The 2018 Amendments to the Federal Class Action Rule

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INTRODUCTION

Assuming no Congressional modifications, amendments to Rule 23 of the Federal Rules of Civil Procedure go into effect on December 1, 2018. The amendments have been about four years in the making from the time that a subcommittee of the Advisory Committee on Civil Rules was appointed to evaluate ways to improve the function of Rule 23. The Supreme Court approved the amendments on April 26, 2018 and transmitted them to the Congress under the process established by the Rules Enabling Act. These are the first amendments to Rule 23 since 2003.

The amendments are meaningful, but not breathtaking. The amendments (1) expand the means of notice to class members; (2) set a performance standard for the information that must be submitted to the district court before the district court can decide to give notice to the class of a proposed settlement; (3) establish core factors the district court must consider in evaluating a request to approve a proposed settlement; (4) address the issue of consideration offered to class-action settlement objectors to withdraw an objection; and (5) clarify that no appeal may be taken from the approval by the district court of a class action settlement.[1]

I discuss each of these five amendments and the Advisory Committee Note that accompanies each amendment.

GIVING NOTICE UNDER RULE 23(c)(2)(B)

Rule 23(c) is entitled: "Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses." The "notice" part of this subparagraph appears in Rule 23(c)(2). Since the decision of the Supreme Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), giving notice of a class action settlement by United States mail became commonplace, irrespective of whether it was the best means of giving notice to a class. Without compromising the requirement that the court must direct to class members "the best notice that is practicable under the circumstances," or the requirement that "individual notice" must be given to all class members who can be identified through reasonable effort, the 2018 amendments recognize that other forms of notice are also appropriate to consider. Amended Rule 23(c)(2) provides:

> ***(B)*** For (b)(3) Classes. *For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through*

[1] The Advisory Committee Note to the 2018 amendments to Rule 23 introduces the amendments as follows: "Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003."

> *reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language: . . .*

The 2018 Advisory Committee Note explains that "technological change since 1974 has introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice." The Note recognizes that "first class mail may often be the preferred primary method of giving notice," but acknowledges the reality that 'courts and counsel have begun to employ new technology to make notice more effective." The Note further recognizes that technological change is not going to cease, and thus admonishes courts, "when selecting a method or methods of giving notice," to "consider the capacity and limits of current technology, including class members' likely access to such technology." The Note also reminds readers that while email may be a better means of giving notice in some instances than mail, "it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet."

The Note highlights the phrasing of the amendment. There is no preference for "any one means of notice." Rather, "the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court." In this regard, the Note explains that when counsel provide the court with information sufficient to enable the court to decide whether to give notice of a proposed class-action settlement under Rule 23(e)(1), "it would ordinarily be important to include details about the proposed method of giving notice and to provide the court with a copy of each notice the parties propose to use."

The concept of "appropriate" means is not limited to the method of communication itself. The Note explains that in deciding what is "appropriate," "the court should also give careful attention to the content and format of the notice and, if notice is given under both Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members must submit to obtain relief."[2] The Advisory Committee adds that counsel should consider "which method or methods of giving notice will be most effective; simply assuming that the 'traditional' methods are best may disregard contemporary communication realities."

The Advisory Committee Note concludes with a series of reminders that notice should be informative yet comprehensible, and that aid can be provided to help class members make informed decisions on whether to opt-out of a settlement:

- "The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims."
- Rule 23(c)(2)(B) directs that the notice be "in plain, easily understood language." "Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class having many members likely to be less sophisticated."

[2] In addition to notice regarding claim forms and the right to object to a class-action settlement, the Note discusses how this multi-purpose notice also implicates opt-out rights: "As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision has been called 'preliminary approval' of the proposed class certification in Rule 23(b)(3) actions. It is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this combined notice practice."

- "The court and counsel may wish to consider the use of class notice experts or professional claims administrators."
- "Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices."

CLASS ACTION SETTLEMENTS UNDER RULE 23(e)

The 2018 amendments bulk up Rule 23(e) to address the concept of "preliminary approval" of a class action settlement as well as notice to the proposed settlement class. The changes to Rule 23(e)(1)-(4) in full appear below:

> ***(e)*** **Settlement, Voluntary Dismissal, or Compromise**. *The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:*
>
> *(1) Notice to the Class*
>
> ***(A)*** Information That Parties Must Provide to the Court. *The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.*
>
> ***(B)*** Grounds for a Decision to Give Notice. *The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:*
>
> ***(i)*** *approve the proposal under Rule 23(e)(2); and*
>
> ***(ii)*** *certify the class for purposes of judgment on the proposal.*
>
> ***(2)*** *Approval of the Proposal. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:* ~~:~~
>
> ***(A)*** *the class representatives and class counsel have adequately represented the class;*
>
> ***(B)*** *the proposal was negotiated at arm's length;*
>
> ***(C)*** *the relief provided for the class is adequate, taking into account:*
>
> ***(i)*** *the costs, risks, and delay of trial and appeal;*
>
> ***(ii)*** *the effectiveness of any* ~~*the*~~ *proposed method of distributing relief to the class, including the method of processing class-member claims, if required;*
>
> ***(iii)*** *the terms of any proposed award of attorney's fees, including timing of payment; and*
>
> ***(iv)*** *any agreement required to be identified under Rule 23(e)(3); and*
>
> ***(D)*** *the proposal treats class members* ~~*are treated*~~ *equitably relative to each other.*

> ***(3)*** *Identifying Agreements. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.*
>
> ***(4)*** *New Opportunity to Be Excluded. If the class action was previously certified 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.*

The changes to subparagraphs (3) and (4) are not substantive.[3] I discuss the changes below to Rule 23(e)(1) and (2):

Preliminary Approval and Notice

Rule 23(e) applies to a certified class, but the text added to Rule 23(e) makes express the requirement that Rule 23(e)'s procedural safeguards also apply to a "class proposed to be certified for purposes of settlement." Thus, if a court has decided to give notice of a proposal that a class be certified as part of a settlement, the notice must not only satisfy Rule 23(e)(1)'s notice requirement for a settlement, but also satisfy Rule 23(c)(2)(B)'s requirement for notice of a class certified under Rule 23(b)(3).[4]

Providing the proposed settlement class with notice of the proposal should assist the court when it considers final approval of the proposed settlement. In theory, at least, providing notice of the settlement should provide the court with the rate of class members opting out of the class, which should assist the court when it evaluates whether the proposed settlement is fair, reasonable, and adequate.

Notice can be quite expensive. Thus, before authorizing notice of the proposal, the 2018 amendments require the court to, among other considerations make the determination that the likelihood of approval of the settlement is high enough to warrant the time and cost of notice. The Advisory Committee Note explains:

> *The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The parties must provide the court with information sufficient to determine whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members. The amended rule also specifies the standard the court should use in deciding whether to send notice—that it likely will be able both to approve the settlement proposal under Rule 23(e)(2) and, if it has not previously certified a class, to certify the class for purposes of judgment on the proposal.*

What should the district court be told regarding the proposed settlement? The Advisory Committee offers these bits of information among others that, if applicable, should be included in the submission to the court:

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[3] The 2018 Advisory Committee Note confirms this fact: "Subdivisions (e)(3) and (e)(4). Headings are added to subdivisions (e)(3) and (e)(4) in accord with style conventions. These additions are intended to be stylistic only."

[4] The Advisory Committee Note makes this point: "The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion."

- The "extent and type of benefits that the settlement will confer on the members of the class." "Depending on the nature of the proposed relief, that showing may include details of the contemplated claims process and the anticipated rate of claims by class members."
- The plans for distribution of any funds left unclaimed.
- The likely range of litigated outcomes, and the "risks that might attend full litigation."
- The "extent of discovery completed in the litigation or in parallel actions."
- As suggested by Rule 23(b)(3)(B), "the parties should provide information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal."
- "The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed."
- "In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results."
- The existence of "any agreement that must be identified under Rule 23(e)(3)."[5]

The Advisory Committee ends this part of the Note with a "catch-all" suggestion: "The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate."

The Advisory Committee Note provides useful general guidance to the district court regarding the subjects to be addressed in the notice depending upon whether a class has already been certified. "If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted."

If a class has not been certified, "the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class." The Note recognizes that the "standards for certification differ for settlement and litigation purposes," and explains that "the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement."

Plainly, as the Note makes clear, the district court "may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address." And just as plainly, the court "should not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing."

Is there any prejudicial impact on a defendant by agreeing to certification as part of a settlement proposal that is later rejected by the district court? The answer is, "No." The Advisory Committee explains in the Note: "If the settlement is not approved, the parties' positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation."

[5] As noted above, Rule 23(e)(3) now refers to a "side" agreement having to be disclosed to the court. The 2018 amendments delete the word "side." But any agreements that exist in connection with the settlement proposal must be disclosed to the court.

Establishing a Floor for Approval Factors

Fairness, reasonableness, and adequacy remain the touchstones for approval of a class-action settlement. The circuit courts have identified their own list of factors that govern the application of the "fair, reasonable, and adequate" test, many of which are the same in most respects and some of which may have no application in a particular case. But without intending to displace these factors, amended Rule 23(e)(2) establishes a uniform set of core approval factors that the Advisory Committee Note states, "should always matter to the decision" of the district court whether to approve the proposal.[6]

The phrase "under Rule 23(c)(3)" was stricken from Rule 23(e)(2), so that the amended rule provides that, "If the proposal would bind class members, the court may approve it only after a hearing . . . ." A proposal approved by the district court would bind class members under Rule 23(c)(3) which provides for a judgment in a class action.[7] Hence, the court must not only determine that the proposal is fair, reasonable, and adequate, it must also determine, as the Note explains, whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

As for the specific facts, subparagraphs (A) and (B) of Rule 23(e)(2) focus on the adequacy of the representation of the class by class representatives and class counsel, and whether the proposal was negotiated at arm's length. The Advisory Committee explains in the Note:

> *Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.*

The Note further fleshes out an evaluation of the adequacy of the representation and the bona fides of the settlement. The district court can review the information submitted under Rule 23(e)(1) to determine whether "the nature and amount of discovery in this or other cases, or the actual outcomes of other cases," indicates that "counsel negotiating on behalf of the class had an adequate information base." If there is "other litigation about the same general subject on behalf of class members," that, too, "may also be pertinent." The court can also review the process that resulted in the settlement. "For example, the involvement of a neutral or court-affiliated mediator or facilitator" in the settlement negotiations "may bear on whether they were conducted in a manner that would protect and further the class interests. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms."

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[6] The Advisory Committee makes the point thusly: "Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal."

[7] Rule 23(c)(3) provides: "**Judgment**. Whether or not favorable to the class, the judgment in a class action must: (A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and (B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members."

Subparagraphs (C) and (D) of Rule 23(e)(2) focus, the Advisory Committee writes in its Note, "on what might be called a 'substantive' review of the terms of the proposed settlement."

Plainly, the expected relief to the class "is a central concern." How should the court measure the proposed relief? The Note elaborates on the test of the Rule in explaining the court should: evaluate "any proposed claims process"[8]; direct "that the parties report back to the court about actual claims experience"; and study the "contents of any agreement identified under Rule 23(e)(3)" to determine if it may "bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class." In evaluating the costs, risk and delay of trial and appeal under subparagraph (C)(i), the court may "may need to forecast the likely range of possible class-wide recoveries and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure." With respect to subparagraph (C)(iii)'s identification of the terms of any proposed aware of attorney's fees, including the timing of payment," the Advisory Committee adds in its Note:

> *Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.*

Subparagraph (D) requires the court to ensure that the proposed settlement treats all class members "equitably relative to each other. The Note elaborates by emphasizing possible matters of concern: "whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief."

AMENDED RULE 23(e)(5): ADDRESSING OBJECTIONS

Objectors can play a valuable role in ensuring the fairness of class action settlements. During the Advisory Committee's evaluation of the Rule 23 amendments, the Rule 23 Subcommittee heard numerous examples, however, of "hold ups": objectors who appear on the scene to challenge a settlement in the hopes of getting paid off, usually by plaintiffs' counsel, so that distribution of relief to the class and payment of attorneys' fees may proceed forward. These persons were referred to as "bad" objectors, in contrast with "good" objectors who raise legitimate concerns about the bona fides of a settlement or the adequacy of class representation.

The Advisory Committee wrestled with different potential solutions and settled on this one: a requirement that any agreement made with an objector had to be approved by the district court even if the settlement occurred after an appeal was taken. In the latter case, the availability of an "indicative ruling" under Rule 62.1 of the Federal Rules of Civil Procedure was the mechanism decided upon to deal with jurisdictional questions associated with the district court's consideration of a request to approve an agreement with an objector after an appeal had already been taken. The full text of amended Rule 23(e)(5) reads:

> ***(5)*** *Class-Member Objections.*

[8] The Note expands on the claims process: "Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding."

> ***(A)*** *In General. Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.*
>
> ***(B)*** *Court Approval Required for Payment In Connection With an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:*
>
> *(i) forgoing or withdrawing an objection, or*
>
> *(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.*
>
> ***(C)*** *Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.*

The Advisory Committee Note to amended Rule 23(e)(5) begins with the important observation that the submissions supporting a proposed class action settlement under Rule 23(e)(1) should be evaluated in part by whether they provide information that would be "critical" for a class member to decide to object or opt out. Objections, of course, may provide the court "with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal."

The changes to Rule 23 (e)(5)(A) remove the requirement of court approval for every withdrawal of an objection. The Note provides: "An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection."

As to the content of an objection, the Note points out that an objection "must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them." With respect to the added text that an objection must be stated with specificity and identify whether it applies to interests of only the objector, or of some subset of the class, or of all class members, the Advisory Committee explained in the Note that "(f)ailure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards."

The Advisory Committee recognized in its Note that good-faith objections can help a court decide whether to approve a proposed class-action settlement and that it is appropriate under Rule 23(h) for an objector "to seek payment for providing such assistance." However, for objectors that seek "only personal gain" and use "objections to obtain benefits for themselves rather than assisting in the settlement-review process," Rule 23(e)(5)(B) attempts to create a new class-action-objector culture that discourages "objections advanced for improper purposes" by requiring approval by the court of any consideration provided to an objector for foregoing or withdrawing an objection before or after an appeal is taken. The Advisory Committee Note provides additional details on the application of this change to Rule 23(e)(5):

> *[T]he amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment in connection with forgoing or withdrawing an objection or appeal is instead to another recipient. The term "consideration" should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to*

objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees. Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court. Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals to decide whether to dismiss the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal.

Finally, as noted early, to address jurisdictional concerns, the procedure of Rule 62.1 applies where approval of a payment to an objector is sought after an appeal has been taken: "Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court."

NO APPEAL FROM PRELIMINARY APPROVAL OF A CLASS ACTION SETTLEMENT: AMENDED RULE 23(f)

Rule 23(f) has been amended to make it clear that no appeal may be taken from an order under Rule 23(e)(1) to provide notice to a class of a proposed settlement. It also gives the United States more time to take an appeal from an order granting or denying class-action certification. Rule 23(f), as amended, provides:

> ***(f) Appeals.*** *A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1).* ~~*if a petition for permission to appeal is filed*~~ *A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.*

The Advisory Committee Note is as straightforward as the change:

> *As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of eventual class certification justifies giving notice. But this decision does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.*

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission to appeal by any party. The extension recognizes—as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard to these matters. It applies whether the officer or employee is sued in an official capacity or an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.

CONCLUSION

With respect to means of notice, these amendments are clarifying and consistent with the need to consider the role that technology can play if it improves the receipt of notice by class members, without compromising the use of United States mail. They are also clarifying in that they make clear that appeals from an order allowing notice of a proposed settlement is not appealable.

With respect to proposed settlements, the amendments are conforming with respect to actual practice in class action settlements.

The amendments should focus courts on the importance of relief to the class in weighing a settlement proposal: How much of the settlement, or the value of the settlement, will go to the class members? How do the proponents of the settlement calculate the scope of relief to the class members? Is it reasonable? Is it consistent with other settlement efforts? Are attorneys' fees tied to the scope of relief? Should they be?

The amendments also establish a consistent set of approval factors to be applied uniformly in every circuit without displacing the various lists of additional approval factors the circuit courts have created over the last four decades.

There is the hope that the amendments will promote "good" objectors and eliminate objectors who do not have a legitimate objection but instead seek consideration in return for withdrawing an objection that is delaying the implementation of a settlement.

/jmb

ABOUT THE AUTHOR

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Mr. Barkett is a partner at the law firm of Shook, Hardy & Bacon L.L.P. in its Miami office. He is a graduate of the University of Notre Dame (B.A. Government, 1972, *summa cum laude)* and the Yale Law School (J.D. 1975) and served as a law clerk to the Honorable David W. Dyer on the old Fifth Circuit Court of Appeals. Mr. Barkett is an adjunct professor of law at the University of Miami School of Law. Mr. Barkett has been a member of the Advisory Committee for Civil Rules of the Federal Judicial Conference since 2012 and has served on the Discovery Subcommittee that developed the December 1, 2015 amendments to the rules, and the Rule 23 Subcommittee, and is now serving on the Rule 30(b)(6) and MDL subcommittees. He is now serving for the second time as a member of the American Bar Association Standing Committee on Ethics and Professional Responsibility. He is also a member of the American Law Institute. He is a fellow of the College of Commercial Arbitrators and of the American College of Civil Trial Mediators as well as the American College of Environmental Lawyers.

Mr. Barkett is a commercial (contract, corporate, and banking disputes, employment, trademark, and antitrust) and environmental lawyer (CERCLA, RCRA, and toxic tort) having handled scores of complex and simple litigation matters in Federal and state courts or before an arbitration tribunal.

Mr. Barkett is also a problem solver, serving as an arbitrator, mediator, facilitator, or allocator in a variety of commercial, environmental, and reinsurance contexts. He is a certified mediator under the rules of the Supreme Court of Florida and the Southern and Middle Districts of Florida and a member of the London Court of International Arbitration and the International Council for Commercial Arbitration, and serves on the AAA and ICDR roster of neutrals, and the CPR Institute for Dispute Resolution's "Panel of Distinguished Neutrals." He has served or is serving as a neutral in scores of matters involving in the aggregate more than $4 billion. He has conducted or is conducting commercial domestic and international arbitrations under AAA, LCIA, ICDR, UNCITRAL, and CPR rules and has conducted *ad hoc* arbitrations.

In November 2003, Mr. Barkett was appointed by the presiding judge to serve as the Special Master to oversee the implementation and enforcement of the 1992 Consent Decree between the United States and the State of Florida relating to the multi-billion dollar restoration of the Florida Everglades. He has also served as a Special Master for judges on the Southern District of Florida or the Miami-Dade County Circuit Court to address a wide variety of discovery and e-discovery issues in complex litigation.

Mr. Barkett also consults with major corporations on the evaluation of legal strategy and risk in commercial disputes, and conducts independent investigations where such services are needed. He also is consulted by other lawyers on questions of legal ethics.

Mr. Barkett is a recipient of the Burton Award for Legal Achievement which honors lawyers for distinguished legal writing. Mr. Barkett has published two books, *E-Discovery: Twenty Questions and Answers* (Chicago: First Chair Press, 2008) and *The Ethics of E-Discovery* (Chicago: First Chair Press, 2009). Mr. Barkett has also prepared analyses of the Roberts Court the past nine years, in addition to a number of other articles on a variety of topics:

- *The Roberts Court 2016-17: A Quiet Term, or the Calm Before the Storm?* (ABA Webinar, August 16, 2017)

- *Refresher Ethics: Cross Border Issues* (ABA National Institute on Cross Border Discovery, Munich, Germany, July 26, 2017)
- *The Future of the Attorney Client Privilege and Work Product Protection,* (ABA National Institute on Cross Border Discovery, Munich, Germany, July 26, 2017 updated from ABA Litigation Section Annual Conference, San Francisco, May 5, 2017)
- *Arbitration Ethics: A Sampler* (Shook, Hardy & Bacon Update on the Law, Kansas City, Missouri, June 22, 2017 updated from a paper presented at the CPR Annual Meeting, Miami, March 3, 2017)
- *Work Product Protect for Draft Expert Reports and Attorney-Expert Communications* (Environmental & Energy Litigation Committee, Section of Litigation, May 30, 2017)
- *Securing Law Firm Data: When the Advice Givers Need Advice* (Shook Hardy & Bacon Private Seminar, May 2017 updating a paper presented at the ABA National Institute on E-Discovery, May 15, 2015, New York)
- *Lawyer Ethics: E-Communications, Social Media, and the Internet,* (ABA Eleventh Annual National Institute on E-Discovery, Chicago, May 11, 2017 updated from DePaul University Law School, Clifford Law Offices Ethics Webinar livestreamed to over 4,000 registrants, Feb. 16, 2017)
- *Arbitration Ethics: The Duty of Candor, the Unauthorized Practice of Law, and Inadvertent Production of Privileged or Protected Documents* (CPR Annual Meeting, Miami, March 3, 2017);
- *The 2015 Civil Rules Amendments: One Year Later* (ABA Center for Professional Responsibility Webinar, December 15, 2016)
- *Do Arbitrators Have Sanctions Authority in Domestic Arbitrations?* Daily Business Review, November 17, 2016.
- *Refresher Civil Procedure: Cost-Shifting Under the Federal Rules* (Georgetown Advanced E-Discovery Institute, Washington D.C., November 10, 2016)
- *Class Action Reform,* 31 N.R.E. 54 (Fall 2016)
- *The Roberts Court 2015-16: An Untimely Death and Its Impacts* (ABA Annual Meeting, San Francisco, August 5, 2016)
- *Antonin Scalia: A Retrospective* (Shook, Hardy & Bacon Update on the Law, Kansas City, June 23, 2016)
- *The First 100 Days (or so) of the 2015 Civil Rules Amendments* (Bloomberg BNA Digital Discovery and e-Evidence, 16 DDEE 178 (April 14, 2016) adapted from a longer piece by the same title at http://src.bna.com/d6z.
- *The First 100 Days (or so) of the 2015 Civil Rules Amendments*, (Bloomberg BNA Digital Discovery & Evidence Report, April 14, 2016)
- *Cheap Talk? Witness Payments and Conferring with Testifying Witnesses* (ABA Webinar, October 2015)
- *Ethics in ADR: A Sampling of Issues* (ABA Webinar, September 30, 2015)
- *The Roberts Court 2014-15: Individual Rights, Voting Rights, Fair Housing, and the Importance of (Con)Text* (ABA Annual Meeting, Chicago, July 31, 2015)
- *Securing Law Firm Data: When the Advice Givers Need Advice* (ABA National Institute on E-Discovery, May 15, 2015, New York)
- *Arbitration: Hot Questions, Cool Answers* (ABA Section of Litigation Annual Conference, New Orleans, April 2015)
- *Work Product Protection for Draft Expert Reports and Attorney-Expert Communications* (ABA Section of Litigation Annual Conference, New Orleans, April 2015)
- *Cheap Talk? Witness Payments and Conferring with Testify Witnesses* (ABA Webinar, October 2014, updating a presentation first made at the ABA Annual Meeting, Chicago, 2009)
- *Ethics in ADR: A Sampling of Issues* (ABA Webinar September 2014 updating an October 31, 2013 webinar for the Professional Education Broadcast Network))

- *The Roberts Court 2013-14: First Amendment, Equal Protection, Privacy, and More (or Less) Unanimity* (ABA Annual Meeting, Boston, August 7, 2014)
- *Chess Anyone? Selection of International Commercial Arbitration Tribunals* (Miami-Dade County Bench and Bar Conference, February 8, 2013 updated for Shook, Hardy & Bacon Annual Update on the Law, June 25, 2014, Kansas City)
- *Perspectives on the New York Convention Under the Laws of the United States* (co-authored with F. Cruz-Alvarez; M. Paulsson, and S. Pagliery) (International Council For Commercial Arbitration 22nd Biennial Congress, April 8, 2014, Miami, Florida)
- *New Rule 45*, 28 N.R.E. 50 (Spring 2014)
- *Refresher Ethics: Steering Clear of Witness Minefields* (with Green, Bruce; Sandler, Paul Mark) (Professional Education Broadcast Network Webinar, May 16, 2014)
- *The Roberts Court 2012-13, DOMA, Voting Rights, Affirmative Action, More Consensus, More Dissent* (ABA Annual Meeting, San Francisco, August 10, 2013)
- *Ethical Challenges on the Horizon: Confidentiality, Competence and Cloud Computing* (ABA-CLE, July 24, 2012; updated, ABA Section of Litigation Annual Conference, Chicago, April 25, 2013)
- *Work Product Protection for Draft Expert Reports and Attorney-Expert Communications* (forthcoming) (ABA Section of Litigation Annual Conference, Chicago, April 26, 2013)
- *Lawyer-Client Fallout: Using Privileged Information To Establish A Claim Against a Client/Employer* (forthcoming) (ABA Section of Litigation Annual Conference, Chicago, April 25, 2013)
- *More on the Ethics of E-Discovery: Predictive Coding and Other Forms of Computer-Assisted Review* (Duke Law School, Washington D.C., April 19, 2013)
- *Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era,* 81 Fordham L. Rev. 1589 (March 2013)
- *Neighborly RCRA Claims*, 27 N.R.E. 48 (Spring 2013)
- *The Roberts Court 2011-12: The Affordable Care Act and More* (ABA Annual Meeting, Chicago, August 3, 2012)
- *Un-taxing E-Discovery Costs: Section 1920(4) After* Race Tire Amer. Inc. *and* Taniguchi (June 29, 2012) (http://www.shb.com/attorneys/BarkettJohn/UntaxingEdiscoveryCosts.pdf)
- *ABA to Tackle Technology Issues in Model Rules at August Meeting*, (http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202560335059&thepage=3&slreturn=1) Law Technology News, June 25, 2012)
- *E-Communications: Problems Posed by Privilege, Privacy, and Production* (ABA National Institute on E-Discovery, New York, NY, May 18, 2012)
- *The 7th Circuit Pilot Project: What We Might Learn And Why It Matters to Every Litigant in America* (ABA Section of Litigation News Online, December 11, 2011) http://apps.americanbar.org/litigation/litigationnews/civil_procedure/docs/barkett.december11.pdf
- *Skinner, Matrixx, Souter, and Posner: Iqbal and Twombly Revisited*, 12 The Sedona Conference Journal 69 (2011) (Mr. Barkett received the Burton Award for Legal Achievement for this paper)
- *The Challenge of Electronic Communication, Privilege, Privacy, and Other Myths*, 38 Litigation Journal 17 (ABA Section of Litigation, Fall 2011)
- *Avoiding the Cost of International Commercial Arbitration: Is Mediation the Solution?* in Contemporary Issues in International Arbitration and Mediation – The Fordham Papers (Martinus Nijhoff, New York. 2011)
- *The Roberts Court 2010-11: Three Women Justices!* (ABA Annual Meeting, Toronto, August 2011)
- *The Ethics of Web 2.0*, (ACEDS Conference, Hollywood, FL March 2011)

- *The Roberts Court: Year Four, Welcome Justice Sotomayor* (ABA Annual Meeting, San Francisco, August 2010)
- *The Myth of Culture Clash in International Commercial Arbitration* (co-authored with Jan Paulsson), 5 Florida International University Law Review 1 (June 2010)
- *Walking the Plank, Looking Over Your Shoulder, Fearing Sharks Are in the Water: E-Discovery in Federal Litigation?* (Duke 2010 Conference, Civil Rules Advisory Committee, May 11, 2010) (http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/John%20Barkett,%20Walking%20the%20Plank.pdf)
- Zubulake *Revisited: Pension Committee and the Duty to Preserve (Feb. 26, 2010)* (http://www.abanet.org/litigation/litigationnews/trial_skills/pension-committee-zubulake-ediscovery.html)
- *Draft Reports and Attorney-Expert Communications*, 24 N.R.E. (Winter 2010)
- *From Canons to Cannon* in A Century of Legal Ethics: Trial Lawyers and the ABA Canons of Professional Ethics (American Bar Association, Chicago, 2009)
- *The Robert's Court: Three's a Charm* (ABA Annual Meeting, Chicago, August 2009)
- *Cheap Talk? Witness Payments and Conferring with Testify Witnesses* (ABA Annual Meeting, Chicago, 2009)
- *Burlington Northern: The Super Quake and Its Aftershocks*, 58 Chemical Waste Lit. Rprt. 5 (June 2009)
- *Fool's Gold: The Mining of Metadata* (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *More on the Ethics of E-Discovery* (ABA's Third Annual National Institute on E-Discovery, Chicago, May 22, 2009)
- *Production of Electronically Stored Information in Arbitration: Sufficiency of the IBA Rules* in Electronic Disclosure in International Arbitration (JurisNet LLC, New York, September 2008)
- *The Robert's Court: The Terrible Two's or Childhood Bliss?* (ABA Annual Meeting, New York, August 2008)
- *Orphan Shares*, 23 NRE 46 (Summer 2008)
- *Tipping The Scales of Justice: The Rise of ADR*, 22 NRE 40 (Spring 2008)
- *Tattletales or Crimestoppers: Disclosure Ethics Under Model Rules 1.6 and 1.13* (ABA Annual Meeting, Atlanta, August 7, 2004 and, in an updated version, ABA Tort and Insurance Practice Section Spring CLE Meeting, Phoenix, April 11, 2008)
- *E-Discovery For Arbitrators*, 1 Dispute Resolution International Journal 129, International Bar Association (Dec. 2007)
- *The Roberts Court: Where It's Been and Where It's Going* (ABA Annual Meeting, San Francisco, August 2007)
- *Help Has Arrived…Sort Of: The New E-Discovery Rules*, ABA Section of Litigation Annual Meeting, San Antonio (2007)
- *Refresher Ethics: Conflicts of Interest*, (January 2007 ABA Section of Litigation Joint Environmental, Products Liability, and Mass Torts CLE program)
- *Help Is On The Way…Sort of: How the Civil Rules Advisory Committee Hopes to Fill the E-Discovery Void,* ABA Section of Litigation Annual Meeting, Los Angeles (2006)
- *The Battle for Bytes: New Rule 26*, e-Discovery, Section of Litigation (February 2006)
- *Forward to the Past: The Aftermath of Aviall*, 20 N.R.E. 27 (Winter 2006)
- *The Prelitigation Duty to Preserve: Lookout!* ABA Annual Meeting, Chicago (2005)
- *The MJP Maze: Avoiding the Unauthorized Practice of Law* (2005 ABA Section of Litigation Annual Conference)

- *Bytes, Bits and Bucks: Cost-Shifting and Sanctions in E-Discovery*, ABA Section of Litigation Annual Meeting (2004) and 71 Def. Couns. J. 334 (2004)
- *The CERCLA Limitations Puzzle*, 19 N.R.E. 70 (Fall, 2004)
- *If Terror Reigns, Will Torts Follow?*, 9 Widener Law Symposium 485 (2003)

Mr. Barkett is also the author of Ethical Issues in Environmental Dispute Resolution, a chapter in the ABA publication, *Environmental Dispute Resolution, An Anthology of Practical Experience* (July 2002) and the editor and one of the authors of the ABA Section of Litigation's Monograph, *Ex Parte Contacts with Former Employees* (Environmental Litigation Committee, October 2002).

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APPENDIX I: 2018 AMENDMENTS TO RULE 23 (PROPOSED)

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses

* * * * *

(2) *Notice*.

* * * * *

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

* * * * *

(e) **Settlement, Voluntary Dismissal, or Compromise**. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class*

(A) *Information That Parties Must Provide to the Court.* The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice.* The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal.* If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:.

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any the proposed method of distributing relief to the class, including the method of processing class-member claims, if required;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members are treated equitably relative to each other.

(3) *Identifying Agreements*. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to Be Excluded*. If the class action was previously certified 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.

(5) *Class-Member Objections.*

(A) *In General. Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.*

(B) *Court Approval Required for Payment In Connection With an Objection. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:*

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.*

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). ~~if a petition for permission to appeal is filed~~ A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

APPENDIX II: 2018 ADVISORY COMMITTEE NOTE TO RULE 23

Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003. Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision has been called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions. It is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this combined notice practice.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have read the rule to require notice by first class mail in every case. But technological change since 1974 has introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice.

Although first class mail may often be the preferred primary method of giving notice, courts and counsel have begun to employ new technology to make notice more effective. Because there is no reason to expect that technological change will cease, when selecting a method or methods of giving notice courts should consider the capacity and limits of current technology, including class members' likely access to such technology.

Rule 23(c)(2)(B) is amended to take account of these changes. The rule continues to call for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may sometimes be true that electronic methods of notice, for example email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.

Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court. The court should exercise its discretion to select appropriate means of giving notice. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it would ordinarily be important to include details about the proposed method of giving notice and to provide the court with a copy of each notice the parties propose to use.

In determining whether the proposed means of giving notice is appropriate, the court should also give careful attention to the content and format of the notice and, if notice is given under both Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members must submit to obtain relief. Counsel should consider which method or methods of giving notice will be most effective; simply assuming that the "traditional" methods are best may disregard contemporary communication realities. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be "in plain, easily understood language." Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class having many members likely to be less sophisticated. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices.

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion.

Information about the opt-out rate could then be available to the court when it considers final approval of the proposed settlement. Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The parties must provide the court with information sufficient to determine whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members. The amended rule also specifies the standard the court should use in deciding whether to send notice—that it likely will be able both to approve the settlement proposal under Rule 23(e)(2) and, if it has not previously certified a class, to certify the class for purposes of judgment on the proposal.

The subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made. One key element is class certification. If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved, the parties' positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation.

Regarding the proposed settlement, many types of information might appropriately be provided to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the contemplated claims process and the anticipated rate of claims by class members. Because some funds are frequently left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.

The parties should also supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. Information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(B), the parties should provide information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal. The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

Another topic that normally should be considered is any agreement that must be identified under Rule 23(e)(3). The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. The court should not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

Subdivision (e)(2). The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement. If the court has appointed class counsel or interim class counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of any proposed claims process; directing that

the parties report back to the court about actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved. Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.

Subdivisions (e)(3) and (e)(4). Headings are added to subdivisions (e)(3) and (e)(4) in accord with style conventions. These additions are intended to be stylistic only.

Subdivision (e)(5). The submissions required by Rule 23(e)(1) may provide information critical to decisions whether to object or opt out. Objections by class members can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

Subdivision (e)(5)(A). The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.

The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. One feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds "with specificity." Failure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.

Subdivision (e)(5)(B). Good-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h). But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay

produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment in connection with forgoing or withdrawing an objection or appeal is instead to another recipient. The term "consideration" should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees. Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court. Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals to decide whether to dismiss the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal.

Subdivision (e)(5)(C). Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court.

Subdivision (f). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of eventual class certification justifies giving notice. But this decision does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission to appeal by any party. The extension recognizes—as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard to these matters. It applies whether the officer or employee is sued in an official capacity or an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.