification but were not appointed class counsel, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

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

Active judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process. Continued reliance on caselaw development of fee-award measures does not diminish the court's responsibility. In a class action, the district court must ensure that the amount and mode of payment of attorney fees are fair and proper whether the fees come from a common fund or are otherwise paid. Even in the absence of objections, the court bears this responsibility.

Courts discharging this responsibility have looked to a variety of factors.

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

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

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

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

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

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

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

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions

for timing of appeal in Rule 58 and Appellate Rule 4. Owing to the distinctive features of class action fee motions, however, the provisions of this subdivision control disposition of fee motions in class actions, while Rule 54(d)(2) applies to matters not addressed in this subdivision.

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

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

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties — for example, nonsettling defendants — may not object because they lack a sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. In setting the date

objections are due, the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion. If a class member wishes to preserve the right to appeal should an objection be rejected, it may be necessary for the class member to seek to intervene in addition to objecting.[1]

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

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

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

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[1] This sentence may need to be revisited after the Supreme Court decides *Devlin v. Scardelletti*, No. 01-417, 122 S.Ct. 663 (cert. granted, Dec. 10, 2001, in *Scardelletti v. Debarr*, 265 F.3d 195 (4th Cir. 2001)).

Comments
Overlapping Actions

B. Resolution Recommended For Adoption

OVERLAPPING, DUPLICATING, AND CONFLICTING CLASSES: LEGISLATION

The Standing Committee will recall that Professor Cooper prepared several proposed rule amendments that addressed some of the severe difficulties posed by repetitive and overlapping class actions. These proposals provided for preclusion of further class-certification attempts following denial of certification; precluded attempts to persuade another court to approve a class-action settlement that had been rejected by one court; and provided the federal court with broad authority and discretion to bar class members from pursuing overlapping class-action litigation in other courts. Although the Civil Rules Committee initially forwarded the proposals to the Standing Committee for formal publication, it was agreed that the proposals were best circulated to the public informally under the title "Call for Informal Comment: Overlapping Class Actions." The Reporter's Call for Comment was published in September 2001, approximately at the same time as the formal rule amendments. We have received a wealth of informal comment and testimony addressed to the Reporter's Call for Comment. In addition, one day of the conference at the University of Chicago Law School was devoted to the Call for Comment and the problem of overlapping class actions.

The Advisory Committee unanimously adopted the following memorandum on the problem of overlapping class actions. The last three pages make findings and recommendations concerning the problem. In sum, the Advisory Committee is of the view that the Reporter's proposed rules amendments test the limits of authority under the Rules Enabling Act. The Committee believes that a legislative solution is more appropriate and recommends that some form of minimal diversity legislation be enacted by Congress to permit large, multi-state class actions to be brought in — or removed to — federal court. By bringing the actions to federal court, a degree of consolidation is possible that would avoid or alleviate some of the most severe problems that are engendered by repetitive and overlapping class actions. Providing a federal forum would also further the important principle that in a federal system, no one state's courts should make decisions that are binding nationwide even as to class members who were not injured in the forum state. Current practice permits forum shopping on a national scale that brings the judicial system into disrepute and that has the potential to damage the interests of class members and defendants alike.

We do not ask that any particular formulation or legislative proposal be supported. Nor do we suggest that all class actions should be removable to federal court. Our focus is on those state class actions in which the interests of no single state predominate. These class actions are appropriately litigated in federal court. The Advisory Committee requests that the Standing Committee "support the concept of minimal diversity for large, multi-state class actions, in which the interests of no one

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Chambers of
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United States District Judge

May 7, 2002

MEMORANDUM TO THE CIVIL RULES ADVISORY COMMITTEE

SUBJECT: *Perspectives on Rule 23 Including the Problem of Overlapping Classes*

Over the last ten years, the Advisory Committee on the Civil Rules has undertaken an intensive consideration and review of Rule 23, the class action rule. This ongoing review by the Committee is the first review of Rule 23 following the thorough reworking of the Rule in the 1966 amendments. But in the now almost 40 years since that time, Rule 23 has figured prominently in the explosive growth of large scale group litigation in federal and state courts, and has both shaped and — in its interpretation and application — been shaped by revolutionary developments in modern complex litigation. The drafters of the 1966 amendments knew that after some appropriate period of time it would be important to reconsider what they had done. We are well underway in that process even as we must take account of continuing rapid changes in Rule 23 practice.

A historical perspective may be helpful in placing our current efforts in context and considering our future course.

I. A Brief History of Rule 23

The class action has its ultimate roots in the English Court of Chancery and the bill of peace. It was a practical rule of joinder where joinder was otherwise impractical. The American courts adopted the procedure in the 19th and early 20th centuries. Federal Equity Rule 48, in place from 1842 to 1912, provided for a class action, but, significantly, also provided that the "decree shall be without prejudice to the rights and claims of all the absent parties." In 1938, Rule 23 was included in the new Federal Rules of Civil Procedure. The Rule was adopted with little fanfare or discussion. It divided class actions into three categories: the "true," the "hybrid," and the "spurious." These categories, with their infelicitous names and formalistic attributes, proved difficult to apply. After almost 30 years of experience, the Advisory Committee entirely rewrote the Rule in 1966, and it is that Rule that we still use today.

The 1966 Rule kept a three-part structure but the structure became functional: (b)(1) classes for situations in which necessary parties under Rule 19(a) were too numerous to be joined, including claims involving a common fund, (b)(2) classes for claims involving common injunctive relief, particularly intended for civil rights litigation, and, finally, (b)(3) class actions for damage based on predominant common issues. The 1966 rule provided new procedural protections, for example, by requiring notice to (b)(3) class members of certification, and, for all classes, notice of a proposed settlement. It provided that class members could be bound if they did not affirmatively opt out of (b)(3) damage class actions. In adopting the "opt out" approach, the Committee apparently had in mind small claim, consumer class actions in which no one class member would have a sufficient interest to litigate an individual claim and in which the forces of inertia might be greater than a potential class member's desire to participate, given the small

stakes involved. The 1966 Rule also clarified that any judgment would bind the members of the class in all certified class actions.

It is not entirely clear what the Committee of 1966 expected. Professor Arthur Miller, who was involved with the work of the Committee at that time, tells us that "Nothing was in the Committee's mind . . . Nothing was going on. There were a few antitrust cases, a few securities cases. The civil rights legislation was then putative. . . . And the rule was not thought of as having the kind of application that it now has." But, as Professor Miller went on to explain, the Rule, perhaps by serendipity, caught the wave of "the most incredible upheaval in federal substantive law in the history of the nation between 1963 and 1983, coupled with judicially-created doctrines of ancillary and pendent jurisdiction."

An esteemed member of the 1966 Committee, John Frank, corroborates Professor Miller's recollection. According to Mr. Frank, the Committee of 1966 was operating in "a world to which the litigation explosion had not yet come. The problems which became overwhelming in the 80's were not anticipated in the 60's. The Restatement (Second) of Torts and the development of products liability law [were] still in the offing. The basic idea of a big case with plaintiffs unified as to liability but disparate as to damages was the Grand Canyon airplane crash. A few giant other cases were discussed but . . . were expected to be too big for the new rule."

It is probably fair to say that the 1966 Committee was most interested in facilitating civil rights class actions for injunctive relief under (b)(2), and in this respect the Committee's intentions were fully realized. But it is also fair to say that the Committee did not foresee the scale or range of litigation that was unleashed by the opt out damage class action in (b)(3). Certainly, the Committee then had no expectation that the Rule would be used in the context of

dispersed mass torts, a concept that the Committee could not have been familiar with. The Committee did know about mass accidents, but considered that "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." So much for the persuasive power of Committee notes!

According to the then Reporter of the Committee, Harvard Professor Benjamin Kaplan, "It will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of the new Rule 23." In 1991, well past a generation in the world of civil litigation, the Judicial Conference asked the Committee to begin a reconsideration of the Rule in light of the upheaval in modern civil litigation since adoption of the Rule.

II. The Advisory Committee Begins its Reconsideration of Rule 23

There have been several phases in the Committee's work although many continuing themes. At the beginning, the Committee developed a comprehensive re-draft of the Rule. In 1992, Judge Pointer, Chair of the Committee, relying on a 1986 proposal from the Litigation Section of the ABA, prepared a revision that did away with the three part (b)(1), (b)(2), and (b)(3) classification, provided for opt-in classes at the court's discretion, and provided that exclusion from the class could be conditioned upon a prohibition against institution or maintenance of a separate action. Notice was made more flexible such that sampling notice might be permitted depending on the circumstances. This far-reaching draft was presented to the Standing Committee but then withdrawn on the Standing Committee's advice that further consideration would be required before such a sweeping proposal could be published for public

comment. In the years since that time, we have engaged in that further consideration and can now appreciate how prescient and sophisticated that first effort was.

The Committee then began the painstaking and careful inquiry into class action practice in which we are still engaged. The new Chair of the Committee, Judge Higginbotham, pioneered the investigatory model that the Committee continues to use to good effect whenever it considers a complex issue. The model combines multiple informal opportunities for involvement by judges, interested academics, members of the bar, and bar organizations, with targeted empirical work. Thus, the Committee was educated at several class action and mass tort conferences, drawing together academic experts and experienced practitioners. The Federal Judicial Center undertook an empirical study of federal class actions. See Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996). The Reporter circulated a variety of proposals informally to gather guidance from members of the bar. Eventually, several different proposals were published resulting in extraordinarily helpful comment from practitioners and others.

The Committee first turned to the all important certification decision in (b)(3) class actions. The Committee was concerned that the certification decision was the critical issue in class action litigation, and yet the rule included no provision for interlocutory appeal. The Committee was also concerned that the Rule's certification criteria were too loose, leading to improvident certification of actions that were more appropriately handled on an individual basis. The Committee was told repeatedly that class actions were rarely tried and that once the class was certified, defendants were placed under overwhelming pressure to settle. In this portion of its inquiry, the Committee considered a variety of additional certification factors such as the

probable success on the merits of the class claims and whether the public interest in, and the private benefits of, the probable relief to individual class members justified the burdens of the litigation. From this work, one significant amendment emerged: Rule 23(f) providing that a court of appeals may, in its discretion, entertain an appeal from an order of a district court granting or denying class action certification. This provision has apparently had its intended effect of developing the case law on certification thereby providing greater guidance to district judges on the certification decision. In addition, the testimony on the various additional certification criteria provided the Committee with a wealth of new information about class action practice

The possible tightening of certification criteria required the Committee to consider whether litigation classes should be subject to more exacting standards than settlement classes. The Committee's attention was drawn to the question because of the Third Circuit decision in *Georgine/Amchem* holding that settlement classes must be certified as if they were litigation classes. Because of the importance of settlement to class action litigation, the Committee considered whether a class action might be certified for settlement even if the class could not be certified for trial. A proposed (b)(4) was circulated for public comment in 1996 at the same time as the additional (b)(3) certification criteria. Proposed (b)(4) provided for certification where "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement even though the requirements of subdivision (b)(3) might not be met for purposes of trial." All of the 23(a) requirements would still apply, however.

The response to this proposal was as copious and thoughtful as the response to the new certification criteria. Opponents of the change warned the Committee that class action

settlements were already prone to unfairness to class members and that this proposal would exacerbate the situation by permitting class counsel to negotiate from a position of weakness, knowing that unless there was a settlement, the class could not be certified for trial. This controversial topic was put aside when the Supreme Court granted certiorari in *Amchem*. The result of *Amchem* has been to permit a certain flexibility in the certification of settlement classes. However, some continue to advise the Committee that there is need for still greater flexibility for settlement classes.

The Committee then entered the present phase of our inquiry. At this point the Committee not only had the comments from the hearings on the proposed amendments, but also the benefit of the RAND Institute for Civil Justice's case study of ten class actions eventually published in 2000 as *Class Action Dilemmas: Pursuing Public Goals for Private Gain*. In addition, in 1998, on the recommendation of Judge Niemeyer, the Chief Justice authorized the formation of an ad hoc working group to study mass torts that would bring together representatives of several Judicial Conference committees under the leadership of the Civil Rules Committee. The Working Group was given one year to study the problems associated with mass tort litigation and to submit a report. Judge Niemeyer designated Judge Scirica as chair of the Working Group. The papers and report of the Working Group provided additional information about the operation of Rule 23 in the context of mass torts and illuminated many of the problems, including the problems associated with multiple, overlapping class actions. See *Report on Mass Tort Litigation* (1999). The Committee was also assisted by appointment of a sub-committee, chaired by Judge Rosenthal, and appointment of a special reporter, Professor Richard Marcus, to support Professor Cooper.

Building on the RAND study, the hearings on the settlement class proposal, and the report of the Working Group on Mass Torts, the Committee determined to provide better judicial supervision of settlements and of class counsel. Proposed new 23(e) requires disclosure of all settlement terms, a fairness hearing, and findings by the court. The court may permit class members who believe that the settlement is unfair to exclude themselves from the settlement. Proposed new Rule 23(g) and (h) provide the court a framework for appointing, monitoring, and compensating class counsel. Notice and the timing of the certification decision also receive attention in the new proposals.

III. Unfinished Business

As this history may demonstrate, the Committee has reason to be both humble, given the complexity and magnitude of the issues, but also proud of its work over the past ten years. It has done much to enhance judicial supervision of the class action process and provide new tools for judicial review, at both the trial and appellate levels.

There are several areas that may yet deserve additional attention and that have not received definitive answers from the Committee. Each has proven controversial and difficult. The first is whether the Rule should incorporate a separate standard for settlement classes. This is a familiar topic. We may wish to reconsider this issue in light of case law under *Amchem* as well as the new proposal on settlement review, including the permission to class members to exclude themselves from settlement upon review of the terms. There may be need for further empirical work in this area. Second, the unique questions surrounding the settlement of future claims in mass tort cases may also merit continued study. Third, we may wish to reconsider the opt in/ opt out question. The 1966 Committee adopted an "opt out" provision but did not foresee

the consequences of doing so. The Committee's 1992 draft, giving the court discretion to certify the class as an opt in or opt out class action, might provide a starting point. Alternatively, we might reasonably conclude that further study of this question is likely to generate more controversy than any clear consensus for change.

Finally, we should complete the substantial inquiry already begun into the difficult problem of overlapping and competing state and federal class actions. Certain aspects, the more modest ones, may be amenable to rule making. The more fundamental issues do not seem so amenable, at least not without specific legislative authorization. At the January meeting the Committee expressed a unanimous consensus that the problems created by overlapping class actions are worthy of congressional attention and that some form of minimal diversity legislation might provide an appropriate answer to some of the problems. The remainder of this memorandum is addressed to this issue.

IV. Overlapping Class Actions

The Committee has been told repeatedly in a variety of forums, by both defense and plaintiff counsel, and without contradiction, that as Rule 23 is reformed to enhance judicial supervision of class counsel, the deliberateness of the certification decision, and the judicial review of settlements, an ever growing number of cases will be filed in those state courts where this kind of supervision is perceived to be less demanding. This results often in multiple filings of multi-state diversity class actions in both federal and state courts. Yet this result is precisely the outcome that the class action device was designed to prevent. The purpose of the class action device is to eliminate repetitive litigation, promote judicial efficiency, permit small claims to find a forum, and achieve uniform results in similar cases. But as our Reporter has noted,

"duplicative class litigation is destructive of just these goals . . . . Multiple filings can threaten appropriate judicial supervision, damage the interests of class members, hurt conscientious class counsel, impose undue burdens of multiple litigation on defendants, and needlessly increase judicial workloads."

The problems generated by overlapping, duplicative, and competing class actions have commanded the attention of many observers. According to the American Law Institute's 1994 Complex Litigation Project, the problems caused by multiple class actions are so pressing that "[w]e are in urgent need of procedural reform to meet the exigencies of the complex litigation problem." "Repeated relitigation of the common issues in a complex case unduly expends the resources of attorney and client, burdens already overcrowded dockets, delays recompense for those in need, results in disparate treatment for persons harmed by essentially identical or similar conduct, and contributes to the negative image many people have of the legal system." American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* (1984-1994) at 9. Although the Federal Judicial Center's study focused on class-action dispositions in only four federal districts over a period of two years, it found several illustrations of unresolved duplicating filings, pp. 14-16, 23-24, 78-79, 163-164 (Tables 5-7). The RAND study confirmed the seriousness of the problem. Part of this project involved intense study of ten class actions. In four of the ten, class counsel filed parallel actions in other courts. In five of the ten, other groups of plaintiffs' attorneys filed competing actions in other jurisdictions. Only two of the ten cases did not experience either type of additional filings. More recent information suggests that the frequency and number of overlapping class-action filings are growing.

Legislative proposals to deal with overlapping actions have been pursued for several years. In March 1988 the Judicial Conference approved in principle creation of minimal-diversity federal jurisdiction to consolidate multiple litigation in state and federal courts involving personal injury and property damage arising out of a "single event." This position was confirmed in March 2001 when the Judicial Conference supported H.R. 860, the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001." The 1990 *Report of the Federal Courts Study Committee* recommended, pp. 44-45, that Congress "should create a special federal diversity jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of major multi-party, multi-forum litigation." Congress has considered many bills that would provide easier access to federal courts by initial filing or by removal from state courts. In 2002 the House of Representatives passed one of these bills, H.R. 2341.

One specific source of the concerns reflected in these legislative proposals has arisen from state-court filings on behalf of classes that include plaintiffs from other states. Many of these actions seek — and frequently win — certification of nationwide classes. Membership in these classes may overlap with classes sought — or actually certified — in other courts, state or federal. Pretrial preparations may overlap and duplicate, proliferating expense and forcing delay now in one proceeding, now in another, as coordination is worked through. Settlement negotiations in one action may be played off against negotiations in another, raising the fear of a "reverse auction" in which class representatives in one court accept terms less favorable to the class in return for reaping the rewards that flow to successful class counsel. Moreover, the certification of nationwide or multi-state class actions in one state court poses a threat to the

proper allocation of decisionmaking in a federal system. Individual state courts may properly apply the policy choices of the residents of that state to those residents. But local authorities ought not impose those local choices upon other states and certainly not on a nationwide basis.

After studying these proposals and the underlying problems, the Civil Rules Advisory Committee authorized its Reporter to issue a "Call for Informal Comment: Overlapping Class Actions" in September 2001. The call for comment included draft amendments of the class-action rule that might reduce the incidence of forum shopping and settlement shopping.[1]

Responses to the call for comment were provided in tandem with reactions to the proposed amendments of Civil Rule 23 that were published for comment in August 2001. The most concerted responses were provided in major segments of the class-action conference sponsored by the Advisory Committee at the University of Chicago Law School in October 2001. Many additional responses were provided in the written comments and oral testimony at hearings in San Francisco (November 2001) and Washington, D.C. (January 2002). Although this process does not match any model of rigorous social-science research, it provided repeated evidence of actual experiences that must not be allowed to continue. This evidence is outlined in the

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[1] The call for comment included three sets of possible rule amendments. The first set attempted to end the relitigation of the same class certification issues by providing that a federal court that refuses to certify a class because it does not meet the standards of Rule 23(a)(1) or (2) or 23(b)(1),(2), or (3) "may direct that no other court may certify a substantially similar class." The second set of proposals sought to reduce "settlement shopping," in which counsel may take the same settlement disapproved by one court into another court for approval. The proposal provided that "A refusal to approve a settlement . . . on behalf of a [certified] class . . . precludes any other court from approving substantially the same settlement." The third set of proposals addressed the potential clash between multiple, overlapping cases and provided that a federal court could "enter an order directed to any member of the . . . class that prohibits filing or pursuing a class action in any other court."

summaries of comments and testimony prepared for the Advisory Committee. The question is not whether something should be done, but what should be done and by whom.

One means of doing something about the problems created by overlapping class actions might be through new provisions in the Civil Rules. Some relatively modest provisions might fit comfortably within the authority of the Rules Enabling Act, 28 U.S.C. § 2072. Rule 23, for example, might address the effect one federal court should give to the refusal by another federal court to certify a class action or to approve a class-action settlement. Modest provisions, however, would provide no more than modest benefits — there is no general feeling that federal courts have experienced particular difficulties in working through overlapping actions in different federal courts. The Judicial Panel on Multidistrict Litigation works well within the federal system to achieve coordination and consolidation. Provisions that might address overlapping class actions in state courts, on the other hand, are not likely to be seen as modest. Serious objections were made to the illustrative drafts in the informal call for comments. Both Enabling Act limits and Anti-Injunction Act limits were invoked. There may be room to adopt valid rules provisions in the face of these objections, but to do so might test the limits of rulemaking authority thus inviting litigation over the rules themselves.

In light of these constraints on rulemaking, and because of the sensitive issues of jurisdiction and federalism implicated by overlapping class actions, Congress would seem the appropriate body to deal with the question. There is a secure basis in the Article III authorization of diversity jurisdiction to consider various approaches to consolidating overlapping class actions by bringing them into federal court. One approach, exemplified in several of the bills that have been before Congress, would establish minimal diversity jurisdiction in federal court for class

actions of a certain size or scope. This approach may embody some elements of discretion; several recent bills bring discretion into the very definition of jurisdiction in an attempt to maintain state-court authority over actions that involve primarily the interests of a single state. Another approach would be to rely on case-specific determinations whether a particular litigation pattern is better brought into federal-court control. This approach could be implemented by authorizing the Judicial Panel on Multidistrict Litigation to determine whether a particular set of litigations should be removed to federal court. The potential advantage of this approach would be that it could prove more flexible over time, enabling the federal court system to respond to actual problems as they arise and to stay on the sidelines when the problems are effectively resolved in the state courts. Yet another approach would be to authorize individual federal courts to coordinate federal litigation with overlapping state-court actions, by enjoining state-court actions, if necessary, when the state-court actions threaten to disrupt litigation filed under one of the present subject-matter jurisdiction statutes. While this approach may have the apparent advantage of leaving federal jurisdiction where it is, it also has the obvious disadvantage of potential conflict and tension between the court systems.

Careful study will suggest still other approaches. Many of the possible approaches are likely to provide the occasion for adapting present class-action procedures or developing new ones. The rules committees, acting through the Enabling Act process, can make important contributions. The nature of these contributions will depend on the nature of the underlying legislation; some forms of legislation may present such particular opportunities that supplemental rules-enabling authority should be included in the legislation.

Any proposal to add to federal subject-matter jurisdiction must be considered with great care. But the problems that persist with respect to overlapping and competing class actions are precisely the problems of multistate coordination that can claim high priority in allocating work to the federal courts. It is very difficult for any single state court to fairly resolve these problems, and nearly as difficult for state courts to act together in shifting ad hoc arrangements for cooperation. The apparent need is for a single, authoritative tribunal that can definitively resolve those problems that have eluded resolution and that affect litigation that is nationwide or multi-state in scope.

V. Minimal Diversity as a Possible Partial Solution

Having delved deeply into this topic, the Committee is in a position now to make the following findings and recommendations to the Standing Committee on the Rules of Practice and Procedure and the Committee on Federal-State Jurisdiction concerning the problems posed by overlapping class actions:

1. Beginning in 1991, the Advisory Committee on Civil Rules has undertaken a searching review of class action practice under Rule 23. This review has involved several conferences, close consultation with judges, members of the bar and bar organizations, publication for comment of several proposals, consideration of extensive testimony and comments on the published proposals, review of empirical studies, and creation of the Working Group on Mass Torts and adoption of its report;

2. On the basis of this extensive inquiry, the Advisory Committee finds that overlapping and duplicative class actions in federal and state court create serious problems that: (a) threaten the resolution and settlement of such actions on terms that are fair to class members, (b) defeat

appropriate judicial supervision, (c) waste judicial resources, (d) lead to forum shopping, (e) burden litigants with the expenses and burdens of multiple litigation of the same issues, and (f) place conscientious class counsel at a potential disadvantage;

3. The Advisory Committee has given close consideration to several rule amendments that might address the problems of multi-state class actions but concludes that these proposals test the limits of the Committee's authority under the Rules Enabling Act;

4. Large nationwide and multi-state class actions, involving class members from multiple states who have been injured in multiple states, are the kind of national litigation consistent with the purposes of diversity jurisdiction and appropriate to jurisdiction in federal court. Federal jurisdiction protects the interests of all states outside the forum state, including the many states that draw back from the choice-of-law problems that inhere in nationwide and multi-state classes;

5. With respect to multi-state class actions, the Advisory Committee agrees with the recommendation of the Federal Courts Study Committee that Congress eliminate the complete diversity requirement in complex, multi-state cases to make consolidation possible;

6. Minimal diversity legislation could be crafted to bring cases of nationwide scope or effect into federal court without unduly burdening the federal courts or invading state control of in-state class actions;

7. Minimal diversity legislation could resolve or avoid some of the problems posed by conflicting and duplicative class actions;

8. The federal and state judicial systems, class members, other parties to the litigation, and conscientious class counsel will benefit from the efficient supervision of these multi-forum, multi-state class actions in one federal forum;

9. For these reasons the Advisory Committee on the Federal Rules of Civil Procedure respectfully recommends to the Standing Committee on the Rules of Practice and Procedure and to the Committee on Federal-State Jurisdiction that they support the concept of minimal diversity for large, multi-state class actions, in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states' jurisdiction over in-state class actions is left undisturbed.

Summary of Comments & Testimony: Overlapping Classes

Michael J. Stortz, Esq., S.F. hearing 5-: Represents a drug company that has been the target of dozens of class actions upon withdrawal of a drug from the market. Many seek medical monitoring — some for statewide classes, some for national classes. They are pending in half a dozen state courts. The federal MDL judge has about 30 class actions. Plaintiff counsel have been racing to see who can go first in getting a favorable class decision. Many of the state actions cannot be removed. One drug store in Mississippi has been made defendant in many class actions to prevent removal. "You can't do two medical monitoring programs," but that is the risk of multiple actions. And the litigation risks are that "the state courts proceed on their own schedule without regard to anything that is happening in the federal MDL." Federal courts are attempting to corral these problems. It would help to provide some guidelines through articulated rules. Minimal diversity jurisdiction also would help. If there is doubt about the ability to act by rule, legislative proposals would be welcome. "There is a real problem out there. It's not scattered. It's not rare. It's very common." As defendant, we argue that an MDL court has in rem jurisdiction to prevent some of these abuses by injunction. Despite the anti-injunction act, "judges have created and crafted solutions, given the pragmatic crisis they face."

There is a further problem with duplicative, overlapping discovery. The same company officials are being noticed for depositions in different jurisdictions — there may be demands to produce the same person for depositions in different places at the same time. Judges attempt to coordinate, but "it's very much a liquid promise that, unfortunately," dissolves. Plaintiff counsel get what they can in the MDL proceeding, and then try state proceedings to get what was not available in the MDL proceeding. MDL judges are anxious to accomplish coordination.

(His written statement, 01-CV-011, observes that at times overlapping classes are filed by the same group of counsel in an effort to obtain the most favorable forum. More common are filings by different groups of plaintiffs' attorneys.)

(His written statement also suggests that the proposals to strengthen review of settlement will be frustrated unless federal courts are given authority to limit and control parallel state-court proceedings.)

Jacqueline M. Jauregui, Esq., S-F Hearing p 45 ff: Her firm has been defending a medical device litigation. In the first six months of 2001 53 class actions were filed involving the same product; 35 of them alleged nationwide classes, while 18 alleged a single-state or Canadian class. 36 were initially filed in federal court or were removed; they are now in MDL proceedings. There were 17 cases that could not be removed — or, if removed, were dismissed and then refiled in state court with an additional and local defendant to defeat removal. These events involve a prodigious waste of judicial and public resources, and of the defendant's resources as well. Other people in the

product-liability arena tell me that this is a not uncommon series of events. For just this one device, the cases in federal court involve 1.5% of a year's class-action filings. Half a dozen similar events a year would mount up to 10% of the class-action filings. Minimal diversity legislation would go a long way toward supporting MDL processes for these cases. There may be a reluctance to support expanded diversity jurisdiction, but that is the only way to unravel this knot. Outside the mass torts context, another client provided another example. Oklahoma state courts, through the state supreme court, denied certification of a class. Two weeks later the same law firm challenged the same practice on behalf of a different named plaintiff in a federal court class action. A different client in the insurance field says that the average cost of discovery and briefing before decision of a certification motion is one million dollars. The client in the Oklahoma litigation reflected and agreed that her costs in this stage run from $750,000 to one million dollars. Going through that process twice or more often is wasteful. The not-published certification-preclusion draft Rule 23(c)(1)(D) would be a superb tool to diminish the waste.

When we have been confronted with competing class actions in different courts, it has tended to be a competition among lawyers each of whom wishes to represent a nationwide class. Coordination, when it has occurred, has been the result of informal efforts of defense counsel. In financial services and insurance litigation, there has not been any sign of informal efforts of the judges to cooperate among themselves. Coordination among judges might be a good thing, "but I don't know whether in a state court setting judges would be willing to do that."

Gerson Smoger, Esq., S-F Hearing 73 ff: For ATLA. ATLA is "rather strongly opposed to the preclusion proposals." There has been limited study and limited ability to get empirical evidence on the problem of dual classes, apart from "the high profile examples that we all hear about." The proposals are designed to affect only a minority of filings, but if adopted in general terms will affect all state-court class actions. The proposals seem to be simply a matter of telling judges to do their jobs. "This is legislation over * * * the state judicial systems." This is a matter for state legislatures, and perhaps for Congress; it is not a matter for the rulemaking process. Class actions commonly are justified for reasons that bear either on efficiency or on providing a forum for small claims.

As to forum-shopping on certification, once one court has denied certification the defendant will describe that decision to any other judge asked to certify the same class. Then it is a question for the second judge. If the job is not being done right, the answer lies in judicial education and in cooperation among the judges.

Settlement shopping is done by the defendant, by the person who is being asked to pay money. If the defendant does not want to settle, there is no settlement to shop. Again, it is a question for the judiciary. In response to a question whether a court should be able to enjoin a defendant from settling in another court while a class claim remains pending in the first court: The settlement might change, the procedures might change. It may not be the same cause of action. And the parties may dismiss the federal action after the court refuses to approve a settlement. Once an action is

dismissed, how does the court exercise continuing control? Who enforces the injunction — the judge who issued it? But if the action remains pending in the first court after the settlement is rejected and another court is preparing to approve the same settlement, "that's very problematic." Overall, these problems — the 37 class actions — seem to arise "where there are high stakes and very bad acts." When there are 37 classes, "a lot of it gets sorted out realistically fairly shortly on." The sorting process occurs in the plaintiffs' bar; there is a self-policing. The problem of overlapping classes is for the most part being resolved within the system. "You couldn't say that in certain situations it's not a problem," but the tools exist to resolve it. Resolution of the actions depends on the defendant. There is some attempt to try to have resolution even if there are multiple state and federal actions. It is not always settlement: very few go to trial. Once the first trial or second trial is lost on a classwide basis, plaintiffs become unwilling to put more resources into a classwide trial. A second trial will happen only if it appears that the earlier trial or trials were not well managed; the risk, cost, and time required deter multiple attempts.

In response to a question whether it is fair to allow multiple opportunities for certification? How many times do we have to win before we lose on certification? Is it fair that when certification is finally ordered, it's the whole ball game? There are many types of class actions. In a mass-tort class action, certification is not the ball game. "The ball game is the reality of the existence of the large torts." In a small-claim consumer class action, certification is necessary for effectuation of the action. The discovery has been done for the first certification attempt, the issues have been explored, so the duplication in successive certification attempts is reduced. So in the example earlier this morning: after Oklahoma courts have denied certification, a federal judge certainly has power to certify a class, but certainly will be influenced by what the state courts did. And there may be a new federal element added when the new action is filed in federal court; if the law changes, there is a new certification issue. The reality is that the multiple filings are there, but most of the federal filings will get consolidated in MDL proceedings. A lot of the state filings will sit back "and not have activity." A few state filings will have activity, but you will never have more than five full "trials" on certification, and usually it is fewer than two. It is not a matter for judicial power to decide whether to enjoin state-court cases once the federal cases are consolidated for MDL proceedings; that is a legislative judgment. But the system is working itself out well without legislation. Informal conversations are taking place among judges. If there is a federal MDL proceeding, the federal judge will be talking to the state judges. Informal mechanisms also exist within the plaintiffs' bar, because there is a coalescence of the plaintiffs' bar. There is some agreement as to who takes what roles. When there are multiple defendants, the same thing happens on the defense side. These things "have to happen because * * * everyone needs the efficiency. The plaintiffs don't need thousands of hearings to attend."

(His written statement, 01-CV-017, adds several points. It is not surprising that these proposals have the enthusiastic support of multinational corporations. But there is not sufficient problem to warrant new rules. The federal courts do not need more cases — and defendants, if given the opportunity, will remove virtually every class action. Class actions that involve state law belong in

state courts. The draft proposals depart so drastically from basic federalism as to be unconstitutional. None of the alternative proposals can disguise the impact. The idea of revising the statutes to authorize rules that the statutes now forbid is surprising, absent any "paramount, urgent basis for doing so.")

Jack B. McGowan, Jr., Esq., S-F Hearing 107 ff: Has defended pharmaceutical, medical-device, and product-liability cases. The breast implant litigation provides an example of overlapping classes. One client had 34 federal class actions around the country, three Canadian class actions, and at last one state-court class action that was limited to a statewide class. There were also 17,000 individual actions around the country. It cannot be said that these numbers reflect the merits of the claims: it has been fairly well established that there is no causal link between the implants and autoimmune disease. In another case involving phenylpropanolamine, there were two virtually identical class actions filed in California courts, alleging violation of state unfair competition statutes and seeking statewide class certification. "One obviously copied the other." The class actions and individual actions are being coordinated before a single state judge. (California has a consolidation procedure similar to federal MDL proceedings; there has been active coordination. In the breast implant litigation, California Judge O'Neill was very active in coordinating with the federal MDL court.) There are, however, likely to be federal actions as well. The state judge is likely to seek active coordination with the federal judge. In California latex glove litigation, the state judge is having conversations with the federal judge in Philadelphia who has the MDL proceeding. But for all the efforts at coordination, state judges oftentimes try to push the litigation faster than the pace of the MDL proceedings. That happened with the California breast implant cases; we tried cases; "they were never tried in the MDL." The cost of parallel proceedings "is phenomenal." There have been numerous class actions around the country in the diet drug litigation. Some seek statewide classes, while others seek national classes. Some have been dismissed because the state involved does not recognize medical monitoring relief. In other states medical monitoring classes were certified. (In response to a question based on the earlier testimony that multiple filings get sorted out: "Maybe they are sorted out at great expense." So it was in the diet drug litigation. It does not make sense to have more than one nationwide class. "We only have one group of all the people. And it just makes no sense.") It may be that the rulemaking process lacks power to address these problems. But then legislation should be considered. Congress should address a problem that "is costing hundreds and hundreds and hundreds of millions of dollars. I'm just talking about three or four clients." The class actions often come first "because there is a major interest on the part of class action lawyers, personal injury lawyers around the country to be there first, to get on the committee, to be a player in the decisions around the country — not only in state courts, but in federal courts — to participate in that activity."

The written statement submitted for the San Francisco hearing, 01-CV-010, added two points. First was an account of a state-court class action involving laser eye surgery: when the defendant filed a motion to compel arbitration, a second class action was filed that named an additional defendant who could not invoke an arbitration agreement. The sole purpose seemed to be to defeat

the arbitration demand. Second was the observation that mass-tort litigation often is launched by the filing of multiple class actions in different jurisdictions. Commonly there is no coordination or control of discovery, leading to inconsistent rulings that escalate the cost of litigating. And there may be inconsistent rulings on class certification.

Anna Richo, Esq., S-F Hearing 129 ff.: Vice-President for Law, Biosciences Division, Baxter Healthcare. Baxter never made breast implants, but inherited litigation based on the activities of a division of an acquired company. It was named in class actions filed in ten state courts — mostly nationwide classes, four federal courts, and four courts in Canada. Some sought worldwide classes. None of the state actions was certified, but Baxter had to contest certification in each one. The federal actions were consolidated. Baxter had to settle some 6,500 suits for people who opted out. The litigation was bet-the-company for Baxter and several other defendants. The science that exonerated the defendants came too late for some companies. Baxter did defend individual actions on the merits; it won consecutively over 20 cases, but the cost was $1,000,000 to $2,000,000 a case. Publicly-traded companies cannot afford to defend themselves one-by-one. And the class action is a lever for settlement.

In the HIV Factor Concentrate litigation, Baxter was sued in class actions in three state courts and five federal courts. The federal actions were consolidated, but no class was certified for trial in any court. These experiences with multiple class actions brought simultaneously in state and federal courts has shown that the MDL procedure is an effective mechanism for federal courts. But competing multistate, multiparty actions in state courts should be removed to federal court whenever possible. Baxter strongly supports the proposed Class Action Fairness Act.

The Reporter's Call for Comment is a thoughtful attempt to address the problems. Multiple overlapping class actions have overreached the original goal of providing access to courts for similarly situated claimants. The abuses have ignored the clients and enriched the attorneys. They ignore due process and single recovery. "They have presented inconsistent and uncertain results and have contributed to the financial crisis in which corporate America, the insurance industry, and the American consuming public find themselves."

Another illustration is provided by five separate class actions in four different state courts seeking damages for children inoculated with childhood DPT vaccine containing Thiomerosol. The National Childhood Vaccine Injury Compensation Act of 1986 provides an administrative remedy and precludes injury claims for more than $1,000 outside the statutory claims process. In an effort to circumvent this limit, some of the plaintiffs' attorneys are seeking to represent national classes of persons with claimed damages of less than $1,000 each. These de minimis claims, when aggregated, could once again threaten to cripple the industry. The certification preclusion proposal, draft Rule 23(c)(1)(D), and the settlement preclusion proposal, draft Rule 23(e)(5), are clearly wise. "Each side will have one opportunity to make its best case on the issuing of class certification or class settlement. The informed well-reasoned decision of the court * * * will have the final word

on the subject." Forum shopping will be ended. Judicial resources will be preserved. The Enabling Act gives authority to adopt these rules; in any event, the Advisory Committee should recommend them to Congress.

Alfred W. Cortese, Jr., Esq., S-F Hearing 156 ff, 01-CV-015: The problem of overlapping duplicative class actions has become worse. The preclusion rules in the call for comment are within the power of the Committee to adopt to "protect Federal judges' Article III powers and jurisdiction. I think that is the essence of federalism. * * * The federal courts were created to provide protection to out-of-state residents and to provide protection against the extension of state law to other states to the detriment of other state residents." But these are very controversial issues. They involve exceedingly important policy choices. They have a substantial impact on substantive rights. Perhaps these changes ought to be left to Congress. If the Committee decides it is better for Congress, the Committee has the responsibility to participate in the process in whatever way it can "to ensure, frankly, that Congress gets it right." The letter transmitting the Mass Torts Working Group Report to the Chief Justice observed that the best chance of success lies in the lead of the Third Branch "with a sensitive interaction with Congress." If not rulemaking, then the Committee should develop a package of legislative recommendations.

Minimal diversity legislation "should rightly be a very high priority for this Committee." The Judicial Conference is presently on record opposing such legislation. That should be worked out, "so that nationwide class actions are tried or handled in nationwide courts, federal courts." Dealing with overlapping classes will (1) avoid the waste of duplicative litigation; (2) prevent use of overlapping actions for interim strategic effects, the need to win 50 separate certification hearings until there is res judicata; and (3) to minimize forum shopping. Sequential forum shopping is much more invidious in class actions than in individual actions.

Even with minimum diversity legislation, the preclusion rules would serve a purpose because there will be a certain number of competing state class actions that are limited by a state's boundaries.

John Beisner, Esq., D.C. Hearing 7-16, and written statement (01-CV-27): Class Action Watch has reported a study of 50 federal MDL proceedings that involved class actions. The research has been completed as to 35. There are competing state-court class actions with respect to more than half, and the number of competing state-court actions tends to increase as the federal MDL proceeding continues. Many of the federal proceedings that do not encounter competing state-court actions involve subjects that cannot be litigated in state court, as with securities actions. The Committee should consider carefully adopting rules that operate only within the federal courts, such as the proposal that a federal court cannot certify a class after another federal court has refused to certify substantially the same class. Although in present circumstances that would leave the plaintiffs free to migrate to state court, adoption of minimal diversity class-action jurisdiction would bring the actions back to federal court. It is hard to find empirical data, but I have had personal experience

with attempts to persuade another federal court to certify a class that has been denied certification by an earlier federal court. The Advisory Committee should express support for the pending minimal diversity bills. The added burden on the federal courts may not be as great as some fear, since even now federal courts commonly have to deal with some part of multiple actions and devote time to efforts to coordinate them. In present circumstances, it is easier to establish federal jurisdiction of a slip-and-fall action than a multistate class action. "The interstate class actions involve more people, more dollars, and more interstate commerce issues than any other sort of lawsuit that's out there, yet, by and large, they're being excluded from our Federal Court system." (The Vol. 3, No. 1 issue of Class Action Watch made available at the hearing by an unidentified member of the audience reports a different survey sent to 75 Fortune 500 companies, with 24 responses. The 24 respondents reported 465 sets of multiple filings in an 11-year period. The median number of actions filed in a single "set" was 24.)

The written statement adds that class actions have become "universal venue" suits — a nationwide class can be filed anywhere an attorney can find a representative plaintiff. Increasingly, class actions have become a state-court phenomenon, so much so that the marginalization of federal courts makes it a real question whether much can be accomplished by improving federal practice. Overlapping and competing class actions are "destroying the legitimacy of the class action device," spawning "an endless litigation cycle." There is a risk of settlement bidding, and races to the bottom.

The written statement is supplemented by a copy of an article by Mr. Beisner and Jessica Davidson Miller, "They're Making a Federal Case Out of It . . . In State Court," Civil Justice Report No. 3, September 2001, The Manhattan Institute Center for Legal Policy. The article reports findings of the County Court Research Project, detailing experience with nationwide class actions in state trial courts that have attracted particularly high numbers of such actions. A wealth of detailed evidence is provided.

Victor E. Schwartz, Esq., for American Tort Reform Assn. and American Legislative Exchange Council, D.C. Hearing and Written Statement, 01-CV-031: The published proposals will augment the incentives for plaintiffs to divert massive class actions to state courts. It is common practice to recruit a representative plaintiff from the state of a defendant's principal place of business. Or the plaintiff may sue a local manager, agent, or retailer to defeat diversity — an example is an action that involved the sale of 120,000 [or 140,000] vehicles in which the plaintiffs added as defendant a salesperson who had sold 14. The "fraudulent joinder" doctrine has had little effect. Its weakness is exacerbated by the rule that bars removal on the basis of diversity jurisdiction after more than one year. The best solution would be minimum diversity legislation for class actions. But until then, Civil Rules provisions could help. A rule could encourage "the highest degree of scrutiny consistent with existing law in determining whether either plaintiffs or particular defendants in removal actions are nominal or real." If a local retailer or distributor is named in a class action against a large manufacturer, the judge "should conduct a hearing to determine whether the plaintiffs' counsel truly intends to enforce a judgment against that local defendant." Sanctions similar to Rule 11 sanctions

could be adopted for enforcement. Steps should be taken to ensure that when there has been an MDL consolidation, later-filed cases are retained in federal courts rather than remanded to state courts so that they may be considered for the consolidation. And the Committee should consider "whether it has the authority to promulgate a rule addressing the procedural opportunities to fraudulently destroy diversity which are created by the one-year removal requirement." If the Committee concludes that it lacks power, it should recommend legislative amendments to Congress establishing a longer period for removal.

Thomas Y. Allman, Esq., D.C. Hearing 105-110, 111-113: Plaintiffs have a seemingly unending ability to sue in several states successively. It is astonishing to learn that a defendant can win by defeating class certification in several states, and then lose: "how many times do I have to win before the class doesn't have to be certified"? The certification preclusion proposal is good; if it requires amendment of the Rules Enabling Act, that should be done. Another approach would be to encourage the states to enact similar, parallel, or reciprocal rules; but there is reason to be concerned that not all states will go along — particularly the states that are more likely to permit improvident certification. Settlement preclusion also would be good; it is improper for a court to approve a settlement that another court has refused to approve. "There are courts that are willing to do this." Defendants should refuse to participate in seeking approval by another court after a rejection. The one personal experience worked out that way — our agreement to submit the same settlement to a second court was conditioned on approval of the federal court that refused approval. The federal court "did have a problem with it" and we stayed in federal court. A rules amendment would help; it would help even if it addressed only federal courts, not state courts. Federal courts should be encouraged to make maximum use of the power they have under the anti-injunction act; the current "knee and hip litigation" is an illustration. We should focus on what is a national class action, looking to citizenship of class members, the amount in controversy, and the nature of the controversy. The best remedy would be to support minimal diversity jurisdiction for national class actions. Together with MDL procedures, concentration of these actions in federal court would be a big help. (His written statement suggests that Rule 23 might provide that a person who seeks to represent a class commit to not seeking certification by another court; he recognizes the difficulty that other representatives could be found. The obvious solution is to authorize federal courts to enjoin state-court certification proceedings. Minimal-diversity jurisdiction is still better.)

Lewis H. Goldfarb, Esq., D.C. Hearing 132-140: Overlapping class actions are a serious problem. It is important to distinguish the circumstances that give rise to them. They may arise because competing lawyers choose to file actions "all over the country." But they also may arise as a calculated strategy of a common group of lawyers. A "joint venture and fee agreement" is provided with the written statement. This agreement establishes strategies among cooperating lawyers that include filing multiple state class actions "in order to coerce settlement. That is the kind of situation that I'm used to dealing with and that many others are used to dealing with." Another illustration is provided by the many cases filed involving every pharmaceutical product that includes PPA. "No one, no lawyer should be able to march into court on behalf of millions of clients and ask a judge

down in Plaquemine in Louisiana to decide that some pharmaceutical ingredient is harmful. I mean, that's a job for the FDA." The same is true for vehicle components. (His written statement, 01-CV-019, adds that "[t]he proliferation of such lawyer generated class actions is one of the many unfortunate by-products of the tobacco settlement — plaintiffs' lawyers, believing their own press, now see their clients as the public at large, and believe that the public is somehow served by whatever settlement they can extract from a deep pocket defendant, regardless of who gets the payoff." One client had 25 nearly identical state-court class actions filed against it in a 2-month period. Another was sued in six, and threatened with 30 more — it took more than a year to get them dismissed, at considerable cost and after suffering substantial adverse publicity. The overlapping class proposals are creative and effective solutions, but they will have no impact at all when the cases are all filed in state courts, and they will take years to implement. The Committee should endorse minimal-diversity class-action jurisdiction bills.)

Prof. Ian Gallacher, D.C. Hearing 141: Asks the committee to support the legislation pending in Congress.

Michael Nelson, Esq., D.C. Hearing 161 ff: One of his clients is defending a number of state-court class actions. In each, the complaint disclaims any recovery greater than $75,000 for any class member. Plaintiffs clearly are trying to avoid federal court. The discovery in these cases "is astronomical." One judge has ordered discovery of 80,000 e-mails from one corporate defendant. Minimum diversity legislation would go a long way to address these issues. "The preclusion rule * * * would also help." And something should be done to regulate voluntary dismissal. A client has encountered this dilemma: A class action was started by a firm, and remains pending. A lawyer left that firm and started an identical class action at a new firm in one state; it was voluntarily dismissed after motions to dismiss were filed. The action was then filed in a second state, again alleging a nationwide class. The law of that state was changed and that action was dismissed. A new action was brought in yet another state. Something should be done to stop this. (His written statement, 01-CV-021, observes that the effectiveness of federal class-action rules depends on establishing federal court authority to manage and control overlapping state and federal actions. Overlapping actions increase the plaintiffs' opportunity to achieve certification in at least one forum: the defendant can never win, and the millions of dollars in costs to defend each action create pressure to settle to buy peace "at a premium to avoid potentially catastrophic results in any one forum." The Committee should go further than the proposed amendments to take every opportunity to remedy the problems created by overlapping class actions.)

David Snyder, Esq., and Kenneth A. Stoller, Esq., D.C. Hearing 167 ff.: Representing the American Insurance Association, notes the perspective of insurers: They are "the financial managers of the civil justice system, * * * a pass-through mechanism between plaintiffs and defendants." Insurers, increasingly, are also defendants in class actions. Insurers also work with public-interest groups to bring about safer workplaces, safer products, cleaner air, and so on. From these perspectives, the most important reform is to address the problems that arise from decision by state courts of class

actions with nationwide significance. The state courts are not equipped to do that. Federal courts should be restored to their "appropriate and constitutional role in the class action situation." An example is provided by an action in a Washington State Court asserting "diminished value" claims on behalf of a class that includes residents in 27 different states. The National Association of Insurance Commissioners joined in an unsuccessful attempt to win review of the certification. They urged that the effect of the class certification is to apply Washington law extraterritorially to all these states, depriving state regulators and legislators of the power to regulate within their own states. (The written statement, 01-CV-022, urges the Advisory Committee to "implement, or at least support," minimal diversity reforms. Federal jurisdiction is particularly appropriate when the legal issues are subject to litigation and adjudication in many states, the law varies significantly across state lines, and the industry involved is heavily regulated by state systems.)

Robert Scott, Esq., for Lawyers for Civil Justice, D.C. Hearing 175 ff.: The proposed rules changes do not go far enough. The plaintiffs' bar now routinely seeks class certification of product liability claims, creating "bet the company" cases. The mere fact of aggregation is enough to coerce settlements. These multi-million dollar transfers have significant long-term implications for the economy and for society. The race for certification leads to overlapping actions in state and federal courts, "trampling on the due process rights of the defendant." The class representative claims to represent unknown numbers of people, most of whom do not even know of the class action, probably would not seek to vindicate the claimed rights, and in many cases would object to being thrust into a court proceeding without their knowledge or consent. The opt-out change in 1966 was wrong. Federal-court oversight is increasingly important: "It is not uncommon to observe overlapping putative class actions in Federal and State Courts by the same or different groups of plaintiffs' counsel." First, the Advisory Committee should support minimal diversity legislation. A preclusion rule also should address "the problem of multiple conflicting, overlapping, and competing class actions because of the increasing frequency of competing and overlapping parallel suits." The present system leads to waste and inefficiency. It also leads to inconsistent rulings both on substantive matters and on discovery. Coordination is attempted in some cases, on an informal basis, but when it works it is only after great expenditures of money, time, and other resources. (The written statement, 01-CV-038, adds that a rule or statute should bar mass tort actions on a consolidated or class-action basis "because such trials result in the deprivation of both plaintiffs' and defendants' due process rights.")

Stephanie A. Middleton, Esq., D.C. Hearing 184 ff.: The better federal courts become in the fair processing of class actions, the more irrelevant they become. Plaintiffs go to state courts and frame actions that cannot be removed. Overlapping, competing, copycat class actions require defendants to submit to coercive settlements. Most state courts are very good, but it takes only one or two state courts to be open to abusive class actions to allow the abuses to continue. State courts also lack the resources available to federal courts. One current area involves the managed care industry. There is a federal MDL proceeding in which the judge is carefully considering all motions to dismiss, for discovery, and so on. Meanwhile, state courts have certified parallel class actions, heavy discovery

proceeds, and the cases are headed for state-court trials. The first the industry learned of these actions was not by filing, but by a story in the Wall Street Journal; the Journal was told by the lawyers that they were going to force settlement by driving down the defendants' stock prices. There are abuses, "and there are some very sophisticated, very well financed, very good attorneys who do know how to force settlements." We cannot explain to our clients how we can be sure that we are buying peace, what class actions are about, how we can budget for them. The Advisory Committee should support minimal diversity jurisdiction. In response to a question, the federal MDL proceeding is a bit unwieldy, but the judge is considering every motion; the problem is that there are unremovable actions in about 20 state courts. (Her written statement, 01-CV-032, urges adoption of a preclusion rule to "enforce a denial of certification" by barring attempts to obtain certification of any substantially similar class no matter who might appear as representative. A preclusion rule precludes serial forum shopping, but leaves plaintiffs free to use other procedural devices. In response to a question at the hearing, she observed that a preclusion rule that operates only among federal courts would not address the real problems, which arise from state proceedings. The written statement also offers examples of cases in which state courts seek to fix the law of a single state on all states through nationwide class actions. She further observes that there is a drug store in Jefferson County, Mississippi, that has been made defendant in many actions — commonly to be dropped after expiration of the time allowed to remove a diversity action.)

David E. Romine, Esq., D.C. Hearing 256-257: The proposal to give preclusive effect to a federal court's refusal to certify a class has good and troubling aspects. Description of a case in which the federal court enjoined a competing state class action seemed an appropriate step. But states are entitled to have their own procedures, and it is not clear that a federal court should be able to say that a state court cannot certify a state class action.

Walter J. Andrews, Esq., D.C. Hearing 276-280: Class-action practice raises the costs of insurance more than any other litigation activity. Competing and overlapping class actions multiply expense with motions practice, discovery, certification, scheduling, and other pretrial procedures occurring simultaneously on multiple tracks. The likelihood of inconsistent decisions impairs the proper consideration of claims and defenses. There may be outright forum shopping. Alternatively, multiple actions may be filed for strategic purposes. "[R]eforming this practice is perhaps the most fundamental problem with the present class action practice * * *." Plaintiffs have unfair opportunities to relitigate endlessly the certification question, and to impose unmanageable discovery demands.

Judith Mintel, Esq., State Farm Mut. Auto. Ins. Co., D.C. Hearing 294-301 and Written Statement, 01-CV-040: State Farm is defending a large number of class actions; 90% of them are in state court. They have experienced "drive-by" certification ordered before service of process. State court actions often involve major policies pursued across the country. One example is the use of crash parts not made by original equipment manufacturers. Many states have concluded that it is desirable to use these parts to reduce costs and insurance premiums, to promote international trade, and avoid

monopoly pricing in an area that involves tens of millions of people and billions of dollars. After winning or settling 19 actions, a court in Southern Illinois entered a $1,800,000,000 judgment for a nationwide class finding the practice unlawful. Diminished value cases are coming next. "[W]hat I'm seeing in these cases, these are federal questions * * *." It would help to have a rule that denial of class certification by a federal court precludes certification of the same class by a state court. (Her written statement supports minimal diversity jurisdiction bills. It also provides much greater detail about the multiple overlapping state-court class actions encountered in the non-OEM crash parts and diminished value cases. Following the Illinois judgment in the crash-parts case, State Farm "no longer issues repair estimates using non-OEM parts." There is also a detailed statement that some state courts persist in certifying nationwide classes to apply their own law to outlaw practices that are in fact lawful in some or many of the states included in the class.)

Sheila Carmody, Esq., D.C. Hearing 301-310, and Written Statement, 01-CV-050: There is a problem with overlapping class actions so severe as to require action. Minimal diversity jurisdiction is desirable. Preclusion rules also are desirable. "I have cases, substantially similar cases in Arizona, Florida, Maryland, Washington, Illinois, Louisiana." The enormous costs of defending include a cost no one has yet mentioned — not just document searches, but document retention. One particular case is an illustration of the origins of these actions. Deposing the class representative in our action, we were led to his deposition in another action in which he also represented a nationwide class. In that deposition he stated that he had told counsel he did not want to be representative in the present action, but they kept calling and finally he agreed. He repeatedly stated that he was thinking about dropping the present action, and that he did not bother to open communications from class counsel. But the case continues. (Her written statement offers examples of two other cases in which class representatives stated that they had not been injured by the practices complained of in the class action. She adds that nationwide class actions are being filed in state courts to avoid MDL consolidations in federal courts. The testimony of some that the problems are being worked out informally "is not supported by the countless simultaneous class actions that are being litigated even during this Comment period." The Committee should consider supporting minimal diversity legislation. There also is a problem with "sequential forum shopping" in which a denial of certification in one court is followed by filing in another court. The Committee should support a rule change or legislation that establishes preclusion on the certification issue.

Bruce Alexander, Esq., D.C. Hearing 310 ff and Written Statement, 01-CV-041: Minimal diversity is good. One example is a series of eight successive litigations; seven were filed by the same firm, six of them within three days and in six different jurisdictions. The plaintiffs lost all of the certifications, but the defendant had to litigate the issue every time. It also would be useful to have a rule that once a federal judge has denied certification, no court can certify. But the alternative approach that would preclude a lawyer from making successive attempts to achieve certification should be rejected — it is in all practical respects a regulation of the practice of law. There is another problem not yet mentioned. Class action counsel will have a local practitioner file an action that includes a small federal claim with small state claims; after the time to remove has passed, the

complaint is amended to add class allegations. This strategy should not be allowed to defeat removal. The remedy is to provide that addition of class allegations starts a new period for removal.

Bruce S. Harrison, Esq., D.C. Hearing 327 ff. and Written Statement, 01-CV-060: After years of employment discrimination class actions in federal court, it looks as if the focus will shift to state courts. One example is presented by an opt-in action in federal court under the Fair Labor Standards Act that is duplicated by an opt-out class action pending in a Washington state court. If the state action proceeds, it will be a race to judgment. It is not at all clear that judgment in the state action will be good for class members, because the state law sets a much higher standard for liquidated damages than the standard set by federal law. There is a risk that the rights of employees will be lost in the shuffle. There is a further problem of what law to apply in the Washington court: the class includes members from states with differing laws, including five states that do not even have fair labor standards laws — will the court apply its own law? Will it group claims according to similarities of state laws? The class action fairness acts should be passed by Congress. The Rules Committee should study amendments, as to the Anti-Injunction Act, that would give federal courts power to prevent competing class actions in state courts.

Linda A. Willett, Esq., 01-CV-028: The Reporter's Call for Comment and testimony of McCowan and Richo in San Francisco "more than adequately set forth the enormous problems created by duplicative class actions and strengthen our belief that the filing of competing suits is an egregious abuse of the intended purpose of class action litigation." The remarkable work of coordinating federal and state actions in the breast implant litigation serves to show how difficult the enterprise is. The coordination came "only after a number of chaotic years during which corporate defendants were forced to pay exorbitant settlements in order to avoid the substantial economic threats posed by competing class actions, endure the often unfair treatment in state courts as out-of-state parties, fell victim to the inconsistent, or absent, application of Daubert standards to scientific evidence, and literally spent thousands of valuable work hours and millions of dollars attending the often repetitive discovery coming from all fronts." Plaintiffs' counsel have learned from the eventual tour de force accomplished by Judge Pointer in effecting substantial coordination with state courts; they now "strive to file their overlapping actions in courts that history has demonstrated are less apt to cooperate with federal court efforts to coordinate litigation." Similar problems are looming in the growing number of class actions filed against manufacturers of products containing phenylpropanolamine. (These actions are described at length. Plaintiffs' attorneys "appear to intend to move at warp speed to the end game — settle now — using the threat of overlapping class actions to convince defendants they should pay now or suffer. That may be effective, but it is not fair!") The draft proposals dealing with overlapping class actions and preclusion would be a modest improvement. The Advisory Committee has authority to adopt such proposals. But if it decides not to adopt them, it should recommend a comprehensive package of meaningful rule and legislative proposals. The Advisory Committee should support minimal diversity jurisdiction legislation. But even with such legislation, preclusion rules will be necessary because "individual competing state

class actions would continue to cause waste and inefficiency, in terrorem strategic effects, and unfair, sequential forum shopping."

Donald J. Lough, Esq., 01-CV-029: Details the experiences of Ford Motor Company. "Overlapping class actions are one of the biggest legal problems confronting Ford today * * *." "In the past ten years, average annual class action filings against Fort have increased by 1,600%." There are three types of overlapping classes: concerted, competing, and copycat. (1) "Concerted class actions are multiple cases in multiple courts alleging essentially the same class claims by the same lawyers. * * * Concerted class actions are the preferred method of forum shopping in class actions." Several examples are offered of concerted filings against Ford. "No legitimate purpose is served when a single lawyer or a group of lawyers acting in concert file multiple cases seeking the same relief for the same people." (2) "Competing class actions allege essentially the same class claims by plaintiffs' lawyers who are not working together. In these cases, rival counsel race to the courthouse to be the first to obtain class certification or a settlement." Among the examples is "[a]n eruption of competing class actions immediately follow[ing] a joint announcement * * * of a recall of 6.5 million tires * * *. More than 100 class actions were filed, mostly in state courts, by nearly 100 law firms. In the most egregious case, one plaintiffs' lawyer anxious to get a lead on his rivals literally 'sued first and asked questions later' — the day after the recall announcement, he filed a form complaint with hundreds of blanks where the names of the parties, the products and the liability theories were to be inserted." [94 of the actions have been consolidated in federal MDL proceedings; 7 "remain trapped in state courts" because they were remanded before the MDL consolidation. The federal judge has achieved an unprecedented level of cooperation between the state and federal courts.] Competing actions follow a common pattern: "competing class actions filed in quick succession following publicity about a recall, termination of a product or a government investigation." "The interests of consumers and judicial efficiency are not served when dozens of different law firms purport to represent the same class of plaintiffs. Certainly, public confidence in class actions and the legal profession is diminished by the spectacle of feeding frenzies among contingency fee lawyers competing to control cases." (3) "Copycat class actions are filed after a decision by one court on class certification or the merits. Copycat cases are filed for three reasons: to end-run a prior denial of class certification, to capitalize on a class certification order entered by another court or to interfere with a potential settlement." Examples are given. As to solutions: "Overlapping class actions are filed predominately in state courts because plaintiffs' lawyers avoid federal court in favor of state courts with lax class certification standards." The Advisory Committee should support minimum-diversity legislation. The Committee also should adopt a rule that denial of class certification by a federal court precludes all federal courts from certifying substantially the same class. Courts should be empowered to impose sanctions on counsel who without good cause attempt to relitigate a federal court's denial of certification, or who unreasonably and vexatiously multiply class actions by filing overlapping cases. And proposed Rule 23(g)(1) on appointing class counsel should require appointment of class counsel at the outset of the case to discourage "piling on" by multiple filings.

Patrick Lysaught, for Defense Research Institute, 01-CV-033, 034, 046, 047: The second section, 32-56, responds to the Reporter's Call for Comment. It pursues many themes. **(1)** First is a statement that the problem of overlapping class actions is severe. The problem arises because counsel can derive economic benefit from a class action, leading to competing filings in an attempt to gain control of the litigation. Few courts would countenance multiple filings by a single plaintiff, whether represented by one counsel or many; "[u]nfortunately, in class action litigation, this is the rule, rather than the exception." Examples are provided. In the Fen-Phen litigation, 58 class actions were filed in federal court and 75 in state courts; when Baycol was withdrawn from the market, 56 class actions were filed in federal courts, and 64 in state courts; when Rezulin was withdrawn, 64 class actions were filed in federal courts, and 24 in state courts; in litigation involving an "orthopedic medical device," 37 class actions were filed in federal courts, and 18 in state courts. A Federalists Society survey provides further information. **(2)** Due process requires that an attorney who seeks to represent a class vigorously pursue the best interests of class members. "Filing of multiple and competing class actions generally demonstrates that such is not the real goal." Defendants face potentially enormous and completely unnecessary costs. The deliberate effort of federal MDL courts to provide due process "often permits judges in state court the opportunity to proceed far more 'expeditiously.' * * * There are genuine reasons for concern about maintaining and securing due process because state courts often lack the resources to appropriately address the issues and sometimes do not neutrally apply the law." Defendants face the incredible due process dilemma that they have to relitigate the same defense "over and over until eventually a loss occurs in some court. Resulting pressures on the companies' resources and its stock prices are enormous." **(3)** What is needed is a mechanism that enables a single federal court to take control of all class-action litigation that arises from the same transaction or occurrence and involves the same claims. That will require ready removal of state actions to federal court. At present, cooperation between federal and state courts "is the exception, not the rule." **(4)** It may be difficult to win adoption of either form of the Rule 23(g) draft on competing class actions, but it is worthwhile. The purpose is to maintain the authority of a federal class-action court and the integrity of federal class-action procedure. The first alternative allows regulation of competing litigation in any form; this is necessary to reach state procedure that involves massive joinder without class procedures, as in Mississippi's "all for one" proceedings. The second alternative, which allows control only of state-court class actions, would be less effective. The provisions in (g)(2) and (3) that authorize deference to state courts, or coordination with them, are useful, but "much more could be done to provide helpful insight." "Virtually all class actions, unless strictly limited to citizens of the forum state, should be supervised by a federal court. Although state courts have many outstanding judges, simply put, seldom do they have the same level of resources available to federal court judges." **(5)** "[R]elitigation of the same class action issues once a court * * * has denied class certification is virtually never appropriate." Unless denial of certification has res judicata effect, failure to meet the requirements of Rule 23 in one proceeding becomes meaningless. A rule such as proposed 23(c)(1)(D) "should be unnecessary, but that is not the case." The rule should not depend on the court's determination to issue a preclusion order; preclusion should be automatic. It would be very helpful to provide detailed

guidance on the reasons that defeat preclusion — whether a later class involves substantially similar claims, issues or defenses, or whether a difference of law or change of fact creates a new certification issue. It is proper to bind absent class members — only the issues actually addressed are precluded, and class members remain free to pursue individual actions or substantially different class actions. To be sure, creative state legislatures or courts may seek to lower the bars to certification, thus defeating preclusion, but the effort is worthwhile. The alternative that would add a factor to Rule 23(b)(3), inviting the court to consider as part of the superiority determination whether any other court has refused to certify a substantially similar class, is reasonable. But it should be made clear that preclusion applies only if the due process rights of the parties were protected by a state court denial of certification, and that there must have been written findings of fact and conclusions of law so that the federal court can determine whether the reasons for denying certification still apply. **(6)** Settlement finality will reduce the practice of settlement shopping. This is eminently fair. The exceptions that allow approval of a substantially different settlement, or approval of substantially the same settlement in face of changed circumstances, are important and "make good sense." But there must be clear guidelines, preferably in the Note or at least in developing case law, to establish what is meant by "'substantially the same,' or not." And if a new court concludes that a second settlement is not substantially the same, it should be made clear that the first court has power to enjoin approval of the settlement. And in any event, appeal should be permitted from the determination whether the settlement was substantially the same. Changed circumstances may relate to the development of the litigation from infancy to maturity. Changes in the defendant's financial condition are relevant. So are changes in the strength of the liability issues. The alternative, which would add a provision to (e)(1)(C) prohibiting approval of a settlement rejected by another court, is preferable because it is a stronger admonition. [Reporter caution: this comment may reflect a misleading suggestion in the call for comment. The (e)(1)(C) alternative affects only approval by a federal court; it leaves state courts free to approve a settlement rejected by a federal court.] **(7)** The Rule 54(b) analogy rule that would allow entry of final judgment refusing to certify a class or to approve a settlement "is the best of the various alternate approaches." It is best because it goes beyond issue preclusion. Class members are bound. There is no need to worry about confusions of the right to appeal: there should be a right to appeal a certification decision. **(8)** The alternative that would preclude a lawyer from directly or indirectly seeking a second certification decision is not likely to be much help. It will be difficult to stop indirect participation. And this approach is no help when competing class actions are filed by different lawyers.

Part III, pp 57-62, reviews again the problems caused by multiple class-action filings. The perspective again is that the increasing control of class actions by federal courts, and particularly the unwillingness to use class actions to address mass torts, has led to filings in state courts that have proved friendly to plaintiffs and hostile to defendants. The Advisory Committee should support minimum diversity jurisdiction; to avoid occasional wrangling, it would be better to set the same $75,000 amount-in-controversy threshold as is used in § 1332 for ordinary diversity jurisdiction. In the alternative, federal removal jurisdiction could be established to reach: "(a) any class action or

consolidated proceeding; (b) pursued on behalf of citizens of more than one state; and (c) that ARISES from a transaction or occurrence implicating interstate commerce * * *."

Alan B. Morrison, Esq., 01-CV-042: Makes points in three parts. **(1)** It is important to distinguish simultaneous from consecutive class actions. Simultaneous actions create problems of coordination in discovery and timing of certification motions, and most importantly problems of defining which court has ultimate authority. Consecutive actions involve second attempts by those who have failed in certification or settlement; there are not as many of these. The evidence that must be gathered to identify and assess the problems is different for these two different situations. **(2)** Action in either area involves potential intrusions on state-court power, and on the freedom of litigants to choose a forum. Proposals such as minimum-diversity jurisdiction have been extremely controversial, and so far have failed in Congress. "[T]his is an area in which the rulemakers should be reluctant to tread because it is more political than procedural." Congress has not considered legislation focused on the consecutive actions. **(3)** The models in the Call for Comments have limits. The certification preclusion model depends on interpretation of what is a substantially similar class, and what changes of law or fact may justify reconsideration of the same class certification. If a federal court decides these questions, it must act by injunction; that is intrusive. If the second court decides, as usual with res judicata, the limit on the second court may be ineffective. The alternative models fare little better. An attempt to treat denial of certification as a final judgment does not square preclusion of absent class members with due process: no class has been certified, so how can they be bound? Lawyer preclusion intrudes on regulation of lawyer activities, a matter left to the states; litigation of "indirect" involvement "would, at best, create a lengthy digression from the main case." The proposals dealing with federal-court control of state-court actions encounter the difficulty that a court has no personal jurisdiction over absent class members until a class has been certified and an opportunity to opt out has been given. Once a person opts out, moreover, there is nothing to prevent an individual action, and no apparent basis for barring the opt-outs from filing an independent class action.

Exxon Mobil Corp., 01-CV-059: Class action practice, designed to eliminate repetitive litigation, to promote judicial efficiency, and achieve uniform results has developed into a practice that "perverts each of these original goals." Exxon Mobil has "seen an increase in competing class actions filed against it in different state courts." These actions are used "to avoid federal jurisdiction, consolidation, and oversight * * *." The most effective means of addressing these problems require legislative action, including the pending minimal diversity legislation. The Judicial Conference should support this legislation.

ABA Antitrust Law and Litigation Sections, 01-CV-069: "[W]e strongly favor the Advisory Committee's continued efforts to address these issues. Overlapping and competing class actions continue to be a problem for practitioners * * *."

Association of the Bar of the City of New York, 01-CV-071: Attaches a June 1, 2001 letter addressing the rules proposals that later were circulated with the Reporter's Call for Comment. The proposals seem better fit for legislation than rulemaking. Concern about Enabling Act limits is an impediment that suggests Congress should address these issues. The preclusion proposal, moreover, raises other questions: what is a "substantially similar" class? How long would the preclusion last?

Civil Division, U.S. Department of Justice, 01-CV-073: The Committee should continue to review Rule 23 amendments "to clarify or enhance the authority of district courts to issue orders concerning duplicative or overlapping class actions." The problems that were identified in the Committee's April 2001 draft "merit further examination."

Prof. Martin A. Redish for Lawyers for Civil Justice, 01-CV-074: The problems addressed by the overlapping class proposals "are extremely serious ones." The problems asserted by many are overstated. "[I]t is essential that the Federal Rules provide for a mechanism to prevent the inescapable and severe harms that flow from the problem of overlapping class actions." Permitting another court to certify a class that a federal court has refused to certify "enables plaintiffs' lawyers to use the class action device as a means of legalized blackmail. * * * [D]efendants are effectively forced to 'buy' litigation peace." The resulting forum shopping is much worse than the single federal-state choice that animates Erie doctrine. It is necessary to extend preclusion beyond the particular representative who failed to win certification. Class members remain free to bring individual actions. In any event, in most class actions it is the attorney, not the named plaintiff, who is the real party in interest. The proposed preclusion rules, moreover, include rules that run in both directions — refusal by a state court binds federal courts, and refusal by a federal court binds other federal courts as well as state courts. Such preclusion is far less invasive than an injunction to protect a federal judgment. But empowering a federal court to enjoin an overlapping class action is itself proper federalism; the in-aid-of-jurisdiction exception in § 2283 "clearly authorizes such relief." This interpretation brings that exception in line with the relitigation exception. Section 2072 permits adoption of such a rule; Rule 13(a) already has the effect of precluding litigation in state court on a claim that ought to have been asserted as a compulsory counterclaim in federal court.

The Committee should support minimal diversity legislation, "fulfilling its role as an important partner in the fashioning of modern federal procedure." Anecdotes about the abuse of class actions in state courts show that "concerns about prejudice towards out-of-state interests go considerably beyond the purely theoretical." Indeed, established doctrine rests on a form of minimal diversity — only the citizenship of the named class representatives is considered in determining whether there is diversity jurisdiction.

Denise P. Brennan, Esq., 01-CV-080: Concurs in the statement filed by Bruce Alexander; see above.

Beverly C. Moore, Jr., Esq., 01-CV-083: "The impetus for many of these Rule 23 'reforms' * * * comes from large corporate defendants who are frustrated that clever plaintiffs' counsel can forum shop to find a judge somewhere who will certify a class, meaning that such defendants cannot consistently rely upon federal judges disproportionately appointed by Republican presidents to deny class certification." "This is very selective forum shopping," aimed at a small number of local courts, often courts with only a single judge so the plaintiff knows who will get the case. It is to the Committee's credit that it decided that it could not adopt minimal diversity proposals under the Enabling Act. The certification proposal in the Rule 23(c)(1)(D) draft "is unnecessary because forum shopping for a pro-class action federal judge has not been a particular problem." If a class certification is not final, why should a denial be final? And federal courts generally give great deference to a prior class denial by another federal court — there is no need for res judicata. More importantly, a new class counsel may be able to "fix" the cause of denial; the fix may not lie in a change of fact or law, but a different crafting of the same facts and law. An injunction against related class actions, as the draft Rule 23(g) would permit, also is unnecessary; federal courts address these problems through J.P.M.L. tag-along rules and § 1404 transfer.

Mortgage Bankers Assn., 01-CV-087: Understanding that there are legitimate issues of Enabling Act Authority, immediate reforms are needed to address multiple class actions. Most MBA members have mass consumer bases, and are heavily regulated by both federal and state law. That supports multiple class actions. In the last several years "over 200 materially identical class actions challenging lender-paid compensation to mortgage brokers under the Real Estate Settlement Procedures Act * * * have been filed all over the country." There is naked judge-shopping. In at least seven instances a single lender has been sued on three or more occasions, each suit challenging the exact same practice on behalf of a putative nationwide class. Even when the actions are in federal court, MDL processes do not always work: several members have failed to achieve consolidation of parallel actions, while another has won consolidation in seemingly identical circumstances. And MDL processes cannot work when the fillings are sequential, not simultaneous — members have had the experience of defeating class certification, "only to have the same plaintiff's counsel or copycat counsel file the identical lawsuit with a new named plaintiff in some other federal jurisdiction." Comity, res judicata, and collateral estoppel principles have not stopped the practice.

J.C. Powell, Esq., 01-CV-088: Centralizing mass-tort litigation will harm people. In fen-phen, the lawyers involved in the federal MDL proceeding failed to produce damning documents regarding the bias of the key witness. The information "was finally obtained after the compliance with state laws regarding discovery." "The use of many eyeballs watching inspecting matters is important."

Lawyers' Committee for Civil Rights Under Law, 01-CV-091: (For 18 civil rights, public interest organizations, and bar associations; joined by law firms, practitioners, and professors.) Legislation such as the "Class Action Fairness Act" would have astounding and disastrous consequences for class-action practice in federal courts. The federal caseload would be expanded by hundreds of

complex cases that do not involve federal law. Rule 23 amendments such as those proposed now would further complicate class-action practice, and are clearly inconsistent with legislation that would enormously increase the volume of federal-court class litigation.

Association of Trial Lawyers of America, 01-CV-098: Has in the past commented extensively on the drafts presented most recently in the Reporter's Call for Comments. "[I]t is our understanding that those proposals will not be pursued further. Accordingly, we will have no more comment on them at this time."

Chicago Conference: October Minutes Summary

Panel 5: Overlapping and Duplicative Classes: The Extent and Nature of the Problems

Panel 5 was moderated by Professor James E. Pfander. Jeffrey J. Greenbaum, Esq., and Professor Deborah Hensler were presenters. Panel members included Fred Baron, Esq.; Elizabeth Cabraser, Esq.; William R. Jentes, Esq.; John M. Newman, Jr., Esq.; David W. Ogden, Esq.; and Lee A. Schutzman, Esq.

The panel was presented a set of questions: How often are overlapping and duplicating class actions filed? What function do they serve? Are they filed by the same lawyers, or do they result from races of competing lawyers? Can we identify subject-matters that typically account for this phenomenon? What eventually happens — do most of the actions simply fade away?

Professor Hensler began by suggesting that only a subjective answer can be given to the question whether there is a problem, and if so what is the problem. It is hard to agree. The RAND study began by interviewing some 70 lawyers on plaintiff and defense sides, including house counsel. What defendants call duplicating class actions, plaintiffs call competing class actions. Defendants complain of costs; plaintiffs talk of the race to the bottom as defendants settle with the greediest attorneys. Defendants offered lists of cases demonstrating duplication; plaintiffs described the deals made by competing attorneys. One plaintiff, for example, described being told by a defendant: "you don't understand how the game is played; I'll make the same deal with someone else."

Professor Hensler then described the in-depth study of ten cases, including six consumer classes and four mass-tort classes involving personal and property damages. Cases were selected from these areas because they seemed to be the areas generating problems; securities actions were in a state of flux at the time of the study, and were excluded for that reason. In four of these ten cases, the plaintiff attorneys who resolved the case filed in other courts, at times many other courts. In five, other attorneys filed in other courts. In only two were there no competing class actions; each of these two were cases involving localized harm and restricted classes. In at least one case, the judges got drawn into a competition to win the race to judgment: it became necessary to mediate between the

judges. This is not close to being a scientific sample, but the course of these cases was consistent with what the lawyers said in interviews. The lawyers who filed in other courts did it to preserve the chance to win certification if certification should be denied by the preferred court, or else to block others from filing parallel actions.

When other groups of attorneys filed parallel actions, operating independently, they often asked for compensation to withdraw their actions. The payments did not become part of the public record. The attorneys who took payment often asked for changes that improved class results, but this was not true in all cases. The presence of these csaes, often at different stages of development, affected the strategies of plaintiff counsel, and especially affected defendants who sought to negotiate in the most favorable case.

From the judicial perspective, competing actions increase public costs. But the costs are a "tiny fraction" of the total costs. From the defendant's perspective there are additional costs, but the defendants interviewed were not willing to say how much.

When settlement followed the joining of forces by plaintiffs, the plaintiff fee award was driven up because there were more attorneys claiming fees. This may be in part a cost imposed on defendants. But in reality, plaintiffs and defendants negotiate the total to be paid by the defendant; the fees come out of the plaintiff pot. It is not clear whether the total payment offsets this.

The more important consequences of parallel filings are these: First, there are increased opportunities for collusion between plaintiff and defendant attorneys. This is a particular risk in "consumer" classes where there is no client monitoring the attorneys. Many state judges have never seen a class action, and their instinct is to cheer, not to review, a settlement. Second, parallel findings provide a means for plaintiffs and defendants whose deal does not pass scrutiny to take the deal to another judge for approval. These consequences support the efforts to provide closer scrutiny of settlements and of fee deals.

Attorney Greenbaum began his presentation by observing that the "current crisis" is overlapping and competing classes. "The multi-headed hydra is with us; cut off one head and two more grow back." Yes, there is a problem; it is described, among other places, in a recent article by Wasserman in the Boston University Law Review. Courts also recognize the problem. And practitioners face it every day. Why has it developed?

Class actions are lawyer driven. They can be very lucrative. It is easier to copy an idea than to invent a new one. Lawyers who file an independent and parallel action may hope to wrest control of the litigation from those who filed first.

In a different phenomenon, the same lawyers may file in several courts, looking for certification, more rapid discovery, or other advantages deriving from the ability to choose among actions as one or another seems to develop more favorably. The Matsushita decision, by empowering state courts to dispose by settlement of exclusively federal claims, encourages such behavior.

There are three types of parallel filings: (1) Plaintiffs bring separate actions against each company in an industry — the plaintiffs and courts duplicate, but not the defendants. (2) The same lawyers sue in multiple courts for the same plaintiffs against the same defendants. (3) Different groups of lawyers bring multiple actions. These suits may be successive as well as simultaneous.

One problem is the tremendous cost of duplicating effort. Coordination of discovery is often worked out, but not always; the more actions that are filed by different attorneys, the more likely it is that at least one will involve an unreasonable attorney.

Another problem is that there is a lack of preclusion. Dismissal of one action for failure to state a claim, for example, does not preclude pursuit of a similar action. A denial of certification by one court does not preclude certification by another.

And of course there is a great pressure to settle, augmented by the burdens and risks of parallel actions.

An illustration is provided by litigation growing out of tax anticipation loans. The litigation generated twenty-two class actions, in the state and federal courts of eleven different states. For a period of ten years, the defendants had "great success"; none of the actions went to judgment. But finally a Texas court certified a class, and the case settled.

It is important to establish preclusion on the certification issue. One refusal to certify simply leads to another effort in a different court. And differences among state certification standards confuse the matter. Further confusion arises from "different levels of scholarship" among different judges. The plaintiffs eventually will find the most lenient forum. Even if you settle or win, preclusion questions remain — who is in the class? Was there adequate representation?

A plaintiff may find it easier to wreck the class by farming opt-outs when there are parallel actions pending.

The presence of competing actions forces a defendant to hold back money from any settlement, harming the plaintiff class.

And plaintiff lawyers complain that other plaintiff lawyers steal their cases.

The reverse auction is often discussed. "I have not seen it in practice, but there is an odor when the newest case is the one that settles."

From the court's perspective there is a burden, and they suffer from the perception that lawyers escape judicial supervision by going from one court to another. The result undermines the very purpose of class actions.

Panel discussion began with the observation that there was no apparent tension between the perspectives of academic Hensler and lawyer Greenbaum. They present a joint perception: they give an unqualified "yes" to answer the question whether overlapping class actions in state and federal courts are a sufficiently serious problem to justify Rule 23 amendments. In addition to the cases they

describe, Judge Rosenthal's memorandum to the Advisory Committee last April described another seven disputes that gave rise to parallel class actions, only two of which involved mass torts. A survey of litigation partners in this panel member's large firm turned up six more examples, only one of which involved a mass tort. "You will hear other examples."

The Manhattan Institute released a study in September 2001 that concentrated on Madison County, Illinois. The county population is some 250,000 people. Yet it is second only to Los Angeles County and Cook County in class-action filings in the last three years. Eighty-one percent of them were for putative national classes on claims that had no real nexus to Madison County. Why should this be? Madison County has a long history as a hotbed for plaintiffs. It began years ago as a favorable forum for FELA plaintiffs. Now they have found a much more fruitful project. One illustration is a class action involving Sears tire balancing, in an attempt to use the Illinois statute for consumers in all states.

The next panel member identified himself as an expert who litigates mass torts. By definition mass torts involve much duplication; victims file individual claims, as they have a right to do. That is his perspective on Rule 23. From that perspective, the question is whether there is a need to revise Rule 23. What are the perceived abuses? The principal abuse is collusion — when a mass tort occurs, the defendant wants global peace. There would be no problem if it were not for this propensity of defendants. They do not like Rule 23, except when they want to use it. Class actions should not be certified for mass torts. It is consumer cases that drive the problems. The proposals on overlapping classes must be dramatically offensive to state-court judges. We cannot by rulemaking solve the problems that arise from plaintiffs' quest for favorable courts. These proposals are not within the ambit of the Enabling Act; they cannot be done. Accordingly there is no need to worry about how they should be done.

A third panel member, speaking from a defense perspective, agreed that the desire to change Rule 23 is substantially driven by consumer claims. The 1998 Securities legislation is a model that deserves consideration. Some state claims have been excluded or federalized. State courts have been told this is a national problem to be addressed on a national basis. The 1995 PSLRA caused a migration to state courts; the 1998 SLUSA responded by limiting the role of state courts. The problem of overlapping class actions is real. In the most recent experience, the evils were demonstrated by a network of lawyers who undertook to file coordinated actions in each state, framing the actions in an effort to defeat removal. If successful, this tactic would eliminate any overlap between federal and state actions. The problem is fairness, not duplication. You have to win every point in every jurisdiction. Discovery, confidentiality, privilege are all at risk every time a state court rules: disclosure in any one action effects disclosure in all. Any focus on certification or settlement comes too late; fairness problems arise before that. And voluntary judicial cooperation is not a sufficient answer. Even as among federal courts, voluntary cooperation is no substitute for MDL processes. Under present procedures, appointment of a master to facilitate coordination is essential; the master's task, however, requires colossal effort.

The fourth panel member spoke from a plaintiff's perspective, based on experience in federal and state courts and in many different subject-matter fields. Unless we abolish state laws, we will have class actions in state courts. The Federal Rules cannot prevent that. Result-oriented rulemaking is a weak approach. The judge in federal court who does not wish to manage a class should not be able to prevent an able and willing judge from managing the same class. Nationwide business enterprise, moreover, generates nationwide classes. It would be futile to tell the manufacturer of a defective product that it should be sold only in the state where it is made. Overlapping classes arise in other fields for similar reasons. Antitrust actions may be filed in several states, for example, because state laws — unlike federal law — often permit suit by indirect purchasers. Plaintiffs, further, often seek statewide classes in state courts as an alternative to the national class that federal courts now discourage. To have the first court — a federal court — direct that there should be no class action in any court "will lead to no litigation, or to many chaotic individual actions." The concept of adding to Rule 23(b)(3) a factor to consider denial of class certification by another court as illuminating the predominance and superiority inquiry is fine; courts do this now, as they should, but a reminder does no harm. Another good idea is an express reminder to judges that it is proper to talk together across court lines; when this happens, coordination works out. But this works only if lawyers tell the judges that there are multiple actions. Defendants know of overlapping actions more often than plaintiffs do, but often do not raise the subject because they fear that plaintiff lawyers will coordinate their work and develop a stronger case. Many problems would be solved if defendants provided this information, and this duty should be recognized as a matter of professional responsibility. Finally, "preclusion is not the answer to collusion," but rather will exacerbate it.

The fifth panel member spoke from a defense perspective. Corporate counsel see a lot of consumer-type actions. And there are hybrids that involve products that have gone wrong, or that might go wrong. For the most part, mass torts are not certifiable. Overlapping classes have been around for at least 25 years. In 1975, the engine-interchange litigation generated many parallel actions, but these actions were "brought incidentally as a result of publicity." There was a different attitude — people believed such actions should be in federal court. This view continued through the 1980s. In the 1990s the phenomenon changed. It is a problem for the system. Rule 23 is a powerful tool. One class now pending against his client involves 40,000,000 people. Beginning with the GM pickup trial, lawyers have brought multiple actions as a weapon to coerce settlement. They often pick state courts in remote rural counties, hundreds of miles from the nearest airport. Legislation will be an important part of any package approaching these problems.

The final panel member spoke both from government experience defending class actions and from experience in private practice. The problem is a consequence of federalism. The United States as litigant has an advantage because actions against it come to federal court. Rule 23 is something that government litigants find valuable to resolve problems, to get a fair result. Typical actions are brought on behalf of federal employees. Rule 23 avoids a proliferation of litigation. This result should not be cut back. When cases can proceed in any of 50 state-court systems, "you lose a judge vested with control of the situation." The incentives seem to be to gain advantage: the plaintiffs get

multiple bites at the apple, and can impose high costs in order to encourage settlement. Defendants have an opportunity to look for a lawyer with whom they can make a "reasonable" deal. The slide of benefits from class to the plaintiff attorney can escape the judge's review and understanding. There is a risk of losing fairness to class members and deterrence.

An audience member asked about parallel litigation as a problem apart from class actions: should we have legislation for all forms of litigation, as perhaps a federal lis pendens statute written in general terms?

One of the presenters observed that "duplicative" litigation is a term used in many senses. The simple fact that events producing hundreds of victims may generate hundreds of individual actions has not been viewed as a problem by the Advisory Committee. So there are families of cases: plaintiffs win against one defendant, and then bring a similar action against another defendant. Again, the Advisory Committee has not viewed this as a problem. The nationwide class, commandeering the strength of the class action, is a distinctive problem: (1) Plaintiff attorneys can coordinate campaigns to press for settlement. (2) Competing classes generate a potential for collusion — this problem is recognized by lawyers, and is not a mere abstract concern of academics. Class actions generate "very powerful financial incentives." We must rely on judges to curb those incentives.

A panel member thought it a lot easier to justify a regimented approach in representative litigation, where the named representative's interest is submerged to the lawyer. But any solution cannot be framed narrowly in terms of "class actions" alone; Mississippi does not have a class-action rule, but achieves substantially similar results by other devices.

Another panel member observed that a plaintiff-perspective panel member had recognized that overlapping classes are a fact of life. The history of responses to multiple overlapping actions began with the electrical equipment pricefixing litigation forty years ago. The lawyers were told there was nothing that could be done about the overlap. But the federal judges created a coordinating committee that dealt with the problems. Discovery and trials were coordinated. The present proposals recognize the similar problems that exist today. State-court actions will remain.

The plaintiff-perspective panel member noted by the prior panel member suggested that there is an elegant solution. Judicial regulation is a need. More judges are involved. Rule 23, § 1407, and § 1651 can all be used. Judges can employ these tools cooperatively. A strict preclusion rule is far too restrictive of substantive and procedural rights. A good test of any solution is whether it makes all lawyers uncomfortable with the process: a fair and balanced solution should do that.

An audience member noted that the electrical equipment experience inspired the federal judges to go to Congress for a statute. There is a real question whether the Enabling Act can be used to preempt state law, or whether legislation is needed.

A judge asked from the audience what was the final outcome of the migration of the GM pickup litigation from federal court to the state courts of Louisiana. Panel members responded that

the litigation was still pending. The parties agreed to a settlement that substantially enhanced the terms that had been rejected in the Third Circuit. The settlement was supported by the parties who had objected to the federal settlement. "Amchem findings" were made on remand in the state court. "There was no quick deal." But as soon as the settlement was signed, a dispute arose over its meaning; the question whether it requires the opportunity to develop a secondary market for sale of class members' rebate coupons has become a stumbling block. It was further noted that the litigation wound up in a small parish in Louisiana because there were more than 40 cases. Some state judges like class actions. The defendant view is that this was a power-play by plaintiffs. After some protest, the certification hearing was extended, but even then was held only three weeks after filing. The hearing was perfunctory, and followed by immediate certification.

Panel 6: Federal/State Issues

The moderator for Panel 6 was Professor Francis McGovern. Panel members included John H. Beisner, Esq.; Judge Marina Corodemus; Paul D. Rheingold, Esq.; Joseph P. Rice, Esq.; Professor Thomas D. Rowe, Jr.; and Chief Justice Randall T. Shepard. The subject was the "unpublished" proposals that would address overlapping, duplicating, competitive class actions.

The moderator observed that this is the "real world" panel. Discussion might begin by starting with "the bottom line," in the manner of reverse trifurcation. The strongest form of the unpublished proposals addressing parallel class actions, a potential "Rule 23(g)," would allow federal courts to seize control, excluding state litigation. This proposal might, as a practical matter, move mass torts to federal court. It could eliminate state class actions that do not conform to federal practice. Using a scale on which extreme approval is a 1 and extreme disapproval is a 10, how would each panel member vote?

The first panel member, representing a defense perspective, voted 1 with respect to the need for action. All of the proposals together rate a 3; there is a concern whether they are "doable." The need is to clarify which court deals with which class action.

A plaintiff-perspective lawyer voted 10. The next panel member abstained. Two more voted 4. The final member, again taking a plaintiff perspective, voted "10 twice": this cannot be done by rule, and should not be done by any means.

The panel was then asked to consider what is "unique": personal injury actions, medical monitoring, consumer fraud, antitrust, securities, in these terms: (1) It could be argued that we have federalism in all cases; class actions simply involve amplification of the amounts at stake. (2) An arguable concern of many people is that class members are not truly represented by the named representatives: class members lack knowledge, the process is not democratic, class members have no control. (3) We are not any longer talking about personal injury cases involving significant

present injury: the actions are for consumer fraud, medical monitoring, and the like, based on state law. A state national class works because opt-outs will not defeat it.

The first panel response was that what is unique about competing class actions is that they are "universal venue" cases: they can be filed in any state or federal court, nationwide. So this is different from individual plaintiff personal-injury cases. Second, the federalism issues are quite different: "This is reverse federalism." The Roto-Rooter case is an example: venue is set in Madison County, Illinois, for a nationwide class claiming a violation because the defendant's house-call employees are not all licensed plumbers. Venue was established on the basis of a set-up by plaintiffs who arranged for one visit to a customer in Madison County by an employee sent from Missouri. The attempt is to enable an Illinois judge to export the Illinois statute to govern events in all states.

Another panel member observed that this may not, does not, apply to mass torts. There are no dueling federal classes; they are swept together under § 1407. Nor has there even been a state class for actual injury; perhaps there have been for medical monitoring. The Advisory Committee has thought about developing an independent mass-tort rule. "One size Rule 23 does not fit all." A "Rule 23A" for mass torts would help.

The next panel member spoke to experience in New Jersey. The state courts have had centralized handling from the time of the early asbestos cases. The tendency has been to select the same county for coordinated proceedings. Judges in that county have built up expertise, and have two special masters for assistance. At present tobacco cases are pending there. Certification has been turned down in seven cases; they have been handled as individual actions. State courts can handle these cases. There are many manufacturers in New Jersey. The documents and individuals with knowledge are there. State courts can and do cooperate with federal courts. There have been some great experiences with particular federal judges. Not as much experience has developed with consumer-fraud actions, but when they arise there is an attempt to cooperate. One reason why plaintiffs go to state courts is because the Lexecon decision prevents trial in an MDL court.

The following panel member asked what is different about overlapping classes? First, the relationship between the lawyer and client is different from the relationship that courts normally rely on. This has serious consequences — ordinarily the lawyer in a class action has a greater financial stake than the client does. There is a much greater need for judicial oversight, even of settlements. (It may be noted that state courts often have to review and approve settlements of actions involving minors — there is a danger that even parents as representatives may not do the right thing.) Second, class actions are "different in the rules of engagement." A judge's first experience with a class action is quite different from the same judge's second experience. In my state, there is a special assignment system, and intensive training for the specialized judges who handle these cases. The difference between these specialized judges and federal judges "is not troubling."

Yet another panel member observed that the constitutional authorization for nationwide classes in state courts is part of the uniqueness. The Lexecon decision can be overruled by statute, although not by rule. The Advisory Committee has been reluctant to take up the suggestion to develop a

specialized mass torts rule because that seems to address a particular substantive area, rubbing against Enabling Act sensitivities. Special mass tort rules, however, are readily within the reach of Congress; the PSLRA is an illustration of a parallel effort. Finally, bringing state actions into federal MDL proceedings for pretrial handling would address the problem of continually relitigating the same issues, such as privilege, in many state courts. One useful approach is to think about creating new procedural rules within the framework of legislation.

The next panel member observed that he generally does not resort to class actions in mass torts. Rule 23 is a tool to resolve existing mass torts; problems arise when it is used to 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.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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May 17, 2002

Honorable Michael J. Melloy
United States Circuit Judge
Chair, Committee on the Administration of the Bankruptcy System
304 Federal Building and United States Courthouse
101 First Street, S.E.
Cedar Rapids, Iowa 52407-4410

Dear Judge Melloy:

You have asked for comment by the Advisory Committee on the Federal Rules of Civil Procedure on the June 20, 2001 report by the Subcommittee on Mass Torts. The Subcommittee was appointed by you to review the mass tort recommendations of the National Bankruptcy Review Commission. In preparation for the March 2002 meeting of the committee chairs with an interest in mass torts, I provided you and the other chairs with a paper by Professor Cooper reviewing some aspects of the National Bankruptcy Review Commission's proposal. At the meeting you discussed several options for the Bankruptcy Committee concerning the Subcommittee report ranging from approval of the report and recommendation of action to the Judicial Conference to disapproval of the report.

As you know, the Advisory Committee on Civil Rules has been studying Rule 23, the class action rule, for the past ten years. The Mass Tort Working Group, including representatives from several interested Judicial Conference Committees, was an important contributor to this Rule 23 study. We have had the benefit of empirical work by the Federal Judicial Center, (Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996)) and the RAND Institute for Civil Justice *(Class Action Dilemmas: Pursuing Public Goals for Private Gain* (2000)). We have also held several conferences on class actions, including, most recently, the two day conference at the University of Chicago Law School in October, 2001. Finally, we have had the benefit of extensive informal comment and formal testimony on various proposed rule amendments.

II Information Items

The Committee agenda includes several items that will be addressed at the October meeting. A brief identification of several of these items follows.

The Committee has not yet concluded its study of Rule 23. Although it is not likely that further changes will be proposed immediately, a number of subjects have been deferred pending developments in practice. The Federal Judicial Center is studying class-action settlements in the periods leading up to and following the *Amchem* and *Ortiz* decisions. Settlement classes, and settlment more generally, have been the subject of long consideration and will be studied again. The challenging problems presented by the desire to protect "futures" claimants and to resolve their claims, if that can be done, also are on the agenda. And several comments on the Rule 23 proposals published last August reminded the Committee that it may be time to take up again the postponed inquiry into opt-in classes.

The Discovery Subcommittee continues to study the questions raised by discovery of computer-based information. These questions are generating great interest among practitioners. The Federal Judicial Center is actively involved in studying the problems and is working with the Advisory Committee. Texas has adopted a specific rule for such discovery, and some federal courts are adopting local rules. It remains uncertain whether the discovery rules should be amended. Specific proposals may not be developed for some time.

The Appellate Rules Committee has requested that the Civil Rules Committee take the lead in considering the method of calculating the additional 3-day period allowed to respond when a paper is served by mail, electronic, or similar means. Surprisingly enough, there are at least four possible methods of calculation, and the courts have not agreed on a choice between the two plausible methods. A draft rule has been prepared for discussion.

The Third Circuit has recommended that the Committee restore to its calendar at least one small part of an earlier study considering possible changes in the provisions of Rule 15(c)(3) that govern the relation back of amendments adding or changing defendants. The specific question raised by the Third Circuit deals with a plaintiff who, at the time of filing an action, knows that it is not possible to identify by name an intended defendant. Several courts have ruled that knowing ignorance is not a "mistake" that can be corrected by relation back. This question can be addressed by a simple amendment. Other issues should be considered at the same time, however; the question is not an easy one.

The Appellate Rules were recently revised to expand the provisions that implement 28 U.S.C. § 2403. This statute requires notice to the Attorney General when the constitutionality of a federal statute is challenged, and notice to the state attorney general when the constitutionality of a state statute is challenged. Civil Rule 24(c) establishes analogous provisions. One of the suggestions made by the comments on Appellate Rule 44 was that the Civil Rules should be changed. The Department of Justice has confirmed that there are a troubling number of actions in which the required notice is not provided. It may be that if any change is to be made, the best approach will

The future claims representation device, proposed by the Commission, is a form of class action under a different name and with a different procedure for designating the representative. In an area as complex and important as class actions, the Civil Rules Committee has hesitated to act without a full record combining multiple opportunities for public comment, empirical work, and the exchange of views by thoughtful experts, scholars, practitioners, and judges. Without study of this kind, the Committee is unable to endorse the recommendations of the National Bankruptcy Review Commission. Moreover, we would hope that the Bankruptcy Committee would not ask the Judicial Conference to endorse the recommendations without further careful study of this type.

While we are unable to endorse the recommendations, we do find that the proposed use of bankruptcy procedures and, perhaps, the bankruptcy courts to resolve potential liability to future victims of a mass tort merits continued study and consideration. The Subcommittee report is a helpful first step that identifies several of the many issues that must be addressed in greater depth, on the basis of more extensive inquiry. There should be further study of whether there is any reliable means of predicting the number and severity of future injuries and claims, since the recommendations depend on reliable estimations of future claims. There should also be study of the jurisdictional consequences of the recommendations, and, in particular, whether the proposal would take into the bankruptcy system, from the state and federal trial courts, both present and future claims against companies that are not actually insolvent. If this were the consequence, it is possible that all mass tort cases would be resolved in the bankruptcy courts, a momentous change in our system that would raise questions both of federalism and of Article III limits on Article I courts.

We would be pleased to assist you in any further consideration of the recommendations that you and the Committee on the Administration of the Bankruptcy System might wish to undertake. I am grateful for the opportunity to provide comment and thank you and the Subcommittee for your joint efforts in this important area.

Sincerely,

David F. Levi

cc: Hon. Anthony J. Scirica
Hon. William Terrell Hodges
Hon. John W. Lungstrum
Hon. Frederick P. Stamp

be to retrieve these provisions from the relative obscurity of Rule 24(c), adopting a new and separately numbered rule. A draft rule has been prepared and revisions have been suggested by the Department of Justice. A consolidated version will be developed.

Substantial revisions of the summary judgment Rule, Rule 56, were approved by the Standing Committee more than a decade ago. They were rejected by the Judicial Conference. Many local rules seek to improve the sketchy procedures provided by Rule 56. Whether or not a second attempt should be made to capture in Rule 56 the summary-judgment test that has grown out of the 1986 Supreme Court decisions, it is possible to make substantial improvements in the procedure for seeking and resisting summary judgment. A draft Rule 56(c) has been prepared on the basis of the earlier attempt.

The Appellate Rules Committee has referred to the Civil Rules Committee a proposal by the Solicitor General that a new rule be adopted to spell out the procedures adopted by most courts to address a Rule 60 motion to vacate a judgment that is pending on appeal. A draft Rule 62.1 on "indicative rulings" has been prepared.

The Department of Justice believes that the time has come to separate civil forfeiture procedures out from Admiralty Rules A through F. Because many forfeiture statutes invoke in rem admiralty procedures, it has seemed best to retain forfeiture procedure in the Supplemental Rules. Several successive drafts have sharpened a proposed new Admiralty Rule G. The Maritime Law Association has concluded that the method of separation reflected in the most recent draft is, subject to one remaining question, appropriate to protect the interests of admiralty procedure. Further comment will be sought over the summer, with an eye to presenting a draft rule to the Committee in October.

Finally, the Committee understands that it must return to the project to restyle all of the Civil Rules. After volunteering to be the bellwether of the style enterprise, the Committee suspended work on the style project in 1994. The complete restyled set prepared by Bryan Garner and revised by Judge Sam Pointer, together with the changes adopted by the Committee in its consideration of a few rules, will provide the starting point. The Standing Committee Style Committee will review these materials for conformity to current conventions. This Committee will take up the subject at the October meeting, considering first the many difficult choices that must be made as to the manner of proceeding.

May 20, 2002

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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WASHINGTON, D.C. 20544

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TO: Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure

From: David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure

Date: May 20, 2002

Re: Overlapping Class Actions

The Standing Committee will recall that Professor Cooper prepared several proposed rule amendments that addressed some of the severe difficulties posed by repetitive and overlapping class actions. These proposals provided for preclusion of further class certification litigation once certification was denied, a similar provision relating to settlements that had been disapproved, and a provision providing the federal court with broad authority and discretion to bar class members from pursuing overlapping class action litigation in other courts. Although the Civil Rules Committee initially forwarded the proposals to the Standing Committee for formal publication, it was agreed that the proposals were best circulated to the public informally under the title, "Call for Informal Comment: Overlapping Class Actions." The Reporter's Call for Comment was published in September 2001, approximately at the same time as the formal rule amendments. We have received a wealth of informal comment and testimony addressed to the Reporter's Call for Comment. In addition, one day of the conference at the University of Chicago Law School was devoted to the Call for Comment and the problem of overlapping class actions.

The Advisory Committee unanimously adopted the attached memorandum on the problem of overlapping class actions. The last three pages make findings and recommendations concerning the problem. In sum, the Advisory Committee

is of the view that the Reporter's proposed rules amendments test the limits of authority under the Rules Enabling Act. The Committee believes that a legislative solution is more appropriate and recommends that some form of minimal diversity legislation be enacted by Congress to permit large, multi-state class actions to be brought in, or removed to, federal court. By bringing the actions to federal court, a degree of consolidation is possible that would avoid or alleviate some of the most severe problems that are engendered by repetitive and overlapping class actions. There is the further important principle that in a federal system, no one state's courts should make decisions that are binding nationwide even as to class members who were not injured in the forum state. Current practice permits forum shopping on a national scale that brings the judicial system into disrepute and that has the potential to damage the interests of class members and defendants alike.

We do not ask that any particular formulation or legislative proposal be supported. Nor do we suggest that all class actions should be removable to federal court. Our focus is on those state class actions in which the interests of no single state predominate. These class actions are appropriately litigated in federal court. The Advisory Committee requests that the Standing Committee "support the concept of minimal diversity for large, multi-state class actions, in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the state's jurisdiction over in-state class actions is left undisturbed."

United States District Court

Eastern District of California
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(916) 930-4090

Chambers of
David F. Levi
United States District Judge

May 7, 2002

MEMORANDUM TO THE CIVIL RULES ADVISORY COMMITTEE

SUBJECT: *Perspectives on Rule 23 Including the Problem of Overlapping Classes*

Over the last ten years, the Advisory Committee on the Civil Rules has undertaken an intensive consideration and review of Rule 23, the class action rule. This ongoing review by the Committee is the first review of Rule 23 following the thorough reworking of the Rule in the 1966 amendments. But in the now almost 40 years since that time, Rule 23 has figured prominently in the explosive growth of large scale group litigation in federal and state courts, and has both shaped and — in its interpretation and application — been shaped by revolutionary developments in modern complex litigation. The drafters of the 1966 amendments knew that after some appropriate period of time it would be important to reconsider what they had done. We are well underway in that process even as we must take account of continuing rapid changes in Rule 23 practice.

A historical perspective may be helpful in placing our current efforts in context and considering our future course.

I. A Brief History of Rule 23

The class action has its ultimate roots in the English Court of Chancery and the bill of peace. It was a practical rule of joinder where joinder was otherwise impractical. The American courts adopted the procedure in the 19th and early 20th centuries. Federal Equity Rule 48, in place from 1842 to 1912, provided for a class action, but, significantly, also provided that the "decree shall be without prejudice to the rights and claims of all the absent parties." In 1938, Rule 23 was included in the new Federal Rules of Civil Procedure. The Rule was adopted with little fanfare or discussion. It divided class actions into three categories: the "true," the "hybrid," and the "spurious." These categories, with their infelicitous names and formalistic attributes, proved difficult to apply. After almost 30 years of experience, the Advisory Committee entirely rewrote the Rule in 1966, and it is that Rule that we still use today.

The 1966 Rule kept a three-part structure but the structure became functional: (b)(1) classes for situations in which necessary parties under Rule 19(a) were too numerous to be joined, including claims involving a common fund, (b)(2) classes for claims involving common injunctive relief, particularly intended for civil rights litigation, and, finally, (b)(3) class actions for damage based on predominant common issues. The 1966 rule provided new procedural protections, for example, by requiring notice to (b)(3) class members of certification, and, for all classes, notice of a proposed settlement. It provided that class members could be bound if they did not affirmatively opt out of (b)(3) damage class actions. In adopting the "opt out" approach, the Committee apparently had in mind small claim, consumer class actions in which no one class member would have a sufficient interest to litigate an individual claim and in which the forces of inertia might be greater than a potential class member's desire to participate, given the small

stakes involved. The 1966 Rule also clarified that any judgment would bind the members of the class in all certified class actions.

It is not entirely clear what the Committee of 1966 expected. Professor Arthur Miller, who was involved with the work of the Committee at that time, tells us that "Nothing was in the Committee's mind . . . Nothing was going on. There were a few antitrust cases, a few securities cases. The civil rights legislation was then putative. . . . And the rule was not thought of as having the kind of application that it now has." But, as Professor Miller went on to explain, the Rule, perhaps by serendipity, caught the wave of "the most incredible upheaval in federal substantive law in the history of the nation between 1963 and 1983, coupled with judicially-created doctrines of ancillary and pendent jurisdiction."

An esteemed member of the 1966 Committee, John Frank, corroborates Professor Miller's recollection. According to Mr. Frank, the Committee of 1966 was operating in "a world to which the litigation explosion had not yet come. The problems which became overwhelming in the 80's were not anticipated in the 60's. The Restatement (Second) of Torts and the development of products liability law [were] still in the offing. The basic idea of a big case with plaintiffs unified as to liability but disparate as to damages was the Grand Canyon airplane crash. A few giant other cases were discussed but . . . were expected to be too big for the new rule."

It is probably fair to say that the 1966 Committee was most interested in facilitating civil rights class actions for injunctive relief under (b)(2), and in this respect the Committee's intentions were fully realized. But it is also fair to say that the Committee did not foresee the scale or range of litigation that was unleashed by the opt out damage class action in (b)(3). Certainly, the Committee then had no expectation that the Rule would be used in the context of

dispersed mass torts, a concept that the Committee could not have been familiar with. The Committee did know about mass accidents, but considered that "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways." So much for the persuasive power of Committee notes!

According to the then Reporter of the Committee, Harvard Professor Benjamin Kaplan, "It will take a generation or so before we can fully appreciate the scope, the virtues, and the vices of the new Rule 23." In 1991, well past a generation in the world of civil litigation, the Judicial Conference asked the Committee to begin a reconsideration of the Rule in light of the upheaval in modern civil litigation since adoption of the Rule.

II. The Advisory Committee Begins its Reconsideration of Rule 23

There have been several phases in the Committee's work although many continuing themes. At the beginning, the Committee developed a comprehensive re-draft of the Rule. In 1992, Judge Pointer, Chair of the Committee, relying on a 1986 proposal from the Litigation Section of the ABA, prepared a revision that did away with the three part (b)(1), (b)(2), and (b)(3) classification, provided for opt-in classes at the court's discretion, and provided that exclusion from the class could be conditioned upon a prohibition against institution or maintenance of a separate action. Notice was made more flexible such that sampling notice might be permitted depending on the circumstances. This far-reaching draft was presented to the Standing Committee but then withdrawn on the Standing Committee's advice that further consideration would be required before such a sweeping proposal could be published for public

comment. In the years since that time, we have engaged in that further consideration and can now appreciate how prescient and sophisticated that first effort was.

The Committee then began the painstaking and careful inquiry into class action practice in which we are still engaged. The new Chair of the Committee, Judge Higginbotham, pioneered the investigatory model that the Committee continues to use to good effect whenever it considers a complex issue. The model combines multiple informal opportunities for involvement by judges, interested academics, members of the bar, and bar organizations, with targeted empirical work. Thus, the Committee was educated at several class action and mass tort conferences, drawing together academic experts and experienced practitioners. The Federal Judicial Center undertook an empirical study of federal class actions. See Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules* (1996). The Reporter circulated a variety of proposals informally to gather guidance from members of the bar. Eventually, several different proposals were published resulting in extraordinarily helpful comment from practitioners and others.

The Committee first turned to the all important certification decision in (b)(3) class actions. The Committee was concerned that the certification decision was the critical issue in class action litigation, and yet the rule included no provision for interlocutory appeal. The Committee was also concerned that the Rule's certification criteria were too loose, leading to improvident certification of actions that were more appropriately handled on an individual basis. The Committee was told repeatedly that class actions were rarely tried and that once the class was certified, defendants were placed under overwhelming pressure to settle. In this portion of its inquiry, the Committee considered a variety of additional certification factors such as the

probable success on the merits of the class claims and whether the public interest in, and the private benefits of, the probable relief to individual class members justified the burdens of the litigation. From this work, one significant amendment emerged: Rule 23(f) providing that a court of appeals may, in its discretion, entertain an appeal from an order of a district court granting or denying class action certification. This provision has apparently had its intended effect of developing the case law on certification thereby providing greater guidance to district judges on the certification decision. In addition, the testimony on the various additional certification criteria provided the Committee with a wealth of new information about class action practice

The possible tightening of certification criteria required the Committee to consider whether litigation classes should be subject to more exacting standards than settlement classes. The Committee's attention was drawn to the question because of the Third Circuit decision in *Georgine/Amchem* holding that settlement classes must be certified as if they were litigation classes. Because of the importance of settlement to class action litigation, the Committee considered whether a class action might be certified for settlement even if the class could not be certified for trial. A proposed (b)(4) was circulated for public comment in 1996 at the same time as the additional (b)(3) certification criteria. Proposed (b)(4) provided for certification where "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement even though the requirements of subdivision (b)(3) might not be met for purposes of trial." All of the 23(a) requirements would still apply, however.

The response to this proposal was as copious and thoughtful as the response to the new certification criteria. Opponents of the change warned the Committee that class action

settlements were already prone to unfairness to class members and that this proposal would exacerbate the situation by permitting class counsel to negotiate from a position of weakness, knowing that unless there was a settlement, the class could not be certified for trial. This controversial topic was put aside when the Supreme Court granted certiorari in *Amchem*. The result of *Amchem* has been to permit a certain flexibility in the certification of settlement classes. However, some continue to advise the Committee that there is need for still greater flexibility for settlement classes.

The Committee then entered the present phase of our inquiry. At this point the Committee not only had the comments from the hearings on the proposed amendments, but also the benefit of the RAND Institute for Civil Justice's case study of ten class actions eventually published in 2000 as *Class Action Dilemmas: Pursuing Public Goals for Private Gain*. In addition, in 1998, on the recommendation of Judge Niemeyer, the Chief Justice authorized the formation of an ad hoc working group to study mass torts that would bring together representatives of several Judicial Conference committees under the leadership of the Civil Rules Committee. The Working Group was given one year to study the problems associated with mass tort litigation and to submit a report. Judge Niemeyer designated Judge Scirica as chair of the Working Group. The papers and report of the Working Group provided additional information about the operation of Rule 23 in the context of mass torts and illuminated many of the problems, including the problems associated with multiple, overlapping class actions. See *Report on Mass Tort Litigation* (1999). The Committee was also assisted by appointment of a sub-committee, chaired by Judge Rosenthal, and appointment of a special reporter, Professor Richard Marcus, to support Professor Cooper.

Building on the RAND study, the hearings on the settlement class proposal, and the report of the Working Group on Mass Torts, the Committee determined to provide better judicial supervision of settlements and of class counsel. Proposed new 23(e) requires disclosure of all settlement terms, a fairness hearing, and findings by the court. The court may permit class members who believe that the settlement is unfair to exclude themselves from the settlement. Proposed new Rule 23(g) and (h) provide the court a framework for appointing, monitoring, and compensating class counsel. Notice and the timing of the certification decision also receive attention in the new proposals.

III. Unfinished Business

As this history may demonstrate, the Committee has reason to be both humble, given the complexity and magnitude of the issues, but also proud of its work over the past ten years. It has done much to enhance judicial supervision of the class action process and provide new tools for judicial review, at both the trial and appellate levels.

There are several areas that may yet deserve additional attention and that have not received definitive answers from the Committee. Each has proven controversial and difficult. The first is whether the Rule should incorporate a separate standard for settlement classes. This is a familiar topic. We may wish to reconsider this issue in light of case law under *Amchem* as well as the new proposal on settlement review, including the permission to class members to exclude themselves from settlement upon review of the terms. There may be need for further empirical work in this area. Second, the unique questions surrounding the settlement of future claims in mass tort cases may also merit continued study. Third, we may wish to reconsider the opt in/ opt out question. The 1966 Committee adopted an "opt out" provision but did not foresee

the consequences of doing so. The Committee's 1992 draft, giving the court discretion to certify the class as an opt in or opt out class action, might provide a starting point. Alternatively, we might reasonably conclude that further study of this question is likely to generate more controversy than any clear consensus for change.

Finally, we should complete the substantial inquiry already begun into the difficult problem of overlapping and competing state and federal class actions. Certain aspects, the more modest ones, may be amenable to rule making. The more fundamental issues do not seem so amenable, at least not without specific legislative authorization. At the January meeting the Committee expressed a unanimous consensus that the problems created by overlapping class actions are worthy of congressional attention and that some form of minimal diversity legislation might provide an appropriate answer to some of the problems. The remainder of this memorandum is addressed to this issue.

IV. Overlapping Class Actions

The Committee has been told repeatedly in a variety of forums, by both defense and plaintiff counsel, and without contradiction, that as Rule 23 is reformed to enhance judicial supervision of class counsel, the deliberateness of the certification decision, and the judicial review of settlements, an ever growing number of cases will be filed in those state courts where this kind of supervision is perceived to be less demanding. This results often in multiple filings of multi-state diversity class actions in both federal and state courts. Yet this result is precisely the outcome that the class action device was designed to prevent. The purpose of the class action device is to eliminate repetitive litigation, promote judicial efficiency, permit small claims to find a forum, and achieve uniform results in similar cases. But as our Reporter has noted,

"duplicative class litigation is destructive of just these goals . . . . Multiple filings can threaten appropriate judicial supervision, damage the interests of class members, hurt conscientious class counsel, impose undue burdens of multiple litigation on defendants, and needlessly increase judicial workloads."

The problems generated by overlapping, duplicative, and competing class actions have commanded the attention of many observers. According to the American Law Institute's 1994 Complex Litigation Project, the problems caused by multiple class actions are so pressing that "[w]e are in urgent need of procedural reform to meet the exigencies of the complex litigation problem." "Repeated relitigation of the common issues in a complex case unduly expends the resources of attorney and client, burdens already overcrowded dockets, delays recompense for those in need, results in disparate treatment for persons harmed by essentially identical or similar conduct, and contributes to the negative image many people have of the legal system." American Law Institute, *Complex Litigation: Statutory Recommendations and Analysis* (1984-1994) at 9. Although the Federal Judicial Center's study focused on class-action dispositions in only four federal districts over a period of two years, it found several illustrations of unresolved duplicating filings, pp. 14-16, 23-24, 78-79, 163-164 (Tables 5-7). The RAND study confirmed the seriousness of the problem. Part of this project involved intense study of ten class actions. In four of the ten, class counsel filed parallel actions in other courts. In five of the ten, other groups of plaintiffs' attorneys filed competing actions in other jurisdictions. Only two of the ten cases did not experience either type of additional filings. More recent information suggests that the frequency and number of overlapping class-action filings are growing.

Legislative proposals to deal with overlapping actions have been pursued for several years. In March 1988 the Judicial Conference approved in principle creation of minimal-diversity federal jurisdiction to consolidate multiple litigation in state and federal courts involving personal injury and property damage arising out of a "single event." This position was confirmed in March 2001 when the Judicial Conference supported H.R. 860, the "Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001." The 1990 *Report of the Federal Courts Study Committee* recommended, pp. 44-45, that Congress "should create a special federal diversity jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of major multi-party, multi-forum litigation." Congress has considered many bills that would provide easier access to federal courts by initial filing or by removal from state courts. In 2002 the House of Representatives passed one of these bills, H.R. 2341.

One specific source of the concerns reflected in these legislative proposals has arisen from state-court filings on behalf of classes that include plaintiffs from other states. Many of these actions seek — and frequently win — certification of nationwide classes. Membership in these classes may overlap with classes sought — or actually certified — in other courts, state or federal. Pretrial preparations may overlap and duplicate, proliferating expense and forcing delay now in one proceeding, now in another, as coordination is worked through. Settlement negotiations in one action may be played off against negotiations in another, raising the fear of a "reverse auction" in which class representatives in one court accept terms less favorable to the class in return for reaping the rewards that flow to successful class counsel. Moreover, the certification of nationwide or multi-state class actions in one state court poses a threat to the

proper allocation of decisionmaking in a federal system. Individual state courts may properly apply the policy choices of the residents of that state to those residents. But local authorities ought not impose those local choices upon other states and certainly not on a nationwide basis.

After studying these proposals and the underlying problems, the Civil Rules Advisory Committee authorized its Reporter to issue a "Call for Informal Comment: Overlapping Class Actions" in September 2001. The call for comment included draft amendments of the class-action rule that might reduce the incidence of forum shopping and settlement shopping.[1]

Responses to the call for comment were provided in tandem with reactions to the proposed amendments of Civil Rule 23 that were published for comment in August 2001. The most concerted responses were provided in major segments of the class-action conference sponsored by the Advisory Committee at the University of Chicago Law School in October 2001. Many additional responses were provided in the written comments and oral testimony at hearings in San Francisco (November 2001) and Washington, D.C. (January 2002). Although this process does not match any model of rigorous social-science research, it provided repeated evidence of actual experiences that must not be allowed to continue. This evidence is outlined in the

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[1] The call for comment included three sets of possible rule amendments. The first set attempted to end the relitigation of the same class certification issues by providing that a federal court that refuses to certify a class because it does not meet the standards of Rule 23(a)(1) or (2) or 23(b)(1),(2), or (3) "may direct that no other court may certify a substantially similar class." The second set of proposals sought to reduce "settlement shopping," in which counsel may take the same settlement disapproved by one court into another court for approval. The proposal provided that "A refusal to approve a settlement . . . on behalf of a [certified] class . . . precludes any other court from approving substantially the same settlement." The third set of proposals addressed the potential clash between multiple, overlapping cases and provided that a federal court could "enter an order directed to any member of the . . . class that prohibits filing or pursuing a class action in any other court."

summaries of comments and testimony prepared for the Advisory Committee. The question is not whether something should be done, but what should be done and by whom.

One means of doing something about the problems created by overlapping class actions might be through new provisions in the Civil Rules. Some relatively modest provisions might fit comfortably within the authority of the Rules Enabling Act, 28 U.S.C. § 2072. Rule 23, for example, might address the effect one federal court should give to the refusal by another federal court to certify a class action or to approve a class-action settlement. Modest provisions, however, would provide no more than modest benefits — there is no general feeling that federal courts have experienced particular difficulties in working through overlapping actions in different federal courts. The Judicial Panel on Multidistrict Litigation works well within the federal system to achieve coordination and consolidation. Provisions that might address overlapping class actions in state courts, on the other hand, are not likely to be seen as modest. Serious objections were made to the illustrative drafts in the informal call for comments. Both Enabling Act limits and Anti-Injunction Act limits were invoked. There may be room to adopt valid rules provisions in the face of these objections, but to do so might test the limits of rulemaking authority thus inviting litigation over the rules themselves.

In light of these constraints on rulemaking, and because of the sensitive issues of jurisdiction and federalism implicated by overlapping class actions, Congress would seem the appropriate body to deal with the question. There is a secure basis in the Article III authorization of diversity jurisdiction to consider various approaches to consolidating overlapping class actions by bringing them into federal court. One approach, exemplified in several of the bills that have been before Congress, would establish minimal diversity jurisdiction in federal court for class

actions of a certain size or scope. This approach may embody some elements of discretion; several recent bills bring discretion into the very definition of jurisdiction in an attempt to maintain state-court authority over actions that involve primarily the interests of a single state. Another approach would be to rely on case-specific determinations whether a particular litigation pattern is better brought into federal-court control. This approach could be implemented by authorizing the Judicial Panel on Multidistrict Litigation to determine whether a particular set of litigations should be removed to federal court. The potential advantage of this approach would be that it could prove more flexible over time, enabling the federal court system to respond to actual problems as they arise and to stay on the sidelines when the problems are effectively resolved in the state courts. Yet another approach would be to authorize individual federal courts to coordinate federal litigation with overlapping state-court actions, by enjoining state-court actions, if necessary, when the state-court actions threaten to disrupt litigation filed under one of the present subject-matter jurisdiction statutes. While this approach may have the apparent advantage of leaving federal jurisdiction where it is, it also has the obvious disadvantage of potential conflict and tension between the court systems.

Careful study will suggest still other approaches. Many of the possible approaches are likely to provide the occasion for adapting present class-action procedures or developing new ones. The rules committees, acting through the Enabling Act process, can make important contributions. The nature of these contributions will depend on the nature of the underlying legislation; some forms of legislation may present such particular opportunities that supplemental rules-enabling authority should be included in the legislation.

Any proposal to add to federal subject-matter jurisdiction must be considered with great care. But the problems that persist with respect to overlapping and competing class actions are precisely the problems of multistate coordination that can claim high priority in allocating work to the federal courts. It is very difficult for any single state court to fairly resolve these problems, and nearly as difficult for state courts to act together in shifting ad hoc arrangements for cooperation. The apparent need is for a single, authoritative tribunal that can definitively resolve those problems that have eluded resolution and that affect litigation that is nationwide or multi-state in scope.

V. Minimal Diversity as a Possible Partial Solution

Having delved deeply into this topic, the Committee is in a position now to make the following findings and recommendations to the Standing Committee on the Rules of Practice and Procedure and the Committee on Federal-State Jurisdiction concerning the problems posed by overlapping class actions:

1. Beginning in 1991, the Advisory Committee on Civil Rules has undertaken a searching review of class action practice under Rule 23. This review has involved several conferences, close consultation with judges, members of the bar and bar organizations, publication for comment of several proposals, consideration of extensive testimony and comments on the published proposals, review of empirical studies, and creation of the Working Group on Mass Torts and adoption of its report;

2. On the basis of this extensive inquiry, the Advisory Committee finds that overlapping and duplicative class actions in federal and state court create serious problems that: (a) threaten the resolution and settlement of such actions on terms that are fair to class members, (b) defeat

appropriate judicial supervision, (c) waste judicial resources, (d) lead to forum shopping, (e) burden litigants with the expenses and burdens of multiple litigation of the same issues, and (f) place conscientious class counsel at a potential disadvantage;

3. The Advisory Committee has given close consideration to several rule amendments that might address the problems of multi-state class actions but concludes that these proposals test the limits of the Committee's authority under the Rules Enabling Act;

4. Large nationwide and multi-state class actions, involving class members from multiple states who have been injured in multiple states, are the kind of national litigation consistent with the purposes of diversity jurisdiction and appropriate to jurisdiction in federal court. Federal jurisdiction protects the interests of all states outside the forum state, including the many states that draw back from the choice-of-law problems that inhere in nationwide and multi-state classes;

5. With respect to multi-state class actions, the Advisory Committee agrees with the recommendation of the Federal Courts Study Committee that Congress eliminate the complete diversity requirement in complex, multi-state cases to make consolidation possible;

6. Minimal diversity legislation could be crafted to bring cases of nationwide scope or effect into federal court without unduly burdening the federal courts or invading state control of in-state class actions;

7. Minimal diversity legislation could resolve or avoid some of the problems posed by conflicting and duplicative class actions;

8. The federal and state judicial systems, class members, other parties to the litigation, and conscientious class counsel will benefit from the efficient supervision of these multi-forum, multi-state class actions in one federal forum;

9. For these reasons the Advisory Committee on the Federal Rules of Civil Procedure respectfully recommends to the Standing Committee on the Rules of Practice and Procedure and to the Committee on Federal-State Jurisdiction that they support the concept of minimal diversity for large, multi-state class actions, in which the interests of no one state are paramount, with appropriate limitations or threshold requirements so that the federal courts are not unduly burdened and the states' jurisdiction over in-state class actions is left undisturbed.

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

May 6-7, 2002

The Civil Rules Advisory Committee met on May 6 and 7, 2002, at the Park Hyatt Hotel in San Francisco. The meeting was attended by Judge David F. Levi, Chair; Sheila Birnbaum, Esq.; Justice Nathan L. Hecht; Dean John C. Jeffries, Jr.; Mark O. Kasanin, Esq.; Judge Paul J. Kelly, Jr.; Judge Richard H. Kyle; Professor Myles V. Lynk; Hon. Robert D. McCallum, Jr.; Judge H. Brent McKnight; Judge 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, Judge Sidney A. Fitzwater, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Bernice B. Donald attended as liaison from the Bankruptcy Rules Committee. Peter G. McCabe, John K. Rabiej, and James Ishida represented the Administrative Office. Thomas E. Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Observers included John Beisner; Alfred W. Cortese, Jr.; Jonathan W. Cuneo (NASCAT); Peter Freeman (ABA); Jeffrey Greenbaum (ABA); Elizabeth Guarnieri; Marcia Rabiteau; Ira Schochet; and Sol Schreiber.

Judge Levi opened the meeting by observing that although the agenda book was thick with several long projects, many of the items on the agenda had become familiar by long study over the years. Most committee members have participated in the process from the beginning of these projects to the present conclusions. The long-drawn-out committee process has been vindicated. Public comments, both in writing and at the hearings, have been very useful. The committee recognizes its debt of gratitude to the many lawyers, judges, and others who have helped to improve the proposed rules. The committee also has done good work. Judge Rosenthal in particular has devoted enormous effort to Rule 23 for many years. The Reporters have done a marvelous job in synthesizing the public comment and in preparing the rule language and notes for the Committee's consideration. And the support provided by John Rabiej has been extremely important.

Many successive drafts of the agenda materials have culminated in proposals of extraordinarily high quality. The reporters have had to struggle with the multiple functions of the Committee Notes. When first published, the Notes have been used to explain why the Committee believes the proposed changes are desirable. But as the process matures, the Notes have shifted to the reduced role of explaining what the committee has done as a guide to future application. The Notes for these rules proposals reflect a dramatic pruning process in response to these concerns.

January 2002 Minutes

The committee approved the minutes for the January 2002 meeting.

Rule 51

Only one change was proposed in the text of Rule 51 as published. Some comments, and particularly the comments by the Department of Justice, suggested that the plain error provision of Rule 51(d)(3) might go too far. As published, Rule 51(d) provided that a party "may assign as error" three categories of instruction mistakes. The third, (d)(3), was "a plain error in or omission from the instructions." The "plain error" term was borrowed from Criminal Rule 52(b), a general plain-error

provision that applies to a wide variety of errors in addition to instruction errors. But Criminal Rule 52(b) does not establish a right to assign a plain error. Instead, by providing that a plain error may be "noticed," it recognizes judicial discretion. As a general matter, the Standing Committee prefers that different sets of rules adopt the same approach to similar problems unless a good reason can be shown for differences. There is little apparent reason to believe that plain-error review should be more readily available in a civil action than in a criminal prosecution. Adoption of the Criminal Rule approach was approved accordingly. Two additional changes in the plain-error provision were suggested as well. The first was to delete "or omission from," on the theory that a "plain error in the instructions" embraces wrongs both of omission and commission. This change was approved. The second was to adopt the expression of the newly restyled Criminal Rules by substituting "consider" for "notice." This change too was approved.

As thus amended and redesignated as Rule 51(d)(2), the plain error provision recommended to the Standing Committee for adoption reads: "A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B)."

Two additions were proposed for the Rule 51 Committee Note. The first adds three sentences on "scope," stating that Rule 51 governs instructions on the law that governs the jury's verdict. Other instructions, such as preliminary instructions to a venire or cautionary instructions in immediate response to events at trial, fall outside Rule 51. This addition was discussed briefly by asking whether it was useful to give examples of instructions that fall outside Rule 51. The conclusion was that the examples are useful, and that it was clear that they were only examples, not a complete list. The second Note addition is a brief description of Supreme Court decisions that explain the plain-error approach taken in criminal cases. Both changes were approved.

A substantially reduced version of the published Committee Note was presented as an illustration of the ways in which justifications and helpful practice comments can be stripped away, leaving only explanations of the changes made in the rule. The proposed deletions were reviewed in order, and approved for deletion.

The committee voted to recommend that the Standing Committee recommend adoption of Rule 51 as revised.

Rule 53

Judge Scheindlin presented the report of the Rule 53 Subcommittee. She observed that although the public comments and testimony on the proposed Rule 53 did not match in volume the comments on Rule 23, the comments were very helpful. They led the Subcommittee, meeting by telephone, to suggest ten changes in the rule as published. In order of the Rule 53 subdivisions, these are to: (1) add to subdivision (a)(1)(C) an express preference to "pretrial and post-trial" matters; (2) make a small style change in (a)(2); (3) add several specific matters to the (b)(2) provisions that address the contents of the order appointing a master; (4) provide an opportunity to be heard before the appointment order is amended; (5) clarify the (b)(4) effective-date provision; (6) raise the question whether the court "must" afford an opportunity to be heard before acting on a master's report; (7) recommend a new (g)(3) provision that increases the court's responsibility of de novo review of the facts; (8) change the (g)(4) provision for review of conclusions of law to parallel the

changes on fact review; (9) adopt the tentatively published (g)(5) provision for reviewing matters of discretion; and (10) delete entirely subdivision (i), which deals with appointment of magistrate judges to serve as masters.

These changes, and other possible changes that were considered but not recommended, were discussed one-by-one.

Rule 53(a)(1)(C), as published, authorizes appointment of a master to "address matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district." Some of the comments expressed concern that this general provision might be read to supersede the limits that Rule 51(a)(1)(B), drawing from longstanding doctrine, imposes on reference to a master for trial. This interpretation was not intended. Instead, (C) was intended to establish a standard to control the uses of masters for pretrial and post-trial purposes that have grown up since Rule 53 was adopted. The standard is different from the trial-master standard, and must be kept clearly separate. The distinction is emphasized by adding an explicit reference to these uses, so that (C) will read: "address pretrial and post-trial matters * * *." This proposed change was accepted without further discussion.

A separate question was addressed to (a)(1)(C). Suppose a master is appointed to address defined matters on a showing that no available district judge or magistrate judge can address those matters effectively and timely, but later developments in the court's docket make it possible for a judge to address those matters? It was agreed that the time for applying the (a)(1)(C) standard is the time of the initial appointment; the appointment need not be subject to the disruption of continual reexamination of this criterion.

Rule 53(a)(2) addresses grounds for disqualification. As published, it referred to disclosure of "a" potential "ground" for disqualification. A style improvement was suggested, making the rule refer to disclosure of "the potential grounds for disqualification." The style change was accepted without further debate. The appropriateness of permitting the parties to consent to appointment of a master who would be disqualified without party consent was discussed. The parties cannot consent to continued service by a judge who is disqualified; why should party consent be accepted as to a master? Two responses were given. A master is not a judge; all parties may prefer the appointment of a particular person who is particularly well qualified to discharge the master's duties, and in such circumstances the need to protect the open assurance that there is no basis for disqualification appears in a different light. In addition, one reason for refusing to accept party consent to continued service by a judge who otherwise should be disqualified is concern that lawyers who expect to appear before the same judge in other matters may feel pressure to consent. That concern is much reduced with respect to a master.

Rule 53(a)(3) was addressed by several comments. As published, it provides that a master must not during the period of the appointment appear as an attorney before the judge who made the appointment. The comments suggested that this disqualification will impose an undue hardship, particularly on lawyers in small firms. The subcommittee considered these comments, but concluded that the provision should remain as published.

Discussion of the disqualification as attorney began with the observation that the disqualification may deprive the court of the opportunity to appoint a good lawyer as master. There is no disqualification from appearing in other cases before a judge who has appointed a lawyer to conduct a trial or appeal; why should appointment as master be any different? The immediate response was that a master is functioning not in the adversary process, as an appointed lawyer does, but as an adjunct of the court.

One approach might be to mollify the rule by excepting cases that are active at the time of the appointment as master. Another might be to seek the consent of the parties in other cases in which the master appears as lawyer, but that would be an invitation to withhold consent as a means of disqualifying a feared adversary. Concern also was expressed that if the master is not disqualified, a party in another case with the master as attorney might seek to disqualify the appointing judge.

It was protested that the disqualification will be particularly costly in a small bar with few lawyers. In the western states, for example, masters are regularly appointed in water-rights cases. A master may be involved as lawyer in twenty other cases — and there is only one judge handling them all.

The appearance of impropriety was brought back to the discussion, asking whether it is proper for the same person to act simultaneously as a court adjunct and also as an adversary representative before the court. Perhaps the concerns about depleting the pool available for appointment could be addressed by adding a qualification that permits an attorney-master to appear before the appointing judge in exceptional circumstances.

The question was renewed: what do we lose by deleting the disqualification? It remains possible for the judge to impose disqualification in making the initial appointment.

It was suggested that the (b)(2)(B) limit on ex parte communications between master and judge may reduce the fears of parties in other litigation that a master-attorney has a special entree with the judge.

The interest of the states in regulating attorney conduct was noted. The problem of simultaneously working as a judge's master and appearing before the judge in unrelated litigation is likely to be seen as presenting a problem of conflicting interests, a matter traditionally regulated by state disciplinary authorities. States likewise regulate the appearance of impropriety, a concept with a long and detailed history. A federal judge cannot, by appointment, immunize a master from regulation by state authorities.

A different analogy is provided by magistrate judges. Judicial Conference conflict-of-interest rules for part-time magistrate judges provide that a part-time magistrate judge may appear in any civil action in any court, and may appear as counsel in a criminal action in any state court but not in any court of the United States. A partner or associate of a part-time magistrate judge may appear as counsel in any federal court other than in the district in which the part-time magistrate judge serves, so long as the magistrate judge has not been involved in the criminal proceeding in connection with official duties.

Noting that the rule does not require disqualification of the master's firm — and that the Note observes that this question is left to the discretion of the appointing judge — it was asked why the appearance is different for other lawyers in the master's firm. It was suggested that screening mechanisms can be used within the firm. But it was noted that the firm is likely to make it known — perhaps on its web page — that one of its lawyers is master for a named judge. And some clients are likely to find this an inducement to retain the firm. On the other hand, disqualification of the entire firm would make it impossible for any lawyer in a firm with many lawyers to accept appointment as a master.

The question of screening within the firm was carried further. Many states accept the use of ethics screens to avoid extending disqualification from an individual lawyer to an entire firm. But other states do not. Discussions of possible federal rules of attorney conduct have repeatedly explored the question whether a federal rule, or a federal court order, can immunize a lawyer from state discipline. The question has proved very difficult. Simply attempting to provide an answer in Rule 53 will not guarantee the result. Perhaps the risk of conflict with state requirements, or confusion, means that (a)(3) should be deleted.

In addition to state rules, most federal courts have local rules that include conflict-of-interest provisions. Adoption of an express Rule 53 provision would override many of these rules.

It was suggested that perhaps (a)(3) should be revised to state that the court may, in appointing a master, order that the master be disqualified. But there is no need to say that in the rule; the judge can impose that term as a condition of appointment. Indeed, a judge would be expected to screen a lawyer before appointment as master, at least asking how many cases the lawyer has before the judge. But the parties may recommend the master, and the judge may be lulled by the parties' recommendation to avoid further inquiry.

A counter-suggestion was that it would be better to establish a presumption of disqualification, subject to exceptions.

This discussion prompted the suggestion that it is proper to write a rule that does not attempt to solve every possible problem. Retaining the (a)(3) disqualification provision may create a problem. Big firms and small firms both may find that a lawyer cannot practicably serve as master, although for different reasons. Big states with big bars may avoid problems that will be encountered in smaller states with small bars. The duration of an appointment may be unpredictable when it is made, making it more difficult to foresee what problems a disqualification provision will generate.

An observer stated that in twenty-four years of serving as a master in many cases, the judge always asks whether there is a conflict. Both the master and judge always assume that the master will not appear before the judge. But the matter is not addressed in the order of appointment. At the same time, it is always assumed that the master's firm can appear before the judge so long as there is an ethical wall — the Note language suggesting the judge has discretion to disqualify the entire firm should be abandoned.

The Federal Judicial Center study of masters did not come across any case in which the disqualification question was addressed.

It was suggested that it might be better to address the disqualification question only in the Note, perhaps by suggesting that the question is one that may be addressed by disciplinary rules.

The response was made that disqualification does belong in the rule. Rule 53 has spoken only to trial masters. The revision is designed to bring Rule 53 to bear on the many appointments for non-trial duties. All master appointments should be brought into the rule. The disqualification issue is important. That it is difficult does not justify leaving it out of the rule.

Another suggestion was that the disqualification problem may not be as severe as it seems: in a multi-judge district, the master can avoid disqualification by having other cases reassigned to other judges. Yet reassignment may not be a panacea; the master's client may prefer the judge originally assigned, creating a conflict for the master. And the court itself may not allow reassignment.

The discussion of disqualification was summarized by suggesting four alternatives: carry forward the disqualification provision as published in (a)(3); modify the provision by permitting defeat of the disqualification in exceptional circumstances; modify the provision still further, to say only that the court may order disqualification; or delete the provision entirely.

A motion to delete (a)(3) passed by voice vote, with dissents. Mark Kasanin abstained because he is a member of the Maritime Law Association practice and procedure committee that was one of the groups raising the issue.

The Note is to be revised to describe the question, alluding to the overtones of state disciplinary interests.

Rule 53(b)(2) sets out matters that must be included in the order appointing a master. The Department of Justice suggested several additions to this provision, reflecting their frequent experience with masters. The Subcommittee decided to recommend adoption of several of these additions.

One change was recommended in (b)(2)(A), adding specification of any investigating or enforcement duties. This change was approved, with a style change to read "any investigation or enforcement duties."

(b)(2)(B), addressing ex parte communications between master and the parties or court, would be changed by adding this: "limiting ex parte communications with the court to administrative matters unless there is good cause to permit ex parte communications on other matters." It was asked how the limit on ex parte communications with the court will work. The order will tell the parties what the rules are. The judge adopts the limit in the appointing order, or decides not to adopt the limit so that ex parte communications are not limited to administrative matters. And the order can be amended.

Ex parte communications with the parties are treated differently — some master functions with respect to mediation or settlement require ex parte communication. But an observer noted that in many years of experience as a master, he has followed the practice of never talking to either side

without the permission of all parties. He suggested that the rule should adopt this standard, with an exception for settlement masters or enforcement masters.

It was asked why have a "good cause" restraint on permitting ex parte communications with the court on non-administrative matters? Why not just leave it to the court, abandoning the suggested new language? A response was that appointment of a master is an exceptional event; the rule should state the normal expectation. A further response was that in settlement or mediation, the parties may prefer that the court not hear from the master. And if the master believes there would be a benefit in ex parte communications with the court, the master can raise the question. But it was responded that it is difficult to understand what circumstances might establish good cause — as a matter of ethics, for example, a master should not communicate with the court on settlement matters. In rebuttal, it was urged that there are many different master functions. In a mass-tort case, for example, the master may be appointed for functions that require constant communication with the court; in one current action the master consults with the court daily.

Further discussion was followed by adoption of a motion to change the wording of (b)(2)(B): "the circumstances — if any — in which the master may communicate ex parte with the court or a party, limiting ex parte communications with the court to administrative matters unless the court in its discretion permits ex parte communications on other matters."

(b)(2)(C), proposed after much discussion of what Rule 53 might say about the record of proceedings before a master, simply states that the order appointing a master must state the nature of the materials to be preserved as the record. The Department of Justice suggested that the rule should be made more specific, addressing the manner in which the record is made, including an obligation to create a record. The difficulty, however, is that masters perform many functions; it may be difficult or even counter-productive to require a record of settlement or mediation work, or of enforcement-investigation work. We do not want to require every master to preserve a record of everything done as master. The key may be whether the master is to engage in fact-finding, but even that may be difficult to draft. But even then there is a risk that a direction to preserve identified categories of material may lead a master to disregard other material that should be retained.

The problem of making a record remains difficult. It was agreed to add a filing requirement in (C), to parallel the method-of-filing addition to (D) that was discussed in tandem. The order must state "the nature of the materials to be preserved and filed as the record * * *." It may be difficult to know what materials should be filed at the time the appointment is made, but the core requirement is clear: a master should make and file a complete record of everything that is to be considered in making or recommending findings of fact on the basis of evidence. The order can be amended to respond to needs that emerge as the master proceeds to discharge the appointed duties.

It was asked whether the (b)(2)(D) requirement that the order state the standards for reviewing the master's order and recommendations could be used to supersede the standards of review set out in (g)(3) and (4). It would be possible to ensure against this possibility by expressly incorporating (g)(3) and (4), so that the appointing order must state "the standards under Rule 53(g)(3) and (4) for reviewing the master's orders and recommendations." But it was concluded that

the intent is sufficiently clear on the face of the rule; a sentence will be added to the Committee Note, however, to make the point.

Subdivision (b)(3) provides that the order appointing a master may be amended at any time after notice to the parties. Two changes were considered; one is recommended for adoption. The public comments suggested that if the master is appointed by consent of the parties under Rule 53(a)(1)(A), consent of all the parties should be required to amend the order. Although this suggestion seems attractive on first approach, it dissolves on closer examination. The most compelling problem is that the court must have power to cancel the appointment if the master's duties are not being performed well, or if the court concludes that the court itself should discharge those duties. Other problems can emerge as well — the need to adjust the terms of compensation, for example, might be thwarted by the veto of one interested party. That change is not recommended. But a second change is recommended: the rule should expressly provide an opportunity to be heard on a proposed amendment. This change was adopted. Later discussion led to one more change: subdivision (b)(4), dealing with entry of the appointing order, was moved ahead of (b)(3) because entry logically comes before amendment. What was published as (b)(3) will become (b)(4), renumbering what was (b)(4) as (b)(3).

The "effective date" provision published as Rule 53(b)(4) was awkwardly drafted. Further reflection led to a recommendation that it be changed to a paragraph on "Entry of order." Brief discussion led to approval of this draft: "The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification."

Action on a master's order, report, or recommendations is covered by subdivision (g). (g)(1), as published, said that the court "may" afford an opportunity to be heard. The committee approved the subcommittee recommendation that "may" be changed to "must." As with other hearing requirements in the rules, a "hearing" does not require live argument. When there is no occasion to take witness testimony, the court can afford a hearing by written submissions only.

It was asked whether it is wise to include in (g)(1) authority for the court to take evidence in acting on a master's report. This authority appears in present Rule 53(e)(2). Given all that masters may be asked to do, it seems wise to preserve the authority — the alternative of remanding to the master to take any "new" evidence may be cumbersome, and the court may prefer to hear again the same testimony that was presented to the master. The opportunity to take evidence may be particularly useful when the court provides de novo review, as recommended by proposed revisions of Rule 53(g)(3).

It was pointed out that subdivision (g)(2) is captioned "Time," but in fact is the basic provision for objections. It was agreed that a new caption must be found. One possibility is "Time for Objections."

Fact review was addressed by publishing two versions of Rule 53(g)(3). The first version called for de novo review unless the appointing order directed review for clear error, or unless the parties stipulate with the court's consent that the master's findings will be final. Present Rule

53(e)(2) establishes clear-error review in nonjury cases, and (e)(4) permits the parties to stipulate for finality. The first version retained these as options, but established a preference for de novo review. Version 2 sought to parallel the distinctions made on review of a magistrate judge by providing a preference for de novo review as to "all substantive fact issues," but a preference for clear-error review of "non-substantive fact findings or recommended findings." Both versions reflected the growing concern expressed by several courts of appeals that Article III courts should not — and perhaps may not — surrender factfinding responsibilities to a non-Article III court adjunct.

The subcommittee proposed a new version that would require de novo review of all fact issues unless the parties stipulate with the court's consent that review will be for clear error or that the findings of a master appointed with party consent under 53(a)(1)(A) or for pretrial or post-trial duties under 53(a)(1)(C) will be final. The requirement of party consent to depart from de novo review would reduce the Article III concerns. Even then, it is not clear that the Article III problem is solved. The problem is particularly acute with respect to a trial master who makes or recommends findings on the merits of the claims or defenses in the action. But the parties cannot control the standard of review simply by their stipulation — the court must consent to the stipulation. There is a long tradition of reliance on special masters, and Rule 53 has provided for clear-error review unless the parties stipulate to finality. These traditions may satisfy the demands of Article III. The *LaBuy* decision, however, may reflect an evolving trend that will reach beyond the justification for appointing a master to the standards of review. A confident answer cannot be given until the Article III courts determine just how far Article III limits master practice. It should be remembered that the project to rewrite Rule 53 is motivated by the desire to bring pretrial and post-trial masters into the rule for the first time. Present Rule 53 governs only trial masters. There is no clear reason yet to write a rule that rejects any use of trial masters, abandoning everything that has been in Rule 53 up to now. For the present, it seems better to continue to permit appointment of trial masters subject to the several new restrictions embodied in the rule: a presumption for de novo review that can be overcome only on stipulation of all parties and with the court's consent, abolition of masters in jury trials absent party consent, and a paring back that deletes the right of the parties to stipulate to finality for a trial master's findings unless the initial appointment was made by consent of the parties.

It was asked what value there is in having a master if all findings have to be reviewed de novo. One answer is that many masters will be appointed for pretrial and post-trial duties that do not lead to review of everything the master does. Even when review is sought, the parties may stipulate to clear-error review in these settings more readily than they would stipulate if finality were permitted for a trial master. And if the initial appointment is by party consent, stipulations for clear-error review or finality are likely to be made. De novo review is most likely to be provided for a trial master. Courts will not always be asked to decide every issue de novo.

The next question was whether the de novo review provision will require that the court review every fact finding even though no one objects. It was responded that in a vast number of cases nothing is done because there is no objection. But the court should remain free to act in the absence of objections. The process of resolving some objections, moreover, may lead the court to review and determine related fact findings that have not been the subject of objections. Still, it needs to be decided whether the district judge is required to act in the absence of objections. The Article

III question does not extend to requiring decision of an issue that no party has asked to have decided. This conclusion seems even more clear when the master is acting on many types of pretrial matters, such as determining the facts surrounding a challenged discovery response.

It was asked how a court can make a de novo determination of credibility — clearly a matter of fact — without hearing the witness? It was pointed out that in reviewing findings by a magistrate judge, the court is not required to rehear the witnesses. Section 636(b)(1) provides that when a magistrate judge conducts evidentiary hearings a judge of the court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. * * * The judge also may receive further evidence or recommit the matter to the magistrate with instructions." In *United States v. Raddatz*, 1980, 447 U.S. 667, the Court ruled that de novo determination does not require rehearing the witness through live testimony. The Court, however, cautioned against rejecting a magistrate judge's credibility determination without seeing and hearing the witness, and several lower court decisions suggest that a redetermination of witness credibility requires hearing the witness.

These questions were redirected toward the provision for reviewing questions of law. Should the parties be able to consent to finality with respect to questions of law? It was urged that it is a bad idea to "box the judge in on the law." And it was asked when it is expected that the court will consent to a stipulation for finality — when the appointment is made, or when the parties seek to make a stipulation later? The stipulation is likely to be plausible only before findings are made. After findings are made, it is possible that all parties are prepared to make objections but to surrender the objections in return for surrender of all objections. Then the situation is the same as if no objections are made. But should the court be able to withdraw its consent to the finality stipulation after the findings are made? And if the parties stipulate to finality, is the stipulation binding in the court of appeals as well as in the district court? Surely both the district court and the court of appeals should be able to override the stipulation?

Several related questions came next: is there any need to provide for reviewing questions of law? Why not make the review provision parallel to the fact-review provision? Why not simply provide that review of law questions is de novo?

The question of an obligation to review in the absence of objections recurred. Should a judge be obliged to review privilege determinations made by a master with respect to 500 documents when objections are made only as to ten? Surely the provision should require de novo review only if an objection is made, giving permission to review de novo if no objection is made without requiring review.

It was observed that Rule 53(g) does not attempt to provide guides for distinguishing between matters of law and fact, nor to suggest the complications of "mixed questions." There is a difference between interpreting a statute and applying a rule to a specific fact situation. A party stipulation for finality with respect to issues of law application seems different from a stipulation with respect to more general questions of law. Perhaps some questions of law-application should be analogized to matters of fact for this purpose, at least if we are to distinguish law from fact. The Civil Rules never

have attempted to provide guidance on these questions, however, and it is better not to begin the attempt now.

Further consideration of subdivisions (g)(3) and (4) included an alternative approach that would substitute a waiver approach for the stipulation for finality. The waiver would be added as a new final sentence of (g)(2): "But the parties may with the court's consent waive the opportunity to object to a master's findings of fact or conclusions of law." This waiver would be reflected in a revised (g)(3): "If a party has objected under Rule 53(g)(2) the court must decide de novo all issues raised by the objection on which a master has made or recommended findings of fact or conclusions of law, unless the parties have stipulated with the court's consent that the findings will be reviewed for clear error." It would be possible to vary this approach by adding an express recognition that the court can review findings even in the absence of an objection: "The court may — and if a party has objected under Rule 53(g)(2) must — decide de novo * * *."

Discussion of this alternative approach led to revision of the new version initially submitted by the subcommittee. The committee approved Rule 53(g)(3) to read: "The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that (A) the findings will be reviewed for clear error, or (B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final." The committee approved Rule 53(g)(4) to read: "The court must decide de novo all objections to conclusions of law made or recommended by a master." The Committee Note will state that the court may decide questions of fact or law de novo even when no party objects.

Rule 53(g)(5) was published in brackets that expressed uncertainty whether it should be adopted. It establishes an abuse-of-discretion standard of review for a master's rulings on a procedural matter unless the appointing order establishes a different standard. Comments endorsed adoption of this provision. Courts should be able to determine what is a matter of "procedure" for this purpose. Adoption, deleting the brackets, was approved.

Rule 53(i) was designed to regulate the use of magistrate judges as masters. The version published for comment was shaped by concerns expressed in the Standing Committee. The published version was an awkward reflection of several pressures that push in different directions. There is a strong pressure to have judges act only in their official roles as judges. Stepping outside to perform other public acts is always sensitive, and it becomes even more sensitive when the acts are directly related to litigation before the judge's own court. This consideration would lead to prohibiting any role for a magistrate judge as master: if the task is one that can be performed as magistrate judge, it should be performed by acting as magistrate judge. If the task is one that cannot be performed as magistrate judge, a magistrate judge should not be appointed to perform it as master. This pressure is offset by others. One offsetting pressure arises from 28 U.S.C.A. § 636(b)(2), which provides both that a judge may designate a magistrate judge to serve as a special master pursuant to the Federal Rules of Civil Procedure and also that on consent of the parties a magistrate judge can be appointed to serve as special master in any civil case "without regard to the provisions of rule 53(b) * * *." This statute seems to favor appointment of magistrate judges, perhaps in part because the parties would not become responsible for the master's compensation. The force of this statute is reduced, however, by its position in the history of § 636: it was adopted before later amendments

that considerably expanded the range of duties that can be assigned to a magistrate judge acting as magistrate judge. A second offsetting pressure arises from specific statutory provisions for special masters. Title VII of the Civil Rights Act of 1964 provides for assigning cases to a magistrate judge as special master, and some judges have found this a useful resource for these cases. Yet a third offsetting pressure arises from the concern that at times it may be better to assign a public judicial officer to perform some of the roles that may be assigned to a master and that cannot be assigned to a magistrate judge acting as magistrate judge. Hence the second sentence of the published proposal: "Unless authorized by a statute other than 28 U.S.C. § 636(b)(2), a court may appoint a magistrate judge as master only for duties that cannot be performed in the capacity of magistrate judge and only in exceptional circumstances."

Rule 53(i) elicited strong and cogent negative comments. It was opposed by the Committee on Administration of the Magistrate Judges System and by the Federal Magistrate Judges Association. These comments reflected the severe tensions at work in this area. The committee concluded that it is better to delete all of 53(i). These questions are better left to further evolution of practice under the relevant statutes.

Deletion of Rule 53(i) led to discussion of the subcommittee proposal to adopt a new Rule 53(h)(4) that would absorb the final sentence of Rule 53(i) as published: "A magistrate judge is not eligible for compensation under Rule 53(h)." It was pointed out that there is no need for this provision, and that including it in Rule 53 might create a confusing implication. In April 1976, 1976 Conf. Rept. pp. 19-20, the Judicial Conference adopted a policy that precludes even a part-time magistrate judge from accepting fees for services performed as a special master, "whether or not such service is rendered in the magistrate judge's official capacity." The committee agreed to delete newly proposed 53(h)(4).

Further discussion of Rule 53 led to the question whether a master can be appointed to conduct "Markman" hearings on the interpretation of patent claims under the pretrial provisions of (a)(1)(C), or whether the appointment must meet the trial-master standards of (a)(1)(B). The Committee Note suggests that this task blurs the divide between trial and pretrial functions. The Markman case ruled that interpretation of patent claims presents a question of law to be decided by the court, not a fact question for the jury. Review of the master will be de novo as a matter of law under Rule 53(g)(4). Experience suggests that an expert master may be able to help resolve the matter both more effectively and more timely, meeting the standards for appointment as a pretrial master. The Federal Circuit has approved and even praised the use of masters in this setting. If the expense seems disproportionate to the needs and stakes of the case, party objections to a reference are likely to block the reference. It was agreed that the Committee Note should be expanded slightly to reflect this discussion.

The subcommittee did not have an opportunity to make recommendations on a substantially shortened Committee Note that resulted from deletions proposed by the reporter. Discussion led to restoration of a few of the deletions and approval of the Note as thus shortened. It was observed that reduction of the lengthy Note was a good thing.

Finally, a few changes not recommended were discussed briefly. The Department of Justice proposed that Rule 53(c) be amended by adding an express provision that a master can enter a protective discovery order under Rule 26(c). The subcommittee concluded that confusion might arise from singling out this one specific issue from the many other orders that a master might enter. The subcommittee also reconsidered, in light of comments, two issues that had regularly been considered in the course of preparing Rule 53 for publication. One issue goes to the liability of a master for malfeasance; early drafts included a provision for a bond to ensure an effective remedy, but this provision was deleted. One reason for deletion was fear that these issues approach matters of substantive liability. A second issue goes to appeal. The opportunities for interlocutory review of an order appointing a master are slim. Many other important pretrial orders also are ordinarily not appealable, however, and the subcommittee concluded that there is no reason to accord special treatment to master appointments. There is nothing like the years of experience and frustration that led to adoption of the class-certification appeal provisions in Rule 23(f). Finally, several comments expressed fear that appointment of masters might be unduly encouraged by deletion of the provision in present Rule 53(b) that "reference to a master shall be the exception and not the rule." The Committee Note twice says that deletion of this phrase is not intended to weaken the strictures against appointing trial masters, the only subject covered by present Rule 53. The "exceptional condition" term is retained, and does all the needed work. Locating "the exception and not the rule" within a revised Rule 53 that covers pretrial and post-trial masters, and also masters appointed by consent, would of itself create problems. There was no suggestion that any of these items be added to Rule 53.

The revisions of Rule 53 approved by the committee, and the reduction of the Committee Note, were approved for recommendation to the Standing Committee.

Rule 23(c)

Judge Rosenthal introduced the report of the Rule 23 Subcommittee. The first matter for attention will be to finish action on the proposals published in August 2001 in light of the public comments and testimony. The published proposals are deliberately narrow, although not unimportant. They focus on process. They provide guidance from the time of the certification decision to the end-point of acting on attorney fees. The Committee Notes published with these proposals may be shortened; much-improved versions are included in the materials. They describe what the amendments do. Further suggestions for refinement will be welcomed.

The second matter for attention is to consider what other Rule 23 topics might be approached. Earlier proposals to sharpen the criteria for class certification have been put aside for the foreseeable future. We chose not yet to address settlement classes, but to wait for *Amchem* and *Ortiz* to "percolate" in the lower courts. But the time may have come to think further about a settlement-class rule, and also about the special problems presented by "futures" plaintiffs.

Turning to the published proposals, the first amendment — Rule 23(c)(1)(A) — changes the time for certification from "as soon as practicable" to "at an early practicable time." This proposal, and the accompanying Note material, provoked extensive comment. The Subcommittee recommends that the published Rule be adopted, but proposes changes in the Committee Note to

further improve the discussion of the relation between discovery and a well-informed certification decision.

Changes are proposed for other parts of (c)(1). (c)(1)(B) is changed by adding an express requirement that an order certifying a class appoint class counsel under Rule 23(g). (c)(1)(C) is changed by dropping all reference to a "conditional" class certification; the footnote explains the need to avoid any hint that a tentative class certification is appropriate. The Committee Note is changed to emphasize the ability to change the class definition if trial makes the need apparent. The amendment that changes the cut-off of amendment from "decision on the merits" to "final judgment" is retained.

A substantial change is proposed in Rule 23(c)(2). The published proposal would require notice by means calculated to reach a reasonable number of members in a (b)(1) or (b)(2) class. Civil rights plaintiffs protested that notice costs would cripple worthwhile class actions, to the point of deterring filing. Others argued that notice is desirable as a matter of principle. In place of the requirement, revised (c)(1)(A) would provide simply that the court may direct appropriate notice to a (b)(1) or (2) class. This authority exists, at least in part, under present Rule 23(d)(2), but this express provision will serve both as a reminder and as an encouragement. The revised Committee Note will emphasize the need to consider the cost of notice and the opportunity to devise forms of notice that are inexpensive. This proposal is meant to strike a fair balance between the competing concerns. As to (c)(2)(B), the Committee Note discussion of plain language is improved. Other technical changes are proposed as well.

A number of changes are proposed for the settlement-review provisions of Rule 23(e). As published, (e)(1) made explicit the requirement that many courts have read into the ambiguous notice provision in present Rule 23(e): notice must be directed to a proposed class even if the action is settled or dismissed before a decision whether to certify the class. The public comments raised several questions about notice in these circumstances. Many comments agreed that it is rare to find that absent class members have relied on the filing and consequent tolling of limitations periods; few class-action filings generate much publicity. There is room for concern that class-action allegations may be added to a complaint to draw attention to the case or to exert settlement pressure, but there is little that a court can practicably do to address this concern when the only parties before it agree to terminate the litigation on terms that do not affect the class. There also is room for concern that a number of actions may be filed in different courts, using pre-certification dismissals as a means of forum shopping. Again, however, there are few practical remedies. In addition to the infrequent benefits, a notice requirement poses distinct problems. One obvious problem is cost. A second problem may be the means of notice: general notice addressed to the class described in the complaint may not do much good, but without extensive discovery it may be difficult to identify the persons who would get more individualized notice. Notice costs are an obvious concern. Some of the comments added concern that limitations on the opportunity to "withdraw" class claims would interfere with the right to amend a complaint under Rule 15(a). Pre-certification developments can demonstrate the value of withdrawing some theories that may impede certification, for example, and it would intrude on adversary preparation to require a justification for the withdrawal.

Faced with these concerns, the subcommittee advises that it would be better to delete any requirement that the court approve pre-certification dismissal. Subdivision (e)(1) should be amended to apply the court-approval requirement only to dismissal of the claims, issues, or defenses of a certified class. Notice is still required for all class members who would be bound by a settlement.

Early drafts of proposed Rule 23(e) included a lengthy list of factors to guide the court's determination whether a proposed settlement is fair, reasonable, and adequate. Doubts about the wisdom of including such a "laundry list" in the rule led to displacing the list from the rule text to the Committee Note. There is less risk that a list in the Note will be mistaken as an exclusive list of considerations, and less risk that the list will become a check-off form applied by rote in reviewing all settlements. Comments on the published Note, however, expressed the same reservations even about including the list in the Note. Deletion of the list is among the recommended Note changes.

A second major change is proposed for the Rule 23(e)(2) provision on "side agreements." The published rule would authorize the court to direct the parties to file a copy or summary of any agreement or understanding made in connection with the proposed settlement. Many comments suggested that a filing requirement should be imposed on the parties. The Subcommittee proposes to amend the rule to require parties seeking approval of a settlement to file a statement identifying any agreement or understanding made in connection with the settlement. The Committee Note would be changed to describe the court's authority to require that copies be filed, and to direct filing of summaries or copies of agreements not identified by the parties.

The change in Rule 23(e)(2) that requires the parties to identify agreements adds to the load that must be carried by the description of the agreements as those "made in connection with the proposed settlement." This phrase is not precise. It would be good to draft a more precise description if one can be devised, but repeated efforts have failed. The difficulty is to find a phrase that encourages filing of the important related agreements, but does not create a "trap for the wary" by language that includes too much on retrospective inquiry.

Rule 23(e)(3) published alternative versions of a discretionary "settlement opt-out" provision. The first provided that notice of settlement of a (b)(3) class action must include a right to opt out of the settlement if an earlier opt-out opportunity had expired, unless the second opportunity is excluded "for good cause." The second alternative was less directive, simply providing that the notice settlement may state terms that afford a second opportunity to request exclusion. The Subcommittee recommends adoption of the second alternative. It is more discretionary with the trial court. Even this discretionary provision may provide great benefits to the court and to class members. The court will be able to use this opportunity to gain information about the quality of the settlement. The opportunities for abuse of the second opt-out to disrupt a good settlement, however, will be reduced.

Comments on the Rule 23(e)(4) provisions for making and withdrawing objections reflected the long-running disagreements the committee has encountered. Plaintiffs and defendants commonly unite in challenging the value of objections to settlements that have been hammered out between the parties. Objectors commonly unite in challenging the quality of many settlements. These comments

have not shown persuasive reasons to change the published rule. But the Note language can be revised. The object is to achieve a Note statement that reflects the distinction between personal and class-wide objections. The Note reminds the court that it can inquire into an unexplained withdrawal. There was concern that the published Note encouraged too much discovery for objectors; the Note is revised to emphasize the need for court control of discovery.

The attorney-appointment provisions in Rule 23(g) are new. Most of the comments agreed that it is good to include an express appointment provision in Rule 23. It is important to define the responsibilities of class counsel, and to define the procedure for appointment. The comments, however, suggested that Rule 23(g), and particularly the Committee Note, reflected an intent that the court stir up competition for appointment as class counsel even in cases with only one applicant. The Note should be revised to show that there is no intent to favor competition when there is none, that when there is only one applicant the court's responsibility is the present responsibility to assure adequate representation. In no-competition cases, Rule 23(g) simply shifts the focus on counsel competence from Rule 24(a)(4) to Rule 23(g), separating it from the focus on the adequacy of the class representative. When there are rival applicants, on the other hand, the rule directs the court to look beyond mere adequacy to select the attorney best able to represent class interests.

The counsel-appointment criteria in Rule 23(g)(1)(C) raised concern that the rule would further entrench an already entrenched class-action bar. The subcommittee recommends addressing this concern by adding an emphasis on knowledge and experience in the law as a relevant factor independent of experience with complex litigation. Similar refinements are recommended for the role of counsel's ability to devote resources to the litigation: resources, although important, are not to be determinative.

A further change is recommended for Rule 23(g)(2) by making express provision for designation of interim class counsel.

Rule 23(g)(1)(C)(iii) and 23(g)(2)(C) provide a bridge to the attorney-fee provisions of Rule 23(h) by establishing a foundation to consider fee terms during the appointment stage.

Rule 23(h) is recommended for adoption with only small style changes. The express incorporation of Rule 54(d)(2) was again considered, but the incorporation remains important because of the nexus among Rule 54(d)(2), Rule 58, and Appellate Rule 4. Notice to class members of an attorney fee application is limited to "a reasonable manner" because of concerns about adding another large cost item. Note language is recommended that stresses the importance of allowing an adequate time for objectors to examine the materials that support a fee application before the objection deadline expires. The Note also emphasizes the need to consider benefits actually achieved for class members in setting fees. The focus can be on amounts actually distributed, the value of coupons, or the non-cash value of specific relief.

Other recommended changes in the Committee Note would delete discussion of risks borne by counsel, and delete much of the discussion of agreements about fees, "inventory" lawyers, the individual clients of class counsel, and the like. The details seemed to generate risks of over-statement or confusion.

Open discussion followed this introduction.

Beginning with Rule 23(c)(1), it was asked whether it is desirable to eliminate the provision for "conditional" certification. The original purpose of this provision was to allow a court to rule that a class is certified subject to fulfillment of stated conditions, such as a condition that a more adequate representative be found. There is reason to doubt the wisdom of what seems to be a premature certification in such circumstances; the effort to foresee the future effects of the dramatic changes made in 1966 may have failed on this score as well as with respect to the growth of (b)(3) class actions. More importantly, this original intent seems to have been lost in practice. Instead, the invitation to conditional certification seems to be read all too often as an invitation to certify now in the face of uncertainty, reasoning that a tentative certification can be undone later. Tentative certification exerts great pressure, even if it is expressed as tentative. It is better to defer the certification decision until the court is clear that certification is — or is not — appropriate. The value of conditional certification is further reduced by the continuing express provision that an order determining whether to certify a class may be amended before final judgment.

Another comment noted that conditional certification can be misused. It may be used to encourage settlement in an action that cannot be tried; one purpose may be to avoid choice-of-law problems that would defeat a class trial. Making a certification "conditional" accomplishes nothing. State courts frequently make use of this device, and it is misused.

Discussion asked whether "conditional" certification makes sense when it is not clear whether individual or class issues will "predominate" in a (b)(3) class. A related question was whether a provisional certification for purposes of reviewing a proposed settlement remains available, and what its effect may be. A provisional certification for settlement review, for example, may indicate that the action has proceeded to a point that deserves protection by injunction against rival litigation that might undo the settlement. The response was that care should be taken in certifying a class without at least a good sense that certification requirements are satisfied, a matter addressed also in connection with the time-of-certification provision. A provisional certification for settlement review, however, should be viewed as a certification that deserves protection by whatever means would be available to protect a proposed settlement in a class that had been certified before the settlement was reached and proposed to the court for approval.

The frequency of decertification was addressed by Mr. Willging, who noted that the FJC study of class actions in four courts for two years found that a decertification question was raised 23 times out of 402 actual cases. In 9 of the 23 cases the certification was affirmed; in 3 it was reversed or modified; and in the remaining cases there was no action on the question.

It was suggested that a "conditional" certification is eligible for appeal under Rule 23(f).

This discussion concluded by the committee's decision to delete conditional certification from Rule 23(c)(1)(C).

Discussion of Rule 23(c)(1)(B) led back to (c)(1)(A). The question was how can a court define the class claims, issues, or defenses at the time of certification? The Note discussion of (c)(1)(A) suggests "controlled" discovery that will inform the certification decision. The Note

further suggests that some courts require trial plans that describe the issues that will be tried on a class basis and the issues that will be tried on an individual basis; it was suggested that perhaps it should say that "many" courts require trial plans. The public comments provided much information about the need to be able to illuminate the certification decision through discovery. They also suggested the fear that pre-certification discovery will generate many disputes as proponents of certification seek unlimited discovery on the merits while opponents argue that all discovery requests are improper because they address the merits rather than certification issues. The experience of some committee members reflects these perspectives, reporting extensive arguments about the scope of pre-certification discovery. The Committee Note seeks to address these comments by stating the importance of active discovery management by the court.

The problem of certification discovery was put in perspective by the comment that this is not an issue in many classes. Matters pertinent to the certification decision can be found out quickly in employment, securities, and other cases. The trial plan, and questions of class-wide proof, are a problem in mass torts. The Note, as revised, does the best that can be done with these problems. The Note follows the direction that is emerging in the cases, including decisions by the 3d and 7th Circuits in 2001 that recognize the need for some merits discovery to inform the certification decision. Arguments can still be made whether the emphasis on "controlled" discovery into the merits are too much offset by the implication that it can be artificial and wasteful to attempt fine distinctions between certification discovery and merits discovery. But the Note seems in all to strike the right balance, recognizing that what is most important is effective case-by-case control.

Discussion moved to the Committee Note commenting on the (c)(2)(B) requirement that notice of certification must be in plain, easily understood language. The Note refers to the need to consider whether class members are more likely to understand notice in a language other than English. But any large class is likely to include some members who are more fluent in other languages. This level of detail seems better left to the Manual on Complex Litigation. The committee determined to delete the proposed new Note sentence on other languages.

The text of Rule 23(c)(2)(B), with the revisions proposed by the Subcommittee, was approved without further comment.

Rule 23(e)

Discussion of Rule 23(e) began with a reminder that the Subcommittee proposes to limit the requirement of court approval to settlements of the claims, issues, or defenses "of a certified class." The history is that some courts read present Rule 23(e) to require approval of pre-certification dismissal. Rule 23(e)(1)(A) as published made that requirement explicit. The Committee Note, however, reflected the committee's uncertainty as to what remedies might be applied in lieu of approving dismissal. Notice to members of the alleged class might protect reliance on the pending action to toll limitations periods. Other methods might be devised to check forum-shopping.

The Subcommittee proposes new Note language that would reflect elimination of the requirement of court approval for pre-certification dismissal. Other new language, however, would suggest that the court can impose terms that protect potential class members who may have relied on the class filing or that prevent abuse of class-action procedure. This language was challenged as

very open. It was noted that these problems will appear only in a very small number of cases. "The rare case will be reliance, or forum-selecting that goes beyond the pale." The Note language is intentionally open, but not empty.

The Note language may not be empty, but it was observed that it has no foundation in the rule once the approval requirement is removed. There also may be a conflict with the right to amend under Rule 15(a), which seems to permit amendment once as a matter of course to delete class allegations before a responsive pleading is filed.

It was asked as a counter what is the bearing of Rule 41(a)(1), which opens the description of the plaintiff's right to dismiss by "Subject to the provisions of Rule 23(e)." It was noted that this qualification still has meaning under revised 23(a)(1), since court approval still is required for voluntary dismissal after a class is certified. Whether the meaning of 41(a)(1) is changed depends on whether present Rule 23(e) is interpreted to require approval of a pre-certification dismissal.

A committee member recalled directing notice of a pre-certification dismissal: if it can be done under the present rule, it can be done under the new rule without facing these problems in the Note. The Manual for Complex Litigation advises that if there is abuse of the class process, the court can protect the class by giving notice that would allow others to come in to represent the class. There also may be inherent power to protect the class. And the authority to regulate related case filings may support measures to address forum-shopping concerns.

A motion to delete the two proposed new sentences that describe terms exacted for pre-certification dismissal was adopted.

The Subcommittee recommends changes in the Committee Note to respond to comments that thought the published Note was hostile to settlements. There was no intent to reflect hostility, and new language has been added to reflect the need to balance the values achieved by settlement against the need for care to ensure that the general value of settlement is not vitiated by a particular inadequate settlement.

The Rule 23(e)(1)(B) provision for notice of a proposed settlement "in a reasonable manner" would be supplemented by new Committee Note language discussing the need for individual notice "in the manner required by Rule 23(c)(2)(B) for certification of a Rule 23(b)(3) class" in some circumstances. It was asked whether this observation should be qualified by referring to individual notice "when practicable." This qualification is part of (c)(2)(B), however, so it is incorporated by that reference.

A similar question was addressed to notice if a settlement opt-out opportunity is provided under Rule 23(e)(3). This question will arise only if a (b)(3) class is settled after expiration of the initial opportunity to request exclusion. Rule 23(e)(1)(B) requires notice to the class in a reasonable manner; the court can determine how far the manner of notice should be adjusted to reflect what is practicable to protect the second opt-out.

Attention turned to the Subcommittee proposal to revise Rule 23(e)(2) to require the parties to identify any agreement or understanding made in connection with a proposed settlement. The first comment was that a decision must be made as to what agreements are covered. The rule language

is very broad: does it reach an unspoken "understanding"? "A wink and a nod"? The reference to "understanding" is troubling. The Committee Note describes agreements that "bear significantly on the reasonableness of the settlement." That is an appropriate test. But that is a very small problem. What other agreements might be seen to be made in connection with a settlement? An agreement to settle individual cases on terms different from the terms available to class members? An agreement among attorneys on fee division? There is a further problem with oral agreements: we do not want to encourage hidden agreements. But the whole provision is very broad.

One possibility would be to add a stronger link to the settlement terms to anchor the duty to identify. The requirement could be limited to agreements "directly related" to the settlement. But some comments thought such rule terms would make it too easy to avoid the requirement. We need a formula that people can understand, but that reaches most of what we need.

It was responded that what we need depends on what we are trying to close down.

One example of the difficulty is provided by a recent Seventh Circuit case in which the class action that was eventually settled was launched by paying a $100,000 consultation fee to a lawyer who had a client that became the class representative. It is difficult to know whether the referral fee agreement was made in connection with the settlement. There might have been a direct connection, but it may have been no more than the easiest way to initiate the action.

The question whether "understanding" is a necessary part of the rule was renewed. It is clear that unwritten agreements should be reached, but so long as they are agreements they are covered by the requirement to identify an agreement. The advice to delete "understanding" was renewed later.

Some interpretive help may be found in the Committee Note sentence stating that: "The functional concern is that the seemingly separate agreement may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others." But is that guidance enough?

The next suggestion was that the test should be "materiality." What we need is identification of something that brought about the settlement. The materiality suggestion was late renewed: we should require disclosure of "any agreement or understanding material to the settlement." Any agreement that affects the fairness of the settlement terms if material. This wording was resisted, with an alternative suggestion that the rule address an agreement that "may have influenced the terms of the settlement." The "may have influenced" suggests a historical inquiry, but that may be acceptable. A more specific objection was that focus on influencing "the terms of the agreement" may not reach the side agreements without which there would not have been any settlement. Such vital agreements are the ones we most want to know about, but might not be seen to have influenced any specific settlement term.

Another alternative formulation was suggested: an agreement that "bears significantly" on the settlement must be identified. But this formula does not escape the "eye of the beholder" problem.

One fear is that any formulation will encourage objectors to seek depositions of the attorneys who negotiated the settlement. None of the alternatives seems to reduce the risk: materiality, bears significantly, made in connection with, simply frame the question in different terms.

It was observed that "objectors are bought off every day. You are giving a weapon to the bad objectors." Even if "understanding" is dropped, a problem will remain. The settlement negotiation will be conducted in a manner similar to the practice that attorney fees are not discussed before the settlement terms are agreed upon: "it is in the room. These matters will be put off."

The question was posed whether there are in fact agreements that relate to the settlement but are not part of the settlement terms. An answer was that there are, but that they "see the light of day. You cannot eliminate unethical behavior." The proposal goes too far; it will deter good settlements.

Another drafting suggestion was to limit the identification requirement to any agreement made in connection with "and as a condition of" settlement.

A reminder was provided that the process is designed in two steps: the parties identify agreements, and the court then decides whether to require further disclosure. It was responded that the objectors will demand to see any identified agreement.

The next observation was that any clear standard invites people on the borderline to avoid identification. Perhaps it is best to adopt a broad standard, but to encourage the judge not to go too deeply into the next step of requiring further disclosures. "I despair of finding a formula" more effective than "made in connection with." It was further observed that broad wording of the identification requirement may discourage the parties from making the kinds of agreements that we worry about.

Further discussion suggested that this proposal is likely to be controversial. It is a mistake to rely on the Note alone; the rule itself should say, as closely as possible, what we want to make happen.

The committee was reminded of the process that led to the present suggestion. The "made in connection with" formula was part of the published proposal that simply authorized the court to direct the parties to file a copy or summary of the agreement. That proposal did not address the means by which the court might become aware of the agreements it might wish to examine. The many comments favoring mandatory identification by the parties responded to the understandable concern that ordinarily the court would have no basis for knowing about agreements that do not directly affect the settlement terms that apply to class members. None of the comments helped to sharpen the formula that defines the agreements to be identified by the parties. The value of a precise formula is increased by changing to a party-identification requirement. But the difficulty of drafting a precise formula is not reduced. The Subcommittee recognized the problem and struggled with it, but was unable to find better wording.

So the court's need to know of the agreements it might wish to explore must be defined in a way that, to repeat the phrase, is not "a trap for the wary." One way to alleviate uncertainty may be to reinstate the examples of "side agreements" that the Subcommittee would strike from the Committee Note.

Returning to the rule reference to an "understanding," it was noted that the word "agreement" is familiar to the law. It is well developed in the law of contracts. "Understanding," on the other hand, is not well developed. The course of safety is to rely on the well-developed "agreement" concept and to delete the non-technical reference to understanding. To be sure, even the concept of agreement has its ragged edges — the law of conspiracy, both criminal and civil, is sufficient illustration.

The "made in connection with" formula was supported as an objective standard. Tests that suggest a response that "I was not influenced by it" are not. But it was responded that "there will be no agreements in connection with the settlement."

It was asked whether the rule should specify "oral or written" agreements. A counter-proposal was that the rule might be limited to a copy of any written agreement.

The problem continued: the rule should not be so narrow as to be easily circumvented. One approach would be to adopt a broad standard for the requirement that parties identify agreements, but a narrow standard for the court to direct disclosure to others.

New Subcommittee language for the Committee Note on agreements made by insurers was addressed. This language was proposed in response to the testimony and comments of insurance companies. An essential part of the process that leads a defendant to settlement is often resolution of an insurer's participation in paying part of the settlement. Insurers fear that agreements they make with their insureds may seem to be made in connection with the settlement, and that identification and eventual disclosure will make it more difficult to reach these agreements. One illustration was an agreement with the insured on how many "occurrences" are involved in the litigation. Other illustrations were complex, drawing from areas of insurance practice that were not fully illuminated by the testimony. The first suggestion was that it is better to say that "information about" insurance coverage may bear on the reasonableness of a settlement than to say that "an understanding of" insurance coverage is relevant. It was noted that the insurance policies themselves are commonly made available; indeed, disclosure often may be required by Rule 26(a)(1)(D). And the court may need to know about agreements that affect how much insurance money is available. The resources available have an important bearing on the reasonableness of a settlement. Simply knowing the policy terms often does not carry far enough. But it was protested that people are not now asking for disclosure of such agreements. The concern for confidentiality may be met, however, if disclosure is made only to the court.

The Committee concluded that there is not enough information to support sophisticated understanding of the problems that arise from agreements about an insurer's share of settlement payments. Without a good understanding, it is better not to adopt the suggested new language.

Further overnight deliberations by the Subcommittee led to specific proposals. Rule 23(e)(2) would be amended by deleting "or understanding" from the party-identification requirement. The duty to identify would be limited to "any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise." The Committee Note would be revised to read as follows:

> Subdivision (e)(2) requires parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) to file a statement identifying any agreement made in connection with the settlement. This provision does not change the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1). It aims instead at related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification.
>
> Further inquiry into the agreements identified by the parties should not become the occasion for discovery by the parties or objectors. The court may direct the parties to provide to the court or other parties a summary or copy of the full terms of any agreement identified by the parties. The court also may direct the parties to provide a summary or copy of any agreement not identified by the parties that the court considers relevant to its review of a proposed settlement. A direction to disclose may raise concerns of confidentiality. Some agreements may include information that merits protection against general disclosure.

This language makes it clear that the court may direct that a summary or copy be provided to the court only, be provided to the court and parties only, or be made available more generally.

It was urged that there should be further work on this language to address confidentiality concerns. The court may examine a summary or copy of an agreement and conclude that the agreement is not relevant to the settlement review. It may be useful to add a statement that the court should provide an opportunity to make claims to work product or other relevant protections.

The proposed Note language renewed the question of the court's sources of information about agreements not identified by the parties. This question, however, is less pressing than it was under the published version of (e)(2) that did not require the parties to identify their agreements.

The question whether to include examples of side agreements in the Committee Note was renewed. The Subcommittee continued to recommend against providing examples. The Manual for Complex Litigation can provide a more useful, and more easily changed, list.

It was urged that the committee consider restoring Committee Note language addressing the concerns that should be considered in determining whether to direct filing of a copy or summary of an agreement identified by the parties. The language would have to be rewritten to avoid the tie to deleted references to "the functional concern" underlying (e)(2) identification requirements. But it may be useful as a further explanation of the value of the filing requirement. It was replied that it adds nothing useful to say the same thing again in the context of court directions to file. But it was protested that something may be added. One example that the Subcommittee would delete from the Committee Note is the "blow out" provision that empowers a defendant to escape a proposed settlement if a specified threshold of opt-outs is exceeded. Practice is to disclose these agreements to the court in camera; the parties to the settlement do not want the class and others to know the terms for fear of encouraging concerted efforts to solicit exclusion requests. It was urged that these matters are better covered by the Manual for Complex litigation; there is no problem that requires

a "solution" by advice in the Committee Note. But it may remain possible to add a clause to the proposed Note language that refers to the value of court directions for further disclosure.

A final question was whether the Note should refer to "trading away" advantages for the class. The language was defended on the ground that the settlement negotiation process is very much a trading process, in which many possible alternative packages of terms are explored and winnowed down by trading off provisions for mutual advantage. But it may be possible to substitute some other word. The reporter, Subcommittee chair, and committee chair were left free to decide whether to say "relinquish" or something similar in place of "trading away."

The changes in Rule 23(e)(2) and the Committee Note language proposed by the Subcommittee were approved.

Rule 23(e)(3), creating a "settlement opt-out," was published in alternative versions. The Subcommittee recommends adoption of the second version, which provides in neutral terms that the court may provide a second opportunity to opt out of a (b)(3) class settlement if the original opportunity expired before settlement terms were announced. This version was favored by many of the comments, although other comments favored the first version that provided a second opt-out opportunity unless good cause is shown to deny the opportunity.

The committee voted to recommend adoption of the second version. Discussion then turned to the Committee Note.

The first question noted that several comments opposed any settlement opt-out, and suggested that perhaps these comments reflect experience in specific subject-matters. Perhaps the Note could suggest that there are classes of cases that are not suited to the settlement opt-out. It was decided that it would be too difficult to establish support for identifying what those cases might be.

A second question addressed the Subcommittee proposal to add Note language saying that an agreement among the parties to settlement terms that permit exclusion may be a factor weighing in favor of settlement. The language is a brief summary of many longer passages recommended for deletion. It was concluded that this sentence should be retained.

A third question addressed Committee Note language stating that the settlement opt-out reduces the influence of inertia and ignorance that apply at the time of the first opt-out opportunity. The language seems weak. The committee agreed to delete this language.

The next question went to new language addressing the possibility that a court may wish to impose terms to control the effect of a settlement opt-out. Two terms are identified: that a class member who elects exclusion is bound by rulings on the merits made before the settlement, or cannot participate in any other class action pursuing claims arising from the same transactions or occurrences. Such terms dilute the value of the opportunity to opt out, even recognizing that courts will not exact such terms in all cases. A prohibition on joining another class action, for example, may defeat a central purpose for requesting exclusion — the hope that better terms can be got in circumstances that do not reasonably support individual litigation. We should not discourage other class actions when many members of the present class are dissatisfied with the settlement terms. And we should not adopt changes that make it more difficult to bring class actions. It was responded that

today there is no second opportunity to opt out after settlement terms are known; it is proper to suggest discretion to impose limits that avoid a "free ride." But it was protested that this Note language does not interpret anything in the text of Rule 23(e)(3). The stakes are not high; it is not quite right to say cautionary things about administration of this new device.

The discussion of terms limiting the effect of a settlement opt-out was defended on the ground that the Note attempts to address objections to the settlement opt-out provision. And the Note is a help in resolving uncertainties as to the consequences, particularly with respect to issue preclusion. The question of "opt-out farmers," however, may be distinct.

A motion was approved to delete the Note sentence suggesting that the court might condition exclusion on the term that a class member who opts for exclusion may not participate in another class action pursuing claims arising from the same underlying transaction or occurrence.

Rule 23(e)(4) recognizes the right of any class member to object to a proposed settlement and provides that an objection may be withdrawn only with the court's approval. Discussion began with the question whether a class member must intervene to object. It was agreed that intervention is not necessary to support an objection in the trial court. The distinctive question whether intervention is needed to support standing to appeal is now pending in the Supreme Court and is not referred to in the revised Committee Note.

Objection was made to suggested Committee Note language stating that the court has discretion whether to provide procedural support to an objector. This sentence distills a much lengthier discussion in the published Note. There were objections that the published Note went too far in encouraging support for objectors, but concern remains that the rule and Note should not discourage support for objectors. But shortening the statement may be even more dangerous, leaving an open-ended invitation to expand support for objectors beyond present levels. "We don't need it; it is dangerous." The committee voted to reject the proposed new sentence.

It was suggested that as published, Rule 23(e)(4)(B) seems to apply to any objector, whether or not a class member. It was agreed that (B) should be restyled: "An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval." Since (A) applies only to an objection by a class member, the ambiguity is removed.

The committee voted to adopt 23(e) as revised during the discussion.

Rule 23(g)

Rule 23(g) brings appointment of class counsel into Rule 23 for the first time. It was introduced without further summary.

The first question expressed concern with the appearance of unfairness that may arise when the trial judge who is to hear the case gives time so competing applications can be made and then makes the appointment. It would be better to have a different judge make the appointment. The class adversary will fear that the judge who selects the lawyer will be too much impressed by the lawyer. The provision allowing a reasonable period to apply for appointment "may lead to an

internet solicitation by the court." The rule, moreover, seems tilted toward the experienced lawyer, at the expense of the neophyte who actually "discovered the pollution" and filed the action.

A prompt reaction was that although it has been suggested that appointment of class counsel might be assigned to a magistrate judge, it is better to have the appointment made by the judge responsible for the class action.

A second reaction is that the problem of appearances arises when there is more than one applicant for appointment. These circumstances occur now, and the court is involved now. Adopting express provisions in Rule 23(g) reduces the appearance of unfairness by establishing a regular, transparent process that is guided by explicit criteria and bounded by the standard calling for appointment of the attorney best able to represent the class.

The problem of entrenching already entrenched class-action specialists is recognized in proposed additions to the list of appointment criteria and also in new Note provisions.

It was suggested that the Note discussion of Rule 23(g)(2)(B) "does not seem to track the rule." As published, (g)(2)(B) allows a reasonable period for applications by attorneys seeking to represent the class even when there are no present competitors. It seems to invite the delay. "I just don't like appointing counsel who did not file." It was responded that such appointments occur now when there are parallel actions. And new language suggested for the Committee Note says that the primary ground for deferring appointment would be that there is reason to anticipate competing applications. Examples are provided — there are multiple class actions, or individual actions are pending on behalf of putative class members. It was suggested that these illustrations should be incorporated in the rule itself. This suggestion was resisted on the ground that these are but illustrations, and it is difficult to draft suitable rule language that does not fall short or go too far.

The Subcommittee concluded that this discussion points to reconsideration of some of the Note language addressing the process for selecting among several applications. The Note can be made to flow better, and to distinguish more clearly between situations with only one applicant for class counsel and situations with rival applicants. The account must include recognition that it may be better to allow time for new applicants when the only present applicant will not provide adequate representation for the class. This concern makes it appropriate to discuss deferring decision even when there is only one applicant. But the Note should be reviewed further to ensure that it does not encourage over-use of delay to wait for competing applications.

The revised Note discussion was applauded as excellent. A friendly amendment was proposed in this spirit. The first paragraph of the revised Note includes a sentence stating that the procedure and standards for appointment vary depending on whether there are multiple applicants to be class counsel. It would help to add to Rule 23(g)(2)(C) an express statement of the court's duty when there is only one applicant. A model might be found in the later Note statement that when there is only one applicant, the court's task is limited to ensuring that the applicant is adequate under the criteria specified in Rule 23(g)(1)(C). The rule does not now state that the court must assure that counsel is adequate; (2)(C) is the best place to say it.

This approach was supported by observing that it is better to state the adequate representation requirement in the rule rather than resolve a possible ambiguity in the Note.

A beginning draft was suggested: "If there is one applicant for appointment as class counsel the court must assure * * *." This amendment was moved for adoption.

Adoption of the amendment was resisted on the ground that there is no need for it. The "must assure" language, further, may imply that the court has a continuing obligation to supervise class counsel. An alternative draft might be: "If there is one applicant for appointment as class counsel, the court must ensure that the applicant is adequate under Rule 23(c)(1)(B)."

This approach was supported with the observation that there is no ambiguity in the published draft, but that the addition will "get everyone quickly and easily attuned to it." Committee members who have worked intensely with these problems "can connect the dots," but it is not so easy for those who come to the question afresh.

It was protested that even as reduced, the proposed language still seems to emphasize the court's "duty to qualify counsel."

An alternative was suggested for (C): "If more than one qualified applicant * * *." This addition was adopted. It was also agreed to include in Rule 23(g)(2)(B) a statement of the standard the court should use to determine whether to appoint the only applicant. The Subcommittee was charged with drafting this provision.

A motion was made to delete all of 23(g)(2)(B), eliminating any express reference in the rule to allowing a reasonable period for applications for appointment as class counsel. The motion was opposed on the ground that (B) simply describes what happens. A response was that there is no need to advertise what happens. A further response was that a good illustration is provided by the recent Seventh Circuit decision in the tax-refund-anticipation-loan case. The class action was filed after many other actions had been filed, and in face of a class action in a state court that was nearing trial. The fact that the attorneys filing the present action could provide adequate representation does not ensure that they can provide the most effective representation for the class in these circumstances, and there is good reason to anticipate that if the court delays the certification decision other counsel may apply. The Note can help, but "there is a place for this in the Rule."

The committee voted to delete Rule 23(g)(2)(B). The Committee Note can be revised to express the thought expressed by (B).

Attention turned to Rule 23(g)(2)(A), proposed by the Subcommittee. This subparagraph expressly recognizes the court's authority to designate interim class counsel before determining whether to certify a class. How can counsel be designated to act for a class that does not yet exist? It was urged by many voices that commonly there is much that must be done on behalf of a proposed class before a certification decision can be made. Motions are made and must be responded to. Discovery often is appropriate or necessary. The conceptual concern that a class has not yet come into recognized existence can be met by adding a few words: "The court may designate interim counsel, to act on behalf of the putative class, before determining whether to certify the action as a class action." This change was approved by the committee.

It was observed that Rule 23(g) generally does a brilliant job of regulating attorney conduct without regulating attorney conduct. Duties are placed on the court and the parties, not directly on the attorneys. The one exception is the direct command of Rule 23(g)(1)(B) that class counsel must fairly and adequately represent the interests of the class. State rules of professional responsibility and many local district rules regulate the general duty to represent a client. They also address the division of fealty owed as between class and class representative as clients. The Committee Note expressly says that the obligation of class counsel may be different from the obligation that has been adopted by most state and local rules. This intrusion on state and local-rule regulation could be avoided by reframing the rule: "The court must ensure that class counsel fairly and adequately represents the interests of the class."

This concern was met by recalling that many comments from class counsel welcomed Rule 23(g)(1)(B). They now explain to class representative clients that the decision to frame an action as a class action imposes on counsel a professional obligation to the class that must be reconciled with the obligation to the representative client, and that the obligation to the representative client changes accordingly. But it was responded that the source of this practice now is in state rules of professional responsibility. 23 (g)(1)(B) changes that, and imposes the obligation "top-down" in the federal system. It was rejoined that this consequence already flows from Rule 23(a)(4), which establishes requirements of adequate representation by class counsel through the requirement that the representative provide adequate representation for the class.

No motion was made to amend the Rule 23(g)(1)(B) statement.

It was asked whether designation of interim class counsel is now the norm. It was agreed that the Note could say that the rule authorizes designation when needed.

It was observed that "everyone who files will seek to be designated as a head-start in the race for appointment as class counsel." It was agreed in response that the Note could be revised to describe designation of interim class counsel not "in order" to protect class interests but "if necessary" to protect class interests.

Attention was directed next to Rule 23(g)(1)(C)(iii), which provides that the court may direct potential class counsel to propose terms for attorney fees and nontaxable costs. It was urged that this provision should be deleted. The Committee Note discusses many other examples of information that applicants might be directed to provide. The explicit reference to fees provides a hint that we are ready to go back to low bidding and auctions. The response was that there were many comments and much testimony on the direction to provide fee information. We were repeatedly encouraged to get the court involved in regulating attorney fees at the beginning of the action, not to facilitate bidding but to avoid later difficulties. It helps to start thinking about these issues early. The Note explicitly says that there will be numerous class actions in which information about fees and costs is not likely to be useful. But fee information is a distinct concern in many class actions. The Federal Courts Study Committee thought that early guidelines are important. (iii) is not an expression that either favors or disfavors auctions.

The provision for information about fees and nontaxable costs was questioned from a different perspective by asking whether we should view the court as a consumer of the legal services

provided by class counsel. It was agreed that it does not help to view the court as consumer, but the fee topic is important nonetheless.

A motion to strike the reference in 23(g)(1)(C)(iii) to proposing terms for attorney fees and nontaxable costs failed.

Turning back to Rule 23(g)(1)(C)(i), it was agreed that the third "bullet," focusing on the work counsel has done in identifying or investigating potential claims in the case, should be moved up to become the first item in the list. This is a logical first point in the appointment inquiry.

Further discussion led to agreement that an evaluation of counsel's "experience" should include not only frequency and duration of involvement, but also the rate of success and failure.

The Committee Note on Rule 23(g)(1)(B) was discussed next, pointing to the statement that the class representative cannot command class counsel to accept or reject a settlement proposal. It was observed that we are separating counsel appointment from its present roots in Rule 23(a)(4). This is a further attenuation of the relationship between the representative and class counsel. The separation may reflect reality. But this is a fundamental policy question. The Private Securities Litigation Reform Act adopts the representative-as-client approach. Rule 23(g) assigns to the court responsibility for selecting who will be attorney for one side of the case.

The response was that in many actions it is class counsel, not the class representative, who is the "main actor." The bond between attorney and representative as client may seem attenuated. There are cases in which the court looks to class counsel. The role of class representative has caused difficulties. An example is the representative who refuses settlement unless there is a large individual payoff for the representative. The Note has been stripped of case citations, but the cases confirm the Note statement. The problem cannot be made to go away by ignoring it in the Note. The Private Securities Litigation Act is a break with this tradition. The class action continues to be one on behalf of other people. Outside securities litigation, it is not the class representative's position to replace class counsel. It is proper to be concerned about the separation between class representative and class counsel. Some of the comments and testimony reflected the importance of maintaining real attorney-client relationships forged between class representative and class counsel, and the Note has been changed to reflect this concern. But Rule 23(g) is intended to adopt, in a modest way, the best practice, to bring to it standards, discipline, regularity.

The committee was reminded that by putting a duty on the attorney to represent the interests of the class Rule 23(g)(1)(B) is invoking disciplinary rules. Enforcement will be not only through the court in the class action but also by state orders suspending or disbarring lawyers who fail the duty.

The committee agreed that it was useful to have had this discussion, and that nothing need be changed.

Rule 23(h)

Rule 23(h) is proposed in the same mode as Rule 23(g), as a clear restatement of present good practices.

A specific drafting question was asked of Rule 23(h)(2): "A class member or a party from whom payment is sought may object to the motion." In a common-fund award case, it could be argued that a class member is a party from whom payment is sought. It was agreed to clarify the separation by adding commas — "A class member, or a party from whom payment is sought, may * * *."

It was observed that disciplinary rules commonly regulate the reasonableness of attorney fees. Rule 23(h) avoids the risk of trespassing on these rules by putting the obligation to determine reasonableness on the court.

In a reprise of a discussion that was addressed to the Rule 23(e) Note, it was observed that the Committee Note cites a specific case. There is a view, shared by some Standing Committee members, that it is unwise to cite specific cases. Even a case that is an exemplary statement of current wisdom may pass into oblivion, or even be overruled. The advantages of invoking a good judicial discussion should not lead to frequent citation. It was agreed that if possible the Note should paraphrase, rather than cite, specific decisions.

It was suggested that it is not useful to refer in the Note to the importance of judicial involvement with fee awards "to the healthy operation" of class actions. It was agreed that "healthy" would be replaced by "proper."

It was asked why Rule 23(h)(1) sets specific notice requirements for a fee motion by class counsel — will there be fee motions by others? The answer is that indeed there may be fee motions by others. A person who acted to represent a putative class in the interim before appointment of class counsel, for example, may be awarded fees even though someone else was appointed as class counsel. Notice to the class of motions by persons not appointed as class counsel might be useful, but the timing of such motions often may make it impossible to combine notice of the fee application with another notice that must go out for independent reasons. Separate notice is expensive. An application by class counsel, on the other hand, can be described in the Rule 23(e) notice of settlement review. But if the class claims are adjudicated rather than settled, separate notice "in a reasonable manner" is required. These matters are discussed in the Committee Note.

A motion to adopt Rule 23(h) was approved. With the revisions discussed at this meeting, the committee recommends to the Standing Committee that Rules 23(c), (e), (g), and (h) be recommended for adoption.

Minimal Diversity Jurisdiction

Judge Levi introduced discussion of a memorandum describing the need to consider minimal diversity or similar legislation that might reduce problems that arise from overlapping, duplicating, and competing class actions. These problems have been described to the Committee for many years. Most of the problems arise from class actions filed in state courts; the systems for transfer of related cases among federal courts seem to reduce to manageable proportions the problems that might arise from multiple federal filings. A year ago this committee concluded that the remaining problems are so serious as to warrant adoption of Rule 23 provisions. The proposed provisions would test the limits of Enabling Act authority, however, and also would raise questions under the anti-injunction

act. Rather than ask the Standing Committee to approve publication of the proposals, it was decided in the end to seek comment by more informal means. The Reporter circulated a Call for Informal Comment. Many responses were made in the course of the hearings and written comments on the published Rule 23 proposals. These comments showed that the problems that the Committee has heard about over the last ten years persist. The problems are so important as to justify continuing work toward an answer.

At the January 2002 meeting the committee considered the many comments already in hand and concluded that it is better to support legislative solutions before devoting any more effort to contentious court rule proposals. It asked for a draft resolution on possible legislation. The memorandum in support of a resolution concludes with a set of findings and recommendations. It aims at the broad concept of legislation, without attempting to endorse any particular bill or even a particular legislative approach.

The first question addressed Item 6 in the findings and recommendations. Item 6 says that legislation addressing these problems can be adopted without imposing undue burdens on federal courts. Is it proper to make this assertion? There have been many suggestions that a substantial number of cases might be drawn into the federal courts by legislation adopted to regulate state-court class actions. It was responded that the burden that might result from carefully designed legislation is not undue. Of course it is difficult to predict with certainty what the burden will be, apart from the confident prediction that the burden will depend on the particular solutions adopted. But it must be remembered that legislation can be helpful — indeed most helpful — without drawing all class actions from state courts into federal courts. The Judicial Conference Executive Committee expressed opposition in 1999 to proposed bills that seemed likely to bring all class actions to federal courts. That position need not extend to more carefully designed legislation.

Another committee member said that the memorandum presents an elegant, balanced, and thoughtful summary of the problems. It does not weigh in on any side of the debate. It only urges the importance of further study. It remains important to determine who the audience will be: is it to be only the Standing Committee? Does the memorandum become a public document? Is it crafted so Congress will understand the importance of the points being made?

It is clear that the memorandum can be addressed to the Standing Committee. There is reason to believe that the Standing Committee will pursue the topic within the Judicial Conference. Other Judicial Conference committees have an interest in these problems. The Federal-State Jurisdiction Committee has considered the questions raised by minimal diversity class-action bills for some years now. The Court Administration and Case Management Committee also may be interested. It will be important to follow the ordinary processes of communication among the committees.

Further expressions of support led to adoption of the memorandum as the committee's statement.

Other Class-Action Questions

The committee was asked what Rule 23 topics might remain to be addressed. No other topic has been developed to a point that would justify a present vote committing the committee to further work, but any directions to help prepare for the October meeting would be helpful. Settlement classes remain a matter of active interest. The problems of future claims also remain, as witnessed by the report of the mass torts subcommittee of the Bankruptcy Administration Committee. Opt-in class proposals were suggested by several of the witnesses and comments addressed to the August 2001 proposals. It would help to offer suggestions to the Subcommittee of any other subjects it should address.

Bankruptcy Committee Mass-Torts Report

The Committee on the Administration of the Bankruptcy System appointed a Subcommittee on Mass Torts to consider the proposals of the National Bankruptcy Review Commission that the bankruptcy statutes be amended to establish a system to handle "mass future claims" in bankruptcy. Judge Rosenthal acted as this committee's liaison to the subcommittee.

Judge Rosenthal introduced the subcommittee report by acknowledging that it is incomplete. Some of the areas of less-than-complete analysis are reflected in the reporter's memorandum summarizing the report. The report was a group effort to point to problems that are apparent on not very searching review of the Commission recommendations.

The problem of identifying mass future claims so that a representative can be appointed is real. The hope was to achieve a final resolution of future claims in bankruptcy courts. It is an ambitious and interesting set of proposals. The *Amchem* and *Ortiz* decisions mean that Rule 23 is not now a realistic response to mass future claims. So many have been searching for a solution.

That the proposals are interesting does not disguise the fact that they present many problems. The most fundamental problems arise from the relationship between Article III courts and the bankruptcy courts; due process; and federalism. None of the reports goes as far as necessary to reach final answers to these problems.

The subcommittee's conclusion that the Commission proposals "are an important step in the right direction" is sound if it is understood to mean that the inquiry must be continued. The recommendation would be premature if it were read as a more enthusiastic affirmation of the Commission proposals.

The Commission definition of mass future claims is open-ended. The subcommittee report recommends that it be made more specific. But a workable degree of specificity might create a procedure that cannot be useful — there may be no useful circumstances in which it is possible to estimate with confidence the number of future victims and the severity and value of their injuries. These and other problems are identified, but are not explored at the level of detail that provides a basis to guess whether solutions are possible.

It seems reasonable to endorse careful further study, but not to endorse adoption of the Commission recommendations. It would be premature to take the subcommittee report to the Judicial Conference. Further study by the Bankruptcy Committee would be appropriate. Or, if the

task of exploring the remaining problems to a practical conclusion seems onerous, it also would be appropriate to put aside the Commission recommendations.

Further discussion noted that the Commission recommendations allow a "defendant" to take all matters into the bankruptcy courts, apparently making the bankruptcy courts into courts of general jurisdiction. Although the proposal is interesting, it requires study in the years-long level of detail that has characterized this committee's study of class actions.

It was noted that future claims are addressed "every day" by bankruptcy courts that deal with asbestos claims. Some of the companies going into bankruptcy say they are not insolvent because they view the claims as fraudulent. These asbestos cases are governed by a specific provision in the bankruptcy statute. It is worthwhile to keep working on these problems to see whether a more general bankruptcy statute can be adopted for other defendants.

The committee concluded that it is not able to endorse the Commission recommendations as an approach to the complicated and important problems generated by anticipated mass future tort claims. The proposals are important, but further investigation and study are needed. The ongoing experience with asbestos may help. Judge Levi will transmit this conclusion to the Bankruptcy Administration Committee.

Electronic Discovery

Professor Lynk stated that since the January meeting the Discovery Subcommittee has met by conference call. He and Professor Marcus have continued to work together. Although in January the Subcommittee expected that it would now be seeking authorization to draft specific proposals for consideration at the October meeting, more work remains to be done before specific proposals may be feasible. "There is a lot of heat" in the world of practice, but there is little light to illuminate the nature of the problems of the rules approaches that might prove helpful.

Professor Marcus noted the preliminary report from the Federal Judicial Center in the agenda materials. The report is in preliminary form; there is time to ask for a different approach if that might be more helpful. The FJC has pursued many inquiries. What remains now is to complete a set of ten specific case studies. The work to date, however, has not suggested any particularly clear line of inquiry or rulemaking. If better questions should be asked, it is important to describe them now.

There are many approaches that could be taken to drafting new rules, but many people have expressed doubts whether changing the rules can do much to ameliorate the problems encountered in practice. There is great interest in the problems, but not much enthusiasm for any particular solutions. And the problems continue to present a series of moving targets.

It was noted that the FJC study seeks to identify problems that rules changes might address, but offers few rule suggestions. Rule 37 requires an order before sanctions can be imposed. The rules do not adequately address spoliation. Discovery of computer-based information may raise such distinctive spoliation problems that we need a new and distinctive rule for them.

It was agreed that the preservation-spoliation problem has been a longstanding concern. Businesses desperately want clear and reliable guidelines for record preservation policies. And even at that, they may not appreciate how truly great their problems are.

Another set of new problems presented by discovery of computer-based information relate to third-party protection. Email, for example, is now used for purposes that would not have generated any form of communication a few years ago. Some companies permit use of company email facilities for personal messages. Outsiders seeking discovery of the company email records gain access to much personal information that is completely irrelevant to any litigation or the purposes of discovery. We need to explore whether there are ways to get information of the discovery to the affected individuals, and ways to protect their privacy interests.

Another set of problems that may prove distinctively different with discovery of computer-based information relate to cost sharing. The problem of who should pay arises in every case. This is particularly important with discovery from nonparties. Practice for the moment seems to have developed no more acceptance of cost bearing between the parties than has developed with other modes of discovery. As to discovery from nonparties, however, it seems to be accepted that the requesting party should bear the costs of responding. But a different view was expressed that cost shifting among parties may be gaining more acceptance because of the great costs that can arise from extraordinary recovery efforts.

Still another set of problems arise from the choice between responding in electronic form or in hard copy.

The cost of preserving back-up tapes can be another special problem. One committee member has a client that is spending $1,000,000 a month to preserve back-up tapes.

One extreme possibility is that the use of electronic technology will be severely restricted if companies come to fear discovery.

Texas has adopted specific court rules for discovery of electronic information. But so far there are no available cases to show how the rules are working.

Two final observations were that special masters may be particularly useful in sorting through problems arising from discovery of computer-based information and that the committee may be driven to creating laboratory experiments that test the effects of different possible rules.

Federal Judicial Center Report

Mr. Willging described work in progress on Rule 23. A preliminary presentation was mailed out before this meeting. "Very preliminary" data have been compiled on filings and on overlapping actions. One purpose of presenting the preliminary report is to learn whether it would be helpful to present the data in different forms.

Even in this preliminary stage, there are some intriguing results. The raw filings data change a lot when account is taken of consolidation and similar efforts. But such empirical work will be most effective if it can be focused on the questions that interest the committee.

The same observation is true of the next step, which will inquire into the motives that guide attorneys as they choose between federal and state courts. A draft questionnaire is included in the materials: can it be better focused? The questionnaire will go to both plaintiff and defendant lawyers, seeing comparison of federal courts with state courts in a number of dimensions.

Discussion confirmed that it is good to ask about the effect on forum selection of choice-of-law approaches, and about the effect of approaches to objectors.

It was suggested that many lawyers seek state courts to avoid the restrictions that the *Daubert* rules place on use of expert witnesses in federal courts.

Another factor to explore is the complexity of pretrial procedures. Many lawyers perceive federal pretrial practice to be more complex than the practice in state courts.

One of the motives for undertaking this study is to determine whether certification standards for settlement classes in federal courts are encouraging plaintiffs to file in state courts rather than federal courts.

Mr. Willging also noted that Todd Hillsee, who testified on the class-action notice provisions at the January hearing, has provided the Federal Judicial Center with draft short-form notices. Reactions of the committee to these forms would be useful.

Other Items

The relation-back provisions of Rule 15(c)(3) will be on the October agenda for discussion. A simple revision has been suggested by the opinion in *Singletary v. Pennsylvania Department of Corrections,* 3d Cir.2001, 266 F.3d 186. The suggestion is attractive. The specific problem is that a plaintiff who knows that it is impossible to identify an intended defendant is given less effective relief than a plaintiff who mistakenly believes that the proper defendant has been properly named. But in approaching it the committee must consider a series of questions. Perhaps the first question is how frequently the committee should act to correct interpretations of the rules that seem wrong. It is not wise, and perhaps would not be possible, to react whenever a court seems to give a wrong answer. Even when a number of courts have concurred in a seemingly wrong answer, the question may not be so important as to deserve a rule amendment. Continual amendment to provide specific answers to ever more specific questions could produce rules that are too complex and too rigid to survive. A second question is whether this specific question should be addressed without also reviewing other aspects of Rule 15(c)(3) that seem unsatisfactory. There are good reasons to question the way the rule is presently drafted. A third question, specific to Rule 15(c), is whether it is wise to continually revisit a rule that presents significant Enabling Act questions. One main function of Rule 15(c)(2) and (3) is to allow claims that would be barred by limitations in the state courts that provide the law governing the claim. Acting to expand this incursion into the realms of state law may be inappropriate.

The Appellate Rules Committee has urged revision of Rule 6(e) to correct an ambiguity about the effect of the provision that when service is made by mail or other defined means "3 days shall be added to the prescribed period" for responding. This committee can take the lead by proposing an answer at the fall meeting. It will remain to be determined whether the Appellate Rules

Committee will wish to publish a parallel provision for the Appellate Rules at the same time, or will prefer to await comments on a published Rule 6(e) revision.

Judge Jane J. Boyle has urged that some Judicial Conference committee should consider the problems that arise from the interplay between Rule 54(d) and the increasingly antique cost provisions in 28 U.S.C. § 1920. The problem is that some courts have felt unable to adjust provisions that address the costs of preparing papers for application to video and other modern media. The committee concluded that the problem is better addressed through statutory revision than through rules amendments. The question of taxable costs has a sufficiently substantive element that it would be better not to take it on through the Enabling Act if other approaches are possible. The topic is recommended for consideration by the appropriate Judicial Conference committee.

There may be a problem of notice to the Attorney General when the constitutionality of a federal statute is required. Notice is required by statute, and Rule 24(c) regulates the manner of notice. But Rule 24(c) does not work as well as it might. This problem was raised during the process of amending the Appellate Rules provisions that address these issues. The Department of Justice has confirmed that failures of the notice process are sufficiently frequent to justify consideration of new rule provisions. This topic will be placed on the fall agenda.

One of two consent calendar items, 02-CV-A, was brought on for discussion. The committee is requested to do something about a district court practice that requires advance permission to file new actions after an individual litigant has been identified as a vexatious litigant. The committee concluded that this specific problem is not of the character that justifies adoption of a general national rule. This item is removed from the agenda without further action. The recommendation to remove the other consent calendar item from the agenda was approved for want of any motion to remove it from the consent calendar.

It was noted that progress is being made with development of a new Admiralty Rule G to govern civil forfeiture practice. The Maritime Law Association has approved the approach taken in current drafts. It is hoped that a draft will be ready to circulate for informal comments over the summer, and to place on the agenda for the fall meeting.

Next Meeting

The next meeting was set for October 3 and 4 in Santa Fe, New Mexico.

Respectfully submitted

Edward H. Cooper, Reporter