

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

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
APPELLATE RULES

A. THOMAS SMALL
BANKRUPTCY RULES

DAVID F. LEVI
CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

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

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

Date: December 15, 2001

Re: Report of the Civil Rules Advisory Committee

Proposed amendments of Civil Rules 23, 51, and 53 were published for comment in August 2001. In September the Advisory Committee Reporter circulated to a broad audience a call for comment on proposals to deal with overlapping and competing class actions. The competing class-action proposals had been considered by the Advisory Committee but were withheld from publication in order to gather more information.

The Advisory Committee devoted all of its October 22 and 23 meeting to a two-day conference at the University of Chicago Law School. The conference focused entirely on class actions, bringing together a large number of judges, lawyers, and academics who are among the most knowledgeable class-action specialists. Many of the panels focused on the proposals published for comment in August, but some of the panels focused on the proposals described in the Reporter's call for comment. The attached draft minutes reflect, although imperfectly, the outstandingly high quality of the conference. Judge Lee H. Rosenthal, a member of the Advisory Committee and Chair of its Rule 23 Subcommittee, took the lead in organizing the conference and deserves our deep appreciation for its success.

The Chicago conference minutes will be distributed throughout the summaries of comments on the published rules. It seems fair, however, to offer a preliminary summary: the published rules were, for the most part, well received. Special attention focused on the "settlement opt-out" provision of proposed Rule 23(e)(3). Comment has been especially invited on this provision, and it will continue to receive special attention as the hearing and comment period unfolds. There were many comments as well on the proper functions of the Committee Notes that accompany amended rules. This topic is on the agenda for the January Standing Committee meeting; discussion may be informed by considering the comments scattered through the draft Minutes.

The first public hearing on the August proposals was held in San Francisco on November 30. Thirteen of the fourteen scheduled witnesses were able to attend. They provided a good beginning for the process. All of the testimony was directed to the Rule 23 proposals; no witness commented on the Rule 51 or 53 proposals.

Discussion of the overlapping class-action drafts at the Chicago conference suggested two important points. First, it is common to find that federal class actions are duplicated by overlapping class actions filed in state courts. Multiple filings generate severe problems — problems that defy sensible management — with sufficient frequency that it is desirable to adopt new provisions to address these problems. Second, however, grave doubt was expressed about the limits that Rules Enabling Act authority may impose on attempts to address these problems through the Civil Rules. The doubts were sufficiently widespread to suggest that it would be unwise to test the possible limits of authority. It seems likely that the Advisory Committee will conclude that the next step should be to explore and then pursue statutory amendments, working with other Judicial Conference committees. Bills pending in Congress provide models for consideration, but other models should be considered as well. One alternative may be to address some aspects of the problems through specific statutory provisions, while amending the Rules Enabling Act to make clear that more detailed implementation is properly accomplished by Civil Rules amendments.

Two public hearings on the August 2001 proposals remain to be held. Written comments are likely to arrive in greater numbers as the comment period comes to a close. The Advisory Committee will meet after the January hearing to consider the testimony and comments received by then, and will have a spring meeting after the comment period has closed.

The agenda for the spring meeting likely will be dominated by consideration of the August 2001 proposals in light of the public testimony and comments. If time permits, consideration will be given to some of the proposals that have accumulated since last spring.