108th Congress, 1st Session – – – – – – – – – – – – – – House Document 108–56

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE THAT HAVE BEEN ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2072

MARCH 27, 2003.—Referred to the Committee on the Judiciary and ordered to be printed

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SUPREME COURT OF THE UNITED STATES,
Washington, DC, March 27, 2003.

Hon. J. DENNIS HASTERT,
Speaker, House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

WILLIAM H. REHNQUIST,
The Chief Justice.

MAR 27 2003

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 23, 51, 53, 54, and 71A.

[See infra., pp. ___ ___ ___.]

2. That Forms 19, 31, and 32 in the Appendix to the Federal Rules of Civil Procedure be, and they hereby are, amended by replacing all references to "19__" with references to "20__."

3. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2003, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or

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

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

* * * * *

(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 refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(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.

* * * * *

(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, and
- the resources counsel will commit to representing the class;

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

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

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

(2) Appointment Procedure.

(A) The court may designate interim 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 Rule 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).

(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).

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).

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 without a jury 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 with the court's approval 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) Notice. 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;

(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 by order 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. 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 Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) Procedural Matters. 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.

Rule 54. Judgments; Costs

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(d) Costs; Attorneys' Fees.

* * * * *

(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 Rule 53(a)(1) 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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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

authority of a master provided in Rule 53(c) and proceedings before it shall be governed by the provisions of Rule 53(d). 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 Rule 53(e), (f), and (g). Trial of all issues shall otherwise be by the court.

* * * * *

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

December 11, 2002

MEMORANDUM TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I have the honor to transmit herewith for consideration of the Court proposed amendments to Rules 23, 51, 53, 54, and 71A and to Forms 19, 31, and 32 of the Federal Rules of Civil Procedure. The Judicial Conference recommends that these amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am transmitting an excerpt from the Report of the Committee on Rules of Practice and Procedure to the Judicial Conference and the Report of the Advisory Committee on the Federal Rules of Civil Procedure.

Leonidas Ralph Mecham
Secretary

Attachments

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rules 23, 51, 53, 54, and 71A with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments were circulated to the bench and bar for comment in August 2001. Public hearings were held on the proposed amendments in San Francisco, California, and Washington, D.C. More than 40 witnesses testified at the hearings. The advisory committee also sponsored a conference at the University of Chicago Law School on proposed amendments to Rule 23. In addition to the published amendments, the conference addressed preliminary proposals dealing with overlapping and competing class actions filed in state courts.

RULE 23 (CLASS ACTIONS)

Over the last ten years, the advisory committee has undertaken an intensive consideration and review of Rule 23, the class-action rule. This ongoing review by the advisory committee is the first review of Rule 23 following the thorough reworking of the Rule in amendments made in 1966. 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.

The present set of proposed amendments takes account of continuing rapid changes in Rule 23 practice and focuses on the persistent problem areas in the conduct of class suits. The proposals focus on class-action procedures rather than on substantive certification standards. The overall goal of the advisory committee has been to develop rule amendments that provide the district courts with the tools, authority, and discretion to closely supervise class-action litigation.

The advisory committee had before it an unusually rich record concerning the operation of Rule 23, including the voluminous record generated in the public comments on the proposed revisions to Rule 23 in 1996; the Federal Judicial Center's 1996 empirical study of federal class action suits; the RAND Institute for Civil Justice's publication in 2000 of *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, analyzing the results of detailed case studies and surveys of lawyers engaged in class-action litigation in state and federal courts; and the extensive materials assembled by the Working Group on Mass Torts, including the 1999 *Report on Mass Tort Litigation*. In addition to these sources, the advisory committee obtained practical insight by consulting with a number of experienced class-action practitioners who represent all major points of view. Taken as a whole, the package is a balanced and neutral attempt to protect individual class members, enhance judicial oversight and discretion, and further the overall goals of the class-action device — efficiency, uniform treatment of like cases, and access to court for claims that cannot be litigated individually without sacrificing procedural fairness or bringing about other undesirable results.

The proposed amendments focus on four areas: the timing of the certification decision and notice; judicial oversight of settlements; attorney appointment; and attorney compensation.

Rule 23(c)(1)(A): The Timing of Certification

In 1996, the advisory committee published a package of proposed amendments to Rule 23 dealing with class certification for comment. Included was a proposed amendment to Rule

23(c)(1) that would change the requirement that a certification decision be made "as soon as practicable" into a requirement that the decision be made "when practicable." Although public comment was largely favorable, the Standing Rules Committee declined to approve the amendment on two grounds. The first was that it would be better to consider all Rule 23 changes in a single package, the consideration of which had been deferred in anticipation of the Supreme Court's pending decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). The second was concern that the change in wording would encourage courts to delay deciding certification motions, leading to an unwarranted increase in precertification discovery into the merits of a class suit.

Amended Rule 23(c)(1)(A) recommends a new variation on the "when practicable" language, calling for a certification determination "at an early practicable time." The Committee Notes address the concerns previously identified. The proposed language is consistent with present good practices. Courts generally make certification decisions only after the deliberation required for a sound decision, as shown by Federal Judicial Center statistics on the time from filing to decision of certification motions. Courts decide certification motions promptly, but only after receiving the information necessary to decide whether certification should be granted or denied and how to define the class if certification is granted. The Committee Notes clearly state that the amended language is not intended to permit undue delay or permit extensive discovery unrelated to certification.

The proposed amendment at first reading may seem a matter of semantics. In fact, it authorizes the more flexible approach many courts take to class-action litigation, recognizing the important consequences to the parties of the court's decision on certification. The current rule's emphasis on dispatch in making the certification decision has, in some circumstances, led courts to believe that they are overly constrained in the period before certification. A certain amount of

discovery may be appropriate during this period to illuminate issues bearing on certification, including the nature of the issues that will be tried; whether the evidence on the merits is common to the members of the proposed class; whether the issues are susceptible to class-wide proof; and what trial-management problems the case will present.

The proposed language is consistent with the practice of authorizing discovery on the nature of the merits issues, which may be necessary for certification decisions, while postponing discovery pertaining to the probable outcome on the merits until after the certification decision has been made. As the Committee Notes discuss, certification discovery need not concern the weight of the merits or the strength of the evidence. By making it clear that the timing of a certification decision, and related discovery, is limited to that necessary to determine certification issues, the amended Rule and Note give courts and lawyers guidance lacking in the present rule. The proposed amendment brings the present rule into conformity with the approach taken by experienced judicial officers. The relatively extensive public comment on this proposal was generally favorable.

Rule 23(c)(1)(B): The Order Certifying a Class

Proposed Rule 23(c)(1)(B) specifies the contents of an order certifying a class action. Such a requirement facilitates application of the interlocutory-appeal provision of Rule 23(f) by requiring that a court must define the class it is certifying and identify the class claims, issues, and defenses. The proposed amendment also requires that the order appoint class counsel under Rule 23(g).

Rule 23(c)(1)(C): The Conditional Nature of Class Certification

Under proposed Rule 23(c)(1)(C) an order granting or denying class certification may be amended at any time up to "final judgment"; the current rule terminates the power at "the decision on the merits," an event that may happen before final judgment. This change avoids possible

ambiguity in the reference to "the decision on the merits," which may apply, for example, to a determination of liability made *before* final disposition. Later proceedings to define the remedy may demonstrate the need to amend the class definition or subdivide the class. Rule 23(c)(1)(C) would also be amended to delete the provision for conditional class certification. The provision for conditional class certification is deleted to avoid the unintended suggestion, which some courts have adopted, that class certification may be granted on a tentative basis, even if it is unclear that the rule requirements are satisfied. The court's power to later redefine or decertify the class is left undisturbed.

Rule 23(c)(2): Notice

Amended Rule 23(c)(2)(A) would recognize the court's authority to direct "appropriate" notice in (b)(1) and (b)(2) class actions. Members of classes certified under (b)(1) or (b)(2) have interests that may deserve protection by notice. Notice to such classes, as compared with (b)(3) classes, is intended to serve more limited, but important, interests, such as the interest in monitoring the conduct of the action. The advisory committee, however, was sensitive to the concern that mandating notice in all (b)(1) and (b)(2) actions could overwhelm a public-interest group seeking class-action relief with only modest resources. In response to public comment from members of the civil rights bar, the advisory committee revised the language — which had been mandatory — to place the giving of notice in (b)(1) and (b)(2) actions within the district court's discretion. The Committee Note expressly cautions courts to exercise the authority to direct notice in these actions with care. The court retains the discretion not to direct any type of notice after balancing the risk that notice costs may deter the pursuit of class relief against the benefits of notice in the particular case. If the court decides that notice is appropriate, it also need not require notice to be made in the same manner as in a (b)(3) action by individual notice, because there is no right to request exclusion from (b)(1) and (b)(2) classes.

Proposed new Rule 23(c)(2)(B) carries forward the present notice requirement for (b)(3) class actions. It requires what the cases now treat as aspirational: class-action notices are to be in "plain, easily understood language."

Rule 23(e): Settlement Review

The need for improved judicial review of proposed class settlements, along with the abuses that can result without effective judicial review, was a recurring theme in the testimony and written statements submitted to the advisory committee during public comment on the 1996 rule proposals. The RAND study also called for closer judicial review of class-action settlements. The proposed amendments focus on strengthening the rule provisions governing the process of reviewing and approving proposed class settlements in a setting that often lacks the illumination brought by an adversary process.

New Rule 23(e)(1)(A) would limit the requirement of court approval of any settlement, voluntary dismissal, or compromise of a class claim to cases in which a class has been certified. Approval is not required if class allegations are withdrawn as part of a disposition reached before a class is certified since putative class members are not bound by the settlement.

New Rule 23(e)(1)(B) would require notice of a proposed settlement, but only when class members would be bound by the settlement. The notice is to issue to the class in a "reasonable" manner; individual notice is not required in all classes or all settlements.

New Rule 23(e)(1)(C) would adopt an explicit standard for approving a settlement for a class: the proposed settlement must be "fair, reasonable, and adequate." This is the standard that has been stated in the case law. The district court must also make findings to support the conclusion that the settlement meets this standard.

New Rule 23(e)(2) would require the parties to file a statement identifying any agreement made in connection with a settlement. Such "side agreements" can be important to understanding

the terms the parties and counsel have agreed to, but sometimes are not disclosed to the court. There is concern that some side agreements may influence the terms of settlement by trading away possible advantages for the class in return for advantages for others.

The disclosure of side agreements, however, should not automatically become the occasion for discovery by the parties. Nonetheless, a court can direct a party to provide to the court or to the other parties (with appropriate confidentiality safeguards) a copy of the full terms of any agreement identified by any party as made in connection with the settlement.

Rule 23(e)(3): Second Opt-Out Opportunity

New Rule 23(e)(3) would establish authority to permit a second opportunity to opt out of a (b)(3) class if settlement is proposed after expiration of the original opportunity to request exclusion. There is no presumption that a second opt-out opportunity should be afforded. That question is left entirely to the court's discretion. This provision would enhance judicial discretion to provide the same ability to opt out with knowledge of the settlement terms that is enjoyed by members of the many (b)(3) classes that are considered for certification — and thus afford a right to request exclusion — after a settlement has been reached.

When a case is certified for trial before settlement has been reached, the decision whether to opt out may be made well before the nature and scope of liability and damages are understood. Settlement may be reached only after the opportunity to request exclusion has expired, and after great changes in class members' circumstances and other aspects of the litigation. The proposal permits the court to refuse to approve a settlement unless it affords a new opportunity to request exclusion, at a time when class members can make an informed decision based on the proposed settlement terms. In appropriate cases, the court can establish an opportunity to opt out that is as meaningful as the opportunity afforded in the many cases that now reach settlement before certification is ordered. And at a more basic level, the second opt-out opportunity gives class

members the same opportunity to accept or reject a proposed settlement as persons enjoy in individual law suits.

This proposal introduces a measure of class-member self-determination and control that best harmonizes the class action with traditional litigation. The presumption of consent that follows a failure to affirmatively opt out at the time of certification may lose its footing when circumstances have changed materially from the time when the class action is finally settled. In these cases, a second opt-out opportunity could relieve individuals from the unforeseen consequences of inaction or decisions made at the time of certification, when limited meaningful information was available. The proposed second opt-out opportunity may provide added assurance to the supervising court that a settlement is fair, reasonable, and adequate. It is just the sort of "structural assurance of fairness," mentioned in *Amchem Products Inc.*, that permits class actions in the first place.

The proposal will only make a difference in cases in which the class is certified and the initial opt-out period expires before a settlement agreement is reached. It is irrelevant in those cases in which a settlement agreement is submitted to the court simultaneously with a request that a class be certified. Even when applicable, however, a court may decide that the circumstances make providing a second opportunity to request exclusion inadvisable. The case may have been litigated to a stage that makes it similar to a fully tried suit and that reduces the need for a second opportunity to opt out. There may not have been a significant change in circumstances or lapse in time between the initial opt-out opportunity and the settlement. There may be other circumstances that make the additional opt-out opportunity inadvisable. Accordingly, the amendments provide a court with broad discretion to assess and determine whether in the particular circumstances a second opt-out opportunity is warranted before approving a settlement.

The advisory committee received several comments on this proposal. It is fair to say that the comments, whether favorable or unfavorable, do not line up by plaintiffs and defendants. Some class-action plaintiffs' lawyers favor and some oppose the proposal. The same is true of the defense bar. Academic commentary has been favorable. District judge members of the advisory committee and of the Standing Rules Committee welcome the enhancement to their discretion.

The advisory committee carefully considered concerns that a second opt-out opportunity might inject additional uncertainty into settlement and create opportunities unrelated to the purpose of the second opt out, potentially defeating some settlements and making others more costly. Under this view, the proposal would create an opportunity for dissatisfied or mercenary counsel to woo class members away from the settlement with promises of a superior alternative settlement award. Balanced against these concerns is the fact that permission to opt out after a tentative settlement is reached is not novel in certain kinds of class-action litigation and generally has not been detrimental to these class-action settlements. Many cases settle before certification in the knowledge that class members must be given a first opportunity to opt out. And when settlements are reached after expiration of the original exclusion period, the terms — particularly in mass tort actions — often include a second opt-out opportunity. The possibility that "too many" class members may opt out during a second-opportunity stage, leaving a defendant with a less comprehensive settlement, is usually guarded against by including provisions in the settlement agreement allowing the parties to abandon the settlement if a pre-determined number or proportion of the class takes advantage of the second opt-out opportunity.

Although providing a second opt-out opportunity may change the dynamics of the negotiation process in some cases, the advisory committee is persuaded that ensuring the fairness of the process outweighs any potential efficiency loss and that provision of the opportunity in appropriate cases, in the court's discretion, will not be unduly disruptive to settlement. District

judges are by no means averse to class-action settlements, and they will apply their discretion to employ this new tool carefully.

New Rule 23(e)(4) would confirm the right of class members to object to a proposed settlement, and would require court approval for withdrawal of an objection.

Rule 23(g): Class Counsel Appointment

All recent examinations of class-action practice recognize the crucial significance of class counsel. But Rule 23 nowhere addresses the selection or responsibilities of class counsel. Until now, the adequacy of counsel has been considered only indirectly 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 proposed amendments build on experience under Rule 23(a)(4) and fill the gap by articulating the responsibility of class counsel and providing an appointment procedure.

Proposed paragraph (1)(A) recognizes the requirement that class counsel be appointed for each class that the court certifies, unless a statute such as the Private Securities Litigation Reform Act (Pub. Law No. 104-67) establishes different requirements.

Proposed paragraph (1)(B) states that class counsel "must fairly and adequately represent the interests of the class." The Committee Note discusses the distinctive role of class counsel, making it clear that the relationship between class counsel and individual class members, including the class representatives, is not the same as the one between a lawyer and an individual client. Appointment as class counsel entails special, paramount responsibilities to the class as a whole.

Proposed paragraph (1)(C) sets out the criteria that a court must consider in appointing class counsel, including the work counsel has performed in the action, counsel's experience in complex litigation and knowledge of the applicable law, and the resources counsel will commit to the representation. Under the proposed amendments, a court may also direct potential class counsel to provide additional information to assist it in making the appointment decision,

including the proposed terms of an attorney fee award. The provision encourages counsel and the court to reach early shared understandings about the basis on which fees will be sought. Such a provision has been encouraged by judges emphasizing the importance of judicial control over attorney fee awards. This feature might obviate later objections to the fee request, serve as a more productive way for the court to deal in advance with fee award matters that seem to defy regulation after the fact, and accommodate competing applications or innovative approaches when appropriate.

Proposed paragraph (2) sets out the appointment procedure for class counsel. Paragraph (2)(A) would point out that the court may appoint interim counsel during the precertification period as a case-management measure. Paragraph (2)(B) would recognize that the court's scrutiny of potential class counsel will differ depending on whether there are multiple applicants for the position. If there is one applicant, the court may make the appointment only if the applicant is adequate under the criteria identified in Rule 23(g)(1)(C). If there are multiple applicants, however, the court must appoint the applicant best able to represent the interests of the class. The proposed rule takes no position on auctions or similar judicial efforts to engender competition. The Note recognizes that one factor that may be important in selecting class counsel in the multiple-applicant situation is an existing attorney-client relationship between the class representative and counsel. Paragraph 2(C) would specifically authorize the court to include provisions regarding attorney fees in the order appointing class counsel.

The advisory committee made several adjustments to the proposal in response to public comment. Most of the changes clarified the difference between the situation in which no applicant applies for appointment and the situation in which several lawyers or firms seek apointment.

Rule 23(h): Attorney Fees

Attorney fees play a prominent role in class-action practice and are the focus of much of the concern about class actions. The award of large attorney fees in the absence of meaningful recoveries by class members in some class actions brings the civil justice system into disrepute. Courts have increasingly assumed significant responsibility for determining attorney's fees, rather than simply accepting previously negotiated arrangements. They have also examined the actual benefits accruing to the class members as opposed to speculative estimates (such as coupon recoveries). But the Civil Rules themselves provide little guidance in this area, which may have contributed to some inconsistency in application. The only provisions on fee awards in the Civil Rules appear in Rule 54(d)(2), but that Rule is not tailored to the special features of class actions. The proposed amendment addresses notification to the class of a motion for award of fees, the rights of objectors, and the criteria to be considered in determining the amount of the fee award.

Under proposed subdivision (h), a court may award attorney fees in a class action only if authorized by law or the parties' agreement. The award must be "reasonable," and it is the court's duty to determine the reasonable amount. The proposed rule does not attempt to influence the ongoing case law development regarding a choice between (or combination of) the percentage and lodestar amounts. As emphasized in the Committee Note, because the class action is a creation of the court, the court has a special responsibility to monitor the attorney fee award, as it also does with regard to proposed settlements. The Note further recognizes the critical role of the court in ensuring that the class action achieved actual results for class members that warrant a substantial fee award.

Paragraph (1) would establish that the attorney fee motion is made under Rule 54(d)(2), "subject to the provisions of this subdivision, at a time set by the court." It is important to

maintain the integration of all fee orders with the entry-of-judgment and appeal-time provisions of Civil Rule 58 and Appellate Rule 4, which — under amendments to take effect this December 1 — are explicitly integrated with Rule 54. But it also is important to recognize the distinctive features of class-action fee applications, particularly with respect to the appropriate time for a fee motion. Subdivision (h) would provide that a motion for fees must be made "at a time set by the court."

The proposed amendment also requires that notice regarding attorney fee motions by class counsel be directed to class members in a reasonable manner (similar to Rule 23(e) notice to the class of a proposed settlement). In a case in which settlement approval is contemplated, notice of class counsel's fee motion should be combined with notice of the proposed settlement. In an adjudicated case, the court may modify the notice to avoid undue expense.

Paragraph (2) would allow any class member or party from whom payment is sought to object to the attorney fee motion. The Committee Note points out that the court may direct discovery depending on the completeness of the material submitted in support of the fee motion, which depends in part on the applicable fee-measurement standard. The Note also makes clear that broad discovery is not normally approved in regard to fee motions.

Proposed paragraph (3) calls for findings under Rule 52(a) and authorizes the court to determine whether to hold a hearing on the motion. In settled class actions, the hearing might well be held in conjunction with proceedings under Rule 23(e), and in other situations there should be considerable flexibility in determining what suffices as a hearing. The findings requirement provides important support for meaningful appellate review. As under Rule 54(d)(2), the court can refer the motion to a special master or magistrate judge. The Committee Note sets out the factors that courts have recently, and consistently, found important to consider in determining whether the fee sought is "reasonable." The Note attempts to identify the analytic

framework for such determinations, recognizing that the case law will continue to develop and will have subtle variations from circuit to circuit. The factors discussed in the Note cut across different methods of determining the size of fee awards, such as percentage of fund or lodestar.

RULE 51 (INSTRUCTIONS TO JURY: OBJECTION)

The Rule 51 project began with a specific request from the Ninth Circuit Judicial Council. Reviewing local district rules, the Ninth Circuit found that many districts had rules that require submission of proposed jury instructions before trial begins. The Council was concerned that these rules may be invalid in light of Rule 51's provision for filing requests "[a]t the close of the evidence or at such earlier time *during trial* as the court reasonably directs." The proposed amendments expressly validate the practices of these courts. The proposed amendments also are designed to capture many of the interpretations of Rule 51 that have emerged in practice and remove traps for the unwary.

Proposed amendments to subdivision (a) govern requests regarding instructions to the jury. The revision recognizes a court's authority to direct that the requests be submitted before trial. But the amendment expressly allows a party to file a later request concerning issues that could not reasonably have been anticipated at the earlier time for requests set by the court. The court also may permit untimely requests on any issue.

The proposed amendments to subdivision (b) govern the instructions to the jury. Paragraph (1) requires the court to inform the parties of all instructions, not only action on requests, before instructing the jury and before jury arguments. Paragraph (2) makes explicit the parties' opportunity to object on the record to the proposed instructions. Paragraph (3) recognizes the practice of instructing the jury "at any time after trial begins and before the jury is discharged."

Under the present Rule 51, a party who wants an issue covered by instructions must do both of two things: make a timely request, and then separately object to failure to give the request as made. The requirement that a request be renewed by an objection is all too often overlooked. These common failures arise in part from the ambiguous language of present Rule 51. The requirement, however, serves useful purposes. Courts of appeals have explained that repetition is useful, at times to ensure that the court had not simply forgotten the request or its intention to give the requested instruction, and at other times to show the court that it has failed in its attempt to give the substance of a requested instruction in better form. These purposes may be fully satisfied by means short of a renewed formal objection. Proposed new Rule 51(d)(1)(B) accommodates these interests by two steps. First, it makes clear that both request and objection are required. But then it also provides that a request suffices without a later objection if "the court made a definitive ruling on the record rejecting the request."

Many circuits recognize a "plain," "clear," or "fundamental" error doctrine that allows reversal despite failure to comply with Rule 51. This doctrine is not reflected at all in the text of Rule 51, but is explicit in the general "plain errors" provision of Criminal Rule 52. The contrast between Criminal Rule 52 and Rule 51 has led some circuits to reject the plain-error doctrine for civil jury instructions. Rule 51(d)(2) would be revised to adopt a plain-error provision parallel to the approach taken in Criminal Rule 52(b).

Rule 53 (Masters)

The Rule 53 project began several years ago, prompted by observations addressed to the advisory committee by two local district-court committees formed to develop Civil Justice Reform Act plans. In working through the Civil Rules, these committees observed that Rule 53 does not describe the uses of special masters that have grown up over the years. Present Rule 53 addresses only trial masters who hear trial testimony and report recommended findings. The

Supreme Court has severely limited resort to trial masters. But masters have come to be used increasingly for pretrial and post-trial purposes. A study by the Federal Judicial Center confirmed the belief that masters are frequently appointed for pretrial and post-trial duties. The proposed amendment is designed to reflect contemporary practice, and to establish a framework to regularize the practice.

In general, proposed new Rule 53 brings pretrial and post-trial masters expressly 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. The rule establishes that a master's findings or recommendations for findings of fact are reviewed de novo by the court, with limited exceptions adopted with the parties' consent and the court's approval.

Rule 53(a)(1)(B) would continue to limit the use of trial masters to actions to be tried to the court without a jury when some "exceptional condition" warrants it or when there is need to perform an accounting or resolve difficult computations. But the present provision for appointment of a trial master in a jury trial is deleted, except when a statute provides otherwise or with the consent of the parties. Deleting the provision for use of a trial master in a jury trial does not foreclose other means of providing neutral assistance to a jury in a complex case, such as by a court appointment of an expert witness under Federal Rule of Evidence 706. Some courts have found it possible to combine the functions of master and court-appointed expert in various ways. Appointment as an expert witness ensures that the jury is informed, through examination and cross-examination, of the grounds for the expert's recommended conclusions and preserves procedural fairness.

Paragraph (1)(C) would expressly authorize a court to appoint a special master to handle pretrial and post-trial matters. The proposed amendment is not designed to encourage — nor, for

that matter, to discourage — use of special masters. 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.

Subdivision (b) would regularize the practice governing the appointment of a master. Parties are given the opportunity to be heard before the court appoints a master. The appointment order must state the master's duties, the circumstances — if any — when ex parte communications are permitted, the record to be maintained, the terms of compensation for the master, and the procedures and standards for reviewing the master's findings and recommendations.

Proposed Rule 53(g)(3) increases the court's responsibility for fact matters. It 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. The changes are consistent with several appellate decisions that reflect substantial reservations about the authority of an Article III judge to delegate responsibility to a master. A master's conclusions of law will continue to be reviewed de novo by the court.

Subdivision (h) would set out the procedures governing the compensation of a master.

Proposed subdivision (i) carries forward the provisions of present Rule 53(f), stating that a magistrate judge is subject to Rule 53 only when the order referring a matter to the magistrate judge expressly provides that reference is made under Rule 53.

Technical and Conforming Amendments

The citations to Rule 53 contained in Rules 54(d) and 71A(h) would be changed to reflect the renumbered provisions in amended Rule 53.

The advisory committee also recommended that the outdated references to the last century in three forms in the appendix to the Civil Rules be updated. The proposed revisions would substitute references to "20__" for "19__" in Forms 19, 31, and 32. The advisory committee concluded that neither public notice nor comment is appropriate or necessary because the proposals are purely technical and do not substantively change the forms.

The Committee concurred with the advisory committee's recommendations. An excerpt from the advisory committee report describes the proposed amendments and is set out in Appendix B.

Recommendation: That the Judicial Conference approve the proposed amendments to Civil Rules 23, 51, 53, 54, and 71A and the revisions to Forms 19, 31, and 32 and transmit these changes to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

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EDWARD E. CARNES
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

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 (Revised and reformatted to account for action taken by Standing Committee at its June 10-11 meeting)

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.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 23. Class Actions

* * * * *

(c) **Determin~~ation~~ing 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~~

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

~~maintained.~~ 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 ~~this subdivision~~ Rule 23(c)(1) ~~may be conditional, and~~ may be altered or amended before ~~the decision on the merits~~ 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 ~~In~~ 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 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).

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

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

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the

notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

* * * * *

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

(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 refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(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.

* * * * *

(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, and

• the resources counsel will commit to representing the class;

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

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

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

(2) Appointment Procedure.

(A) The court may designate interim 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 Rule 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).

(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

169 award to a special master or to a magistrate judge as

170 provided in Rule 54(d)(2)(D).

Committee Note

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

Paragraph (1). Subdivision (c)(1)(A) is changed to require that the determination whether to certify a class be made "at an early practicable time." The "as soon as practicable" exaction neither reflects prevailing practice nor captures the many valid reasons that may justify deferring the initial certification decision. See Willging, Hooper & Niemic, *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 26-36* (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.

If the definition of a class certified under Rule 23(b)(3) is altered to include members who have not been afforded notice and an opportunity to request exclusion, notice — including an opportunity to request exclusion — must be directed to the new class members under Rule 23(c)(2)(B).

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.

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. Redefinition of a class certified under Rule 23(b)(3) may require notice to new class members under Rule 23(c)(2)(B). See Rule 23(c)(1)(C).

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 refuse to approve a settlement unless the settlement affords class members a new opportunity to request exclusion from a class certified under Rule 23(b)(3) after settlement terms are known. 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.

Rule 23(e)(3) authorizes the court to refuse to approve a settlement unless the settlement affords a new opportunity to elect exclusion in a case that settles 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 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 approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's discretion. The court may make this decision before directing notice to the class under Rule 23(e)(1)(B) or after the Rule 23(e)(1)(C) hearing. Many factors may influence the court's decision. Among these are changes in the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members' claims.

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.

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 that 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 existing attorney-client 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.

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.

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."

Recommendation

The Committee recommends adoption, with revisions, of the amendments of Rules 23(c) and (e), and of the new Rules 23(g) and (h), published in August 2001.

The Committee's work with Rule 23 now spans more than a decade. Although the work has been continuous, substantially seamless, and frequently intense, it is convenient to mark off periods of changing directions.

The first phase, completed rather quickly, undertook a top-to-bottom revision of all of Rule 23. The draft — in large part the work of Judge Sam Pointer — was a remarkable undertaking. It was put aside not for want of quality but out of concern that the Enabling Act process could not assimilate such dramatic change in any manageable period of time. Even the law professors who commented on less ambitious later drafts argued that the process cannot work as intended when too many new ideas are presented for consideration and action.

The second phase was embodied in amendments published for comment in 1996. This phase focused on the criteria for certifying a

class under Rule 23(b)(3) and proposed a rule for certifying settlement classes. The voluminous, clear, and conflicting advice provided on these proposals is preserved in the four-volume Working Papers published at the end of the process. The only amendment that emerged from this process was addition of a new Rule 23(f) establishing court of appeals discretion to permit an interlocutory appeal from an order granting or denying class certification. Rule 23(f) appears to be working well, enabling courts of appeals to resolve many uncertainties about certification and to establish a greater uniformity of practice.

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.

Committee Note Showing Post-Publication Changes[1]

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 26-36 (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

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[1] Shadowed test indicates matter deleted after advisory committee reviewed comments submitted in response to its request for public comment.

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. The 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 or 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.

If the definition of a class certified under Rule 23(b)(3) is altered to include members who have not been afforded notice and an opportunity to request exclusion, notice — including an opportunity to request exclusion — must be directed to the new class members under Rule 23(c)(2)(B).

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 protectioned 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)(BA)(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.

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 relyied 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 notice also may be ordered if there is an involuntary dismissal after certification, although such orders are unusual. One 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, reviewing a proposed class-action settlement often will not be easy. Many settlements can be evaluated only after considering a host of factors that reflect the substance of the terms agreed upon, the knowledge base available to the parties and to the court to appraise the strength of the class's position, and the structure and nature of the negotiation process. A helpful review of many factors that may deserve consideration is provided by *In re: Prudential Ins. Co. America Sales Practice Litigation Agent Actions*, 148 F.3d 283, 316-324 (3d Cir. 1998). Any list of these factors must be incomplete. 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 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, sSettlement review also may provide an occasion to review the cogency of the initial class definition. The terms of the settlement themselves, or objections, may reveal an effort to homogenize conflicting divergent interests of class members and with that demonstrate the need to redefine the class or to designate subclasses. Redefinition of the class or the recognition of subclasses is likely to require renewed settlement negotiations, but that prospect should not deter recognition of the need for adequate representation of conflicting interests. This lesson is entrenched by the decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Redefinition of a class certified under Rule 23(b)(3) may require notice to new class members under Rule 23(c)(2)(B). See Rule 23(c)(1)(C).

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 refuse to approve a settlement unless the settlement affords class members a new opportunity to elect request exclusion from a class certified under Rule 23(b)(3) after settlement terms are announced known. 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 Rule 23 (e)(3) creates authorizes the court to refuse to approve a settlement unless the settlement affords a new This second opportunity to elect exclusion for in a cases that settles after a certification decision if the earlier opportunity to elect exclusion provided with the certification notice has expired by the time of the settlement notice. This second opportunity to elect exclusion reduces the influence forces of inertia and ignorance that may undermine the value of a pre-settlement opportunity to elect exclusion. A decision to remain in the class is apt likely to be more carefully considered and is better informed when settlement terms are known.

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

Objectors may provide important support for the court's inquiry review of a proposed settlement, but attempts to encourage and support objectors may prove difficult. An opportunity to elect exclusion after the terms of a proposed settlement are known provides

is a valuable protection against improvident settlement that is not provided by an earlier opportunity to elect exclusion and that is not reliably provided by the opportunity to object. The opportunity to opt out of a proposed settlement may afford scant protection to individual class members when there is little realistic alternative to class litigation, other than by providing an incentive to negotiate a settlement that — by encouraging class members to remain in the class — is more likely to win approval. In some settings, however, a sufficient number of class members may opt out to support a successor class action. The protection is quite meaningful as to the decision of most class members to remain in the class after they know the terms of the settlement may provide a court added assurance that the settlement is reasonable. This assurance may be particularly valuable if class members whose have individual claims that will support litigation by individual action, or by aggregation on some other basis, including another class action, in such actions, the decision of most class members to remain in the class may provide added assurance that the settlement is reasonable. The settlement agreement can be negotiated on terms that protect against the risk that a party will become bound by an agreement that does not afford an effective resolution of class claims by allowing any party to withdraw from the agreement if a specified number of class members request exclusion. 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 approve a settlement that does not allow a new opportunity to elect exclusion is confided to the court's discretion. The court may make this decision before directing notice to the class under Rule 23(e)(1)(B) or after the Rule 23(e)(1)(C) hearing. Many factors may influence the court's decision. Among these are changes in the information available to class members since expiration of the first opportunity to request exclusion, and the nature of the individual class members' claims. The decision whether to permit a second opportunity to opt out should turn on the court's level of confidence in the extent of the information available to evaluate the fairness, reasonableness, and adequacy of the settlement. Some circumstances may present

particularly strong evidence that the settlement is reasonable. The facts and law may have been well developed in earlier litigation, or through extensive pretrial preparation in the class action itself. The settlement may be reached at trial, or even after trial. Parallel enforcement efforts by public agencies may provide extensive information. The pre-settlement activity of class members or even class representatives may suggest that any warranted objections will be made. Other circumstances as well may enhance the court's confidence that a second opt-out opportunity is not needed.

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

The terms set for permitting a 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. Such class-based objections may be the only means available to provide strong present the most effective adversary challenges to the reasonableness of the settlement, — the parties who have presented the agreement for approval may be hard-put to understand the possible failings of their own good-faith efforts. It seems likely that in practice many 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. Fee 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.

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. Yet until now the rule has said nothing about either the selection or responsibilities of class counsel. 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 their 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 subdivisionIt 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 if the court certifies subclasses to represent divergent interests.

Ordinarily, the court would appoint class counsel at the same time that it certifies the class. As a matter of effective management of the action, however, it may be important for the court to designate attorneys to undertake some responsibilities during the period before class certification. This need may be particularly apparent in cases in which there is parallel individual litigation, or those in which there is more than one class action on file. In these circumstances, it may be desirable for the court to designate lead or liaison counsel during the pre-certification period.

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 class comes into being due to the action of the court in granting class certification, and class counsel are appointed by the court to represent the class. The rule thus establishes defines the scope and nature of the obligation of class counsel, an obligation resulting from the court's appointment and one that may be different from the customary obligations of counsel to individual clients. See American Law Institute, Restatement (Third) of the Law Governing Lawyers, § 128 comment d(iii) (2000); *Bash v. Firstmark Standard Life Ins. Co.*, 861 F.2d 159, 161 (7th Cir. 1988) ("conflicts of interest are built into the device of the class action, where a single lawyer may be representing a class consisting of thousands of persons not all of whom will have identical interests or views").

For these reasons, the customary rules that govern conflicts of interest for attorneys must sometimes operate in a modified manner in class actions; individual class members cannot insist on the complete fealty from counsel that may be appropriate outside the class action context. See *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581, 584, 589-90 (3d Cir.), cert. denied, 528 U.S. 874 (1999) (adopting a "balanced approach" to attorney-disqualification motions in the class action context, and noting that the conflict rules do not appear to have

been drafted with class action procedures in mind and that they may even be at odds with the policies underlying the class action rules); *In re Agent Orange Product Liability Litigation*, 800 F.2d 14, 19 (2d Cir. 1986) ("the traditional rules that have been developed in the course of attorneys' representation of the interests of clients outside the class action context should not be mechanically applied to the problems that arise in the settlement of class action litigation"); *In re Corn Derivatives Antitrust Litigation*, 748 F.2d 157, 164 (3d Cir. 1984) (Adams, J., concurring); see also *Petway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) ("when a potential conflict arises between the named plaintiffs and the rest of the class, the class attorney must not allow decisions on behalf of the class to rest exclusively with the named plaintiffs").

Class representatives may or may not have a preexisting attorney-client relationship with class counsel, but aAppointment as class counsel means that the primary obligation of counsel is to the class rather than to any individual members of it. The class representatives do not have an unfettered right to "fire" class counsel, who is appointed by the court. See *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078-79 (2d Cir. 1995). In the same vein, the class representatives cannot command class counsel to accept or reject a settlement proposal. To the contrary, class counsel must has the obligation to determine whether seeking the court's approval of a settlement would be in the best interests of the class as a whole. Approval of such a settlement, of course, depends on the court's review under Rule 23(e).

Until appointment as class counsel, an attorney does not represent the class in a way that makes the attorney's actions legally binding on class members. Counsel who have established an attorney-client relationship with certain class members, and those

who have been appointed lead or liaison counsel as noted above may have authority to take certain actions on behalf of some class members, but authority to act officially in a way that will legally bind the class can only be created by appointment as class counsel.

Before certification, counsel may undertake actions tentatively on behalf of the class. One frequent example is discussion of possible settlement of the action by counsel before the class is certified. Such pre-certification activities anticipate later appointment as class counsel, and by later applying for such appointment counsel is representing to the court that the activities were undertaken in the best interests of the class. By presenting such a pre-certification settlement for approval under Rule 23(e) and seeking appointment as class counsel, for example, counsel represents that the settlement provisions are fair, reasonable, and adequate for the class.

Paragraph (1)(C) Paragraph (2)(B) articulates the basic responsibility of the court in selecting class counsel -- to appoint class counsel an attorney who will provide assure the adequate representation called for by paragraph (1)(B). It identifies three criteria that must be considered and invites the court to consider any other pertinent matters. Although couched in terms of the court's duty, the listing also informs counsel seeking appointment about the topics that should be addressed in an application for appointment or on which they need to inform the court. As indicated above, this information may be included in the motion for class certification.

The court may direct potential class counsel to provide additional information about the topics mentioned in paragraph (1)(C)(2)(B) or about any other relevant topic. For example, the court may direct applicants counsel seeking appointment as class counsel to inform the court concerning any agreements they have made about a prospective award of attorney fees or nontaxable costs, as such agreements may sometimes be significant in the selection of class counsel. The court

might also direct that potential class counsel indicate how whether they represent parties or a class in parallel litigation that might be coordinated or consolidated with the action before the court.

The court may also direct counsel to propose terms for a potential award of attorney fees and nontaxable costs. As adoption of Rule 23(h) recognizes, aAttorney fee awards are an important feature of class action practice, and attention to this subject from the outset may often be a productive technique for dealing with these issues. Paragraph (2)(C) therefore authorizes the court to provide directions about attorney fees and costs when appointing class counsel. Because there will be numerous class actions in which this information is not likely to be useful in selecting class counsel or to provide criteria for an order under paragraph (2)(C), the court need not consider it in all class actions. But the topic is mentioned in the rule because of its frequent importance, and courts should be alert to whether it is useful to direct counsel to provide such information.

Some information relevant to class counsel appointment may involve matters that include adversary preparation in a way that should be shielded from disclosure to other parties. An appropriate protective order may be necessary to preserve confidentiality. Full reports on a number of the subjects that are to be covered in counsel's submissions to the court may often reveal information that should not be available to the class opponent or to other parties. Examples include the work counsel has done in identifying potential claims, the resources counsel will commit to representing the class, and proposed terms for attorney fees. In order to safeguard this confidential information, the court may direct that these disclosures be made under seal and not revealed to the class adversary.

In addition, the court may make orders about how the selection process should be handled. For example, the court might direct that

separate applications be filed rather than a single application on behalf of a consortium of attorneys.

In evaluating prospective class counsel, the court should weigh all pertinent factors. No single factor should necessarily be determinative in a given case. 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. For example, tThe resources counsel will commit to the case must be appropriate to its needs, of course, but the court should be careful not to limit consideration to lawyers with the greatest resources.

If, after review of all applicants potential class counsel, the court concludes that none would be is 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 is intended to provides the a 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)(2)(B) is included. If there are oOther applicants, they attorneys seeking appointment as class counsel would ordinarily would have to file a formal application detailing their suitability for the position.

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

The court is not limited to attorneys who have sought appointment in selecting class counsel for a defendant class. The authority of the court to certify a defendant class cannot depend on the willingness of counsel to apply to serve as class counsel. The court has a responsibility to appoint appropriate class counsel for a defendant class, and paragraph (2)(B) authorizes it to elicit needed information from potential class counsel to inform its determination whom to appoint.

The rule states that the court should appoint "an attorney" as "class counsel." In many instances, the applicant this will be an individual attorney. In other cases, however, appointment will be sought on behalf of an entire firm, or perhaps of 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 objective is to ensure adequate representation of the class. In evaluating such applications, the court should therefore be alert to the need for adequate staffing of the case, but also to the risk of overstaffing or an ungainly counsel structure. One possibility that may sometimes be relevant to whether the court appoints a coalition is the alternative of competition for the position of class counsel. If potentially competing counsel have joined forces to avoid competition rather than to provide needed staffing for the case, the court might properly direct that they apply separately. See *In re Oracle Securities Litigation*, 131 F.R.D. 688 (N.D.Cal. 1990) (counsel who initially vied for appointment as lead counsel resisted bidding against each other rather than submitting a combined application, and submitted competing bids only under pressure from the court).

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 that 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 Paragraph (2)(BA) provides that the court to may allow a reasonable period after commencement of the action for filing applications to serve as class counsel. The primary ground for deferring appointment would be that there is reason to anticipate competing applications to serve as class counsel. Examples might include instances in which more than one class action has been filed, or in which other attorneys have filed individual actions on behalf of putative class members. The purpose of facilitating is to permit the filing of 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, but in some instances deferring appointment would not be justified. The principal example would be actions in which a proposed settlement has been negotiated before the class action is filed, justifying prompt review of the proposed settlement under Rule 23(e). Except in such situations, the court should ordinarily defer the appointment for a period sufficient to permit competing counsel to apply.

This provision should not often present difficulties; recent reports indicate that ordinarily considerable time elapses between commencement of the action and ruling on certification. See T. Willging, L. Hooper & R. Niemic, *Empirical Study of Class Actions in Four Federal District Courts* 122 (FJC 1996) (median time from filing of complaint to ruling on class certification ranged from 7 months to 12.8 months in four districts studied). Moreover, the court may take account of the likelihood that there will be competing applications, perhaps reflecting on the nature of the action or specifics that indicate whether there are likely to be other applicants, in determining whether to defer resolution of class certification. All of these factors would bear on when a class certification decision is "practicable" under Rule 23(c)(1).

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 existing attorney-client 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 a method of monitoring class counsel's performance throughout the litigation. See *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 201-02 n.6 (3d Cir. 2000); Report of the Federal Courts Study Committee 104 (1990) (recommending provision of advance guidelines in appropriate cases regarding such items as the level of attorney involvement that will be compensated). Ordinarily these provisions would be limited to tentative directions regarding the potential award of attorney fees and nontaxable costs to class counsel. In some instances, however, they might affect potential motions for attorney fees by other attorneys.

The court also might find it helpful to direct class counsel to report to the court at regular intervals on the efforts undertaken in the action, to . Courts that employ this method have found it an effective way to assess the performance of class counsel. It may also facilitate the court's later determination of a reasonable attorney fee. without having to absorb and evaluate a mountain of records about conduct of the case that would have been more digestible in smaller doses. Particularly if the court has directed potential class counsel to provide information on agreements with others regarding fees at the time of appointment, it might be desirable also to direct that class counsel

notify the court if they enter into such agreements after appointment. Because such reports may reveal confidential information, however, it may be appropriate that they be filed under seal.

The rule does not set forth any hearing or finding requirements regarding appointment of class counsel. Because appointment of class counsel is ordinarily a feature of class certification, and therefore may be subject to an immediate appeal under Rule 23(f), district courts should ensure an adequate record of the basis for their decisions regarding selection of class counsel.

Subdivision (h). Subdivision (h) is new. Fee awards are a powerful influence on the way attorneys initiate, develop, and conclude class actions. See RAND Institute for Civil Justice, *Class Action Dilemmas, Executive Summary* 24 (1999) (stating that "what judges do is the key to determining the benefit-cost ratio" in class actions, and that salutary results followed when judges "took responsibility for determining attorney fees"). Class action attorney fee awards have heretofore been handled, along with all other attorney fee awards, under Rule 54(d)(2), but that rule is not addressed to the particular concerns of class actions. This subdivision provides a framework for fee awards in class actions. It is designed to work in tandem with new subdivision (g) on appointment of class counsel, which may afford an opportunity for the court to provide an early framework for an eventual fee award, or for monitoring the work of class counsel during the pendency of the action. In cases subject to court approval under Rule 23(e), that review process would ordinarily proceed in tandem with consideration of class counsel's fee motion.

Subdivision (h) applies to "an action certified as a class action." This is intended to includes cases in which there is a simultaneous proposal for class certification and settlement even though technically the class may not be certified unless the court approves the settlement

pursuant to review under Rule 23(e). When a settlement is proposed for Rule 23(e) approval, either after certification or with a request for certification, As noted below, in these situations the notice to class members about class counsel's fee motion would ordinarily accompany the notice to the class about the settlement proposal itself. Deferring the filing of class counsel's fee motion until after the Rule 23(e) review is completed would therefore usually be wasteful.

This subdivision does not undertake to create any new grounds for an award of attorney fees or nontaxable costs. Instead, it applies when such awards are authorized by law or by agreement of the parties. Against that background, it provides a format for all awards of attorney fees and nontaxable costs in connection with a class action, not only the award to class counsel. In some situations, there may be a basis for making an award to other counsel whose work produced a beneficial result for the class, such as attorneys who acted for the class before certification but were not appointed sought appointment as class counsel but were not appointed, or attorneys who represented objectors to a proposed settlement under Rule 23(e) or to the fee motion of class counsel. See, *e.g.*, *Gottlieb v. Barry*, 43 F.3d 474 (10th Cir. 1994) (fee award to objectors who brought about reduction in fee awarded from settlement fund); *White v. Auerbach*, 500 F.2d 822, 828 (2d Cir. 1974) (objectors entitled to attorney fees for improving settlement). Other situations in which fee awards are authorized by law or by agreement of the parties may exist.

This subdivision authorizes an award of "reasonable" attorney fees and nontaxable costs. This is the customary term for measurement of fee awards in cases in which counsel may obtain an award of fees under the "common fund" theory that applies in many class actions, and is used in many fee-shifting statutes. See, e.g., 7B C. Wright, A. Miller & M. Kane, Fed. Prac. & Pro. § 1803 at 507-08. Depending on the circumstances, courts have approached the determination of what is reasonable in different ways. See generally

A. Hirsch & D. Sheehey, *Awarding Attorneys' Fees and Managing Fee Litigation* (Fed. Jud. Ctr. 1994). In particular, there is some variation among courts about whether in "common fund" cases the court should use the lodestar or a percentage method of determining what fee is reasonable. See *Powers v. Eichen*, 229 F.3d 1249 (9th Cir. 2000) (district court did not abuse its discretion by using percentage method); *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000) (in common fund cases the district court may use either the lodestar or the percentage approach); *Johnson v. Comerica Mortgage Corp.*, 83 F.3d 241, 244-46 (8th Cir. 1996) (district court has discretion to select either percentage or lodestar approach); *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768 (11th Cir. 1991) (percentage approach is supported by "better reasoned" authority). Ultimately the courts may conclude that a combination of methods — lodestar and percentage — should be employed in a blended manner to provide the best possible assessment of a reasonable fee. The rule does not attempt to resolve the question whether the lodestar or percentage approach, or some blending of the two, should be viewed as preferable, leaving that evolving determination to the courts.

Active judicial involvement in measuring fee awards is singularly important to the 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.

Although the rule does not attempt to supplant caselaw developments on fee measurement, it is premised on the singular importance of judicial review of fee awards to the healthy operation of the class action process. Ultimately the class action is a creation

of equity for which the courts bear a special responsibility." See 7B Fed. Prac. & Pro. § 1803 at 494 ("The court's authority to reimburse the parties stems from the fact that the class action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts."); "In a class action, whether the attorneys' fees come from a common fund or are otherwise paid, the district court must exercise its inherent authority to assure that the amount and mode of payment of attorneys' fees are fair and proper." *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328 (9th Cir. 1999); see also *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 730 (3d Cir. 2001) (referring to "the special position of the courts in connection with class action settlements and attorneys' fee awards"). Accordingly, "a thorough review of fee applications is required in all class action settlements." *In re General Motors Corp. Pick-Up Truck Fuel Tank Litigation*, 55 F.3d 768, 819 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995). Indeed, improved judicial shouldering of this responsibility may be a key element in improving the class action process. See RAND, *Class Action Dilemmas*, supra, at 33 ("The single most important action that judges can take to support the public goals of class action litigation is to reward class action attorneys only for lawsuits that actually accomplish something of value to class members and society.").

Courts discharging this responsibility have looked to focused on a variety of factors. Indeed, in many circuits there is already a recognized list of factors the district courts are to address in deciding fee motions. Without attempting to list all that properly might be considered, it may be helpful to identify some that are often important in class actions.

One fundamental focus is the result actually achieved for class members, a basic consideration in any case in which fees are sought on the basis of a benefit achieved for class members. See RAND, *Class Action Dilemmas*, supra, at 34-35. The Private Securities

Litigation Reform Act of 1995 explicitly makes this factor a cap for a fee award in actions to which it applies. See 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). For a percentage approach to fee measurement, results achieved is the basic starting point.

In many instances, the court may need to proceed with care in assessing the value conferred on class members. Settlement regimes that provide for future payments, for example, may not result in significant actual payments to class members. In this connection, the court may need to scrutinize the manner and operation of any applicable claims procedure. In some cases, it may be appropriate to defer some portion of the fee award until actual payouts to class members are known. Settlements involving nonmonetary provisions for class members also deserve careful scrutiny to ensure that these provisions have actual value to the class. "Coupon" settlements may call for careful scrutiny to verify the actual value to class members of the resulting coupons. If there is no secondary market for coupons, and if there are significant limitations on using them, a substantial discount may be appropriate. It may be that only unusual circumstances would make it appropriate to value the settlement as the sum of the face value of all coupons. On occasion the court's Rule 23(e) review will provide a solid basis for this sort of evaluation, but in any event it is also important to assessing the fee award for the class.

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

Courts also regularly consider the time counsel reasonably expended on the action—the lodestar analysis. Even a court that initially uses a percentage approach might well choose to "cross-check" that initial determination with consideration of the time needed for the action. Similarly, a court that begins with a lodestar approach may also emphasize the results obtained in deciding whether the resulting lodestar figure would be a reasonable award. The attorney work to be considered under this factor would include pre-appointment efforts of attorneys appointed as class counsel. This analysis would ordinarily also take account of the professional quality of the representation.

Any objections submitted pursuant to paragraph (2) should also be considered. Often these objections would shed light on topics addressed by the other factors. Sometimes objectors will provide additional information to the court. Owing to the court's special duty for supervising fee awards in class actions, however, it has been held that the absence of objections does not relieve the court of its responsibility for scrutinizing the fee motion. See *Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1328-29 (9th Cir. 1999) ("This duty of the court exists independently of any objection.").

The risks borne by class counsel are also often considered in setting an appropriate fee in common fund cases. In some cases, the probability of a successful result may be very high, making any enhancement of the fee on this ground inappropriate. But when there is a significant risk of nonrecovery, that factor has sometimes been important in determining the fee, or in interpreting the lodestar as a cross-check on the fee determined by the percentage method.

Any terms proposed by counsel in seeking appointment as class counsel, and any directions or orders made by the court in connection with appointing class counsel under Rule 23(g) should also weigh heavily in making a fee award on an eventual fee award. The process

of appointing class counsel under Rule 23(g) contemplates that these topics will often be considered at that point, and the resulting directives should provide a starting point for fee motions under this subdivision.

Courts have also given weight to agreements among the parties regarding the fee motion, and to agreements between class counsel and others about the fees claimed by the motion. Rule 54(d)(2)(B) provides: "If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made." The agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee. "Side agreements" regarding fees provide at least perspective pertinent to an appropriate fee award other factors such as the contingency of the representation and financial risks borne by class counsel. These agreements may sometimes indicate that others are reaping a windfall due to a substantial award while class counsel are not significantly compensated for their efforts. If that appears to be true, the court may have authority to make appropriate adjustments.

In addition, courts may take account of the fees charged by class counsel or other attorneys for representing individual claimants or objectors in the case. The court-awarded fee will often not be the only fee earned by class counsel or by other attorneys in connection with the action. Class counsel may have fee agreements with individual class members, while other class members may have fee agreements with their own lawyers. In determining a fee for class counsel, the court's objective is to ensure an overall fee that is fair for counsel and equitable within the class. In some circumstances individual fee agreements between class counsel and class members might have provisions inconsistent with those goals, and the court might determine that adjustments in the class fee award were

necessary as a result. In other circumstances, the court might determine that fees called for by contracts between class members and other lawyers would either deplete the funds remaining to pay class counsel, or deplete the net proceeds for class members, in ways that call for adjustment.

Courts have also referred to the awards in similar cases for aid in determining a reasonable fee award. See, e.g., *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 737-38 (3d Cir. 2001) (including chart of attorney fee awards in cases in which the common fund exceeded $100 million).

Finally, it is important to scrutinize separately the application for an award covering nontaxable costs. These charges can sometimes be considerable. They may often be suitable for initial prospective regulation through If costs were addressed in the order appointing class counsel, See Rule 23(g)(2)(C). If so, those directives should be a presumptive starting point in determining what is an appropriate award. In any event, the court ought only authorize payment of nontaxable costs that are reasonable.

Paragraph (1). Any claim for an award of attorney fees must be sought by motion under Rule 54(d)(2), which invokes the provisions for timing of appeal in Rule 58 and Appellate Rule 4. but 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. As noted above, this includes awards not only to class counsel, but to any other attorney who seeks an award for work in connection with the class action.

The court should direct when the fee motion must be filed. For motions by class counsel in cases subject to court review of a proposed settlement under Rule 23(e), it would ordinarily be important to require the filing of at least the initial motion in time for

inclusion of information about the motion in the notice to the class about the proposed settlement that is required by Rule 23(e). It may, however, be sensible in some such cases to defer filing of some supporting materials until a later date. In cases litigated to judgment, the court might also order want class counsel's motion to be filed on file promptly so that notice to the class under this subdivision (h) can be given. If other counsel will seek awards, a different schedule may be appropriate. For example, if fees are sought by an objector to the proposed settlement, or by an objector to a fee motion, it is important to allow sufficient time after the ruling on the objection for the fee motion to be filed.

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

Paragraph (2). A class member and any party from whom payment is sought may object to the fee motion. Other parties — for example, nonsettling defendants — may not object because they lack a have no sufficient interest in the amount the court awards. The rule does not specify a time limit for making an objection. , but it would usually be important to set one. In setting the date objections are due,

the court should provide sufficient time after the full fee motion is on file to enable potential objectors to examine the motion. If a class member wishes to preserve the right to appeal should an objection be rejected, it may be necessary for the class member to seek to intervene in addition to objecting.[2] For those purposes, an objection would ordinarily have to be made formally by filing in court, rather than by letter to counsel or the court.

The court may allow an objector discovery relevant to the objections. In determining whether to allow such discovery, the court should weigh the need for the information against the cost and delay that would attend discovery. See Rule 26(b)(2). One factor in determining whether to authorize discovery is would be the completeness of the material submitted in support of the fee motion, which depends in part on the fee measurement standard applicable to the case. If the motion provides thorough information, the burden should be on the objector to justify discovery to obtain further information. Unlimited discovery is not a usual feature of fee disputes. See *In re Thirteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litigation*, 56 F.3d 295, 303-04 (1st Cir. 1995).

Paragraph (3). Whether or not there are formal objections, the court must determine whether a fee award is justified and, if so, set a reasonable fee. The rule does not require a formal hearing in all cases. The form and extent of a hearing , leaving the question whether to hold a hearing to depend on the circumstances of the case. The rule does require See *Sweeny v. Athens Regional Medical Ctr.*,

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[2] 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)).

917 F.2d 1560, 1566 (11th Cir. 1990) ("[T]he more complex the disputed factual issues, the more necessary it is for the court to hold an evidentiary hearing."). In order to permit adequate appellate review, the court must make findings and conclusions under Rule 52(a). See *In re Cendant Corp. PRIDES Litigation*, 243 F.3d 722, 731 (3d Cir. 2001) ("the cases make clear that reviewing courts retain an interest -- a most special and predominant interest -- in the fairness of class action settlements and attorneys' fee awards"); *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 196 (3d Cir. 2000) ("it is incumbent upon a district court to make its reasoning and application of the fee-awards jurisprudence clear, so that we, as a reviewing court, have a sufficient basis to review for abuse of discretion").

Paragraph (4). By incorporating Rule 54(d)(2), this provision gives the court broad authority to obtain assistance in determining the appropriate amount to award. If a master is to be used to assist in resolving the basic question whether an award should be made to certain moving parties, the appointment must be made under Rule 53. If the court needs assistance in compiling or analyzing detailed data to determine a reasonable award, this option is available. See Report of the Federal Courts Study Committee 104 (1990) (recommending consideration of using magistrate judges or special masters as taxing masters). In deciding whether to direct submission of such questions to a special master or magistrate judge, the court should give appropriate consideration to the cost and delay that such a process might would entail.

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

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

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

(a) Requests.

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

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

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

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

(b) Instructions. The court:

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

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

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

(c) Objections.

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

(2) An objection is timely if:

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

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

(d) 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.

Committee Note Showing Post-Publication Changes[3]

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.

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[3] Shadowed text indicates matter deleted after advisory committee reviewed comments submitted in response to its request for public comment.

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. 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), 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)(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. 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.~~

~~**(c) 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 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.~~

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 without a jury 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 with the court's approval 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) **Notice.** 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;

(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 by order 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. 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 Conclusions.** The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) **Procedural Matters.** 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.

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* (Federal Judicial Center 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.

Special masters are appointed in many circumstances outside the Civil Rules. Rule 53 applies only to proceedings that Rule 1 brings within its reach.

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 condition" 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 as to issues to be decided by a jury 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.

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. 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)

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)(3) 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. It may happen that a master who is an attorney represents 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.

The hearing requirement of Rule 53(b)(1) can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

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, 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 exercise its discretion 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.

Subdivision (b)(3) 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.

The provision in Rule 53(b)(4) 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 (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 clear-error 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.

If a master makes a recommendation on any matter that does not fall within Rule 53(g)(3), (4), or (5), the court may act on the recommendation under Rule 53(g)(1).

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.

Subdivision (i)

Rule 53(i) carries forward unchanged former Rule 53(f).

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.

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.

Committee Note Showing Post-Publication Changes[4]

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

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[4] Shadowed text indicates matter deleted after advisory committee reviewed comments submitted in response to its request for public comment.

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.

Special masters are appointed in many circumstances outside the Civil Rules. Rule 53 applies only to proceedings that Rule 1 brings within its reach.

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 pParty 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 circumstancecondition" 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 as to issues to be decided by 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 Ppretrial 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. Mullie*, 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)(3) (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. It may happen that a A master who is an attorney may represents 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.

The rule prohibits a lawyer-master from appearing before the appointing judge as a lawyer during the period of the appointment.

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

Subdivision (b)

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

The hearing requirement of Rule 53(b)(1) can be satisfied by an opportunity to make written submissions unless the circumstances require live testimony.

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 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 exercise its discretion 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)(4) 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)(34) 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.

The provision in Rule 53(b)(4) 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 (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 aAlthough 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, tThe 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. If the court withdraws its consent to a stipulation for finality or clear-error review, it may 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, [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.]

If a master makes a recommendation on any matter that does not fall within Rule 53(g)(3), (4), or (5), the court may act on the recommendation under Rule 53(g)(1).

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)

Rule 53(i) carries forward unchanged former 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 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.

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Committee Note

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