

Updates to Rule 23 of the Federal Rules of Civil Procedure

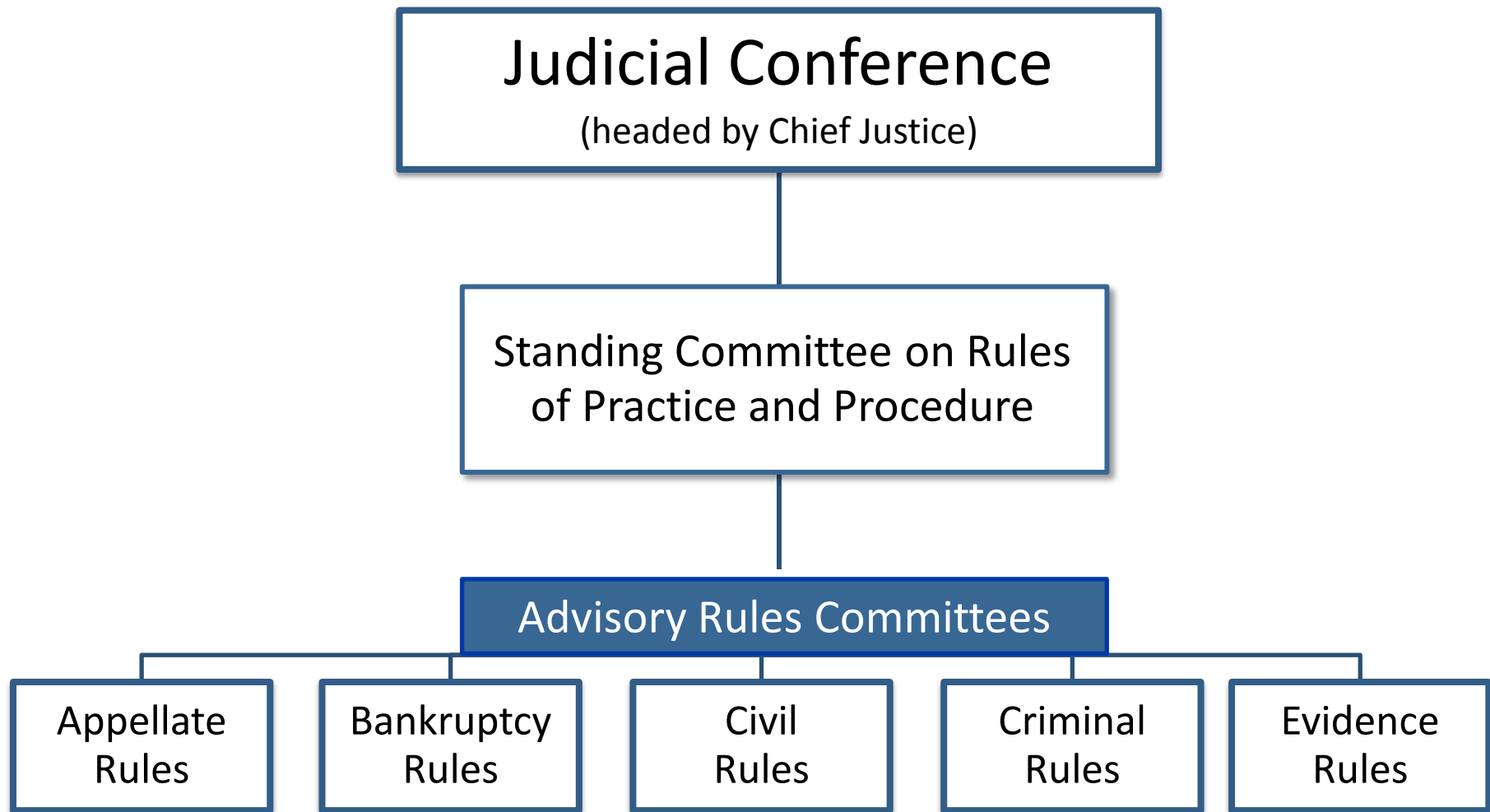
Joseph Laska
Sarah Gettings

April 9, 2019

- **How do the federal rules get updated anyway?**
- **FRCP 23: What didn't change this time?**
- **FRCP 23: What did change?**
 - Change #1: Incorporates technological advances for notices
 - Change #2: Provides new requirements for proposed class settlements
 - Change #3: Discourages vexatious objections to class settlements
 - Change #4: No longer allows appeals of orders directing notice of settlement
- **What does this mean for class actions in state court?**
- **N.D. Cal.'s comprehensive guidance. Trend?**

- **Healthcare organizations are prime targets for class actions.**
 - No. 1 target for data breach lawsuits
 - No. 3 target for TCPA lawsuits—despite TCPA exemption
- **Hot issues that have been – or will be – the subject of class actions:**
 - Mental health and substance abuse
 - Opioids
 - Excessive charges
 - Affordable Care Act
 - And so on

How do the rules get updated?



Step 1:

“Sketches” of potential amendments published, and “suggestions” accepted from the public.

Step 2:

The draft amendments published, with an official comment period and public hearings.

Step 3:

The revised amendments pass through the formal approval process.



Step 1: Initial Sketches and Public “Suggestions”

Initial “Sketches”:

1. “Frontloading” for settlement
2. Settlement approval criteria
3. Cy pres provisions
4. Objections to settlements
5. Class definition and ascertainability
6. Settlement class certification
7. Issue certification
8. Method of notice
9. “Pick-off” offers

A total of 29 “suggestions” were submitted by the public, and the Rule 23 Subcommittee held a “Mini-Conference.”

The Subcommittee decided which issues to pursue and presented to the Civil Rules Advisory Committee.

Early 2015

Sept. 11, 2015

Nov. 5, 2015

Initial “Sketches”	Committee’s Decision
1. “Frontloading” specifics of settlement	Proceed with rulemaking
2. Settlement approval criteria	Proceed with rulemaking
3. Cy pres provisions	Place on hold
4. Objections to settlements	Proceed with rulemaking
5. Class definition and ascertainability	Place on hold
6. Settlement class certification	Remove from current work
7. Issue class certification	Remove from current work
8. Methods of notice	Proceed with rulemaking
9. “Pick-off” offers to named plaintiffs	Place on hold

“Pick-off” Offers

- The committee was considering the same issue addressed by the Supreme Court in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016)
- That case had just been argued, so the committee put the topic on hold
- We don't expect further rulemaking on this issue anytime soon

Ascertainability

- Circuit split on ascertainability and the scope of the requirement continues to be developed in the lower courts
- Potential for Supreme Court guidance in the near future
- The committee decided to put this on hold to allow the caselaw to develop

Cy Pres Awards

- Proposals would require distributions to class members be maximized before any cy pres awards
- Rules are difficult to draft given state-by-state variability
- The committee decided to put this topic on hold

Step 2: Proposed Rules and Public Comment

The committee published the Preliminary Proposed Amendments:

- Distributed to the bench and bar (over 10,000 persons and organizations on the mailing list)
- Sent to points of contact within 53 state bar associations
- Public typically given 6 months to submit comments.

76 comments were submitted before the comment period closed.

Two public hearings:

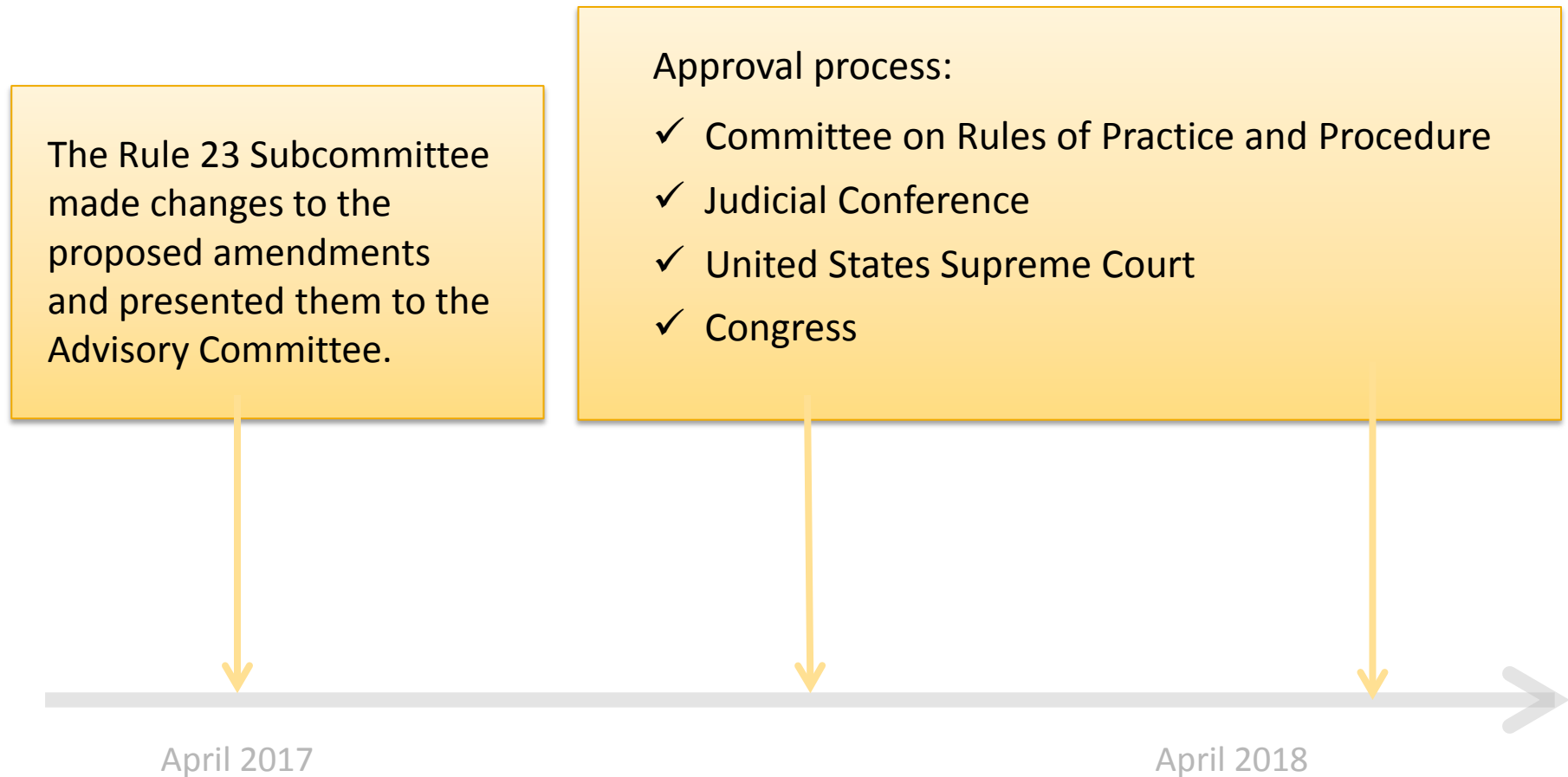
- November 3, 2016
- January 4, 2017

Aug. 2016

Feb. 15, 2017

Step 3: Final Changes and Approval

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What did change?

Change #1: Incorporating technological advances

- For 23(b)(3) classes, Rule 23 used to require that the court “direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”
- *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974): Interpreted as a requirement to give individual notice by U.S. mail
- The amendments recognized the need to modernize class notice

Change #1: Incorporating technological advances

- Rule 23 now authorizes notice by “one or more of the following:
 - United States mail,
 - electronic means,
 - or “other appropriate means.”
- What does this mean for healthcare entities?
 - State and federal privacy laws
 - May require two-step notice process (e.g., “HIPAA Part II”)
 - Scope of opt-ins

Change #1: Incorporating technological advances

- The HIPAA Privacy Rule allows covered entities to communicate electronically, such as through email, provided they take reasonable measures to protect PHI. *See* 45 C.F.R. § 164.530(c)
- Use of email to distribute settlement notices containing PHI would require individual analysis of consent language and security:
 - The most popular email services do not use encrypted email
 - The consent forms signed by consumers usually do not cover class action litigation

Change #2: Requirements for class settlements

- The amendments establish a more formalized process for presenting a proposed class settlement to the court
 - Procedures and standards for approving class settlement had been developed by courts over the years
 - Amended Rule 23 standardizes and streamlines the process for determining class settlement approvals
 - Now consistent across the United States

Change #2: Requirements for class settlements

- The Rule highlights several factors to consider:
 - the adequacy of the representation by class representatives and class counsel
 - whether the settlement was negotiated fairly and at arm's length
 - the adequacy of the relief provided to the class
 - whether class members were treated equitably relative to one another

Change #2: Requirements for class settlements

- The “adequacy of the relief provided to the class” has four sub-factors:
 - Costs, risks, and delay of trial and appeal
 - Effectiveness of notice and claims process
 - Terms and timing of fee award
 - Settlements with objectors
- Not an exhaustive list

Change #3: Reduces vexatious objections to settlements

- Bad faith objectors, known as “professional objectors,” are attorneys who file specious objections to extract a payoff
 - The new rules set a higher standard for objections and require more information
 - They also require any “payment in connection with an objection” to be disclosed and approved by the court
 - Meant to permit good faith objections while discouraging vexatious objections

Change #4: No more appeals of orders directing notice

- The amendments provide that no appeal may be taken from an order to provide notice of a proposed settlement
- What does this mean for healthcare entities?
 - If there is a dispute about notice—for example, if the court orders class notice creating burdensome privacy issues—there is no immediate right to appeal

What does this mean for state court?

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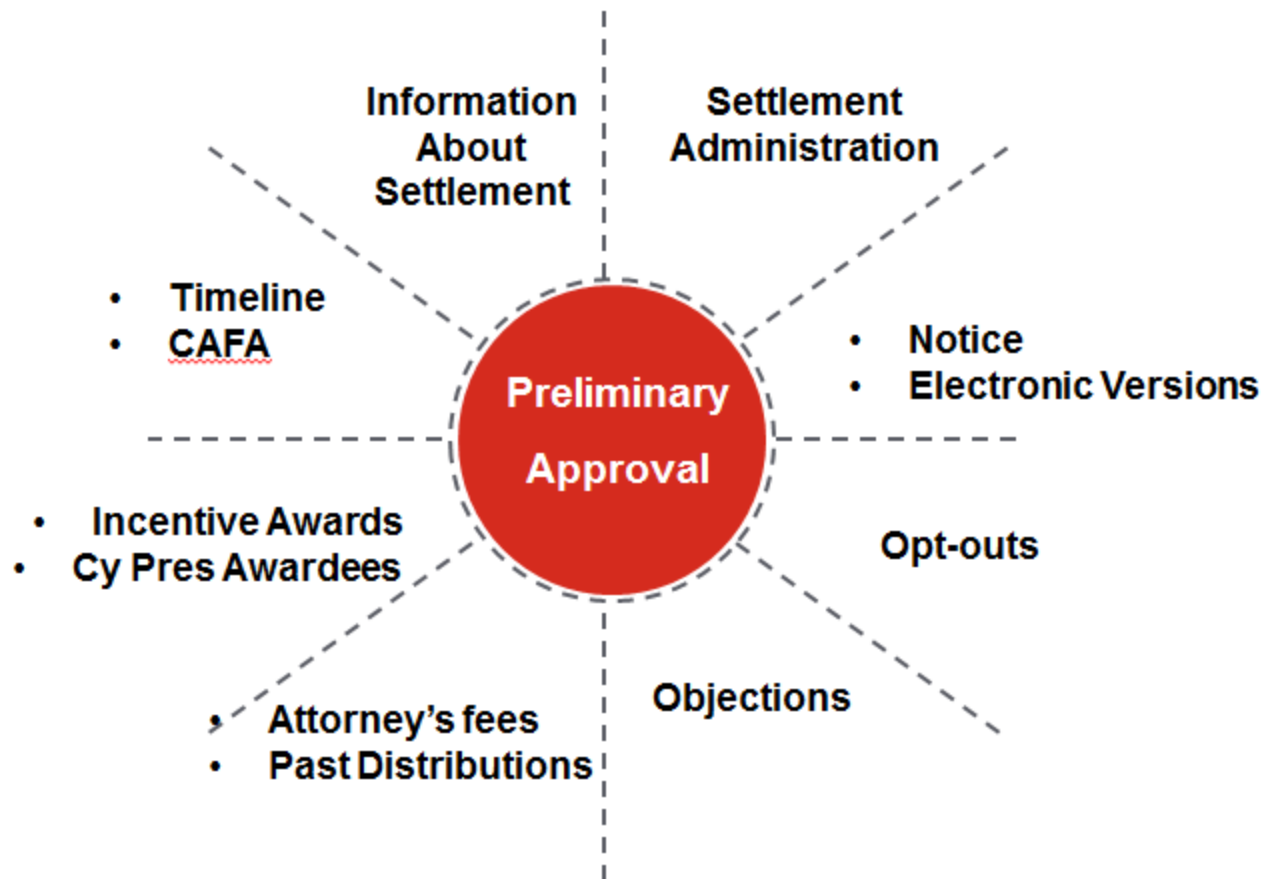
- Most states have class action procedures that are based on, if not identical to, Rule 23
- Other state courts are permitted to look to federal class action law in the absence of relevant state law precedent
 - For example, CA: “In the absence of relevant state precedent, trial courts are urged to follow the procedures set forth in rule 23 of the Federal Rules of Civil Procedure for conducting class actions.” *Capitol People First v. Dept. of Dev. Servs.*, 155 Cal. App. 4th 676, 692 (2007).
- Most likely to fill gaps in state law regarding:
 - Method of class notice
 - Class settlements

N.D. Cal.'s procedural guidance. Trend?

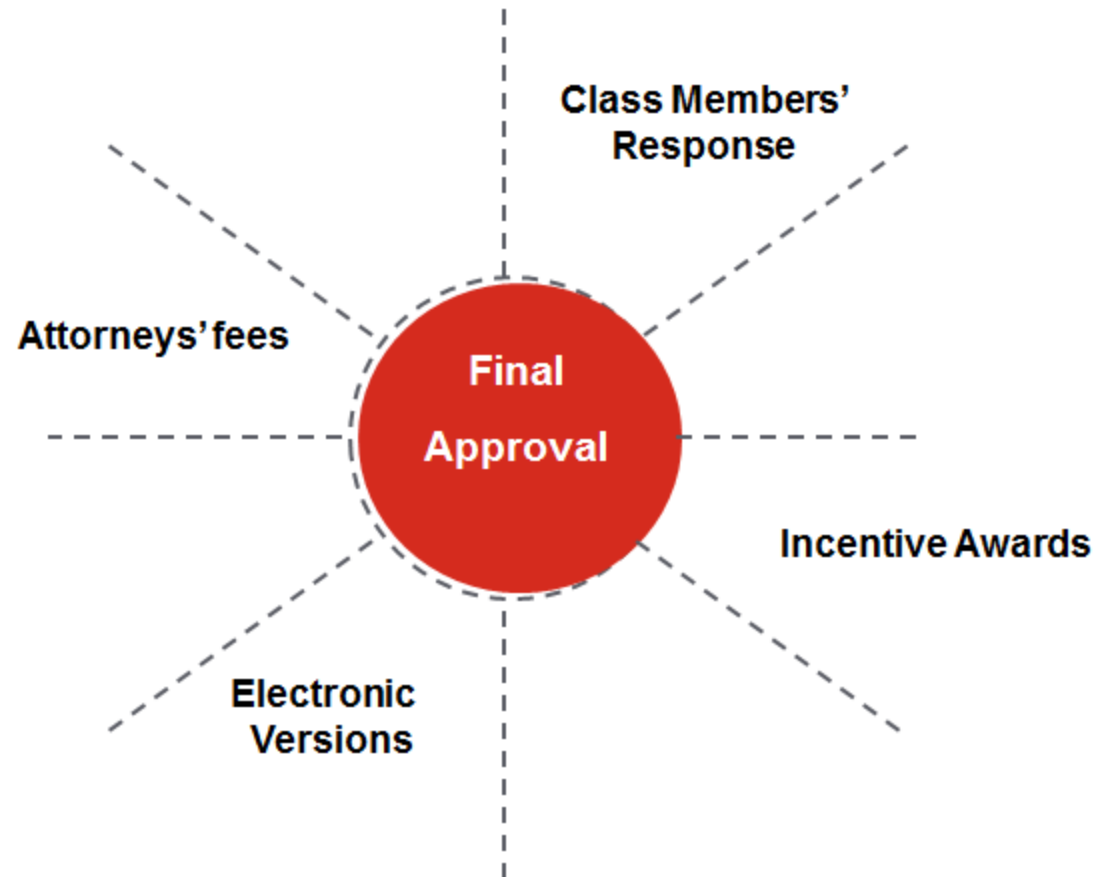
- The Northern District of California has issued its own comprehensive guidance for class action settlements (updated 12/5/18)
 - Accounts for changes to Rule 23
 - Gives additional guidance to assist parties in settlement negotiations and courts in approving settlements
 - If parties fail to comply with the guidance, the potential consequences include delay or denial of settlement approval

- Why should you care what the Northern District of California is doing?
 - N.D. Cal. is in the Ninth Circuit and includes San Francisco and Silicon Valley
 - Plaintiffs like to sue here—and they do it a lot
 - Tends to be a trendsetter, both in substance and procedure
 - The N.D. Cal. comprehensive guidance on class settlements appears to be the first of its kind
 - ◆ Other districts are likely to adopt it or refer to it

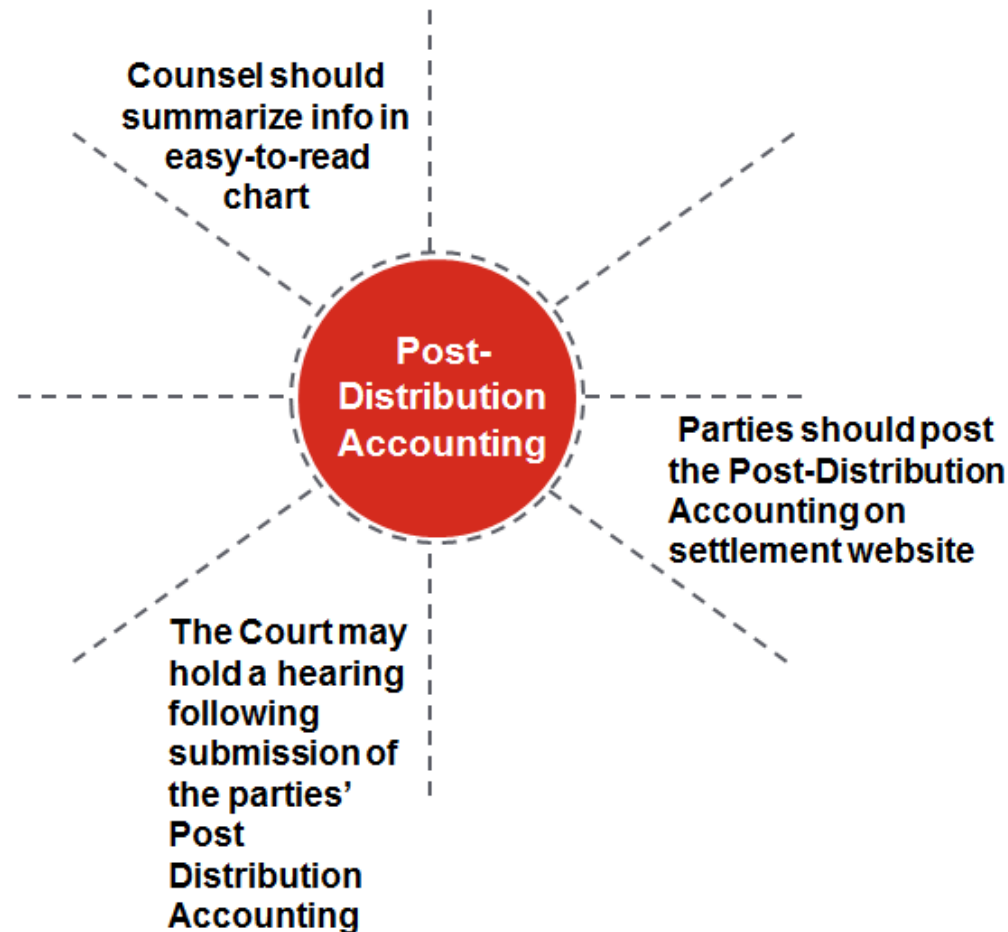
- Parties must provide a lot of information to gain preliminary approval



- ... and additional information for final approval ...

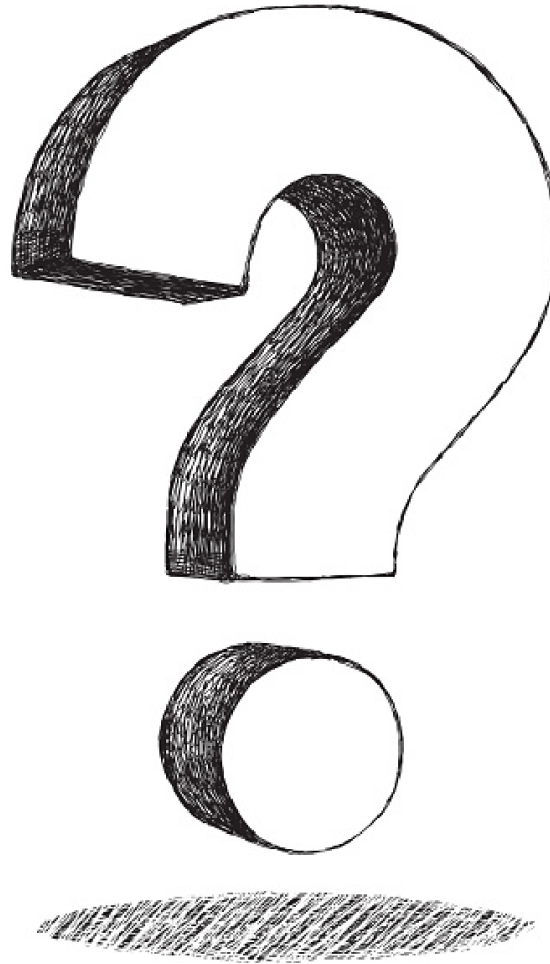


- ... plus a post-distribution accounting within 21 days after distribution of settlement funds and payment of attorneys' fees



- In line with, but more detailed than, the 2018 Amendments
 - Amended Rule 23 expands methods of notice
 - ◆ N.D. Cal. guidance (1) lists specific information that should be included in every notice, (2) even includes some proposed language, (3) requires counsel to consider different ways to increase notice, and (4) specifically mentions “social media” as a method of giving or increasing notice
 - Amended Rule 23 fleshes out procedures for approving class settlements and fee requests
 - ◆ N.D. Cal. guidance (1) specifically requires both preliminary and final approval, (2) requires detailed information justifying fee requests, and (3) requires lead class counsel to provide detailed information on “comparable class settlements”

- Impact on healthcare industry?
 - More scrutiny of proposed settlements by courts
 - ◆ Reduced ability to be creative
 - ◆ Potentially harder and more onerous to settle cases
 - New notice rules raise many potential privacy issues





Joseph Laska
Healthcare Litigation Partner
San Francisco, CA

415.291.7446

jlaska@manatt.com



Sarah Gettings
Healthcare Litigation Partner
Los Angeles, CA

310.312.4193

sgettings@manatt.com

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