

GUIDELINES AND BEST PRACTICES IN CLASS-ACTION LITIGATION

James F. Humphreys Complex Litigation Center

George Washington Law School

October 20, 2021

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(PLEASE SUBMIT COMMENTS TO humphreyscenter@law.gwu.edu)

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FOREWORD[†]

On November 12-13, 2020, the Complex Litigation Center held its First Annual Class Action Case Law and Practices Review Bench-Bar Conference. The conference was held online because of the covid pandemic. More than 230 participated remotely, including six panels consisting of 18 practitioners, 12 federal judges, and other experts.

The conference reviewed case law and practices developments that arose in class actions during the past 12-18 months. Six main topics along with a dozen subsidiary topics were examined, including several addressing the issues arising from the implementation of the 2018 amendments to Federal Rule of Civil Procedure 23. In the weeks following the conference, selected issues were identified as suitable for guidelines and best practices. Three teams of 44 practitioners, judges, and other experts worked for nearly 12 months preparing the first best-practices draft soon after the 2020 conference. The materials considered at the conference are posted at: <https://www.law.gwu.edu/first-annual-class-action-case-law-and-practices-review-conference-materials>.

The center is publishing a preliminary draft of best practices addressing five matters for a two-month public-comment period. The center invites all comments, including positive, negative, or otherwise. Please submit them to humphreyscenter@law.gwu.edu.

The comments will be considered and reviewed by the drafting teams. The center will make final edits, taking into account the public comments and edits recommend by the drafting teams. The guidelines and best practices will be incorporated as the first installment in the James F. Humphreys Complex Litigation Center Compendium of Guidelines and Best Practices in Class-Action Litigation. The compendium will be updated and supplemented annually after every class action conference that the center holds.

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The feedback of the judiciary has been invaluable in identifying best practices, exploring the challenges faced by judges, and assessing the viability of the proposed guidelines and best practices. The ways in which these guidelines and best practices have benefitted from the candid assessment of the judiciary cannot be understated. It is with great gratitude that we recognize the contributions of the judges who reviewed drafts and provided comments and suggestions.

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GUIDELINES AND BEST PRACTICES IN CLASS-ACTION LITIGATION

GUIDELINE 1: Effective discovery in a class action often requires a tailored approach, instead of adopting a rigid bifurcated-discovery approach. (Universal No. G-1)

Discovery, particularly in the context of a large, complex class-action litigation, can be a lengthy and expensive undertaking. Parties have “bifurcated” their discovery between “class” and “merits” issues, so that the more limited “class” discovery is completed first, which might obviate the need for “merits” discovery. The idea being that by reserving discovery on issues relating exclusively to the “merits” of the case, some cases may be resolved at the class certification stage without requiring that resources be spent on those issues that are deemed “merits” only. “Merits” discovery would only proceed after the court has addressed the plaintiff’s motion for class certification, which may significantly narrow or promote the resolution of the case. In practice, however, the formal distinctions between “merits” and “class” discovery are often unclear and resolving these disputes has often added more burden and work.

Two developments have obscured the distinctions between “class” and “merits” discovery. First, in 2011, the U.S. Supreme Court in *Wal-Mart Stores, Inc. v. Dukes*, held that a plaintiff had to be capable of “proving,” at the class-certification stage “that there are in fact sufficiently numerous parties, common questions of law or fact, etc.” and that class certification is proper only if the trial court determines, after a “rigorous analysis,” that the requirements of Rule 23(a) have been satisfied.¹ As the court explicitly noted, “[f]requently that ‘rigorous analysis’ will entail some overlap with the merits of the plaintiff’s underlying claim. That cannot be helped.”²

The second development occurred when Rule 23 was amended in 2018 to require parties to provide the court with information sufficient to make a decision preliminarily approving a class-action certification. The factors considered by a court deciding class certification implicate and overlap with many “merits” issues.³

In light of these two developments, courts have been hesitant to grant requests for class-discovery bifurcation, in part because the result is likely not the streamlining of discovery but rather the increase of discovery disputes, motion practice, and the potential for duplicative discovery.⁴ In addition, parties frequently have different subjective views as to what constitutes “class” and “merits” discovery, and those disagreements are not resolved at the outset of the bifurcation process.⁵

BEST PRACTICE 1A: The parties should consider prioritization of discovery relating to core issues in the case that are material to the claims and defenses. (Universal No. BP 1A)

Parties in class litigation are best positioned to determine what the core issues are and what documents, written discovery, and depositions are best tailored to prioritize dispositive issues (including, but not limited to “class” issues). It is in the parties’ interests to work collaboratively to focus discovery on priority issues, informally narrowing or tailoring discovery to those issues without the need for strictures of formal bifurcation.

Although the parties will be best suited to identify ways in which discovery can be prioritized to target central issues early in the discovery process, there are certain procedures which will facilitate the discovery prioritization discussed below.

BEST PRACTICE 1B: The parties should consider producing previously produced documents (or a subset). (Universal No. BP 1B)

Often in class actions, there are documents that have been previously gathered, reviewed, and produced as part of other litigation or agency proceeding. This is common in consumer, environmental, and other class cases. These situations provide opportunities to reduce cost and expedite production of relevant documents by focusing on those document sets that have already been collected and produced in prior litigation or agency action. For example, if there are significant amounts of overlap between the first production and discovery requests made in the pending case, an identical or nearly identical re-production of those documents can occur. The parties should consider reaching agreement on the re-production format to maximize cost savings and efficiency. Even in cases where the document requests are much narrower than the documents previously produced—as is sometimes the case when a regulatory investigation deals with a much broader set of issues than those currently being litigated—the parties may be able to agree to run agreed search terms against the already-created database, thereby reducing the time and expense of a fresh collection of documents from different or additional custodians. Either approach allows for additional discovery informed by these documents, which are quickly available for production.

BEST PRACTICE 1C: The parties should consider identifying key custodians and data sources as early as possible during the meet-and-confer conference to prioritize their discovery. (Universal No. BP 1C)

In addition to formal processes, such as a custodial deposition, the parties should be prepared at the meet-and-confer conference to seriously discuss the departments and players that are likely to have key relevant documents and information. Although this practice should be followed as a best practice generally, it is particularly important in class actions and allows for both sides to quickly identify key personnel and bodies of documents to be prioritized during discovery. Inevitably there will be additional discovery that flows out of this focused process, but relevant issues and witnesses are likely to precipitate from the parties engaging in such a process.

BEST PRACTICE 1D: The parties should identify key categories of documents for certain types of cases and agree to produce them as part of initial disclosures or before formal discovery requests are propounded in accordance with Rule 26(d)(2) and Rule 34. (Universal No. BP 1D)

The parties should work to identify key categories of documents for their case and agree to produce them as part of initial disclosures or before formal discovery requests have even been propounded in accordance with Rule 26(d)(2) and Rule 34. Certain types of cases will invariably involve categories of documents that are indisputably at issue and are known to the disclosing party. They can be readily produced early in the litigation. For example, a false advertising case requiring the production of the advertisements at issue in the geographies involved in the case. A toxic tort claim involving medical injury will require production of the plaintiffs' medical records.

In addition, practitioners who frequently handle certain types of cases should work to identify standard document requests and interrogatories in their cases that can be promoted as best practices. As a model for this, parties can look to various state jurisdictions that have standard or "form" interrogatories and/or document requests for particular case types (e.g., medical malpractice).

BEST PRACTICE 1E: The parties should inform the court of their plans to prioritize discovery as soon as possible. (Universal No. BP 1A)

Many judges prefer that the parties attempt to handle all discovery issues and resolve any discovery disputes themselves and only raise problems to the court as a "last resort." But a growing

number of judges have advocated active management of discovery and encourage counsel to not only raise disputes with them early before they metastasize into major problems, but also matters which might streamline discovery. These judges often hold a live conference, whether in-person or by telephone or video conference, with the court in accordance with Rule 16(a).

Parties should raise pointed questions about what *specific* discovery the parties need, why they need it, the sources from which they plan on obtaining it, and concrete plans to prioritize discovery in a way that increases efficiency during Rule 16 and other conferences with the court. If parties must prepare to answer these questions from a judge at the outset of the discovery process, they will be forced to explain the various ways in which the efficiencies sought may be achieved with the suggestions above and others that may be tailored to their case. Most importantly, these discussions with the court must sufficiently inform the judge of the proposed discovery so that discovery cut-off deadlines can be set.

GUIDELINE 2: Under Rule 23(e)(2), the court’s core task in deciding whether to approve a proposed class-action settlement is to determine whether it is “fair, reasonable, and adequate.” In making this determination, the court must address the four considerations listed in the Rule, and it should draw on factors listed by the court of appeals when they inform those four considerations. (Universal No. G-2)

Under Rule 23(e) of the Federal Rules of Civil Procedure, “[t]he 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.” Rule 23(e)(2) identifies a single determination a court must make before it may approve a class settlement: it must find that the settlement is “fair, reasonable, and adequate.”⁶

Although the ultimate question is simply whether the settlement is fair, reasonable, and adequate, many considerations may inform the answer. Before the 2018 amendments to Rule 23, most circuits had created long unwieldy lists of factors for trial courts to consider in every case—lists that varied by circuit. The most commonly listed factors included: (1) the strength of the plaintiff’s case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the risk of maintaining class action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery completed and the stage of the proceedings; (6) the experience and view of counsel; (7) the presence of a governmental participant; (8) the reaction of the class members of the proposed settlement; (9) the fairness of the claims process; (10) the ability to get money directly to the class; and (11) the court’s analysis of process-based considerations and considerations regarding objectors. The *Manual for Complex Litigation* listed still more factors.⁷

These long lists of factors typically were not accompanied by any set of organizing principles, but because the circuit courts had listed them, trial courts felt obligated to discuss all of them in every case. The result was often a rote discussion of the listed factors, rather than a focus on the ultimate question of a settlement’s fairness, reasonableness, and adequacy.⁸

Rule 23(e)(2) was amended in 2018 to cut through the clutter and provide organizing principles for the core analysis.⁹ As the Committee Note explained, “[a] lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process.”¹⁰ To simultaneously free courts from the unnecessary burden of discussing every factor in every case, while focusing them on the core concerns, the amended Rule requires courts to consider just four questions: whether (A) the class representatives and class counsel have adequately represented the class; (B) the settlement was negotiated at arm’s length;

(C) the relief provided to the class is adequate; and (D) the settlement treats class members equitably relative to each other.

As the Committee Note helpfully explains, the first two concerns are “procedural.” They assess indirectly whether the settlement is fair, reasonable, and adequate by examining whether the process that led to it was sound.¹¹ The second two concerns are “substantive.” They assess directly whether the settlement’s terms are fair, reasonable, and adequate.

Because the Rule 23(e)(2) amendments do not explicitly displace or supersede the factors developed under circuit law, these best practices continue to identify the circuit factors. But to help accomplish the purposes of the 2018 amendments, the guidelines do so by organizing those factors within the four core considerations identified by Rule 23(e)(2) itself and emphasizing that the factors should be addressed only when they inform those core considerations. This approach is consistent with the Committee Note’s explanation that “[t]his 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.”¹²

The courts’ application of amended Rule 23(e)(2) during the 20 months since its promulgation has been uneven, with a majority applying both the rule’s core considerations and the relevant circuit’s list of factors.¹³ But the better view and the one adopted by a minority of the courts and these best practices is to adhere to the intent and spirit of the amended rule by focusing the analysis on the core considerations and organizing the discussion around those considerations.¹⁴

BEST PRACTICE 2A: A court must determine whether the substantive terms of the settlement are fair, reasonable, and adequate, considering whether the relief is adequate under Rule 23(e)(2)(C) and whether class members are treated equitably relative to each other under Rule 23(e)(2)(D), and the court should draw on factors listed by circuit law when they inform these two considerations. (Universal No. BP 2A)

Rule 23(e)(2)(C) poses the core question: Is the relief provided by settlement adequate and the compromise therefore reasonable and fair? The adequacy of relief is assessed by comparing (1) what class members could reasonably expect to obtain in litigation and (2) what they will actually get in the settlement. Rule 23(e)(2)(C) lists four factors that address these two halves of the equation. The first factor addresses the potential relief class members could obtain in the

litigation, directing the court to consider “the costs, risks and delay of trial and appeal.”¹⁵ The next three factors address the relief provided by the settlement, directing the court to consider the effectiveness of the method of distributing relief, the terms of attorney fee awards, and any side agreement made in connection with the core class settlement agreement.¹⁶

The following outline organizes the factors recognized under circuit law under the considerations listed by Rule 23(e)(2)(D), which courts should consider if they are relevant to an individual case and provide guidance in answering the question posed by the rule.

1. How much are the class members’ claims worth, taking into account the costs, risks, and delay of trial and appeal?¹⁷
 - a. How strong or weak are the claims and defenses on the merits?¹⁸
 - b. What relief could plaintiffs likely recover, and how strong or weak are the claims for that relief?
 - c. Do plaintiffs face risk in maintaining a class through judgment?¹⁹
 - d. Might the defendant be unable to pay the full amount sought by the lawsuit?²⁰
 - e. How much time, expense, and complexity would it take to litigate to judgment and collection?²¹

2. What relief does the settlement provide?²²
 - a. What are the monetary and non-monetary benefits provided by the settlement, and how effectively will those benefits be made available to class members?²³
 - i. If the settlement includes coupons or other non-cash relief, how much value will class members likely actually receive, and how does it compare to cash?²⁴
 - ii. If the settlement includes injunctive relief, does it accomplish what the lawsuit set out to do, and is it different from what defendants are already required to do?²⁵
 - iii. If the settlement includes *cy pres* benefits, is it limited to when the amounts are too small to make further distributions impracticable or unfair,²⁶ and are the *cy pres* recipients adequately connected to the interests of class members?²⁷
 - iii. How effective is the notice plan?
 - Does it consider how the defendants regularly communicated with class members?²⁸
 - Are best practices in place to ensure that the class receives the notice?²⁹
 - Is the language of the notice easy to understand?³⁰
 - Will the notice come to the attention of class members?
 - Does the notice contain sufficient information for a class member to make an informed decision, including the anticipated class recovery?

- Does the notice provide class members with all relevant information in advance of the opt-out and objection deadline?³¹
- Will plaintiffs' counsel have filed their motion for fees before the objection deadline?
- iv. How effective is the claims process and the method for distributing relief?
 - Is the claims deadline reasonable?
 - Are direct payments being made to the class if feasible?³²
 - If a claims process is contemplated:
 - Do the burdens of the claims process match the magnitude of benefits class members will receive?³³
 - If the total value of the settlement will depend on the number of claims submitted, have the parties provided a reliable estimate of the likely number of claims?³⁴
- b. What are the terms of any proposed award of attorney's fees, and how will an award of fees affect the relief received by class members?³⁵
 - i. How much are class counsel requesting in total fees and costs, and does the amount awarded to class counsel affect the amount available to class members?³⁶
 - ii. Is class counsel's request for costs, fees, and service awards reasonable based upon the law of the circuit and in comparison to the relief given to class members?³⁷
 - iii. Have the parties provided information about the relationship among the amount of the award, the amount of the common fund, and counsel's lodestar calculation?³⁸
 - iv. If the amount of attorney fees is being justified by the value ascribed to nonmonetary relief awarded to the class or by estimates of how many class members will submit claims, how well supported are those values?
- c. What are the terms of any "side agreements," and do they shed any light on the adequacy of the relief provided to class members?³⁹

Rule 23(e)(2)(D) poses a more discrete question regarding the terms of the settlement: Are class members treated equitably relative to each other? The following outline organizes the factors recognized under circuit law that are relevant to Rule 23(e)(2)(D), which courts should consider if they are relevant to an individual case and provide guidance in answering the question posed by the rule.

1. If different amounts or other relief is made available for different class members, is there a fair justification?⁴⁰

2. If the settlement offers service awards to class representatives, are they reasonable and not conditioned upon their approval of the settlement?⁴¹

BEST PRACTICE 2B: A court must assess the process that led to settlement, considering whether the class representatives and class counsel have adequately represented the class under Rule 23(e)(2)(A) and whether the proposal was negotiated at arm's length under Rule 23(e)(2)(B), and the court should draw on factors listed by circuit law when they inform these two considerations. (Universal No. BP 2B)

Rule 23(e)(2)(A) poses the broad question whether the class representations and class counsel have adequately represented the class. The focus is on the actual performance of counsel acting on behalf of the class. The following outline organizes the factors recognized under circuit law that are relevant to Rule 23(e)(2)(A), which courts should consider if they are relevant to an individual case and provide guidance in answering the question posed by the rule.

1. Has the court considered the relevant factors pursuant to Rule 23(g) in appointing class counsel and 23(a)(4) when considering adequacy?
 - a. Did the parties zealously prosecute the claims and to what extent?
 - b. Are there any conflicts between the class representatives and the absent class members?
 - c. Is it necessary to form subclasses to guard against conflicts? If so, were those subclasses formed before the parties settled and were attorneys for any subclasses separate and independent of the attorneys for the class and other subclasses?
2. Do the parties address any “red flags” that give the court cause for concern?⁴²
 - a. Are class members being provided with relief for released claims? Is the release limited to claims that were pleaded in the operative complaint, could have been brought in the complaint, or were related to those claims?
 - b. If the settlement includes coupons, as that term is defined in the Class Action Fairness Act, have the Act's provisions been addressed?
3. Has the reaction to the settlement been mostly positive?
 - a. Are there objectors?
 - i. Have the parties addressed objectors' concerns, if any?⁴³
 - ii. Does the record contain evidence that objectors do not have the best interests of the class in mind?⁴⁴
 - iii. How do the objectors stand to benefit if the settlement is rejected? Are the objectors or their counsel attempting to extract a bounty or are they otherwise engaged in other inappropriate conduct? Is there evidence in the record that counsel for the objectors are “professional objectors.” Has counsel for the class made any promises to compensate objectors or their counsel in exchange for their dropping objections?⁴⁵

- iv. Does the ratio of objections and opt-outs relative to unopposed class members weigh in favor of settlement?⁴⁶
 - b. Do regulators, including state attorneys general, have concerns?
 - i. Have the parties addressed regulator concerns, if any?⁴⁷
4. Will the parties report claim rates to the court?

Rule 23(e)(2)(B) asks directly about one aspect of adequate representation: whether the settlement was negotiated at arm's length.⁴⁸ The following outline organizes the factors recognized under circuit law that are relevant to Rule 23(e)(2)(B), which courts should consider if they are relevant to an individual case and provide guidance in answering the question posed by the rule.

- 1. Are there any concerns that the settlement constituted a “reverse auction”?
- 2. Was a mediator involved in the process?
- 3. Have the parties conducted sufficient discovery—either formally or informally—to allow for a fair assessment of the settlement's fairness and whether the settlement class has been appropriately defined?⁴⁹

GUIDELINE 3: Although good-faith objections can assist the court in evaluating a proposed class-action settlement, objectively meritless objections, and especially appeals from the denial of those objections, can harm class members by significantly delaying finalization of a settlement. (Universal No. G-2)

The ability of class members to object to a proposed class settlement is both an important due process protection and a useful check for ensuring that named plaintiffs represent class members well.⁵⁰ For these reasons, Rule 23(e) allows “any class member” to object to a proposed class settlement,⁵¹ and if the objection is not sustained, the objector may appeal from the order approving the settlement.⁵² So far, so good.

But what if an objector’s appeal is filed in good faith but is plainly meritless, or worse, filed in bad faith solely to pressure class counsel to pay the objector to dismiss the appeal?⁵³ Because a typical appeal takes months or even years to resolve, an objector can significantly delay the implementation of a class settlement by filing an appeal.⁵⁴ This delay is a necessary incident of providing appellate review for colorable objections that are made in good faith. But it cannot be justified for appeals from objectively meritless objections.

The 2018 amendments to Rule 23(e)(5) reduce the incentive to file a meritless objection by requiring a district court to approve any payment made to an objector before an objection can be withdrawn or dismissed. Although this approval requirement has deterred some bad-faith objectors, it has not deterred all of them, and some continue to extract payoffs by filing an appeal and prolonging delays. Moreover, it does not address good-faith but meritless objections.⁵⁵

BEST PRACTICE 3A: In a court of appeals whose local rules or internal operating procedures allow for summary affirmance,⁵⁶ a court should summarily affirm an order approving a class-action settlement if an appeal filed by an objector is shown to be objectively meritless, meaning it lacks an arguable basis either in law or fact. (Universal No. BP 3A)

To address the problem of delay caused by an objectively meritless appeal filed by an objector, an appellate court should use summary affirmance to quickly resolve such an appeal. Summary affirmance allows a court to resolve an appeal without time-consuming full briefing or oral argument.⁵⁷ By streamlining and accelerating the appellate process, summary affirmance can reduce the court’s workload, reduce the parties’ costs, avoid undue delay in distributing settlement benefits, and minimize a bad-faith objector’s leverage for extracting payoffs.

An appeal filed by an objector to a class settlement is objectively meritless if it lacks an arguable basis in fact or law. The following factors may be relevant in assessing whether the appeal is objectively meritless:

- The record reveals that the objection is not genuine, such as when the appellant has no personal objection to the settlement or did not read the settlement agreement or the objection itself.
- The appellant is not a class member.
- The appellant failed to timely file a proper objection in the district court.
- The objection is merely a “form” objection that fails to “state with specificity the grounds for the objection,” as required by Rule 23(e)(5)(A).
- The objection is based on a plainly erroneous misreading of the settlement agreement (such as objecting that the settlement contains a provision it does not contain or arguing that a settlement lacks a term it does contain).
- The appellant or his or her attorney is a “professional” or “repeat” objector, as demonstrated by a record of judicial decisions criticizing or sanctioning the appellant or attorney for meritless objections or vexatious conduct.

BEST PRACTICE 3B: A Court of appeals should amend its local rules or internal operating procedures (“IOPs”) to provide, if not otherwise provided for, a procedure to deny an objectively meritless objection and summarily affirm an order approving the class-action settlement. (Universal No. BP 3B)

A majority of courts of appeals currently have a general summary-affirmance procedure in their local rules or IOPs.⁵⁸ Some courts, however, limit summary affirmance to narrow circumstances, such as a supervening change in the law, or only allow the court to grant it *sua sponte*.⁵⁹

Four circuits do not have a summary-affirmance procedure. In these courts, the parties must conduct full merits briefing even if an appeal filed by an objector is objectively meritless. Requiring full merits briefing significantly delays the implementation of a class settlement and requires a significant output of time and resources from both the parties and the court.⁶⁰ Adopting a summary-affirmance procedure would help address these problems.

BEST PRACTICE 3C: A court of appeals should consider expediting an appeal involving an objectively meritless objection to a proposed class-action settlement. (Universal No. BP 3C)

Most courts of appeals provide a procedure for expediting an appeal through local rules issued under FRAP 2.⁶¹ These local rules generally require a showing of emergency,⁶² irreparable harm,⁶³ good cause,⁶⁴ or other exceptional reason⁶⁵ to justify expediting an appeal. In addition to summary affirmance, a court of appeals should consider an expedited appeal in appropriate circumstances. For example, expedited consideration of an appeal involving an objectively meritless objection may be appropriate when there is an urgent need to implement the injunctive relief provided by the settlement or to distribute settlement recoveries that compensate class members for significant ongoing expenses.⁶⁶

GUIDELINE 4: Virtual appearances for court proceedings in class actions have proven to be effective and cost saving. (Universal No. G-4)

Many courts and law offices have embraced virtual appearances for hearings and conferences, spurred on by the COVID-19 pandemic and public health emergency, which closed courthouses across the country to the public. The constantly improving technology continues to attract more supporters.

Virtual proceedings have provided real benefits for litigants, attorneys, and courts, including the following.⁶⁷

- Virtual proceedings provide judges better control over their docket and cases and their courtroom management.
- Video hearings permit judges and attorneys to see each other, witnesses, and jurors' faces close up.⁶⁸
- Because all documents in virtual hearings are electronic, paper and the costs associated with paper handling (copying, postage, storage, and delivery fees) for firms and court staff are reduced.
- Costs to witnesses and clients are reduced because virtual proceedings mitigate costs of travel to the courthouse.⁶⁹
- The efficiencies of virtual hearings allow cases to continue when they otherwise would have stalled on the docket.⁷⁰
- For all parties, virtual hearings minimize the risk of further spread of COVID-19 by reducing foot traffic in the courthouse. Mingling of vaccinated and unvaccinated individuals who would otherwise come together at security screening check points is minimized.⁷¹
- Individuals who would otherwise be prohibited from entering the courthouse—for example, people who have tested positive or have been exposed to others who have tested positive for COVID-19—or who are otherwise unable to physically visit the courthouse can have access (even though virtual) to the proceedings.⁷²

Best Practice 4A: On the parties' request, a court should utilize virtual proceedings for pretrial proceedings, including status conferences, motion hearings, preliminary and final

approval hearings to promote efficiency and preserve the resources of the parties.
(Universal No. BP 4A)

A court should consider granting the parties' request to hold a proceeding virtually.⁷³ But parties in specific cases may want to convene in-person to conduct pretrial proceedings at the courthouse for a variety of strategic and logistical reasons. And that opportunity should be retained.

BEST PRACTICE. 4B: A court should amend its local rules and practices to facilitate virtual appearances for pretrial proceedings, including status conferences, motion hearings, preliminary and final approval hearings in class actions, and other similar proceedings. (Universal No. BP 4B)

The CARES Act, passed by Congress at the beginning of the pandemic in the U.S., authorized judges to use video and telephone conferencing in civil cases and certain criminal proceedings during the Covid-19 emergency with the defendants' consent.⁷⁴ In response, the Judicial Conference issued a *temporary exception* to the policy against cameras and broadcasting in the court while public access to the federal courthouse was restricted due to the COVID-19 pandemic.⁷⁵ The exception expires when a court fails to extend the 90-day COVID emergency for the district and the court returns to the former status quo.⁷⁶

Courts across the country, at both the state and federal level, developed experience with holding virtual proceedings as emergency procedures authorized by the CARES Act.⁷⁷ Although some courts held all civil hearings virtually, others handled proceedings in a hybrid manner, such as conducting evidentiary and bench trials in person, while conducting other hearings virtually.⁷⁸ As the COVID health emergency passes, courts are opening courthouses for in-person proceedings. Many judges and lawyers want to capitalize on their favorable experiences with virtual appearances and extend their use in the normal course of practice.

Neither Federal Rule of Civil Procedure 43 nor the Judicial Conference Camera policy expressly prohibits virtual appearances for pretrial proceedings in civil cases.⁷⁹ Federal Rule of Civil Procedure 77(b) permits a judge to hold any pretrial proceeding in a civil case in chambers or anywhere inside or outside the district, but the parties' consent is required for a hearing outside the district. Amending local rules to facilitate virtual appearances of pretrial class-action proceedings would be consistent with Rule 77(b) and the Judicial Conference camera policy if the broadcasting was limited exclusively to the parties, excluding the public, because a pretrial proceeding can be conducted outside the public's view. But holding virtual hearings routinely

outside the public view is not consistent with long-established and honored tradition keeping court proceedings open to the public.

Once the temporary exception expires, the tension between the Judicial Conference camera policy and the growing support for virtual hearings and the traditional reluctance to hold court proceedings outside the public's view may need to be addressed by the Conference.

BEST PRACTICE 4C: A court should make its expectations clear about counsels' conduct and the presentation of evidence in a virtual appearance. (Universal No. BP 4C)

The court in its local rules, or a judge in its standing orders, case-management orders, or pretrial-conference orders, should express its expectations about the conduct of counsel and the presentation of evidence at virtual proceedings or otherwise publicize expectations in a form readily available to all counsel.⁸⁰ The expectations should address how counsel is to submit any documents, exhibits, or demonstratives at a scheduled virtual appearance, including in hard copy, electronic pdf format, or other format in advance of the appearance.⁸¹ The court should designate whether it or the attorneys are responsible for maintaining the clock, timing the presentations or arguments at the hearing.⁸²

BEST PRACTICE 4D: An attorney or witness appearing at a virtual proceeding must dress in appropriate courtroom or business attire. (Universal No. BP 4D)

An attorney should dress in appropriate court attire; a witness must also dress in business or courtroom appropriate attire.⁸³ Attorneys, witnesses, and others should remember that these are court hearings and dress accordingly.⁸⁴ The legal trade press and newspapers have discussed lawyers attending virtual hearings in beach coverups and casual shirts, which undermine the court's decorum. "Zoom hearings are just that: hearings, not casual phone conversations," one judge wrote, admonishing attorneys who appeared before him at virtual hearings in inappropriate attire.⁸⁵

BEST PRACTICE 4E: Unless the court assumes responsibility to provide the technology to operate the virtual proceedings itself, counsel should designate one individual who is responsible for making the logistical arrangements, troubleshooting, and resolving any technological glitches that may arise during the virtual proceeding. (Universal No. BP 4E)

Many courts rely on the parties to make the arrangements for a virtual appearance. But even when a court assumes the responsibility to make the arrangements, it may not have adequate staff to manage the process and promptly respond to transmission problems. In either situation, a single point of contact should be designated who is responsible for initiating and managing the video transmission, including handling any transmission problems.

Counsel should preplan for technology issues that can occur during the virtual hearing, including how to resolve them promptly. Technological glitches of any kind are highly disruptive and negate effective advocacy.

BEST PRACTICE 4E(i): Counsel should take steps during their virtual appearance to ensure that the operation of the remote appearance is run smoothly and efficiently. (Universal No. BP 4E(i))

The individual designated to manage the virtual hearing should schedule a “dry-run” before the hearing is held. Attorneys should check their video equipment to ensure that the camera and microphones work, that their background is not distracting, that the camera position and lighting are acceptable, and that no unsuspecting filters are engaged.⁸⁶

Attorneys who are not speaking should mute their phones (if calling into a proceeding) and mute the sound and turn off video on their computers when not speaking. Muting non-speakers reduces background noise and distractions and increases bandwidth on the video for the speakers. Turning off the video of counsel not participating in the hearing is a best practice as it allows the judge to focus on the attorney presenting the argument. Even small background noises, which we normally disregard, can become large distractions on videoconferences. Attorneys should ensure that there no background distractions: rustling of papers, others at home, noise from pets, or outside while on camera.

In addition to lag time in video communication and inaudible speech or dropped service, participants may not realize that that they are talking over other participants. Information and arguments get lost, and the judge’s questions or statements are not heard by the parties. Counsel should avoid talking over others on the virtual-meeting platform. Counsel should take a long pause before speaking to be sure the other speaker is finished.

BEST PRACTICE 4E(ii): Counsel appearing virtually should put in place a contingency plan to address technology or other interruptions. (Universal No. BP 4E(ii))

The plan can include a stipulated protocol or agreed-to order by the court and should address the potential for problems and remedies in the event the video transmission is terminated or otherwise compromised. Counsel should exchange contact information with each other, the court, and witnesses before the hearing in case of technical issues during the hearing as a backup for communication.⁸⁷

BEST PRACTICE 4E(iii): Courts and counsel should take steps to ensure that the platform used to make virtual appearances is secure. (Universal No. BP 4E(iii))

The individual designated to manage the virtual proceeding should be responsible to ensure that appropriate security measures are in place for the virtual proceeding, including data, recording, exhibit storage, and access to break-out rooms for privileged confidential conversations.⁸⁸ The platform must have appropriate cybersecurity safeguards, including passwords and access numbers. Separate access codes for the public and press should be considered to avoid distractions and other security or disruptive issues, although broadcasting of proceedings to the public may run afoul of the existing Judicial Conference camera policy. Third parties, such as court reporters and videographers who are not affiliated with or provided by court should have cybersecurity protocols established and provide those to counsel in advance.⁸⁹

BEST PRACTICE 4F: Counsel should submit appearances for attorneys and witnesses to the clerk of court before the appearance to save time and avoid confusion during virtual hearings. The submission should include an identification of the designated speakers for each party. (Universal No. BP 4F)

During multiparty hearings, counsel must identify oneself and affiliation before speaking. Class actions often have multiple lawyers representing different parties and interests during the pendency of a class action. In larger class actions, there may be several counsel for one party or one lawyer may represent the interests of multiple parties. To save time and to insure a smooth process, counsel should be requested to: (1) provide written notice in advance of the hearing

identifying who will be speaking and on behalf of whom; and (2) restate that information on the record at the start of the hearing.

In the courtroom, identification of the parties and their relationship to the case (plaintiff or defendant) is readily apparent; but on a virtual platform the designation of plaintiff attorney or defendant attorney requires more. Counsel making an argument should state their name and identify their client before proceeding.

BEST PRACTICE 4G: Counsel should clear all sealed hearings with the court in advance and comply with all local rules and case management orders. The public should be advised that all or part of the hearing will be closed to the public. (Universal No. BP 4G)

If members of the press and the public have access to the virtual hearings, contingency plans should include provisions for “sealing” the virtual court room when confidential, trade secret, or information subject to a protective order is discussed or shown should be cleared with the court well in advance and comply with all local rules or the Case Management Order.⁹⁰ Counsel should make the court staff aware that protected information may be discussed or shown at the hearing, and that public access will be limited. Various virtual meeting platforms include the ability to proceed with the meeting in a breakout room or provide limited access to certain participants.⁹¹ The ECF notice of the hearing should disclose that all or part of the hearing will be closed to the public.

GUIDELINE 5: A proposed class-action settlement that includes monetary relief must include a plan that effectively distributes relief to the class members. (Universal No. G - 5)

Under Rule 23(e), a court may approve a proposed settlement “only on finding that it is fair, reasonable, and adequate.” One of the factors that the court must consider in making its findings is that the “relief provided for the class is adequate, taking into account ... the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims.” The court should not insist on a distribution method that promises 100% success. The court’s focus should instead be on whether the method proposed is justified in light of other reasonably available methods.

BEST PRACTICE 5A: The parties in a class-action settlement that includes monetary relief should consider providing individuals (i.e., natural persons) a menu of payment options, including full-size paper check by First Class mail and a reasonable number of commonly used digital options that match the preferences and needs of class members, including the unbanked, to increase the overall effectiveness of distributing settlement payments. (Universal No. BP 5A)

Full-sized paper checks sent by First Class mail are a common and familiar payment method for most individuals and businesses. But when class members are individuals, there are growing concerns regarding the effectiveness of this payment method because of low cash rates, high costs, and the impact on unbanked class members.

In the most comprehensive empirical study of consumer class-action settlements to date, the FTC found a 77% weighted average cash rate in settlements with a claims process and a 55% cash rate in settlements without a claims process. Depending on the number of payments being issued, settlement administrators typically charge approximately \$0.75 to \$1.00 per check (including check printing, bank fees, and postage). In addition, checks present challenges for the approximately 5.4% of U.S. households (7.1 million persons) who are unbanked according to the FDIC. It is worth noting that, when class members are businesses, the check cash rate often is higher and there are fewer unbanked recipients.

The efficacy and cost of digital payments vary by method, but they usually are more effective and less expensive than paper checks. Digital payments, sometimes also called electronic payments or epayments, include a wide range of methods such as Zelle, ACH, e-checks, wires, PayPal, Venmo, prepaid debit cards, and retail gift cards. Under certain digital methods (such as

Zelle, ACH, e-checks, and wires), the payment is deposited directly into an individual's bank account. Under other methods (such as PayPal and Venmo), the payment is deposited into an individual's account on the applicable payment platform and may be used to make payments on that platform or transferred to the person's bank account. Virtual and physical prepaid cards and retail gift cards are particularly effective methods for making payments to unbanked individuals. Some prepaid cards can be added to digital wallets and used with Apple Pay, Samsung Pay, Google Pay, and other platforms.

Postcard-size checks are somewhat less expensive than full-sized checks because of lower postage and printing costs. But postcard checks often have an even lower cash rate than full-sized checks. Moreover, class members, settlement administrators, and banks report widespread dissatisfaction with the use of postcard checks in connection with the distribution of class-settlement payments. Some experts believe that the lower cash rates exist because some class members believe that postcard checks are junk mail or fake.

Cash pickup services allow class members to receive their payments in cash at designated locations. The cost usually is higher than mailing a paper check or sending a digital payment.

No single payment method is ideal for everyone. Many people no longer want to receive payment by check. Digital platforms such as PayPal, Venmo, and Zelle are popular with some people, but not everyone has one of those accounts. Likewise, ACH is desired by some people, but many are not comfortable providing their account number and routing number online. Prepaid cards are highly flexible options for both banked and unbanked class members, but the funds often cannot be transferred back to a bank account. A retail gift card might be a convenient and practical option for some unbanked individuals, but ineffective and frustrating for people who do not shop at that retailer (or even live near one of that retailer's locations).

The parties should be aware of the various payment methods, which constantly change, and offer a menu of selected optional payment methods best suited for the putative class members as part of the settlement proposal.

BEST PRACTICE 5B: Given the wide range of potential payment options, the settling parties should consult with a settlement administrator or a bank with class-action experience to select the most effective payment method or combination of methods. (Universal No. BP 5B)

The increasing digitization of payments in the United States and globally suggests that payment methods other than by paper checks may be more effective in distributing relief, particularly when class members are individuals. Staying abreast of the wide variety and frequent emergence of new digital payment methods requires dedicated attention. Settlement administrators and banks with class-action experience have the knowledge and expertise necessary to make informed judgments.

BEST PRACTICE 5C: If a settlement requires individuals to submit a claim, the claim form should list the available payment options and request the claimant’s preferred payment option. If a settlement does not include a claim process, the settlement notice should inform settlement class members of the available payment options and provide an opportunity for individuals to select their preferred option (such as on a settlement website). (Universal No. BP 5C)

The menu of payment methods should be integrated into the claim form itself, instead of notifying claimants at a later date when the settlement and distribution are finally approved that it is time to make a payment selection. Otherwise, many claimants will not respond to the later email or text notification. The failure of some claimants to return to make their selection will, depending on the default method used by the administrator, likely reduce the efficacy of the payments and increase the distribution costs.

BEST PRACTICE 5D: The parties should provide the court with sufficient information about the effectiveness of the distribution-payment method(s) when seeking preliminary approval of a settlement under Rule 23(e)(1). (Universal No. BP 5D)

Although the actual effectiveness of any payment method cannot be known until after the court approves the settlement, the parties should provide information at the preliminary-approval stage, including estimates of costs and projected efficacy, sufficient for the court to find that the effectiveness of the payment method is adequate.

¹ Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011).

² *Id.* at 351.

³ *See, e.g.,* Denny v. Amphenol, No. 1:19-cv-04757, 2020 WL 5500276 (S.D. Ind. Sept. 4, 2020) (Pryor, J.) (denying joint motion to bifurcate); Obertman v. Electrolux Home Care Prods., Inc., No. 2:19-cv-02487, 2020 WL 8834885, at *2 (E.D. Cal. June 18, 2020) (“This court has been reluctant to draw a bright line separating class certification from merits discovery; when the parties agree to a flexible approach, it has encouraged frontloading class certification discovery with overlap as appropriate to avoid duplication, without providing for bifurcation.”).

⁴ See, e.g., *Obertman*, 2020 WL 8834885, at *2; *Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 300 (S.D.N.Y. 2012) (“[B]ecause of the ‘rigorous analysis’ required by *Dukes*, courts are reluctant to bifurcate class-related discovery from discovery on the merits.”).

⁵ See, e.g., *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 258 F.R.D. 167, 174 (D.D.C. 2009) (“If bifurcated, this Court would likely have to resolve various needless disputes that would arise concerning the classification of each document as ‘merits’ or ‘certification’ discovery.”).

⁶ Hon. Elaine Bucklo and Thomas Meites, *What Every Judge Should Know about a Rule 23 Settlement (But Probably Isn’t Told)*, 41 LITIG. 18 (2015).

⁷ THE MANUAL FOR COMPLEX LITIGATION (FOURTH) (2004) (hereinafter *Manual*) also discusses considerations for courts when analyzing whether to approve a settlement. The *Manual* reminds district judges that they serve in a fiduciary role for absent class members and warns that judges “should be wary” of “potential abuses in class-action litigation,” such as:

- conducting a “reverse auction,” in which a defendant selects among attorneys for competing classes and negotiates an agreement with the attorneys who are willing to accept the lowest class recovery (typically in exchange for generous attorney fees);
 - granting class members illusory nonmonetary benefits, such as discount coupons for more of defendants’ product that require class members to spend more money with the defendant, while granting substantial monetary attorney fee awards;
 - filing or voluntarily dismissing class allegations for strategic purposes (for example, to facilitate shopping for a favorable forum or to obtain a settlement for the named plaintiffs and their attorneys that is disproportionate to the merits of their respective claims);
 - imposing such strict eligibility conditions or cumbersome claims procedures that many members will be unlikely to claim benefits, particularly if the settlement provides that the unclaimed portions of the fund will revert to the defendants;
 - treating similarly situated class members differently (for example, by settling objectors’ claims at significantly higher rates than class members’ claims);
 - releasing claims against parties who did not contribute to the class settlement;
 - releasing claims of parties who received no compensation in the settlement;
 - setting attorney fees based on a very high value ascribed to nonmonetary relief awarded to the class, such as medical monitoring injunctions or coupons without regard to their redemption rate, or calculating the fee based on the theoretical maximum that class members may receive, rather than the funds actually claimed by and distributed to class members; and
- assessing class members for attorney fees in excess of the amount of damages awarded to each individual. *Manual* § 21.61. See also Jonathan R. Macy and Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. LEGAL ANALYSIS 167 (2009) (advocating for various levels of scrutiny depending on features of settlement).

⁸ “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 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).” FED. R. CIV. P. 23(e)(2) advisory committee’s note.

⁹ Donald R. Frederico, *The Roles of the Players in Class Settlements. Part 3: The Judge*, NAT’L L. REV. (Mar. 4, 2020), <https://www.natlawreview.com/article/roles-players-class-settlements-part-3-judge>. Mr. Frederico notes, “As the Advisory Committee Notes to the 2018 Amendments to Rule 23 explain, ‘[t]he decision to give notice of a proposed settlement to the class is an important event.’ The parties are expected to provide the court with sufficient information from which it can make the required findings, and federal judges are expected to conduct a meaningful review of the proposed settlement before authorizing notice. This ‘front-loading’ of the settlement approval process makes sense, given the often significant costs and delay attendant to the lengthy notice process.” *Id.*

¹⁰ FED. R. CIV. P. 23(e)(2) advisory committee’s note.

¹¹ *Id.*

¹² *Id.*

¹³ Post-2018 cases in five circuits applied both the Rule 23(e)(2) core considerations *and* the circuit list of factors, including: *Briseno v. Henderson*, 998 F.3d 1014 (9th Cir. 2021); *In re Equifax Inc. Customer Data Security Breach*

Litig., 999 F.3d 1247 (11th Cir. 2021); *In re* Payment Card Interchange Fee and Merchant Discount Antitrust Litig., 330 F.R.D. 11 (E.D.N.Y. 2019); *In re* GSE Bonds Antitrust Litig., 414 F.Supp. 3d 686 (S.D.N.Y. 2019); *Chambers v. Together Credit Union*, No. 19-CV-00842, 2021 WL 19484452 (S.D. Ill. May 14, 2021); *Norcia v. Samsung Telecommunications America, LLC*, No. 14-cv-00582, 2021 WL 3053018 (N.D. Cal. July 20, 2021); *Anderson Living Trust v. Energen Resources Corp.*, No. 13-909, 2021 WL 3076910 (D. N.M. July 21, 2021).

¹⁴ Post-2018 cases in three circuits applied only the Rule 23(e)(2) factors, including: *Li v. Aeterna Zentaris, Inc.*, No. 3:14-cv-07081, 2021 WL 2250904 (D.N.J. June 1, 2021); *In re* Peanut Farmers Antitrust Litig., 2:19-cv-00463, 2021 WL 3174247 (E.D. Va. July 27, 2021); *Loreto v. Gen. Dynamics Info. Tech.*, No.: 3:19-cv-01366, 2021 WL 3141208 (S.D. Cal. July 26, 2021); *Norcia v. Samsung Telecomm. Am.*, No. 14-cv-00582, 2021 WL 3053018 (N.D. Cal. July 20, 2021).

¹⁵ See FED. R. CIV. P. 23(e)(2)(C)(i).

¹⁶ See FED. R. CIV. P. 23(e)(2)(C)(ii), (iii), (iv).

¹⁷ See FED. R. CIV. P. 23(e)(2)(C)(i).

¹⁸ James C. Martin, Douglas C. Allen, and M. Patrick Yingling, *Who Truly Benefits? Appellate Scrutiny of Class Action Settlements*, REED SMITH (2015), <https://www.reedsmith.com/-/media/files/perspectives/2015/12/appellate-scrutiny-of-class-action-settlements/files/client-alert-2015305/fileattachment/alert15305.pdf> (“The proposed compensation that a settlement would provide to individual class members likewise must be adequately supported by the record and tailored to a reasonable estimation of what a class member could recover individually given the claims alleged and the risks of litigating.”).

¹⁹ See, e.g. *In re* Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig., 229 F. Supp. 3d 1052, 1066 (N.D. Cal. 2017) (finding that potential difficulties in obtaining and maintaining class certification, including risk that court might later decertify a class, weighed in favor of settlement).

²⁰ *Id.*; see also *In re* Advanced Battery Techs., Inc. Secs. Litig., 298 F.R.D. 171, 178 (S.D.N.Y. 2014) (considering that defendants had minimal insurance coverage for lead plaintiffs’ claims and that any judgment against defendants would likely be uncollectible).

²¹ See, e.g., *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV-08-1365, 2010 WL 1687832, at *10 (N.D. Cal. Apr. 22, 2010) (“Indeed, there is no doubt that the time and expense of continuing the litigation would be substantial, and that such transactional costs could significantly reduce whatever judgment, if any, Plaintiff could recover through litigation. . . . [A]pproval under this factor [is] favored where, as here, significant procedural hurdles remain[], including an anticipated summary judgment motion, *Daubert* motions, and appeals.”).

²² See *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 284 (7th Cir. 2002) (rejecting settlement which failed to provide justification for release of approximately \$20 million in claims for certain class members over others).

²³ See FED. R. CIV. P. 23(e)(2)(C)(ii).

²⁴ See 28 U.S.C. 1712 (2018); *In re* Online DVD Rental Antitrust Litig., 779 F.3d 934, 950 (9th Cir. 2015) (finding that gift cards do not constitute a coupon settlement that falls under the umbrella of CAFA).

²⁵ District courts should ensure that the injunctive relief being offered is not merely something that defendant has already decided to do, or that defendant was already obligated to do under law. *Bezdek v. Vibram USA, Inc.*, 809 F.3d 78, 84 (1st Cir. 2015); *In re* Electronic Data Systems Corp. “ERISA” Litig., No. 6:03–CV–126, 2005 WL 1875545, at *3 (E.D. Tex. June 30, 2005).

²⁶ Courts recognize generally that *cy pres* distributions are inferior to direct distributions and maintain that if funds remain after distributions to class members, a settlement should presumptively provide a mechanism to distribute the residual funds further to the participating class members unless the amounts involved are too small or other specific reasons exist that would make such further distributions impossible or unfair. *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 173 (3d Cir. 2013) (citing ALI, PRINCIPLES OF LAW OF AGGREGATE LITIG. §3.07(b) (2010)).

²⁷ Martin, et al., *supra* n. 18; see also Wilber H. Boies & Latonia Haney Keith, *Class Action Settlement Residue and Cy Pres Awards: Emerging Problems and Practical Solutions*, 21 VA. J. SOC. POL’Y & L. 267, 293 (2014).

²⁸ Gary E. Mason & Jennifer S. Goldstein, *Unveiling the New Class Action Rules*, TRIAL MAG. (Nov. 2018), <https://archive.justice.org/what-we-do/enhance-practice-law/publications/trial-magazine/unveiling-new-class-action-rules> (“While initially skeptical of electronic notice, courts can no longer disregard the option given the increasing sophistication and entrenchment of internet advertising through means such as banner ads, targeted ads on social media, emails, and texts--as well as its cost effectiveness. The proposed amendments to Rule 23’s notice provision reflect this trend, providing that ‘the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort,’ may be ‘by one or more of the following: United States mail, electronic means, or other appropriate means.’” Alexander W. Aiken, *Class Action Notice in the*

Digital Age, 165 U. PA. L. REV. 967 (2017); Brian Walters, “*Best Notice Practicable*” in the *Twenty-First Century*, 7 U.C.L.A. J. LAW & TECH. 4 (2003).

²⁹ See *Swinton v. SquareTrade, Inc.*, 454 F. Supp. 3d 848, 871 (S.D. Iowa 2020), *appeal dismissed* (8th Cir. June 18, 2020) (discussing spam filters and supplementation of notice via banner advertisements); see also Caley DeGroot, Note, *Can You Hear Me Now? The Reasonableness of Sending Notice Through Text Messages and its Potential Impact on Impoverished Communities*, 23 WASH. & LEE J. C.R. & SOC. JUST. 279 (2016) (gathering cases concerning text message notice).

³⁰ FED. JUD. CTR., JUDGES’ CLASS ACTION NOTICE AND CLAIMS PROCESS CHECKLIST AND PLAIN LANGUAGE GUIDE (2010).

³¹ See, e.g., *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015) (“Most importantly, the notice states the amount of the settlement fund with Walmart, the amount class counsel will seek in fees, litigation expenses, and incentive awards, the fact that class counsel will seek payment for other costs from the fund, the fact that class members will need to submit a claim to obtain relief, an internet link and phone number to obtain a claim form, and the deadline for objecting or submitting a claim.”).

³² As noted by the Federal Judicial Center, a claims process is not necessary in all cases: “In too many cases, the parties may negotiate a claims process which serves as a choke on the total amount paid to class members. When the defendant already holds information that would allow at least some claims to be paid automatically, those claims should be paid directly without requiring claim forms.” *De Leon v. Bank of Am., N.A.*, 2012 WL 2568142, No. 6:09-cv-1251, at *20 (M.D. Fla. Apr. 20, 2012) (quoting FED. JUD. CTR., JUDGES’ CLASS ACTION NOTICE AND CLAIMS PROCESS CHECKLIST AND PLAIN LANGUAGE GUIDE (2010)); see *Otey v. CrowdFlower, Inc.*, No. 12-cv-05524, 2015 WL 4076620 (N.D. Cal. July 2, 2015) (having previously rejected a claim procedure, the court approved a claims process paying settlements directly to class members concurrent in time with the notice provided).

³³ *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014) (criticizing a lengthy claim form relative to the relief that each class member would receive); *Pearson v. NBTY, Inc.*, 772 F.3d 778, 783 (7th Cir. 2014) (criticizing a claims process which required not only a sworn statement, but receipts for supplements: “One would have thought, given the low ceiling on the amount of money that a member of the class could claim, that a sworn statement would be sufficient documentation, without requiring receipts or other business records likely to have been discarded. The requirement of needlessly elaborate documentation, the threats of criminal prosecution, and the fact that a claimant might feel obliged to wade through the five other documents accessible from the opening screen of the website, help to explain why so few recipients of the postcard notice bothered to submit a claim.”).

³⁴ N.D. CAL. PROC. GUIDANCE FOR CLASS ACTION SETTLEMENTS, PRELIMINARY APPROVAL § 1 (2018).

³⁵ See FED. R. CIV. P. 23(e)(2)(C)(iii).

³⁶ N.D. CAL. PROC. GUIDANCE FOR CLASS ACTION SETTLEMENTS, PRELIMINARY APPROVAL § 6 (2018).

³⁷ Federal Rule of Civil Procedure 23(h) provides that “[i]n a certified class action, the court may award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement.” In awarding fees under this rule, “courts have an independent obligation to ensure that the award, like the settlement itself, is reasonable.” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 949. Generally, parties may seek approval of fees under one of two methods: the lodestar approach or the percentage-of-the-recovery approach. *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 330 (3d Cir. 2011). An attorney’s lodestar is calculated by multiplying the number of hours that counsel reasonably expended on the litigation by a reasonable hourly rate—most often used in actions brought under fee-shifting statutes or when the relief obtained is primarily injunctive in nature. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 941 (9th Cir. 2011). Alternatively, when a settlement produces a common fund, courts may choose to award fees as a percentage of the recovery, with 25 percent or 30 percent serving often as a reasonable benchmark. *Faught v. Am. Home Shield Corp.*, 668 F.3d 1233, 1242-43 (11th Cir. 2011).

³⁸ N.D. CAL. PROC. GUIDANCE FOR CLASS ACTION SETTLEMENTS, PRELIMINARY APPROVAL § 6 (2018).

³⁹ FED. R. CIV. P. 23(e)(2)(C)(iv).

⁴⁰ See *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 284 (7th Cir. 2002) (discussing failure to provide justification for release of claims).

⁴¹ See *Radcliffe v. Experian Information Sol’ns Inc.*, 715 F.3d 1157, 1160-61 (9th Cir. 2013) (vacating settlement providing incentive awards to the named plaintiffs conditioned on their approval of a settlement).

⁴² This would include such terms like “clear sailing” provisions. The Seventh Circuit in *Redman* reversed a settlement approval order due to an attorneys’ fees award that was deemed unreasonable, in part because of a clear-sailing agreement. *Redman v. Radioshack Corp.*, 768 F.3d 622 (7th Cir. 2014). The court stated that such agreements illustrate “the danger of collusion in class actions between class counsel and the defendant, to the

detriment of the class members,” acknowledging that “[c]lear-sailing clauses have not been held to be unlawful per se, but at least in a case such as this, involving a non-cash settlement award to the class, such a clause should be subjected to intense critical scrutiny by the district court; in this case it was not.” *Id.* at 637. Similarly, courts are concerned with potential reversions to defendants. If unclaimed funds are to revert to Defendant, the parties should explain why those funds should revert to Defendant. *See Dudum v. Carter's Retail, Inc.*, No. 14-cv-00988, 2015 WL 5185933, at *3 (N.D. Cal. Sept. 4, 2015) (citing *Flores v. Alameda Cnty. Indus. Inc.*, No. 14-cv-03011, 2015 WL 3763605, at *3 (N.D. Cal. June 16, 2015)).

⁴³ While objectors serve a valuable purpose, see Robert Klonoff, *Class Action Objectors: The Good, The Bad, and the Ugly*, 89 FORDHAM L. REV. 475 (2020), courts should also be mindful of their role in high-stakes litigation, where abundant protections are already in place to protect the class. *See* Bruce D. Greenberg, *Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action Settlements*, 84 ST. JOHN'S L. REV. 949 (2010) (“...objectors, especially professional objectors, are frequently not needed, particularly in the high-dollar cases where they normally surface, since existing multi-layered protections ensure the fairness of settlements. The protections include the class counsel’s fiduciary duty to the class, the class counsel’s own economic interest in advocating only appropriate settlements, the obligation of judges to scrutinize settlements for fairness and the class counsel’s requested fees for reasonableness, judges’ track record of carefully evaluating settlements even before objectors come on the scene, and, in many cases, the role of governmental agencies who must be notified of proposed settlements and can protect class members’ interests. Only in the relatively rare case in which an objector raises a valid problem with a settlement that a court would not otherwise have perceived does an objection have value, and professional objectors virtually never do that.”).

⁴⁴ The *Manual* provides that courts may consider such facts like whether the objectors have misled the class about the settlement. *See Manual*, § 21.33 (“Objectors to a class settlement or their attorneys may not communicate misleading or inaccurate statements to class members about the terms of a settlement to induce them to file objections or to opt out.”). Class counsel may seek discovery from objectors to determine their motivations. 4 NEWBERG ON CLASS ACTIONS § 13:33 (5th ed. 2001) (“Class counsel have increasingly sought to disarm professional objector/attorneys by probing their relationship with the underlying class member/objector. Thus, class counsel may seek discovery *from* objectors on issues such as the objectors’ proof of their membership in the class, the factual basis of their objections, any past objections they have made, and their relationships with the professional objector counsel. As objectors often seek to appeal rejection of their objections, and class counsel as frequently will seek to require the objector to post an appeal bond, ‘discovery may be utilized to ensure that each objector is capable of posting bond in the full amount.’ If objectors do not comply with the discovery sought, class counsel must seek a court order to compel them to do so.”) (emphasis original) (internal citations omitted).

⁴⁵ Brian T. Fitzpatrick, *Objector Blackmail Update: What Have the 2018 Amendments Done?*, 89 FORDHAM L. REV. 437 (2020).

⁴⁶ For example, in a class action commenced by owners of allegedly defective dishwashers against the manufacturer, the Ninth Circuit found that the district court adequately weighed the reactions of members of the proposed settlement class, supporting approval of the settlement agreement as fair and adequate; the district court was informed that only 45 of the approximately 90,000 notified class members objected to the settlement, and reviewed the ultimate list of 500 opt-outs prior to issuing the order finalizing the settlement. *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566 (9th Cir. 2004).

⁴⁷ The district court in *In re Volkswagen* noted, “Although CAFA does not create an affirmative duty for either state or federal officials to take any action in response to a class action settlement, CAFA presumes that, once put on notice, state or federal officials will raise any concerns that they may have during the normal course of the class action settlement procedures.” *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prod. Liab. Litig.*, 229 F. Supp. 3d 1052, 1067 (N.D. Cal. 2017), *enforcement granted*, (quoting *Garner v. State Farm Mut. Auto. Ins. Co.*, No. CV-08-1365, 2010 WL 1687832, at *14 (N.D. Cal. Apr. 22, 2010)).

⁴⁸ FED. R. CIV. P. 23(e)(2)(B). *See also* *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 284 (7th Cir. 2002) (finding that where defendants pitted competing plaintiffs’ attorneys against each other, a “reverse auction” settlement would undermine arms-length discussions).

⁴⁹ Bucklo & Meites, *supra* note 6.

⁵⁰ Robert Klonoff, *Class Action Objectors: The Good, The Bad, and the Ugly*, 89 FORDHAM L. REV. 475, 478-80 (2020) (outlining potential benefits of objectors); Brian Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1630 (2009) (arguing objections are necessary to give class members opportunity to reveal divergence of interest from class counsel); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class*

Action Litigation: Theoretical and Empirical Issues, 57 VAND. L. REV. 1529, 1536 (2004) (arguing due process concerns underlie right of class members to object).

⁵¹ FED. R. CIV. P. 23(e).

⁵² See *Devlin v. Scardelletti*, 536 U.S. 1 (2002).

⁵³ See Klonoff, *supra* at note 50, at 478, 484 (outlining this problem); see also John Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them?*, 39 FLA. ST. U. L. REV. 865, 865-67, 874-79 (2012) (same); Fitzpatrick, *supra* note 50 at 1624 (same).

⁵⁴ Klonoff, *supra* note 50 at 484, 500; Fitzpatrick, *supra* note 50 at 1624.

⁵⁵ See Klonoff, *supra* note 50 at 493-97, 500-01.

⁵⁶ Currently, eight Court of Appeals provide procedures or standards for seeking summary affirmance. See Klonoff, *supra* note 50, at 503 n.174 (2020) (outlining potential benefits of objectors); 1ST CIR. R. 27.0(c) (summary disposition); 3D CIR. R. 27.4 (motions for summary action); 4TH CIR. R. 27(f) (motions for summary disposition); PRACTITIONER'S HANDBOOK FOR APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT at 102 (2020) (“[T]he court may summarily decide an appeal when the motion papers, in conjunction with the record and the district court’s opinion, show the appropriate disposition of the appeal with sufficient clarity that a call for briefs would be nothing but an invitation for the parties to waste their money and the court’s time.”); 8TH CIR. R. 47A (“The court on its own motion may summarily dispose of any appeal without notice.”); 9TH CIR. R. 3-6 (summary disposition); 10TH CIR. R. 27.3 (summary disposition); HANDBOOK OF PRACTICE AND INTERNAL PROCEDURES FOR THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT at 36 (2020) (“Parties are encouraged to file [summary disposition] motions where a sound basis exists for summary disposition.”). See generally Christopher S. Perry, *Summary Disposition on Appeal*, 29 APP. PRAC. J. 2 (2010); Robert D. Menna, Jr., *Motions for Summary Affirmance in the Seventh Circuit*, DCBA BRIEF 8 (Oct. 2016) <https://www.dcba.org/mpage/vol291016art1>.

⁵⁷ See Klonoff, *supra* note 50 at 500.

⁵⁸ The Second, Fifth, Sixth, and Eleventh Circuits do not have procedures for summary affirmance as part of their Local Rules.

⁵⁹ The Eighth Circuit allows a court to summarily affirm appeals only “on its own motion.” 8TH CIR. R. 47A. The Tenth Circuit allows parties to file a motion for summary disposition only “because of a supervening change of law or mootness.” 10TH CIR. R. 27.3(B).

⁶⁰ Klonoff, *supra* note 50 at 484, 501; Fitzpatrick, *supra* note 50 at 1624.

⁶¹ See Klonoff, *supra* note 50 at 503 n. 174; 1ST CIR. R. 27.0(b) (emergency relief); 2D CIR. R. 27.1 (emergency or expedited relief); 3D CIR. R. 4.1 (motion to expedite); 4TH CIR. R. 12(c) (expedition of appeals); 5TH CIR. R. 27.2.8, 27.5 (motions to expedite appeals); 6TH CIR. R. 27(f) (motions to expedite appeals); 7TH CIR. IOP 1(c)(7) (motion to expedite briefing is a “routine” motion); 9TH CIR. R. 27-12 (motions to expedite); 10TH CIR. R. 827.5 (motions to expedite); 11TH CIR. R. 27-1(d)(9) (motion to expedite); D.C. CIR. R. 27(f) (requests for expeditious consideration).

⁶² 1ST CIR. R. 27.0(b) (emergency relief); 2D CIR. R. 27.1 (requiring movant to “state the nature of the emergency and the harm that the movant will suffer if the motion is not granted”); 4TH CIR. R. 27(e).

⁶³ D.C. CIR. R. 27(f).

⁶⁴ 5TH CIR. R. 27.5 (court may expedite an appeal “only for good cause”); 6TH CIR. R. 27(f) (movant must show good cause to expedite); 7TH CIR. R. 34(b)(1)(viii); 9TH CIR. R. 27-12.

⁶⁵ 3D CIR. R. 4.1 (movant must state the “exceptional reason that warrants expedition”).

⁶⁶ See Klonoff, *supra* note 50 at 503.

⁶⁷ Cara Salvatore, *Minn. Judge Calls for More Zoom Trials—Pandemic or Not*, LAW360 (March. 30, 2021), <https://www.law360.com/articles/1370514/print?section=legalindustry> (“I do plan to continue, and urge our other judges to continue, to do as many hearings on Zoom as possible. It’s worked really, really well, and we’re still not in a position where we want a lot of people coming into the courthouse,” says C. J. John Tunheim.).

⁶⁸ C.J. Barbara M.G. Lynn, *Trials in the Age of COVID*, webinar hosted by Dallas and Fort Worth Chapters of the Federal Bar Association (March 9, 2021); Shalini Nangia, *The Pros and Cons of Zoom Court Hearings*, 10 NAT’L LAW REV. 141 (May 20, 2020), <https://www.natlawreview.com/article/pros-and-cons-zoom-court-hearings>; Cf. Lauren Kirchner, *How Fair is Zoom Justice?*, THE MARKUP (June 9, 2020), <https://themarkup.org/coronavirus/2020/06/09/how-fair-is-zoom-justice> (stating that research shows that virtual proceedings “put defendants at a visual and auditory disadvantage ... The audio feature on some videoconferencing technology...cuts off voice frequencies [that] are typically used to transmit emotion.” Without these cues, judges may not hear remorse are adequately judge a witness’s character, and hence, the witness’s credibility.). The benefits

are greater when face coverings are not required (as they have been during the pandemic during in person appearances).

⁶⁹ Alicia Bannon & Janna Adelstein, *The Impact of Video Proceedings on Fairness and Access to Justice in the Court*, BRENNAN CTR. FOR JUST., at 9. (Sept. 10, 2020), <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>.

⁷⁰ Nangia, *supra* note 68

⁷¹ *In re Ct. Operations Under Exigent Circumstances Created by Outbreak of Coronavirus Disease 2019*, No. 2:20MC7, 2021 WL 963497, at *2 (E.D. Va. Mar. 15, 2021) (“[E]ach additional in-person hearing increases the close contact that occurs in the security screening areas located at Courthouse entrances.”).

⁷² *Hughes v. U.S. Dep’t of Hous. & Urb. Dev.*, No. 20-CV-025-LM, 2020 WL 8366280, at *2 (D.N.H. Nov. 2, 2020) (referencing the court’s Standing Order 20-32 (Oct. 27, 2020) that prohibits certain individuals from entering the courthouse, including people diagnosed with or exposed to someone diagnosed with COVID-19).

⁷³ Kirchner, *supra* note 68 (claiming some courts may maintain virtual proceedings after the pandemic because of the cost and time savings of video hearings).

⁷⁴ Coronavirus Aid, Relief and Economic Security Act (CARES ACT), Pub. L. No. 116-136, 134 Stat. 281, § 15002 (2020).

⁷⁵ *Judiciary Authorized Video/Audio Access During Covid -19 Pandemic*, U.S. COURTS (Mar. 30, 2020), <https://www.uscourts.gov/news/2020/03/31/judiciary-authorizes-videoaudio-access-during-covid-19-pandemic> (“The Executive Committee of the Judicial Conference, acting on an expedited basis on behalf of the Conference, on March 29 approved a *temporary exception* to the Conference broadcast/cameras policy to allow a judge to authorize the use of teleconferencing to provide the public and media audio access to court proceedings.”).

⁷⁶ *Id.*

⁷⁷ Order *in re* Coronavirus/Covid-19 Pandemic, No. M10-468 (S.D.N.Y. Mar. 13, 2020); Order for Continuance of Jury Trials and Exclusion of Time Under the Speedy Trial Act, Order No. 2020-06 (E.D.N.Y. March 16, 2020) (“Judges are strongly encouraged to conduct court proceedings by telephone or video conferencing where practicable[.]”); Order *in re* Court Operations Under The Exigent Circumstances Created By The Outbreak Of Coronavirus Disease 2019 (Covid-19): Cares Act Reauthorization to Use Video Conferencing or Telephone Conferencing, Case No. 2:20mc7 (E.D. Va. March 15, 2021)(reauthorizing use of virtual proceedings after 90 day issuance of General Order 2020-24 authorized use of cameras in the courtroom.).

⁷⁸ See, e.g. *Superior Court Frequently Asked Questions, Concerning Covid-19*, MASS.GOV, <https://www.mass.gov/info-details/superior-court-frequently-asked-questions-concerning-covid-19#criminal-faqs> (last updated July 12, 2021) (providing information related to Superior Court proceedings in civil matters during the pandemic. The courts are holding R. 16 conferences, final pre-trial conferences, status conferences, and hearings on non-evidentiary motions virtually. Bench trials and evidentiary hearings *may be* held in person.); Craig Clough, *LA Courts To Launch New Remote Appearance System*, LAW360 (June 2, 2020), <https://www.law360.com/articles/1279254/la-courts-to-launch-new-remote-appearance-system>; Thirty-sixth Emergency Order Regarding the Covid-19 State of Disaster, Misc. Docket No. 21-9026 at 2 (Tex. March 5, 2021) (“Courts should continue to use reasonable efforts to conduct proceedings remotely.”).

⁷⁹ State courts permit cameras in the court room and transmission of proceedings, including trials. Federal Rule of Civil Procedure 43 allows the court to take testimony virtually in a *trial* only “[f]or good cause in compelling circumstances and with appropriate safeguards.” “Taking Testimony. (a) In Open Court. At trial, the witnesses’ testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.” FED. R. CIV. P. 43. Federal Rule of Criminal Procedure 53 prohibits broadcasting of any proceeding in a criminal case. FED. R. CRIM. P. 53. Judicial Conference policy prohibits broadcasting, televising, or recording of most pretrial proceedings in civil cases. *History of Cameras in the Courts*, U.S. COURTS (last visited Oct. 19, 2021), <https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-courts>. “At its March 15, 2016 session, the Judicial Conference received the report of its Committee on Court Administration and Casement Management (CACM), which agreed not to recommend any changes to the Conference policy at that time. the Ninth Circuit Judicial Council, in cooperation with the Judicial Conference authorized the three districts in the Ninth Circuit that participated in the cameras pilot (California Northern, Washington Western, and Guam) to continue the pilot program under the same terms and conditions to provide longer term data and information to CACM. The following is the current policy for cameras in trial courts:

A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only:

- 1) for the presentation of evidence;
- 2) for the perpetuation of the record of the proceedings;
- 3) for security purposes;
- 4) for other purposes of judicial administration;
- 5) for the photographing, recording, or broadcasting of appellate arguments; or
- 6) in accordance with pilot programs approved by the Judicial Conference.

....

When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will:

- 1) be consistent with the rights of the parties,
- 2) not unduly distract participants in the proceeding, and
- 3) not otherwise interfere with the administration of justice.” *Id.*

⁸⁰ *In re Glumetza Antitrust Litigation*, 3:19-cv-05822, ECF No. 174 (N.D. Cal. Feb. 18, 2020) (J. Alsup sending a list of issues to be addressed at hearing on motion to dismiss in class actions regarding generic delay of Glumetza (metformin))

⁸¹ HON. NORMAN ST. GEORGE, J.S.C. DIST. ADMIN. J., 10TH JUDICIAL DIST.-NASSAU CTY, VIRTUAL BENCH TRIAL PROTOCOLS AND PROCEDURES, at 7-8 (<http://www.nycourts.gov/whatsnew/pdf/VirtualBenchTrial-Protocols-2112021.pdf>).

⁸² Dani Kass, *Lessons From 1st Attys To Argue At The Fed. Circ. By Phone*, LAW360 (Apr. 15, 2020), <https://www.law360.com/articles/1263101/print?section=appellate>.

⁸³ Jacey Fortin, *When Court Moves Online, Do Dress Codes Still Matter?*, NEW YORK TIMES (Apr. 15, 2020), <https://www.nytimes.com/2020/04/15/us/coronavirus-lawyers-court-telecommute-dress-code.html>. A version of this article appears in print on April 16, 2020, Section A, Page 11 of the New York edition with the headline: “You Still Have to Wear a Shirt and Get Out of Bed on Zoom Court, Judge Says.”; see *Looking Your Best During Remote Depositions*, ESQUIRE DEPOSITIONS SOLUTIONS (Nov. 10, 2020), <https://www.esquiresolutions.com/looking-your-best-during-remote-depositions/> (provides background on sartorial failures in remote court proceedings, and suggestions for apparel for virtual depositions.); Bob D'Angelo, *Coronavirus: Florida Judge Tells Lawyers, Clients to Dress Properly for Zoom Court Hearings*, KIRO 7 COX MEDIA GROUP (Apr. 15, 2020), <https://www.kiro7.com/news/trending/coronavirus-florida-judge-tells-lawyers-clients-dress-properly-zoom-court-hearings/B7WBYYQTJZBO5G6KLJ7GW3II7A/> (describing letter from Broward Circuit Judge Dennis Bailey to attorneys in Weston Bar Association on proper attire for virtual court proceedings. Casual shirts, blouses, ill grooming, videos from the bedroom showing the bed are not appropriate for court hearings, he wrote.).

⁸⁴ HON. NORMAN ST. GEORGE, J.S.C. DIST. ADMIN. J., 10TH JUDICIAL DIST.-NASSAU CTY, VIRTUAL BENCH TRIAL PROTOCOLS AND PROCEDURES, at 4, <http://www.nycourts.gov/whatsnew/pdf/VirtualBenchTrial-Protocols-2112021.pdf>. (“All participants shall recognize that a Virtual Bench Trial is a formal proceeding.”).

⁸⁵ D'Angelo, *supra* note 83 (describing letter from Broward Circuit Judge Dennis Bailey to attorneys in Weston Bar Association on proper attire for virtual court proceedings.).

⁸⁶ Daniel Victor, *“I’m Not a Cat,” Says Lawyer Having Zoom Difficulties*, NEW YORK TIMES (Feb.9, 2021), <https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html> (describing the difficulties of removing a cat filter on a Zoom hearing by attorney Ron Ponton at the 394th Judicial District Court, Presidio County, Texas).

⁸⁷ HON. NORMAN ST. GEORGE, J.S.C. DIST. ADMIN. J., 10TH JUDICIAL DIST.-NASSAU CTY, VIRTUAL BENCH TRIAL PROTOCOLS AND PROCEDURES, at 5 (<http://www.nycourts.gov/whatsnew/pdf/VirtualBenchTrial-Protocols-2112021.pdf>).

⁸⁸ *Virtual Disputes: Best Practices and Benefits*, BLG (May 4, 2020)

<https://www.blg.com/en/insights/2020/05/virtual-disputes-best-practices-and-benefits> (discussing security issues with virtual hearings in Canadian cases.).

⁸⁹ *Id.*

⁹⁰ A court should consider whether providing the press and others remote access to a virtual hearing is inconsistent with the Judicial Conference policy against broadcasting proceedings. See *supra* note 79.

⁹¹ *Courts Deliver Justice Virtually Amid Coronavirus Outbreak*, U.S. COURTS, (Apr. 8, 2020), <https://www.uscourts.gov/news/2020/04/08/courts-deliver-justice-virtually-amid-coronavirus-outbreak> (Courts are providing access to the public by providing call-in and video conferencing links from their websites.) (“It’s important that we maintain public access in these uncertain times. We’ve set up a separate muted conference line for our proceedings, so we can have the media and public listen in without fear of affecting the interactions between judges and litigants.” Clerk of Court Hanorah Tyer-Witek, of the District of Rhode Island.)

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