MINUTES

CIVIL RULES ADVISORY COMMITTEE

January 22-23, 2002

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

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

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

provided a model that the Committee will remember and follow in the future.

Minutes Approved

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

Admiralty Subcommittee Report

Mr. Kasanin reported for the admiralty subcommittee, observing that the current focus is more on forfeiture than admiralty. The Department of Justice believes that the time has come to establish a separate and independent Supplemental Rule to govern civil asset forfeiture proceedings. By long tradition, civil forfeiture proceedings have been governed by the Supplemental Rules for admiralty and maritime cases. Many forfeiture statutes refer to the admiralty rules, leading the Department to conclude that the forfeiture rule should be included in the Supplemental Rules. The lead in drafting a proposed rule has been taken by Stefan Cassella at the Department of Justice. The first draft was reviewed with Department of Justice and Maritime Law Association participants at a meeting held after the November 30 San Francisco hearing on the August 2001 rules amendment proposals.

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

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

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

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

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

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

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

to resist civil forfeitures.

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

Discovery Subcommittee Report

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

Standing Committee Meeting

Judge Kyle attended the January Standing Committee meeting in place of Judge Levi, who with Judge Rosenthal attended the meeting of the Federal-State Jurisdiction Committee. Among the topics discussed by the Standing Committee, four were directly relevant to the work of the Advisory Committee. The Local Rules Project delivered a lengthy report that was discussed at length. It was

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

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

It was observed at the beginning that the Advisory Committee will likely be charged with the style project. The history of the Civil Rules style work began nearly ten years ago, at the beginning of the Standing Committee's Style Committee. The Civil Rules Committee volunteered to become the bellwether project. Bryan Garner prepared a complete package that restyled all of the Civil Rules and Supplemental Admiralty Rules. Judge Pointer, then Advisory Committee Chair, reworked the complete package. Subcommittees were appointed and prepared further revisions. At first, these products were considered piecemeal as items to fill time remaining after exhaustion of other agenda topics at regular committee meetings. Progress in that fashion was so slow that a special meeting devoted solely to style was held. The story of this meeting at Sea Island has taken on nearly legendary dimensions as it is retold. Two days of intensive work made progress through nine or ten rules. The most important lesson was the futility of attempting to meet the original goal, defined to be clear restatement of the rules without any change of meaning. Time and again, ambiguities appeared that defied any resolution of the

present rule's meaning. Clear restatement of an ambiguity without changing meaning did not seem possible. Further work on the style project was suspended.

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

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

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

styling process.

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

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

Federal Judicial Center

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

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

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

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

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

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

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

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

Legislative Proposals

Judge Levi noted that he and Judge Rosenthal had attended the January meeting of the Federal-State Jurisdiction Committee. This committee and the Bankruptcy Administration Committee are interested in class actions, particularly with respect to competing class actions and mass torts. Several members of the Federal-State Jurisdiction Committee attended the Chicago Law School conference on the pending Rule 23 proposals. They were impressed by the quality of the discussion and the level of information gained from it. They had a panel discussion of competing class actions at their meeting. Francis McGovern moderated the panel, which included Judges Corodemus, Mott, and Rothstein, lawyers Birnbaum and Cabraser, and Professors Hensler and Marcus. The panel discussion was good. Judges Levi and Rosenthal described the work

of the Advisory Committee. At the end of the day, there seemed to be a consensus that serious problems are arising from overlapping, duplicating, and competing class actions. Real tensions are emerging. Some federal courts have enjoined competing state-court class actions without waiting for the more traditional injunction designed to protect an imminent or accomplished settlement.

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

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

Before the Federal-State Jurisdiction Committee meeting, Judge Levi met with Judge Stamp, chair of the Federal-State Jurisdiction Committee, and Judge Hodges, chair of the Judicial Panel on Multidistrict Litigation to discuss the role of state-court class actions. Reporters and other staff members of the committees and Panel participated. Particular attention was devoted to the distinction between "in-state" and multistate actions in state courts. No attempt was made to reach a formal consensus. But the Judicial Panel is increasingly concerned with the effects of overlapping state actions. It may be that the Panel will come to support legislation that would provide for removal of some state

class actions to the Panel; the legislation would establish criteria for consolidation, and the Panel would decide case-by-case whether particular groups of related actions should be consolidated in federal court. One advantage of this procedure would be that the Panel could consider the consolidation court's docket pressures in seeking a court that could handle the consolidated proceedings.

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

Judge Rosenthal, who participated in drafting the bankruptcy Subcommittee report, noted that the report was an attempt to summarize the issues that must be understood before deciding whether to develop a bankruptcy mechanism to address mass torts. Civil Rule 23 encounters two limits. The Ortiz decision severely limits the "limited fund" concept, and accordingly limits the prospect of resolving many mass torts through mandatory (b)(1) classes. The Amchem decision severely limits the ability to settle future claims in the Rule 23 context, particularly with respect to future victims who do not yet even know that they have been exposed to an injury-causing event or thing. Some bankruptcy experts believe that bankruptcy procedures provide an answer. Bankruptcy

can provide representatives, estimate claims, and channel future claims. This procedure could give relief to defendants. There are a number of issues. The Amchem decision clearly includes due process considerations; there is no apparent reason to believe that due process operates differently in bankruptcy. The Subcommittee report may be too optimistic C it represents a strong effort by those who believe that bankruptcy offers the last best hope to find a resolution of future claims within the judicial system. Earlier drafts of the report were still more ambitious. The actual report does highlight real limits on the use of Rule 23. And it serves to renew the question whether it would be useful to develop a settlement class rule, particularly for mass torts.

Brief discussion of the draft bankruptcy report noted again that the proposed system does not require that a tort defendant be insolvent. Indeed, several supporters seem to envision a system in which the bankruptcy court could be approached with a pre-packaged plan that "passes through" without change all other obligations of the tort defendant, resolving only the future tort claims by the reorganization plan. This system might be characterized as using bankruptcy to overrule both the Amchem and Ortiz decisions. The contrast is to the real bankruptcies that have been experienced in the asbestos field, where many companies have experienced tort claims that exceeded their assets. The bankruptcies are now sweeping beyond asbestos producers to reach distributors. The next wave of claims are likely to reach the owners of premises and insurers. So far, fortunately, "asbestos is unique." The bankruptcy report does not explore any of the alternatives to the Review Commission proposal in any meaningful way. A conference to discuss the problems in greater depth would be a great help. The problems are indeed complex.

It was asked whether it would be useful to resurrect Rule 23 proposals to accomplish some of the same things as proposed for bankruptcy. It is important that we begin the review process. "Estimating" future claims is difficult to fit into Rule 23. But it may prove that asbestos again is unique: experience with other mass torts suggests that ordinarily is it much easier to find a secure basis to estimate the total number of victims, and that ordinarily the period in which injuries will become manifest is far shorter than it has been with asbestos. Estimating future claims, however, may easily be seen as a substantive issue, bound up with many matters that are controlled by state law. There also may be due process problems with addressing the "unself-conscious and

amorphous" set of future victims who may not yet be aware even of exposure, much less potential injury. One perspective is that civil procedure worries about notice, and federalism. In bankruptcy they are accustomed to resolving these worries by the need to accomplish closure. The bankruptcy report "seems to leap over everything that we worry about." The main argument for bankruptcy proceedings is that nothing else will work. The Article I bankruptcy authority may help by providing an easily recognized basis for federal legislation.

The view was expressed that there has been no showing that bankruptcy courts can do a better job of estimating the number of victims and severity of injuries than can be done by trial courts that deal with tort litigation as a frequent and familiar event. Elizabeth Gibson did a fine study of several real bankruptcies for the Federal Judicial Center; it deserves renewed attention as we approach these issues again.

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

Rule 23 Proposals

Overlapping Classes

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

The conclusion that there are serious problems that should be addressed if possible led to the question whether satisfactory answers can be found in amending the Civil Rules. The Reporter's Call for Comment included a description of theories that would

establish authority in the Rules Enabling Act and would show compatibility with the anti-injunction provisions of 28 U.S.C. § 2283. Illustrative rules provisions were included. These questions were discussed extensively at the Chicago Conference. Nearly all of the participants were not persuaded that the Enabling Act and § 2283 strictures could be overcome.

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

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

The same view was expressed by observing that any rule solution will raise serious questions of authority. Whatever the actual resolution of the authority question might be, there can be no good outcome of a process beset by such challenges and doubts.

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

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

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

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

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

The next question was whether a broad approach should be taken. There are many possible alternatives to minimum diversity legislation. Focus on the Judicial Panel has been explored in this discussion. It might be possible to focus more directly on limiting the reach of state-court class actions to embrace "nationwide" classes. Or federal courts could be given more focused and case-specific power to channel or restrain state actions when a class action is brought within present jurisdiction limits, without the need to expand federal subject-matter jurisdiction. Or the Enabling Act might be amended to establish clearly the authority to proceed by court rule amendments. Choice-of-law issues also could be addressed.

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

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

Rule 23 Amendments

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

One question frequently raised challenges the proposal to require some form of notice in (b)(1) and (b)(2) class actions. The proposal was not intended to raise a barrier that might thwart successful pursuit of some civil rights claims now brought occasionally as (b)(1) classes but most commonly as (b)(2) classes. Many public interest and civil rights lawyers have expressed concern that notice costs could easily deter filing. These concerns could be addressed by rewriting the Note language that, perhaps inadequately, warns that notice costs should not be allowed to defeat worthy class actions. A different approach would be to

revise the rule to encourage notice, but to state expressly that notice is not required if notice costs would defeat pursuit of the action. A still different approach might be to retain the notice requirement, but make an exception for "civil rights" cases. It will be useful to seek advice from some of the people who have expressed these concerns, to see whether suitable protective language can be drafted. If these concerns cannot be addressed effectively, it may be that the provision should be abandoned.

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

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

The Note language addressing court approval of voluntary dismissal before a ruling on class certification has proved confusing. The question is whether there is an interest that deserves to be protected in this setting. Some case law interprets the ambiguous language in present Rule 23(e) as requiring approval, but the practice is not consistent. One of the initial concerns was that class members may rely on the class claim to toll the statute of limitations, deferring individual action filings. There

has been much comment that this is a very rare circumstance C that most class-action filings do not receive the kind of public attention that could realistically lead to any reliance. Another concern, however, has been that the class allegations may be filed for strategic reasons, and may be dropped for strategic advantage. Forum-shopping is one concern, leading to pursuit of class claims in successive courts. Another is that the class allegation may not be intended seriously, but added to capture attention or perhaps to seek a premium settlement in return for abandoning the class allegations. It is not clear what a court is supposed to do about these concerns. It may be possible to impose a requirement that the lawyer not bring a class action in another federal court, since § 2283 does not apply. It may be possible to advise that a lawyer who uses class allegations for these purposes is not a suitable lawyer to represent the class, but ordinarily this question will be faced by the next court, not the court of initial filing. Ordinarily the court of first filing does nothing to interfere with a pre-certification settlement and dismissal. There are further complications with the right to amend as a matter of course established by Rule 15(a); an attempt to address them is included in the agenda's revised Note illustrations. Perhaps it would be wiser to remain with the ambiguity of the present rule.

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

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

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

The published Note suggests that a certification decision might be delayed to await developments in parallel state-court

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

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

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

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

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

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

Much broader questions also were noted. Several parts of the testimony by law professors suggested sweeping revisions of Rule

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

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

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

Rule 15(c)(3)

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

Rule 56 Procedure

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

Respectfully submitted,

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Reporter