SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Notice of Proposed Amendments to Superior Court Rules of Civil Procedure

The District of Columbia Superior Court Rules Committee recently completed review of proposed amendments to Superior Court Rules of Civil Procedure 5, 5-I, 23, 62, 62-I, and 65.1. The Rules Committee will recommend to the Superior Court Board of Judges that the amendments be approved unless, after consideration of comments from the Bar and the general public, the proposed amendments are withdrawn or modified.

Written comments must be submitted by June 14, 2019. Comments may be emailed as a PDF file to Laura.Wait@dcsc.gov or may be mailed to:

Laura M.L. Wait
Associate General Counsel
Superior Court of the District of Columbia
500 Indiana Avenue, N.W., Room 6715
Washington, D.C. 20001

All comments submitted in response to this notice will be available to the general public. New language is underlined and deleted language is stricken through.

Rule 5. Serving and Filing Pleadings and Other Papers

(a) SERVICE: WHEN REQUIRED.

(1) *In General*. Unless these rules provide otherwise, each of the following papers must be served on every party:

(A) an order stating that service is required;

(B) a pleading filed after the original complaint, unless the court orders otherwise;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper.

(2) *If a Party Fails to Appear*. A pleading that asserts a new claim for relief against a party in default must be served on that party under Rule 4.

(3) *Seizing Property*. If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an appearance, answer, or claim must be made on the person who had custody or possession of the property when it was seized.

(b) SERVICE: HOW MADE.

(1) *Serving an Attorney*. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) *Service in General*. A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address—in which event service is complete upon mailing;

(D) leaving it with the clerk's office if the person has no known address;

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means ~~as~~that are permitted or required by administrative order or that the person~~as~~ consented to in writing ~~by the person~~—in which event service is complete upon ~~transmission~~ filing or sending, but is not effective if the ~~serving party~~filer or sender learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing—in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) [Omitted].

(c) SERVING NUMEROUS DEFENDANTS.

(1) *In General*. If an action involves an unusually large numbers of defendants, the court may, on motion or on its own, order that:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) *Notifying Parties*. A copy of every such order must be served on the parties as the court directs.

(d) FILING.

(1) *Required Filings*. Any paper after the complaint that is required to be served, other than those referred to in Rule 12-I(d)(2) and (e), must be filed ~~within~~no later than 7 days after service. The following discovery requests and responses must not be filed except as provided in Rule 5(d)(2) or until they are used in the proceeding: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(2) *Discovery Requests and Responses*.

(A) *Without Leave of Court*. Discovery requests and responses may be filed, without leave of court, if they are appended to a motion or opposition to which they are relevant.

(B) *By Court Order*. If not appended to a motion or opposition under Rule 5(d)(2)(A), a party may only file discovery requests and responses by court order.

(C) *Retaining Discovery Papers*. The requesting party must retain the original discovery paper, and must also retain personally, or make arrangements for the reporter to retain, in their original and unaltered form, any deposition transcripts until the case is concluded in this court, the time for noting an appeal or petitioning for a writ of certiorari has expired, and any appeal or petition has been decided.

(D) *Certificate Regarding Discovery*. A "CERTIFICATE REGARDING DISCOVERY," setting forth all discovery that has occurred, must be filed with the court as an attachment to:

(i) any motion regarding discovery;

(ii) any opposition to a dispositive motion based on the need for discovery; and

(iii) any motion to extend scheduling order dates.

(3) ~~*How*~~ *Non-Electronic Filing* ~~*Is Made*~~. A paper not filed electronically is filed by delivering it:

(A) to the clerk's office; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk's office.

(4) *Chambers Copy Required for Non-Electronic Filing*. When a party files, by non-electronic means, a motion, papers related to the motion (e.g., an opposition, a memorandum of points and authorities, exhibits, or a proposed order), pretrial statements, or other papers described in Rule 16(d) and (e), the party must deliver a chambers copy to a depository designated by the clerk's office for receipt of such papers by the assigned judge.

(A) *Motions*. With the chambers copy of a motion, the moving party must provide:

(i) a proposed order; and

(ii) an addressed envelope or a mailing label for each counsel or unrepresented party to the case.

(B) *Oppositions*. With the chambers copy of an opposition, the filing party must provide a proposed order.

(C) *Filing by Mail*. If the original document was mailed, the chambers copy may be mailed to chambers. But no other papers should be delivered to the judge's chambers unless the assigned judge so orders.

(5) *How Electronic Filing Is Made*.

(A) *In General*. As permitted or required by statute, rule or administrative order, pleadings and filings may be electronically filed. ~~A paper filed electronically is a written paper for the purposes of these rules.~~ Electronic filing is complete on transmission, unless the filing party learns that the attempted transmission was undelivered or undeliverable.

(B) *Form of Electronically Filed Documents*.

(i) *Format*. All electronic filings must, to the extent practicable, be formatted in accordance with the applicable rules governing formatting of paper filings, and in any other format as the court may require.

(ii) *Signatures*. Every document filed electronically through the court's authorized eFiling system is deemed to have been signed by the attorney who made or authorized the filing. Each filing must have either "/s/" or a typographical or imaged signature on the signature line. Below the signature line, the filing attorney must list his or her typed name, address, telephone number, email address and Bar number.

(iii) *Self-Represented Parties*. If a self-represented party chooses to use the court's authorized eFiling system, the same format and signature requirements listed in Rule 5(d)(5)(B)(i) and (ii) apply to him or her except that no Bar number is required. A self-represented party will be responsible for the filing under Rule 11.

(C) *Maintenance of Original Document*. Unless the court orders otherwise, an original of all electronically filed documents, including original signatures, must be maintained by the filing party during the pendency of the case and through exhaustion of any appeals or appeal times, and the original documents must be made available, on reasonable notice, for inspection by other counsel or the court.

(D) *Service of Original Complaint and Related Documents*. After electronically filing the original complaint, a plaintiff is responsible for serving the defendant(s) in accordance with these rules. Proof of service must be filed electronically.

(E) *Electronic Filing and Service of Orders and Other Papers*. The court may issue, file, and serve notices, orders, and other documents electronically, subject to the provisions of these rules, statutes or administrative order.

(F) *Who Must Electronically File*. By statute, rule or administrative order, all attorneys representing parties may be required to electronically file.

(G) *Who May Electronically File*. By statute, rule or administrative order, any self-represented party, who has consented in writing, may electronically file and serve documents and may be electronically served, if such activities are provided for by the court's eFiling program.

(H) *Failure to Process Transmission*. If the electronic filing is not filed because of a failure to process it, through no fault of the filing party, the court must enter an order allowing the document to be filed nunc pro tunc to the date it was electronically filed, as long as the document is filed within 14 days of the attempted transmission.

(6) *Same as a Written Paper*. A paper filed electronically is a written paper for purposes of these rules.

(7~~6~~) *Exceptions to Electronic Filing*.

(A) *Documents Filed Under Seal*. A motion to file documents under seal must be electronically filed and served. But the documents to be filed under seal must be filed in paper form, unless a different procedure is required by statute, rule, the court, or administrative order. Documents filed under seal should be clearly marked as such by the filing party.

(B) *Exhibits and Real Objects*. Exhibits to declarations or other documents that are real objects (e.g., x-ray film or vehicle bumper) or which otherwise may not be comprehensibly viewed in an electronic format may be filed and served by non-electronic means, unless a different procedure is required by statute, rule, the court, or administrative order.

(C) *Chambers Copies*.

(i) Paper chambers copies of electronically filed documents exceeding 25 pages must be delivered to the clerk. Otherwise, unless specifically requested by the court or required by administrative order, paper chambers copies of electronically filed documents do not need to be delivered to the court.

(ii) When motions are served, unless otherwise provided by administrative order, a copy of the proposed order must be emailed to the judge's eService email address in a format that can be edited (i.e., a non-write protected format).

(e) PRIVACY REQUIREMENTS. Privacy requirements are set forth in Rule 5.2.

COMMENT TO 2019 AMENDMENTS

This rule incorporates many of the 2018 amendments to *Federal Rule of Civil Procedure 5*. The Superior Court rule already contained specific electronic filing provisions, but these were amended and reorganized to be more consistent with the newly-added federal electronic filing provisions. For instance, the provision declaring that "a paper filed electronically is a written paper for purposes of these rules" was moved from subsection (d)(5)(A) to new subsection (d)(6). The documents excepted from electronic filing were then moved to new subsection (d)(7). The federal amendments to proof of service provisions are addressed in Rule 5-I.

COMMENT TO OCTOBER 2017 AMENDMENTS

Consistent with the Federal Rules of Civil Procedure, the provisions regarding privacy requirements appear in new Rule 5.2.

COMMENT TO MARCH 2017 AMENDMENTS

Rule 5 differs substantially from *Federal Rule of Civil Procedure 5*, as amended in 2007.

Subsection (a)(1)(B) excludes language from the federal rule that permits courts to make exceptions to the requirement that every pleading subsequent to the original complaint be served on each of the parties when there is a large number of defendants. This omission allows the court to make such exceptions in all cases.

Subsection (a)(1)(E) omits the former reference to a designation of record on appeal. District of Columbia Court of Appeals Rule 10 is a self-contained provision for

the record on appeal, and it provides for service. This provision has also been deleted from the federal rule. Deleted from subsection (a)(2) is the provision that no service need be made upon parties in default for failure to appear. It is required, for example, that a copy of a Rule 55-II(a) motion and affidavit be sent to a defendant who is in default. If new or additional claims are asserted against parties in default, then such parties must be served in the manner provided in Rule 4.

Subsection (b)(3) is omitted from this rule because it is inapplicable. The Superior Court does not supply parties with facilities to transmit electronically filed documents.

Section (d) differs substantially from its federal counterpart. It includes a significant amount of Superior Court specific material. Subsection (d)(1) is different in the following ways: 1) the substitution of language that specifies the 7-day period within which papers must be filed with the court; 2) the omission of language requiring a certificate of service; 3) the addition of a provision excluding papers filed under Rule 12-I(d)(2) and (e) from the filing requirements of section (d); and 4) the modification of language, which states that the specified discovery requests and responses must not be filed except as provided in subsection (d)(2) or until they are used in the proceeding.

Subsection (d)(2) is unique to the Superior Court rule. It provides exceptions for filing discovery papers. Additionally, it provides rules for retaining discovery papers and submitting certificates regarding discovery.

Subsection (d)(3) is the same as subsection (d)(2) of the federal rule except that the title has been modified and the phrase “clerk’s office” is substituted for “clerk” throughout.

Subsection (d)(4) is unique to the Superior Court rule. It provides the rules for submitting chambers copies. Specifically, it requires that any party filing a motion, any paper related to a motion or a pretrial statement and other papers described in Rule 16(d) and (e), deliver a chambers copy of the motion or papers to judge assigned to the case via a designated depository at the courthouse. If the original paper has been mailed, the copy can likewise be mailed. Note, as to this matter, original papers should never, unless ordered otherwise, be filed with a judge.

Subsection (d)(5) replaces subsection (d)(3) of the federal rule. This subsection provides the specific rules for electronically filing documents in the Superior Court.

Subsection (d)(6) is unique to the Superior Court rule. It provides exceptions to the mandatory electronic filing rules in subsection (d)(5). Certain documents may be filed conventionally if they meet the requirements in this subsection.

Subsection (d)(4) of the federal rule is omitted in its entirety from Superior Court Rule 5.

COMMENT TO 2006 AMENDMENTS

This Rule expresses the Court's concern about access to, and dissemination of, private information in the Court's public records to the detriment of individuals whose privacy is compromised simply because their otherwise private information is contained in court filings. The risk of invasion of privacy is heightened where the court's public records are made available through the internet. Although the Rule does not expressly prohibit all use of personal identifiers and other private information, such as home addresses, it is the policy of the Court that parties not include home addresses and other private information in any court filings unless it is necessary to the matter being

litigated or is otherwise expressly required by statute or other Rules of the Court, such as, for example, Rules 16(a)(2), 10-I(b), and 4(l)(2).

COMMENT

Several changes are made to Federal Rule of Civil Procedure 5. Deleted from paragraph (a) is the provision that no service need be made upon parties in default for failure to appear. It is required, for example, that a copy of a Rule 55-II(a)(3) affidavit be sent to a defendant who is in default. If new or additional claims are asserted against parties in default, then such parties must be served in the manner provided in Rule 4. Unlike the federal rule which permits courts to make exceptions to the requirement that every pleading subsequent to the original complaint be served upon each of the parties because of the large number of defendants, the local rule would allow the Court to make such exceptions in all cases. Paragraph (d) specifies the time within which papers must be filed with the Court and provides that discovery papers or deposition transcripts shall not be filed unless relevant to a motion or opposition or authorized to be filed by order of the Court. Paragraph (e) requires that any party filing a motion, any paper related to a motion or a pretrial statement and other papers described in SCR Civil 16(d) and (e), deliver a chambers copy of such motion or papers to judge assigned to the case via a designated depository at the Courthouse. If the original paper has been mailed, the copy can likewise be mailed. Note, as to this matter, original papers should never, unless ordered otherwise, be filed with a judge.

Rule 5-I. Proof of Service

(a) IN GENERAL. Except as provided in Rule 5-I(b) or as otherwise provided by statute, ~~P~~proof of service ~~of~~for filings ~~required or permitted to be~~ served under Rule 5 ~~(other than those for which a method of proof is prescribed elsewhere in these rules or by statute) and proof that chambers copies have been supplied to the assigned judge as required by Rule 5(d),~~ must be filed before any other action is taken on that filing. The proof must show the date and manner of service on the parties and delivery to the judge, and may be made by:

(1) written acknowledgment;
(2) affidavit of the person making service or delivery;
(3) certificate of a member of the Bar of this court; or
(4) other proof satisfactory to the court.

(b) ELECTRONICALLY-FILED PAPER. No proof of service is required when a paper is served with the court's electronic-filing system.

(c~~b~~) FAILURE TO MAKE PROOF; AMENDING PROOF. Failure to make proof will not affect the validity of service. The court may at any time allow the proof to be amended or supplied, unless to do so would result in material prejudice to a party.

COMMENT TO 2019 AMENDMENTS

Consistent with the 2018 amendments to *Federal Rules of Civil Procedure 5*, this rule was amended to eliminate the proof of service requirement where a paper was served with the court's electronic-filing system.

COMMENT TO 2017 AMENDMENTS

Stylistic changes were made to this rule to conform with the 2007 amendments to the Federal Rules of Civil Procedure.

Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order*.

(A) *Time to Issue*. At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel*. An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order*. An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice*.

(A) *For (b)(1) or (b)(2) Classes*. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

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

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion by a specified date;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment*. Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues*. When appropriate, an action may be maintained as a class action with respect to particular issues.

(5) *Subclasses*. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General*. In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders*. An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

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

(1) *Notice to the Class.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) *New Opportunity to Be Excluded.* If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections*.

(A) *In General.* Any class member may object to the proposal if it requires court approval under Rule 23(e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

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

(i) forgoing or withdrawing an objection, or

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

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

(f) APPEALS. An appeal from an order of the Superior Court granting or denying class action certification under this rule may be permitted in accordance with D.C. Code § 11-721 (d) (2012 Repl.) and the District of Columbia Court of Appeals Rules.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In 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. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of Rule 23(h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

COMMENT TO 2019 AMENDMENTS

This rule incorporates the 2018 federal amendments to *Federal Rule of Civil Procedure 23*, but maintains the local distinction in section (f) addressing appeals.

COMMENT TO 2017 AMENDMENTS

This rule is identical to *Federal Rule of Civil Procedure 23*, as amended in 2007 and 2009, except that 1) language in subsection (c)(2)(B)(v) clarifies that there is a deadline for requesting exclusion from the class; and 2) in accordance with *Ford v. ChartOne*, 834 A.2d 875 (D.C. 2003), section (f) has been modified to indicate that the filing of an appeal is governed by D.C. Code § 11-721 (d) (2012 Repl.) and the appellate rules. The provisions allowing the court to shift the cost of notice, which were unique to the Superior Court rule, have been deleted.

If a class action is settled and residual funds remain after all identified members of the class have received their proper distribution, the court may turn to conventional principles of equity to resolve the case. Traditionally, there are four ways by which a court may distribute the residual funds: 1) *pro rata* distribution to the class members; 2) reversion to the defendant; 3) escheat to the government; and 4) *cy pres* distribution. *See, e.g.*, *Powell v. Georgia-Pacific Corp.*, 119 F.3d 703, 706 (8th Cir. 1997). It is generally understood that "neither party has a legal right to the unclaimed funds." *Id. See also Diamond Chem. Co. v. Akzo Nobel Chems. B.V.*, 517 F. Supp. 2d 212, 217 (D.D.C. 2007). When determining which method of distribution is most appropriate, the court's choice "should be guided by the objectives of the underlying statute and the interests of the silent class members." *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1307 (9th Cir. 1990).

In the case of a *cy pres* distribution of the residual funds, the court should first consider whether the funds can be distributed in a manner that is closely related to the original purpose. *See Superior Beverage Co. v. Owens-Illinois, Inc.*, 827 F. Supp. 477, 477-80 (N.D. Ill. 1993). If no such distribution is possible, the court may use its equitable powers to consider "other public interest purposes by educational, charitable, and other public service organizations," including "charitable donations . . . to support non-profit provision of pro bono legal services." *Jones v. Nat'l Distillers*, 56 F. Supp. 2d 355, 359 (S.D.N.Y. 1999) (citing *Superior Beverage Co.*, 827 F. Supp. at 478-79) (internal quotation marks omitted). The court may solicit applications for *cy pres* grants by public notice and, if necessary, hold hearings to give the applicants a chance to be heard. Alternatively, the court may allocate some or all of the residual funds to an organization such as the D.C. Bar Foundation or other local bar associations that have already implemented procedures for the distribution of funds to public service organizations.

COMMENT

Rule 23 is identical to Federal Rule of Civil Procedure 23 except for certain changes in subsections (c)(1) and (c)(2) which specifically authorize the judge to shift the costs of notice to the defendant, in whole or in part, under limited circumstances. In order to make this determination relating to costs of notice, the judge is further authorized to conduct a hearing, pursuant to Rule 23-I(c)(3), at which all relevant factors, including the likelihood of success on the merits, can be considered. The amendment, while essentially retaining the previous Superior Court procedure, was made necessary by *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) which held that under the language of Fed. R. Civ. P. 23, the costs of notice could not be shifted to the defendant, except perhaps in cases involving a fiduciary, and, the Court could not make a preliminary determination of the merits of a case. The specific changes are the deletion of the phrase, “As soon as practicable ...” in the 1st sentence of subsection (c)(1) and the addition of the last sentence in subsection (c)(2).

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) AUTOMATIC STAY~~; EXCEPTIONS FOR INJUNCTIONS AND RECEIVERSHIPS~~. Except as ~~stated in this rule~~provided in Rule 62(c) and (d), ~~no~~ execution ~~may issue~~ on a judgment~~, nor may~~ and proceedings ~~be taken~~ to enforce it~~, until 14 days have passed~~ are stayed for 30 days after its entry~~. But~~ unless the court orders otherwise~~, an interlocutory or final judgment in an action for an injunction or a receivership is not stayed after being entered, even if an appeal is taken~~.

~~(b) STAY PENDING THE DISPOSITION OF A MOTION. On appropriate terms for the opposing party's security, the court may stay the execution of a judgment—or any proceedings to enforce it—pending the disposition of any of the following motions:~~

~~(1) under Rule 50, for judgment as a matter of law;~~

~~(2) under Rule 52(b), to amend the findings or for additional findings;~~

~~(3) under Rule 59, for a new trial or to alter or amend a judgment; or~~

~~(4) under Rule 60, for relief from a judgment or order.~~

(b) STAY BY BOND OR OTHER SECURITY. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

(c) STAY OF AN INJUNCTION OR RECEIVERSHIP. Unless the court orders otherwise, an interlocutory or final judgment in an action for an injunction or receivership is not stayed after being entered, even if an appeal is taken.

(d~~c~~) INJUNCTION PENDING AN APPEAL. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or ~~denies~~refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

~~(d) STAY WITH BOND ON APPEAL. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a). The bond may be given on or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.~~

(e) STAY WITHOUT BOND ON AN APPEAL BY THE UNITED STATES, THE DISTRICT OF COLUMBIA, OR AN OFFICER OR AGENCY OF EITHER. The court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, the District of Columbia, or an officer or agency of either or on an appeal directed by a department of either.

(f) [Deleted].

(g) APPELLATE COURT'S POWER NOT LIMITED. This rule does not limit the power of the appellate court or one of its judges or justices:

(1) to stay proceedings—or suspend, modify, restore, or grant an injunction—while an appeal is pending; or

(2) to issue an order to preserve the status quo or the effectiveness of the judgment to be entered.

(h) STAY WITH MULTIPLE CLAIMS OR PARTIES. A court may stay the enforcement of a final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and may prescribe terms necessary to secure the benefit of the stayed judgment for the party in whose favor it was entered.

COMMENT TO 2019 AMENDMENTS

This rule was amended and reorganized consistent with the 2018 federal amendments to *Federal Rule of Civil Procedure 62*. The period of the automatic stay was extended to 30 days, eliminating the gap between the automatic stay and the 28-day time period for filing one of the motions previously listed in section (b). While the term "supersedeas" has been eliminated from the rules, the concept remains in section (b).

COMMENT TO 2017 AMENDMENTS

This rule is substantially similar to *Federal Rule of Civil Procedure 62*, as amended in 2007 and 2009, but maintains the following local distinctions: 1) the addition of the District of Columbia to section (e), which exempts the government from the requirement of posting security to stay enforcement of a judgment on appeal; and 2) the deletion of inapplicable references to patent accountings, three judge District Court panels, and state law on stay of judgments in sections (a), (c) and (f) of the federal rule, respectively.

Rule 62-I. [Deleted].~~Supersedeas Bond~~

~~(a) IN GENERAL.~~

~~(1) *Court Approval*. An appellant who is entitled to a stay on appeal may present a supersedeas bond or undertaking to the court for its approval.~~

~~(2) *Requirements*. The bond or undertaking must:~~

~~(A) have a surety or sureties if the court so requires; and~~

~~(B) be conditioned to satisfy the judgment in full, together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full any modification of the judgment and the costs, interest, and damages awarded by the appellate court, if any.~~

~~(3) *Value of Bond or Undertaking*.~~

~~(A) *Unsecured Monetary Judgments*. When the judgment is for the recovery of money not otherwise secured, the amount of the bond or undertaking will be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond.~~

~~(B) *Judgments Determining the Disposition of Property in Controversy*. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of the property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond or undertaking must be fixed at a sum that will secure but not exceed the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay.~~

~~When the defendant in an action to recover possession of real estate seeks review, the undertaking must also provide for the payment of all intervening damages to the property sought to be recovered and compensation for its use and occupation from the date of the judgment to the date of the satisfaction if the judgment is not reversed.~~

~~(4) *Supplementing a Bond or Undertaking*. Unless the court orders otherwise, when the appellant has already filed, in the trial court, security that was intended to include adequate security in the event of an appeal, a separate supersedeas bond need not be given, except for the difference in amount, if any.~~

~~(b) EVIDENCE OF FINANCIAL ABILITY. Before the court approves any bond or undertaking, the party offering the bond or undertaking must furnish to the court any evidence establishing the financial ability of the surety or sureties to discharge the financial obligations of the bond as might be required by the court.~~

COMMENT TO 2019 AMENDMENTS

Rule 62-I, which allowed an appellant who is entitled to a stay on appeal to present a supersedeas bond or undertaking to the court for its approval, was deleted as unnecessary. Rule 62 comprehensively addresses the procedure concerning bonds or other security when a party seeks a stay pending appeal.

The deletion of Rule 62-I does not affect the substantive standards applied by the court to ensure that security pending appeal adequately protects the appellee if the

appeal is dismissed or the judgment is affirmed. For example, Rule 62-I(a)(3)(A) provided, "When the judgment is for the recovery of money not otherwise secured, the amount of the bond or undertaking will be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond." Although this provision is deleted, the court still retains authority to require security that will cover the whole amount of a judgment for the recovery of money not otherwise secured and damages for delay, or to fix a different amount for good cause show. Likewise, the deletion of Rule 62-I(b) does not affect the appellant's obligation to demonstrate that the security provider has the financial ability to discharge its obligations.

COMMENT TO 2017 AMENDMENTS

Stylistic changes were made to this rule to conform with the 2007 amendments to the Federal Rules of Civil Procedure.

COMMENT

This Rule contemplates that although the party securing the bond must make diligent efforts to provide adequate security, the ultimate burden is on prevailing parties to assure themselves that the surety is solvent and to bring any issues to the Court's attention.

Rule 65.1. Proceedings Against a Security~~urety~~ Provider

Whenever these rules require or allow a party to give security, and security is given ~~through a bond or other undertaking~~ with one or more security~~ureties~~ providers, each provider~~urety~~ submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the ~~bond or undertaking~~security. The ~~surety~~security provider's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly ~~mail~~send a copy of each to every ~~surety~~security provider whose address is known.

COMMENT TO 2019 AMENDMENTS

This rule was amended consistent with the 2018 amendments to *Federal Rule of Civil Procedure 65.1*. It reflects the amendments to Rule 62, which permits stay of a judgment "by a bond or other security."

COMMENT TO 2017 AMENDMENTS

This rule is identical to *Federal Rule of Civil Procedure 65.1*, as amended in 2007, except that it maintains one local distinction—the omission of a reference to the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

COMMENT

Identical to *Federal Rule of Civil Procedure 65.1* except for the deletion therefrom of the inapplicable reference to Supplemental Rules for Admiralty Cases in the federal District Courts.