Report of the ABA Sections of Antitrust Law and Litigation Regarding the Proposed 2001 Amendments to Rule 23 of the Federal Rules of Civil Procedure

February 11, 2002

I. INTRODUCTION

The Sections of Antitrust and Litigation of the American Bar Association submit the following comments to the Advisory Committee on Civil Rules with respect to the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure. This testimony has not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Section of Antitrust Law Committees on Private Litigation and Civil Practice and Procedure considered the proposed amendments and developed positions. Professor Edward B. Cavanagh of St. John's University School of Law and Paul Friedman of Dechert in Washington, D.C. articulated those positions in a report that was preliminarily approved by the governing Council of the Section of Antitrust Law in January 2002.

The Section of Litigation Committee on Class Actions and Derivative Suits has been monitoring the Advisory Committee's work on Rule 23 since 1991, sending a representative to most Advisory Committee meetings when the rule was on the agenda and keeping in close communication with the Section of Litigation's official liaison to the Advisory Committee. The Class Actions and Derivative Suits Committee also is grateful that it has had the benefit of first-hand reports on the work of the Advisory Committee from its Rule 23 Subcommittee Chair, United States District Judge Lee H. Rosenthal, at its last two National Institutes on Class Actions and at other recent programs and meetings. The Advisory Committee's Reporter, Professor Edward H. Cooper, also has appeared to update the Class Actions and Derivative Suits Committee at recent programs and meetings.

The Rule 23 Subcommittee of the Class Actions and Derivative Suits Committee solicited comments from its members on the proposed amendments to Rule 23. Those comments were the starting point for the Co-

Chairs of the Class Actions and Derivative Suits Committee, Dinita James of Ford & Harrison, LLP in Tampa, Fl., and Deana Peck of Quarles & Brady Streich Lang, LLP in Phoenix, Az., in preparing an initial draft of testimony on behalf of the Section of Litigation. The initial draft was circulated to the co-chairs of all subcommittees of the Committee on Class Actions and Derivative Suits, to former Committee Co-Chairs, to representatives of the Federal Practice Task Force and other persons in Section of Litigation Leadership with extensive class action experience. The proposed testimony was then revised to incorporate this additional commentary.

The Section of Litigation Council considered the proposed testimony in January 2002 and directed the Class Actions and Derivative Suits Committee to attempt to work out joint testimony with the Section of Antitrust Law, and delegated a final decision on a joint report to its Executive Committee. Representatives of both Sections worked together to combine their proposed testimony into the current document.[1] The joint comments were approved by the Executive Committee of the Section of Litigation Council in a teleconference on February 11, 2002, and by the Council of the Section of Antitrust Law.

II. RULE 23 PROPOSALS AND CONCLUSIONS

The proposed changes to Rule 23 are far-reaching and likely to have significant impact on litigation, including antitrust litigation, if approved. The Sections of Antitrust Law and Litigation support most of the proposed changes to Rule 23 and offer suggestions for improving or clarifying some of the proposed language and the accompanying Notes. The Sections oppose the second opt-out opportunity for Rule 23(b)(3) class action settlements under proposed Rule 23(e)(3). The Sections support proposed Rule 23(g)(1) on appointment of counsel but could not achieve consensus on the appointment procedure set forth in proposed Rule 23(g)(2). The Sections set forth herein the competing considerations that prevented consensus, in hopes

[1] Representatives working on the joint report included the original drafters as well as Roberta D. Liebenberg of Fine, Kaplan and Black, R.P.C., Philadelphia, Pa., and H. Thomas Wells Jr. of Maynard, Cooper & Gale, P.C., Birmingham, Al., both members of the ABA House of Delegates, on behalf of the Section of Litigation.

that the diversity of views will be of benefit to the Advisory Committee in its deliberations.

A. Timing of Certification Decision: Proposed Rule 23(c)(1)(A)

Proposed Rule 23(c)(1)(A) would require a class certification decision "at an early practicable time" rather than "as soon as practicable." We recognize proposed Rule 23(c)(1)(A) as an attempt to strike a middle ground between the current language requiring a class certification decision "as soon as practicable" and the 1996 proposed amendment that class certification decisions be made "when practicable." We agree that in current practice class certification decisions are not, in fact, made as soon as practicable. We support the Advisory Committee's objectives in proposing the amendment – to conform to the current best practice of permitting motions to dismiss and motions for summary judgment to be resolved prior to class certification and to allow courts to make class certification decisions based upon a well-developed record after class discovery. While recognizing the possibility that more flexibility and discretion in the trial court can lead to abuses by both proponents and opponents of certification, we believe that the class certification determination is too important to be made according to some rigid, artificial schedule that fails to take into account the facts and circumstances of particular cases.

The Advisory Committee Note provides useful illustrations of the circumstances that might justify a delay in the certification determination. We agree with the principles set forth in the Note that district courts need flexibility to sequence the pre-certification proceedings in such a way as best serves the needs of the particular case, allowing time as needed for class counsel appointment, discovery or briefing and rulings on motions brought under Rule 12 or 56. Likewise, we agree that all parties are entitled to an early decision regarding the scope – and stakes – of the litigation. The focus on trial plans and the critical analysis concerning how class claims, if certified, would be tried is similarly appropriate. In whole, the commentary of the proposed Note is guidance that is much needed by district courts today. We also understand the Committee's long-standing practice of requiring some change in the language of the rule itself to support a Committee Note.

We are aware, however, that some district courts view such Notes in the same light as legislative history, giving it little or no weight. Likewise, the proposed rule appears to leave intact various local rules requiring class

certification motions to be filed within a specified period, such as 90 days after service on the defendant.

As a result, some have concerns whether the modest change in language is sufficient to support the extensive commentary in the excellent accompanying Notes. Although some believe the language proposed by the Committee is adequate to accomplish its salutary purposes, we suggest that the Committee consider more detailed instructions to district courts in the language of the rule itself, such as by requiring the entry of a scheduling order for pre-certification proceedings that would deal on a case-by-case basis with the timing of the certification briefing and decision in the context of the sequence of other proceedings, such as discovery, motions under Rules 12 or 56 and the appointment of class counsel.

An alternative to the proposed rule could specify the matters that should be dealt with in the pre-certification phase scheduling order, such as the sequence, timing and scope of discovery, procedures for the appointment of class counsel, when motions under Rules 12 and 56 will be heard and when briefs and evidentiary materials relating to the certification decision must be submitted. Rule 16(b) provides a good model for such an alternative proposed rule, which also should incorporate some method, similar to that set forth in Rule 26(f), for the parties to advise the district court of their views on how the pre-certification scheduling order should be constructed.

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

Proposed Rule 23(c)(1)(B) would require that the class certification order define the class and the class issues, claims or defenses and, for classes certified under Rule 23(b)(3), state when and how class members can elect exclusion. In some cases now, only the court-approved notice specifies the method for requesting exclusion. We believe that the proposed rule embodies the better practice now employed by district courts, and we support implementing this "best practice" nationwide by the amendment of Rule 23 as proposed.

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

Proposed Rule 23(c)(1)(C) would make an order granting or denying class certification conditional and therefore subject to alteration or

amendment at any time before "final judgment." The current language makes such orders conditional only before "the decision on the merits." We are unaware of any circumstances in which the prior rule has prevented a court from modifying a class certification order as necessary based on developments in the litigation. The proposed Note uses the hypothetical example of proceedings on the remedy demonstrating the need to amend the class definition or subdivide the class. We do not believe the current language of the Rule would prevent a court from altering the class definition during the remedy phase, and we are not aware of any district court expressing the belief that it was so limited.

We also are concerned by the Note's attempt to draw a distinction between the meaning of "final judgment" in the proposed rule and the meaning of "final judgment" for appeal purposes. The proposed Note states that "[i]t 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." We are concerned that using the terminology of "final judgment" to mean something different than the well-developed meaning of that term in the context of appealability poses more risks of ambiguity than the current language of the rule. Thus, in the first instance we suggest that the Committee consider whether the current language has engendered sufficient concerns among district courts about their authority to alter a class definition after a finding of liability to justify the potential ambiguity that the use of the term "final judgment" might engender.

We also are concerned that some may suggest that the proposed rule amendment amounts to an endorsement of the view that a court may conditionally certify a class without strict compliance with the requirements of Rule 23 because the determination is only "conditional," and can be vacated up until final judgment, if later proven improvident. Thus, in the event the Committee is cognizant of a number of cases sufficient to justify amendment in which district courts have believed themselves tied to their class definition during the remedy phase and thereby prohibited from modifying the definition as needed, then we suggest that the Notes be modified to make it clear that the change is not a basis for failing rigorously to apply the requisites of Rule 23 when class certification is first considered.

D. Notices in "Plain, Easily Understood Language": Proposed Rule 23(c)(2)(A)(i)

The proposed rule would direct that all notices of class certification orders be in "plain, easily understood language." We believe that the laudable goal of easy-to-understand notices should be reinforced by inclusion of this requirement in the rule.

E. Notice of Certification in (b)(1) and (b)(2) Cases: Proposed Rule 23(c)(2)(A)(ii)

Proposed Rule 23(c)(2) for the first time would expressly require notice to class certification in (b)(1) and (b)(2) class actions. In most instances, the proposal to require notice to members of classes certified under Rule 23 (b)(1) or (2) serves the salutary purpose of giving such class members the opportunity to monitor class proceedings without imposing the more onerous notice requirements applicable to members of a Rule 23 (b)(3) class (who have a right to exclude themselves from the action). There is some tension, however, between the proposal to make notice mandatory and the observation in the Advisory Committee Note that courts should tailor the means and extent of notice in these cases "to ensure that notice costs do not defeat a class action worthy of certification." The Sections recognize the possibility that certain cases in which monetary relief is not sought, such as civil rights actions seeking only injunctive or declaratory relief, might not be brought because of the proposed mandatory notice requirement. The Sections would support the inclusion in the proposed rule of a safety valve, which would give the district judge discretion to vary the form and content of the notice otherwise required by Rule 23(c)(2)(A)(i) to comport with the special needs of a particular case. The Sections are of the view that such a safety valve is consistent with the intent of the proposed rule change as expressed by the Advisory Committee and with public policy.

The suggestion in the Note is that the notice could be included as part of a regular communication; however, it is typically the defendant who would be sending regular communications to class members in the ordinary course of business, such as an employer sending out a newsletter or a credit card company sending out a monthly billing statement. Because the Note is ambiguous as to who should bear the costs of this notice, we believe that the Note should be modified to remove or clarify these comments.

F. Settlement Review: Proposed Rule 23(e)(1) and (2)

Proposed Rule 23(e) rewrites the existing rule regarding settlements and voluntary dismissals of actions brought as class actions. In doing so, it bifurcates requirements applicable to settlements and dismissals occurring pre-certification and those occurring after certification. With respect to a settlement, voluntary dismissal or withdrawal of class claims occurring prior to certification, proposed Rule 23(e)(1) clarifies that court approval of such pre-certification dispositions is required and that such approval is all that is required. Where, however, a settlement, dismissal or compromise occurs after or simultaneously with a request for certification (*i.e.* would bind class members), proposed Rule 23(e)(1) requires not only court approval, but also a hearing, specific findings that the disposition is "fair, reasonable and adequate," and notice "in a reasonable manner to all class members." In either case, proposed Rule 23(e)(2) allows the court to require the parties to file any side agreements made in connection with a proposed settlement, voluntary dismissal or compromise.

We believe that these proposals for settlement review are a welcome clarification of what is, and is not, required in the murky world of pre-certification settlements and dismissals. The one suggestion we would make with regard to the pre-certification provisions relates to the Notes, not the Rule itself. The Notes suggest that the court may choose to order notice of a pre-certification disposition, especially if there is reason to believe that putative class members may have relied on the pending action to defer filing their own lawsuits. While this suggestion may be supported by the inherent authority of the court over such matters, we believe that this language in the Notes should be eliminated to avoid confusion as to the purpose of the rule amendment.

With regard to settlements occurring after or simultaneously with a request for certification, proposed Rule 23(e)(1) and (2) incorporate existing best practices in this area. We believe that one of the most important purposes of the amended Rule 23(e) is to set forth in detail what courts must do to approve class action settlements. The rule formalizes that a court must conduct a hearing and make findings that the settlement is "fair, reasonable and adequate" before approving a class action settlement. In setting forth this requirement, the Advisory Committee correctly recognizes that not all courts may be as experienced as those who routinely proceed in this manner and

further that the federal rules serve as a model for state court practice. We strongly support this incorporation of best practices into the Rule.

We are aware of criticisms that restating best practices and existing law may constrain judicial flexibility to deal with new issues and abuses in the class settlement area in the future. However, we believe that the Notes provide ample comfort that the factors enumerated in the Notes as factors to be considered in reviewing a proposed settlement are but examples, which may be irrelevant in some cases and trumped by even more important, but as yet unarticulated, factors in other cases. The terms of the Rule proposals themselves, we believe, provide ample flexibility to deal with future cases over time.

Proposed Rule 23(e)(2) specifies that a court may direct the parties to file a copy or summary of any side agreements made in connection with a proposed settlement. We suggest that the language be revised or clarified to require, if the court so directs, disclosure of any side agreements involving objectors, insurance carriers and others who, although not technically parties, may nonetheless be subject to the court's jurisdiction or under the control of a party.

G. Additional Opt-Out Opportunity: Proposed Rule 23(e)(3)

Proposed Rule 23(e)(3) expressly authorizes a court to provide a second opt-out opportunity on settlement of a (b)(3) action that was previously certified as a class action. Under the proposal, a class member who previously did not opt out may request exclusion after receiving notice of the terms of a later proposed settlement. The Advisory Committee asks for comment on two alternative versions of this proposal: the first version requires the second opt-out opportunity to be extended unless the court for good cause refuses to allow it; the second version merely authorizes the court to provide such an opportunity in its discretion.

We are aware of a wide divergence of opinion among class action practitioners on whether the proposed second opt-out opportunity should be incorporated into Rule 23. The split of opinion does not follow "party lines." Rather, support for, as well as opposition to, the proposal can be found on both plaintiff and defense sides of the bar. Recognizing this split, we nonetheless urge the Advisory Committee not to include the second opt-out opportunity in the proposed Rule changes using either alternative.

In opposing proposed Rule 23(e)(3), we are mindful of the purpose of the proposal, which is to allow an informed decision by each class member, with full knowledge of proposed settlement terms, whether to remain in the class and share in that settlement, or instead opt out if the settlement terms are considered unsatisfactory. The Advisory Committee Note suggests that this second opportunity is needed to protect class members from "the forces of inertia and ignorance that may undermine the value of a presettlement opportunity to elect exclusion."

At the same time, however, the Advisory Committee recognizes that this second bite is not likely to be of value to individual class members who have relatively small claims: "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 …." As the Advisory Committee recognizes, the second opportunity to opt out is most meaningful to class members who have larger individual claims and who often are separately represented by counsel: "The protection is quite meaningful as to class members whose individual claims will support litigation by individual action…."

While the Advisory Committee thus recognizes that a second opt-out opportunity will likely be meaningful only with respect to larger claims, it has been urged that a second opt-out opportunity should nonetheless be added because it improves the perception of fairness of the system with respect to all claims. While informed decision-making and perceived fairness are laudable objectives, we believe that the proposal ignores both the theory and policy of class representation, as well as significant problems that a second opt-out opportunity would create.

The theory of class representation is that with proper court supervision and effective notice, class representatives are allowed to litigate on behalf of all similarly situated class members. Those class representatives are invested with the duty and the authority to make strategic decisions about the class claims, including whether they should be settled. Providing a second opt-out opportunity at this later stage of the proceedings is contrary to the entire theory. In effect, it approaches the "one way intervention" that Rule 23 was supposed to preclude. The initial notice should make it clear that one possible outcome of the class litigation is settlement. We see no distinction in the importance of the initial opt-out right based on whether the class claim is resolved by judgment or settlement. Allowing a second opt-out opportunity

demeans the meaningfulness of the first opt-out right as an exercise of the class member's free will.

Further, rather than "reduc[ing] the forces of inertia and ignorance," a second opportunity to opt out would likely undermine the efficacy of the class action device. Class members with small individual claims would not be able economically to opt out and would depend on the work of class counsel and the court doing its job to assure that a settlement is "fair, adequate and reasonable." Class members with larger individual claims frequently are represented by separate counsel and do not suffer from the forces of inertia and ignorance at the initial certification stage. These class members will find that they can free ride on the efforts of class counsel early and avoid both the cost and the burdens of discovery and motion practice. If a settlement were struck that is not to their liking, they could opt out with relative impunity. If the opt out option were unavailable at the time of settlement, such class members would have the incentive to pursue forcefully any objection they might have to the fairness of the settlement. Indeed, allowing a second chance to opt out may have the perverse effect of driving down the value of class settlements in the expectation that large individual purchasers will more often than not opt out once the class sets the settlement floor.

Finally, and equally important, the proposed amendment fails to prescribe the issue preclusive effect on rulings in a case that occurred after the initial certification but prior to the time that a class member exercises the second opt-out right. While the proposed rule permits the court to condition the exercise of the second opt-out right, its failure to specify the issue preclusive effect under these circumstances creates ambiguity that may create significant opportunities for mischief.

For these reasons, we are opposed to a presumption that a second opt-out opportunity will be provided in previously certified (b)(3) cases that later settle. We therefore oppose the Advisory Committee's proposed Rule 23(c)(3), Alternative 1.

We also oppose Alternative 2, which permits, but does not require, that a second opt-out opportunity be provided to members of a previously certified (b)(3) class. While this version is intended to be neutral, we are concerned that even putting such a provision in the Rule will be interpreted as a bias in favor of requiring a second opt-out opportunity. Moreover, putting such a provision in the Rule may subtly lead to the expedient of ordering a

second opt-out opportunity as a makeshift solution to a questionably adequate settlement.

Nor do we believe that Alternative 2 is necessary to deal with the case in which the parties, in reaching a proposed settlement, incorporate a second opt-out opportunity into the settlement scheme. *Cf. In re Diet Drugs Prods. Liab. Litig*., 263 F.3d 157 (3d Cir. 2001), *aff'g* 2000 U.S. Dist. LEXIS 12275 (E. D. Pa. April 28, 2000) (approving settlement with "back end" opt out rights). The "back end" opt out rights in the *Diet Drugs* settlement are different than the second opt-out chance that would be provided under proposed Rule 23(c)(3). A second opt-out right under the Rule proposal would begin and end at some defined point in time. In *Diet Drugs*, on the other hand, "back end" opt out rights are triggered by a change in a class member's physical condition. Notwithstanding these differences, we believe that *Diet Drugs* is illustrative of the point that the parties, in an effort to structure a "fair, reasonable and adequate" settlement, may incorporate some form of future opt-out rights. And, there is apparently no reason why such a settlement – if otherwise appropriate – cannot be approved under Rule 23 in its existing form.

H. Objectors: Proposed Rule 23(e)(4)

Proposed Rule 23(e)(4)(A) permits a class member to object to a proposed settlement, voluntary dismissal or compromise. Proposed Rule 23(e)(4)(B) provides that such objections can be withdrawn only with court approval, to prevent "buying off" objectors. We favor these proposals.

I. Appointment of Class Counsel: Proposed Rule 23(g)

We agree that selection and appointment of class counsel is critical to the success of the class action mechanism. Proposed Rule 23(g) confirms that it is the responsibility of the district court to appoint for each certified class counsel who must "fairly and adequately represent the interests of the class" and sets out the procedure to be followed and criteria to be considered in the appointment process.

Based on discussions among the Sections of Antitrust Law and Litigation and their constituent Committees and leaders, the provisions concerning appointment of counsel are the most controversial amendments proposed for Rule 23. Although these provisions are controversial, on

balance we believe that the district courts must have a role in the appointment of counsel for a putative class and that the Rules should provide guidance on how district courts are to perform that role. We agree with the Committee that the federal courts owe a duty to the members of the classes they have by their rules created to police this atypical attorney-client relationship to ensure that class counsel "fairly and adequately represent the interests of the class." For this reason, we support the proposals for creating Rule 23(g)(1).

We have not, however, achieved consensus on Rule 23(g)(2). There are many competing considerations, some that divide along plaintiff and defense counsel lines, some that do not.

Plaintiff's lawyers are understandably concerned about a Rule that would permit a court to take a case away from them in which they have invested considerable time and resources to investigate and develop. We also see a significant policy risk that if too many plaintiffs' lawyers had too many cases taken away from them, then the private attorney general function of the plaintiff class action bar would be seriously undermined. Except for litigation brought by some public interest groups, most class action litigation is brought by plaintiff's lawyers who have necessarily concluded that the case is sufficiently meritorious to justify the risk of investing their time and resources in it. Given the limited governmental resources we as a society are willing to invest in enforcement of antitrust, consumer, civil rights and environmental protection laws, we believe that any proposed rule that would unduly upset this entrepreneurial aspect of the plaintiff's class action bar would be a detriment to society as a whole.

In the civil rights arena particularly, class action practitioners on the plaintiff side express well-founded concerns about the inevitable delay that will result from the application procedure, even when there are no competing applications. These practitioners correctly point out that in all but the largest civil rights cases, the issue typically is too few lawyers seeking to become class counsel, not too many of them.

Those among us who typically represent plaintiffs also see a significant chance that satellite litigation over counsel appointment will occur, exacerbating the delay and diverting resources that would benefit the class more if they were instead devoted to prosecuting the case. The proposed Note indicating that the appointment of counsel would ordinarily be subject to an appeal under Rule 23(f) heightens these practitioners' concerns

that satellite litigation over counsel appointment would overwhelm any benefits to the class. They envision such an appeal as creating uncertainty about the role of appointed counsel, perhaps further delaying the case.

Civil rights practitioners also correctly point out that the factors set forth in the proposed Rule 23(g)(2)(B) do not require consideration of the existing attorney-client relationship between the filing plaintiff's lawyer and the putative class representatives. They point out that often the named plaintiff is willing to serve as a class representative only because of his or her trust in the lawyer bringing the action.

On the flip side, defense counsel are understandably concerned that the district judge who delves into the specifics of a case sufficiently to make an informed decision about the appointment of class counsel inevitably will be invested in his or her choice in a manner that undermines the court's essential impartiality. Some of the references in the Notes to the ongoing monitoring and *ex parte* and perhaps sealed communications that could occur between chosen class counsel and the district court are truly frightening to defendants and their counsel. We believe that these references in the Notes must be deleted because of the unacceptable appearance of partiality such communications will create. We also suggest that the Notes be modified to include instead a strong admonition about the need to avoid any actions that might create the appearance of partiality.

We recognize that in many cases, an application procedure will result in healthy competition among candidates wanting to serve as putative class counsel. Regardless of whether we usually represent plaintiffs or defendants, however, we note the apparent emphasis on the proposed terms for cost and attorney fee awards in the procedure for selecting counsel. Proposed Rule 23(g)(2) specifically authorizes the district court to direct counsel to propose terms for awarding fees and costs as part of the appointment process and to incorporate terms for fee and cost awards into the appointment order. The proposed Note predicts that the utility of such information will be "frequent." We are concerned that district courts may read the proposed Rule and Note together as endorsing auctions as the preferred or only method for selecting class counsel.

Some courts have used competitive bidding models as the basis for selecting class counsel. The best analysis of the auction process, however, recommends that it should not be used in the typical case. *See* Third Circuit

Task Force on the Selection of Class Counsel, Final Report (Jan. 2002), available at http://www.ca3.uscourts.gov/classcounsel/final%20report%20of%20third%20circuit%20task%20force.pdf. In the marketplace for individual litigation, lowest cost is not the single determinant in an empowered plaintiff's selection of counsel. Instead, the combined factor of highest quality at lowest cost is likely the more relevant determinant, leaving aside other, more "political" factors.

We agree that fees and costs properly may be considered during the appointment process in some cases. As drafted, the text of the proposed rule provides flexibility for the courts to consider the compensation issue at the appointment stage, or not, as appropriate to the specific case. But we suggest that the Committee make it clear in the Note that fee structure is only **one** of many factors to consider in naming class counsel and that the primary standard is fair and adequate representation of the class.

We also suggest that the text of the proposed rule incorporate a provision giving the district court the discretion to dispense with the application procedure altogether in appropriate cases. As the proposed Notes are now written, they appear to limit the occasions on which a district court should forgo the application process to cases in which a proposed settlement has been negotiated prior to filing the action. We believe that an application procedure is unnecessary in cases in which it is unlikely that there would be competing applicants to serve as putative class counsel, such as civil rights cases seeking primarily injunctive and declaratory relief. The urgency of the relief sought also should be a factor in determining whether to dispense with the application process to avoid delaying the progress of the action.

We generally support the balance struck by the Committee in articulating in proposed Rule 23(g)(2)(B) the factors that must be considered in selecting counsel, including the requirement that the work counsel has done in identifying and investigating the class claims be taken into account. We also suggest that an additional factor that must be considered is the existing attorney-client relationship between the putative class representatives and the lawyer who filed the action. We urge the Committee to add that factor to proposed Rule 23(g)(2)(B).

Finally, we believe the proposed Rule is inappropriately silent on the timing of the appointment procedure. The Note compounds the problem, implying that the appointment would occur when and if the class is certified.

If an appointment procedure is to occur, it should occur immediately, so that the status of plaintiff's counsel is resolved as soon as possible. Surely the Advisory Committee does not anticipate that every competing applicant would be permitted to take discovery or would be expected to hire and prepare experts and brief the class certification issue. Nor is it reasonable to expect that counsel vigorously competing to represent a putative class simultaneously and effectively could work together in the class certification proceedings. The language of the Note about interim designation of lead counsel seems destined to add another layer of delay on an already complex process. Modification of this provision, perhaps as part of an expansion of 23(c)(1) to require a pre-certification scheduling order, is necessary to clarify that if an appointment procedure is deemed appropriate, then it should occur first and quickly, so that plaintiff's counsel — who presumptively will be class counsel if the class is certified — is appointed as the advocate for the putative class in the remainder of the certification proceedings.

We applaud the Committee for taking on the difficult task of developing a rule to deal with the appointment of class counsel and for proposing provisions that seek to strike an appropriate balance between the concerns of the public, plaintiffs and defendants. We hope that the suggestions we offer will help the Committee in refining its proposal concerning the appointment of counsel.

J. Attorneys' Fees: Proposed Rule 23(h)

Proposed new Rule 23(h) requires that class action attorney fees be awarded only upon motion, that class members be given notice of such motions in all cases, that class members and parties against whom a fee award is sought have a right to object to the application, and that the district court must determine, by specific written findings, the reasonableness of the fee sought. Proposed new Rule 23(h) follows the key recommendation of the RAND Report[2] that judges must assume responsibility for determining class action attorney fees. We support the proposed amendment and believe its adoption will be an important step toward improving public confidence in the judicial process with respect to class actions.

[2] Hensler, Deborah R. et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain, Executive Summary at 33 (1999)

Proposed Rule 23(h) is a substantively neutral provision[3] that we believe will serve the laudable purpose of requiring the involvement of a federal judicial officer in the determination of a reasonable fee. We believe that courts have a special obligation to oversee the fee award process to assure fairness and equity.

There is too often a perception under current practice in a settled class action that the district court accepts the agreement of the parties regarding the amount of class counsel's fee, without examining whether the fee is commensurate with the benefit provided to the class and the risk undertaken and work performed to obtain the result. Whether that perception is accurate or not, we believe that a rule amendment mandating careful judicial scrutiny of all fee applications in class actions will lead to greater public confidence in the judicial process, prevent some of the perceived abuses and help to articulate for the public why large class action fees are justified in appropriate cases.

While no system for measuring fees is perfect, the guiding principle for any fee award should be the benefit conferred on the class. The proposed Note sets out appropriate factors for the district court to consider in evaluating the reasonableness of the fee and gives the district court sufficient leeway to fashion fair and equitable awards.

The provisions regarding notice and the right to object further bolster the proposed Rule's function in raising public confidence regarding the award of class action attorney fees. Particularly when class actions are settled, class counsel and the defendant are not adversaries with respect to the fee application. The requirement of notice will facilitate the adversary process by providing class members with the information they need to determine whether they believe the fee sought is reasonable in terms of the benefit obtained for them. The right to object will help to present the issue to the court in the adversary context our justice system has traditionally regarded as optimal.

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[3] We believe the Advisory Committee chose the right course in not attempting by rule amendment to resolve the current circuit split between the percentage-of-the-fund method and the lodestar method for determining class action attorney fees.

Finally, the requirement of specific findings on the reasonableness of the fee will provide for effective appellate review. Perhaps more importantly, such findings will provide a public education function in class action cases, which often are followed closely in the media. In those cases in which large fee awards relative to the benefit to individual class members are appropriate, written findings from the court awarding the fee will help to educate the public regarding why such a fee is appropriate in that particular case.

We agree with the Committee on the "singular importance of judicial review of fee awards to the healthy operation of the class action process." The straightforward provisions of proposed Rule 23(h) appear well designed to facilitate such judicial review.

K. Overlapping and Competing Class Actions

We are aware that problems presented by overlapping and competing class actions were addressed in proposed rule changes initially considered by the Advisory Committee last year. While there are currently no proposals addressing these issues before the Advisory Committee for formal adoption, we strongly favor the Advisory Committee's continued efforts to address these issues. Overlapping and competing class actions continue to be a problem for practitioners, and we urge the Advisory Committee, possibly with the support of Congress, to find ways of addressing these very serious problems.

III. CONCLUSION

The Sections of Antitrust Law and Litigation of the American Bar Association hope that the above comments will be of assistance to the Advisory Committee as it considers whether to recommend that the Standing Committee on Rules of Practices and Procedure adopt the proposed amendments to Rule 23 of the Federal Rules of Civil Procedure. We are supportive of most of the proposed changes although, as set forth above, we believe that certain aspects of the proposed amendments need additional refinement and clarification.