

# **Notice of Proposed Dismissal MEMORANDUM**

## **SCOPE OF MEMORADUM**

FRCP 23(e) is the rule requiring notice be given to the class membership upon dismissal or compromise of a class action. The four basic requirements for notice under Rule 23(e) are that the class membership be notified: (1) of the nature of the pending litigation, (2) of the settlement=s general terms, (3) that complete information is available from the court files, and (4) that any class member may appear and be heard at the fairness hearing. In addition, the notice should be given in reasonable amount of time before the fairness hearing and the notice should be understandable to the lay person.

## **SUMMARY OF THE NOTICE LAW**

Federal Rule of Civil Procedure 23(e) states that AA class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." This rule protects individual class member interests by informing them when those interests may be compromised in a proposed settlement, so as to allow them an opportunity to voice their objections. Trial judges are required to "provide notice of a proposed settlement to the class and extend to any objectors an opportunity to voice their objections before the settlement is approved" so that the trial court may A>examine the settlement in light of objections raised and set forth on the record a reasoned response to the objections including findings of fact and conclusions of law necessary to support the response."

Courts assess the adequacy of notice by considering the "notices mode of dissemination" and the content of the notice, with the courts= discretion being limited only by the Abroad reasonableness standards imposed by due process." In terms of the

"mode of dissemination," the standard is "best practicable" instead of "actually received" notice. The notice should be brief, understandable, and not "couched in legalese." To satisfy both due process requirements and Rule 23(e) requirements, the notice should be reasonably structured in a way that informs the "interested parties of the of the pendency of the settlement proposed and to afford them an opportunity to present their objections."

### **CONTENT OF NOTICE**

Notices should appear on court stationery so as to maintain neutrality in the communication. There are seven basic elements contained in the notice: (1) Heading; (2) Description of the litigation, including allegations of the complaint and a summary of the proceeding that preceded the settlement; (3) Summary of the proposed settlement; (4) Requested allowance for attorney=s fees; (5) Procedure for filing proof of claim; (6) Procedure for filing appearances and objections; and (7) Procedure for inspecting and obtaining documents related to the settlement and the entire litigation.

### **HEADING**

The heading should contain the case caption, description of the affected class members, the date of the fairness hearing, and the purpose of the fairness hearing. The heading should be structured so that an individual reader is easily informed that the notice is of particular importance to him or her, especially if it is a published notice.

### **DESCRIPTION OF THE LITIGATION**

The description of the litigation should briefly describe the following: a summary of the general allegations in the complaint, the requested relief, a list of the cases or docket numbers if the action has been consolidated, a summary of the proceedings before the settlement, a general description of the defendants if multiple defendants are involved, a description of the class or subclasses involved, and a list of the named plaintiffs representing the subclasses. The complexity of the litigation will affect the length

and detail of the summary.

### **SUMMARY OF PROPOSED SETTLEMENT**

The three basic elements normally composing a settlement summary are a statement of the settlement consideration to be paid, the distribution formula for the settlement fund, and the formula and method for attorneys' fees and expenses. However, as this case does not involve payment that will be made to individual class members, but instead, delivery of services and systemic reform, a summary of the settlement terms and how those services will now be offered to class members ought to be provided instead. It not necessary to specify precisely how each individual class member will be individually affected.

### **REQUESTED ATTORNEYS' Fees**

The notice should inform class members of the fees and expenses that will be sought and potentially awarded by the court and who will bear such costs. Some notices have included more specific information such as the names of the attorneys, the exact amount sought, percentage of the settlement fund it will comprise, and the method of payment. However, the notice should include a caveat stating that the court may not award the amount requested.

### **PROOF OF CLAIM**

The procedure for filing a proof of claim is generally within the discretion of the court. However, this does not appear to be at issue in this case because the individual class members are not receiving a monetary award.

### **OBJECTION PROCEDURE**

The notice must inform class members that they may appear and be heard at the fairness hearing. Settlement notices generally include a mandatory procedure for how objectors can voice their complaints. Generally, this procedure will include requiring objectors to submit their written objections to the court and to serve them on counsel for both parties or, the notice may require that notice of an objector's intention to appear at the hearing and submission of written objections be directed to the court clerk.

### **INSPECTION OF DOCUMENTS**

Because Aclass members are not expected to rely upon notices as a complete source of settlement information,@ it is required that class members be notified of their right to inspect the complete court file and complete settlement agreement. Rule 23(e) notice generally allows class members to inspect and make copies of papers and pleadings in the litigation at the district court house where the action has been filed. Some settlement notices allow the class members to obtain copies of the settlement agreement by mailing a request to the class counsel and other notices allow class members to obtain documents from both plaintiff and defendant counsel in addition to the court.

### **MEANS OF NOTICE**

Due process does not require actual notice, but instead, a good faith effort to provide notice. Mail and newspaper notice are considered acceptable means to distributing notice. In addition, the notice should be given in an adequate amount of time prior to the fairness hearing so class members may have sufficient time to respond to the settlement agreement in the event they are opposed to it. There is no rule-prescribed amount for what constitutes adequate time between the mailing of notices and the fairness hearing. However, courts have approved notices that were given as few as four weeks, 24 days, or 19 days in advance.

### **DESCRIPTION OF METHOD FOR ASSURING SUFFICIENCY AND ADEQUACY OF DISTRIBUTION OF NOTICE**

To assure the most sufficient and adequate distribution of notice of the proposed Settlement Agreement, the parties plan to jointly accomplish the following:

- 1 By March 1, a list of consumers, consumer organizations, and interested parties will be compiled from various sources, including the Office of Consumer and Ex-patient Relations of the Alabama Department of Mental Health and Mental Retardation and the Alabama Disabilities Advocacy Program. A letter will be sent to

each of the referenced people or organizations advising them of the proposed Settlement Agreement, and advising them how they may obtain a copy of the Settlement Agreement if they desire a copy.

- 2 By March 1, plaintiffs and defendants will jointly write to all known members of the plaintiff class. The letter will advise plaintiffs of the proposed Settlement Agreement, notify plaintiffs in defendants' facilities that they may view copies of the Settlement Agreement in the offices of facility Directors and Advocates, and advise plaintiffs how they may obtain a copy of the Settlement Agreement if they desire a copy. The notice will describe the status of the case, class members' rights, how to contact plaintiffs' counsel, and how to obtain other assistance. Defendants will bear the costs of printing and distributing the notice to all class members.
- 3 By March 1, the defendants will post notices of the proposed Settlement Agreement in all of their facilities. The notice will be prepared jointly by plaintiffs and defendants. The notice will advise plaintiffs of the proposed Settlement Agreement, notify plaintiffs in defendants' facilities that they may view copies of the Settlement Agreement in the offices of facility Directors and Advocates, and advise plaintiffs how they may obtain a copy of the Settlement Agreement if they desire a copy. The notice will be posted in each living area of each of defendants' facilities. Defendants will bear the costs of printing and distributing the notice to all class members.
- 4 The defendants will support and facilitate the efforts of plaintiffs' counsel to have group meetings with institutional residents at defendants' facilities. Such meetings shall occur on or before April 3. Plaintiffs may also invite next-of-kin, guardians, and responsible

parties to such meetings. Staff may be present at such meetings only with the permission of plaintiffs' counsel. Residents on one-on-one supervision will not be permitted to attend such meetings unless accompanied by a staff person. Plaintiffs and defendants will mutually arrange the time(s) and places(s) of such meetings.

- 5 Plaintiffs and defendants will work together to attempt to work out with community providers means by which plaintiffs' counsel may communicate with class members in the community.
- 6 On or before April 3, the Notice of Proposed Entry of Settlement Agreement shall be published in a newspaper of general circulation in each of the following cities: Birmingham, Montgomery, Tuscaloosa, Mobile, Huntsville, Decatur and Thomasville.
- 7 ADAP and the defendants will post the Notice of Proposed Entry of Settlement Agreement and a copy of the Settlement Agreement on their respective web-sites as soon as practicable.
- 8 James Tucker and Kathy Sawyer, representing plaintiffs and defendants respectively, have already met with the Council of Community Mental Health Center directors on February 3 and in a publicly advertised meeting sponsored by the Mental Health Consumers of Alabama on **February 12**. Both meetings occurred in Montgomery.

In addition, Tucker and Sawyer plan, at a minimum, the following joint appearances:

Decatur, Lurleen Wallace, March 8;

Tuscaloosa, Bryce, March 9;

Birmingham, Jefferson-Blount-St. Clair Mental Health Authority, March 15;

Montgomery, Tarwater, March 16; and

Mobile, Brewer, March 22.

All meetings will occur at 6:30 in the evening and the public will be invited, including especially guardians, next-of-kin and stakeholders.