

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Misc. No. 06-20

IN RE: RULES OF PRACTICE AND PROCEDURE

ORDER

Pursuant to the authority of 38 U.S.C. § 7264(a) and consistent with 28 U.S.C. § 2071(b), the Court has proposed adding Rule 22 (FILING A REQUEST FOR CLASS CERTIFICATION AND CLASS ACTION (RCA)) and Rule 23 (ACTION ON A REQUEST FOR CLASS CERTIFICATION AND CLASS ACTION) to its Rules of Practice and Procedure (Rules). In addition, the Court has determined that Rule 15 (INTERVENTION) of its Rules should be revised by adding a provision regarding class actions. The proposed revisions were developed in collaboration with the Court's Rules Advisory Committee.

Accordingly, it is

ORDERED that the attached proposed revisions to the Court's Rules are hereby published for public comment for a period of 45 days. Comments must be submitted to the Clerk of the Court by February 27, 2020, at comments@uscourts.cavc.gov or to 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004.

DATED: January 13, 2020

FOR THE COURT:

/s/Gregory O. Block
GREGORY O. BLOCK
Clerk of the Court

Attachments:
Proposed Revised Rules

PROPOSED U.S. Vet. App. Rule 22. Filing a Request for Class Certification and Class Action (RCA)

(a) Relief from the Court on a class action basis may only be sought by represented parties in an action commenced by the filing of (1) a Notice of Appeal or (2) a petition under the All Writs Act. A party seeking relief on a class wide basis must file a **Request for Class Certification and Class Action (RCA)** with the Clerk with proof of service on the respondent(s), the Secretary (if not a respondent), and any other party in interest. The RCA shall:

- (1) define the class on whose behalf the RCA is filed;
- (2) address with specificity and detail each of the factors in Rule 23(a);
- (3) explain the reasons why a decision granting relief on a class action basis would serve the interests of justice to a greater degree than would a precedential decision granting relief on a non-class action basis;
- (4) address each of the factors in Rule 23(f)(1)(A);
- (5) state the precise relief sought on behalf of the class, the reasons why such relief should be granted, and the legal authorities that support the requested relief;
- (6) state the facts, if any, (i) that are relevant to the question whether class certification is warranted or the question whether injunctive or corresponding relief is appropriate respecting the class as a whole; (ii) that are not known to the party seeking relief on a class action basis; and (iii) as to which the Secretary has exclusive knowledge and control; and
- (7) include an appendix containing copies of documents necessary to understand and support the RCA.

(b) Time for Filing RCA. An RCA may only be filed in the context of an appeal of a final decision of the Board of Veterans' Appeals or a petition for extraordinary relief. The RCA must be filed with the Clerk concurrent with, or within 90 days after, the filing of the Notice of Appeal or petition.

(c) Form and Length. Except by permission of the Court, an RCA may not exceed 30 pages and must comply with the form requirements in Rule 32 (Form of Brief, Appendices, and Other Documents) for principal briefs.

(d) Docketing. Upon receipt of an RCA, the Clerk will (1) note the request on the docket of the underlying appeal or petition and (2) docket the RCA as a separate action on the pending RCA docket with a new docket number and send notice to all parties. Action on the two dockets may proceed separately and independently, to include separate entry of judgment and mandate. If class certification is denied, the Court may order unresolved issues concerning the underlying appeal or petition to be transferred to the original docket or maintain the matter on the pending RCA docket.

(e) Payment of Fees. A \$400 nonrefundable filing fee, payable to "U.S. Court of Appeals for Veterans Claims," shall be submitted with an RCA or received by the Court not later than 14 days after the filing of the RCA. The requirements of Rule 24 (Waiver of Filing Fee) apply to RCAs filed under this Rule.

(f) Public Notice. Upon receipt of an RCA, the Clerk shall:

(1) place a notice on the home page of the Court's website providing a link to the pending RCA docket; and

(2) provide notice of each RCA filed at the Court to those organizations, law firms, attorneys, and agents who have informed the Court that they wish to be notified of the filing of such RCAs in a manner determined by the Clerk.

Practitioner's Note: Filing an RCA under this Rule does not automatically stay proceedings in any pending appeal or petition.

PROPOSED U.S. Vet. App. Rule 23. Action on a Request for Class Certification and Class Action

(a) Prerequisites. One or more members of a class may submit an RCA as representative parties on behalf of all members only if:

- (1) the class is so numerous that consolidating individual actions in the Court is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the legal issue or issues being raised by the representative parties on the merits are typical of the legal issues that could be raised by the class;
- (4) the representative parties will fairly and adequately protect the interests of the class; and
- (5) the Secretary or one or more officials(s), agent(s), or employee(s) of the Department of Veterans Affairs has acted or refused to act on grounds that apply generally to the class, so that final injunctive or other appropriate relief is appropriate respecting the class as a whole.

(b) Processing the RCA

(1) *Action on the RCA* –

(A) If the RCA lacks sufficient specificity and detail, the Court may order the proponent to provide sufficient specificity and detailed information within a fixed period of time.

(B) A proponent may amend the RCA once as a matter of course within 21 days after serving it, and otherwise only with the Court's leave. The Court should freely give leave when justice so requires.

(2) *Response* –

(A) Unless the Court determines that the RCA should be dismissed or denied without a response from the respondent, the Court will order the respondent to serve and file a response to the RCA within a fixed period of time, not to exceed 90 days. In the response, the respondent shall include:

(i) a statement as to whether the respondent opposes class certification and, if so, the reasons for that opposition addressing with specificity the issues raised in the RCA;

(ii) if the Secretary does not concede numerosity, the Secretary's reasons for such opposition and a statement of the actual or estimated number of putative class members, if feasible, or an explanation as to why the number of putative class members cannot be determined or estimated; and

(iii) a statement of the facts necessary to respond to allegations in the RCA that the respondent has acted or failed to act with respect to the putative class and, if ordered by the Court, an appendix containing documents that evidence the foregoing facts.

(3) Form and Length. Except by permission of the Court, the response may not exceed 30 pages and must comply with the form requirements in Rule 32 (Form of Brief, Appendices, and Other Documents) for principal briefs.

(c) Certification Order; Notice to Class Members; Judgment; Issue Classes; Subclasses.

(1) *Certification Order.*

(A) *Action by the Court.* At an early practicable time after the RCA and response, if ordered, have been filed, the Court will determine by order whether to certify the action as a class action. An order denying certification of a class is a dispositive order triggering judgment and mandate in the RCA matter in accordance with Rules 35, 36, and 41.

(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(f). An order certifying a class may serve only to commence the class action proceeding and direct further action of the parties or may address all relief sought and conclude Court action on the RCA.

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

(2) *Notice to Class Members.* For any class certified under this Rule, the Court need not, but may, direct notice to the class.

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must include and describe those whom the Court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or 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) Managing the Action.

(1) *In General.* In managing the litigation of a class action proceeding under this Rule, the Court may issue all orders that it deems necessary and proper.

(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 33.

(e) Settlement, Voluntary Dismissal, or Compromise. Once a class is certified, the claims, issues, or defenses of a certified class 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) The Court must direct notice in a reasonable manner to all class members who would be bound by the proposal.

(2) If the proposal would bind class members, the Court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

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

(4) Any class member may object to the proposal if it requires Court approval under this subdivision (e); the objection may be withdrawn only with the Court's approval.

(f) Class Counsel.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, the Court 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(g); 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(f)(1) and (4). If more than one adequate applicant seeks appointment, the panel 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.

(5) *Limitation on Role of Class Counsel.*

(A) The role of class counsel is to act as lead counsel on all issues related to the class proceedings before the Court.

(B) Representation of class members before the agency is a matter between class counsel and class members.

(g) 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. A claim for an award must be made by application under Rule 39, subject to the provisions of this subdivision (g), at a time the Court sets. Notice of the application must be served on all parties.

Amendment/addition to:

Rule 15. Intervention

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(e) In Class Actions. A potential intervenor in a Rule 23 class action shall submit for filing with the Clerk a motion for permission to intervene and serve a copy on all parties within a reasonable period of time after the date of the notice placed by the Clerk on the Court's website (see Rule 22(f)(1) (Public Notice)). The motion shall contain a concise statement of the interest of the moving person or organization and the grounds upon which intervention is sought.