



Kentucky Supreme Court

# Mass Tort and Class Action Litigation Committee

*Final Report*

**Kentucky Supreme Court Mass Tort  
and Class Action Litigation Committee**

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**Submitted by:**

Justice Lisabeth Hughes Abramson, Chair  
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Susan Pope, Lexington  
Edward H. Stopher, Louisville

**The Committee respectfully requests that Chief Justice John D. Minton Jr. appoint the following persons to be members of the Committee in recognition of their efforts and contributions:**

Gregory Bubalo, Louisville  
Christopher Burnside, Louisville  
Janet Jakubowicz, Louisville  
Ron Parry, Covington  
Beverly Storm, Covington  
Kenneth Sales, Louisville

**Committee Staff:**

Rebekkah Rechter  
Kelly Stephens

## **Introduction**

The Committee was originally established as the Mass Tort Committee by Order of then-Chief Justice Joseph Lambert on April 27, 2007. Comprised of attorneys appointed from each Supreme Court District, the Committee was charged with “the purpose of studying the Kentucky Rules of Professional Conduct, and any other rules necessary, in order to make recommendations to the Supreme Court as to any needed changes in order to prevent unethical conduct and provide guidance to attorneys and courts with regard to mass tort litigation cases.” Then-Court of Appeals Judge Lisabeth Hughes Abramson and retired Supreme Court Justice Martin E. Johnstone were appointed co-chairs of the Committee. Upon initial consideration of its charge, the Committee requested that it be renamed the Mass Tort and Class Action Litigation Committee, which request was approved by the Court.

## **Overview of the Committee Process**

In assessing the scope of its mandate to “prevent unethical conduct and provide guidance to attorneys and courts,” the Committee recognized that its focus must remain on attorney conduct and judicial supervision of mass tort and class action litigation. Inquiries into the facts of specific cases (such as the Fen Phen litigation) were beyond the scope of the Committee’s mandate, as were numerous other topics that relate to mass tort and class action litigation.

The Committee solicited the advice and expertise of other professionals to determine the issues to be examined and the potential impact of changes on Kentucky’s bench and bar. In January 2008, Fordham University School of Law Professor Howard M. Erichson visited Kentucky to meet personally with the Committee. In addition to providing an overview of rule changes adopted in other states, he led a valuable discussion to assist the Committee in determining which reforms would be appropriate in Kentucky. Professor Erichson is an Advisor to the American Law Institute’s Principles of Aggregate Litigation and a frequent contributor on the topics of civil procedure and ethics in the area of mass torts and other complex litigation. See *CAFA’s Impact on Class Action Lawyers*, 156 U. Penn. L. Rev. 1593 (2008); *Mississippi Class Actions and the Inevitability of Mass Aggregate Litigation*, 24 Miss. Coll. L. Rev. 285 (2005); *A Typology of Aggregate Settlements*, 80 Notre Dame L. Rev. 1769 (2005); *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. Chicago Legal F. 519 (2003); *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, Duke L.J. 381 (2000). Professor Erichson also presented research by Dr. Deborah Hensler of Stanford Law School, who was consulted but was ultimately unable to advise the Committee in person. Dr. Hensler is a nationally recognized expert on class actions. Deborah Hensler, *Bringing Shutts Into the Future: Rethinking Protection of Future Claimants in Mass Tort Class Actions*, 74 UMKC Law Review 585 (2006); Deborah R. Hensler et al, *Asbestos Litigation*, Santa Monica, CA: RAND Institute for Civil Justice, 2005; Deborah R. Hensler, *Our Courts, Ourselves: the Transformation of the U.S. Court System*, 108 Penn

State Law Review 165-197 (2003); Deborah R. Hensler et al, *Class Action Dilemmas: Pursuing Public Goals for Private Gain*, Santa Monica: Rand Institute for Civil Justice.

In addition to the compilation and consideration of the large body of literature on the issues of mass torts and class actions, the Committee also called upon several practitioners who acted as advisors in the formulation of recommendations. These practitioners (listed on page one) have extensive experience in the management of large scale litigation and settlements from the perspective of both the plaintiff and defense bar. During numerous consultations with the Committee and the Subcommittees, these attorneys provided real-world insight into the effects of the proposed recommendations on Kentucky practitioners. The service of these advisors proved so invaluable that the Committee respectfully requests that Supreme Court appoint them as full members.

Upon narrowing its focus, the Committee determined that it would form two subcommittees: the Class Action Subcommittee and the Aggregate Settlement Subcommittee. Each subcommittee compiled recommendations that were then approved by the Committee as a whole.

Throughout the process, the Committee (with the assistance of Professor Erichson and the attorney advisors) considered the following additional topics, which were ultimately determined not appropriate for implementation by rule:

- **Imposition of harsher penalties for attorneys who violate ethical rules in the practice of class action litigation or aggregate settlements.** Because this recommendation would involve the interpretation and application of existing Rules of Professional Conduct, it is properly within the purview of the Kentucky Bar Association.
- **Multi-district litigation rules for common claims.** While Kentucky has many jurisdictions, the relative infrequency of cases spanning multiple circuits renders multi-district litigation rules unnecessary.
- **Mandatory requirement of an independent audit of aggregate settlements.** Independent audits may be an essential tool for the management of complex or large scale settlements, but the use of auditors should be discretionary rather than mandatory for trial courts. Additionally, the Kentucky Bar Association may consider the implementation of audit requirements as a part of its disciplinary enforcement mechanisms.
- **Restrictions on the use of coupon settlements.** Though recovery to the individual claimant in coupon settlements may be minimal compared to compensation for class counsel, approval of settlements and the fee for class counsel is properly within the purview of the individual trial court.

- **Limitations on the transfer of class action settlement remainders to charitable trusts.** Drafting a rule to completely prohibit the transfer of settlement remainders to charitable trusts proved to be unworkable. However, this topic is ripe for attorney and judicial education. (See Recommendation #3 below)
- **Restriction on an attorney’s withdrawal from a case if a client’s refusal to settle affects other clients represented by the same attorney.** The Committee considered whether RPC 1.16 should be amended to indicate that withdrawing from a client’s representation as a result of that client’s refusal to agree to an aggregate settlement is not ethical. Ultimately, the Committee determined that the rules should not make any statement as to whether a withdrawal in an aggregate setting might exemplify good cause for withdrawal under RPC 1.16(b)(7). The Committee concluded that such comments could be considered too restrictive, and that good cause should be determined on a case-by-case basis and in context by the court. The Committee also decided that the Rules of Professional Conduct should not include a discussion of the propriety of a lawyer threatening to withdraw if the client does not accept the settlement. The Committee notes that current case law from other jurisdictions already indicates that failure of a client to accept a settlement offer does not constitute just cause, and a lawyer may not burden a client’s decision-making with threats to withdraw. *Nehad v. Mukasey*, 535 F.3d 962 (9<sup>th</sup> Cir. 2008)
- **Limitations on settlements which restrict an attorney’s future practice.** Colloquial evidence indicates that proposed settlement offers may involve limitations on an attorney’s future right to practice certain types of cases or to bring actions against a particular defendant or class of defendants. However, the Committee determined that current RPC 5.6 and its Comments make it clear that a lawyer shall not participate in offering or making an agreement in which a restriction on a lawyer’s right to practice is a part of the settlement of a client controversy.

## **Final Recommendations**

After consultation with scholars, practitioners, and judges, the Committee has thoroughly examined the Kentucky Rules of Professional Conduct, the Rules of Civil Procedure, and Federal Civil Rule 23 and hereby makes the following Recommendations:

### **Recommendation 1. Kentucky Civil Rule 23 should be revised to be consistent with Federal Civil Rule 23.**

Recognizing that the Kentucky rules applicable to class actions have not been revised since 1990, the Committee devoted considerable time to the following proposed amendments to Kentucky Civil Rule 23.

The recommended revisions are intended to achieve several goals. Primarily, the Committee intends to clarify the class action rules in order to ensure their uniform

statewide application. Also, by following the format and substance of FRCP 23, the proposed Kentucky Rules and our courts will have the benefit of the body of federal cases interpreting a comparable Rule 23. To this end, the Committee strongly suggests that education opportunities be provided to the circuit judges regarding the meaning, application and purpose of the class action rule. The creation of forms, administrative procedures, and educational materials for the judiciary and bar will, ideally, reduce the need for disciplinary enforcement of the ethical rules.

The Committee identified a vital need for increased judicial supervision of class action suits, particularly in the case of a proposed settlement, compromise or dismissal. While the current version of CR 23.05 requires the court's approval, the proposed rule enumerates specific procedures to ensure adequate disclosure to class members. The proposed rule requires a hearing before judicial approval in certain instances, and more precisely identifies the court's authority in approving a settlement, compromise or dismissal.

The Committee also considered it critical to permit the immediate appeal of an order granting or denying class certification. Pursuant to Proposed Rule 23.06 such an appeal may be undertaken by either the class or the defendant, and does not require the permission of the trial court. An expedited appeal of the narrow issue of certification would not unduly burden the appellate court system or the progress of a properly certified class action suit.

Again, with the goal of increased judicial supervision in mind, Proposed Rule 23.07 requires judicial appointment of class counsel. The proposed rule enumerates specific criteria which the court must consider in selecting counsel. The purpose of this proposed rule is to reduce the possibility of mismanagement or undue delay through the appointment of qualified counsel.

Finally, Rule 23.08 requires judicial approval of reasonable attorney's fees and costs. A specific procedure for such approval is included which requires notice to all class members.

Below, you will find the proposed revisions to CR 23. The Committee believes that the following recommendations will enhance judicial supervision of class action suits in order to prevent unethical conduct, mismanagement, and abuse. A side-by-side comparison of the current version of Kentucky CR 23 and the equivalent federal CR 23 is provided in the Appendix.

***Rule 23.01 Prerequisites to class action.***

*Subject to the provisions of Rule 23.02, one or more members of a class may sue or be sued as representative parties on behalf of all only if:*

- (a) the class is so numerous that joinder of all members is impracticable,*
- (b) there are questions of law or fact common to the class,*
- (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and*

- (d) *the representative parties will fairly and adequately protect the interests of the class.*

**Rule 23.02 Class Actions Maintainable.**

*An action may be maintained as a class action if the prerequisites of CR 23.01 are satisfied, and in addition:*

- (a) *The prosecution of separate actions by or against individual members of the class would create a risk of*
  - (i) *inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or*
  - (ii) *adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or*
- (b) *the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or*
- (c) *the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:*
  - (i) *the interests of members of the class in individually controlling the prosecution or defense of separate actions;*
  - (ii) *the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;*
  - (iii) *the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and*
  - (iv) *the difficulties likely to be encountered in the management of a class action.*

**Rule 23.03 Determination by order whether class action to be maintained; Notice; Judgment; Actions conducted partially as class actions.**

- (1) *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.*
- (2) *An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under CR 23.07.*
- (3) *An order that grants or denies class certification may be altered or amended before final judgment.*
- (4) *If an appeal is taken from the Certification Order, as authorized by CR 23.06, notice shall not be given until a final non-appealable order has decided the issue. If no appeal is taken the court, after 11 days from the entry of its Certification Order, shall give notice as follows:*
  - (a) *For any class certified under CR 23.02(a) or 23.02(b), the court may direct appropriate notice to the class.*

- (b) *For any class certified under CR 23.02(c), 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 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, whether favorable or not, on members under CR 23.03.*
- (5) *Whether or not favorable to the class, the judgment in a class action must:*
  - (a) *for any class certified under CR 23.02(a) or (b) include and describe those whom the court finds to be class members; and*
  - (b) *for any class certified under CR 23.02(c) include and specify or describe those to whom the CR 23.02(c) notice was directed, who have not requested exclusion, and whom the court finds to be class members.*
- (6) *When appropriate, an action may be brought or maintained as a class action with respect to particular issues.*
- (7) *When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.*

**Rule 23.04 Orders in conduct of actions.**

- (1) *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 certified 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 this 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) *An order under CR 23.04(1) may be altered or amended from time to time and may be combined with an order under Rule 16.*

**Rule 23.05 Dismissal or compromise.**

*The claims, issues, or defenses of a certified class may be settled, 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) If the class action was previously certified under CR 23.02(c), 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) Any class member may object to the proposal if it requires court approval under this subdivision (5); the objection may be withdrawn only with the court's approval upon a showing of good cause.*

**Rule 23.06 Appeals.**

*An order granting or denying class action certification is appealable within 10 days after the order is entered. An appeal does not stay proceedings in the circuit court unless the circuit judge or the Court of Appeals so orders. The matter shall be expedited in the appellate courts.*

**Rule 23.07 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 CR 23.08; and*
  - (e) may make further orders in connection with the appointment,*

- (2) *When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under CR 23.07(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) *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) *Class counsel must fairly and adequately represent the interests of the class.*

***Rule 23.08 Attorney's Fees and Nontaxable Costs.***

*In a certified class action the court shall approve or 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 to be heard 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 CR 52.01.*
- (4) *The court may refer issues related to the amount of the award to a Commissioner, as provided in CR 53.*

**Recommendation 2. Commentary should be added to the Kentucky Rules of Professional Conduct to provide guidance as to the existence of conflicts and notice requirements in the context of aggregate settlements.**

As noted by the American Law Institute in the Principles of Aggregate Litigation:

Non-class settlements arise in a variety of contexts: through multidistrict litigation or consolidation, through informal coordination by multiple claimants' counsel, or informally as multiple clients of a single lawyer or law firm...The structure, mechanics and effects of a settlement may vary greatly between class and non-class aggregate litigation on the claimant's side of the equation....Class-action settlements are governed by special procedural rules and occur under court supervision. Non-class aggregate settlements, by contrast, are governed primarily by ethical rules and are rarely subject to court review or approval for fairness. Section 3.15, comment a.

The Committee found that the current Rules of Professional Conduct do not define the term "aggregate litigation" and do not expound on the nature and extent of the notice that a claimant's or plaintiff's attorney is required to give to his or her client in order to obtain the client's informed consent to the settlement. Because communication with the client and disclosure are essential, additions to the RPC would be helpful to practitioners; however, upon consideration, the Committee determined that it would not be necessary to include a new rule, but rather commentary to existing rules should be expanded.

Accordingly, the Committee recommends the addition of the following language (shown here in bold) to Comment 13 of SCR 3.130(1.8):

(13) Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The Rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, ~~including what the other clients will receive or pay if the settlement or plea offer is accepted~~ **as described herein.**

**A non-certified, non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent. The resolution of claims in a non-class aggregate settlement is interdependent if the defendant's acceptance of the settlement is contingent upon the acceptance by a specified number or percentage of the claimants or specified dollar amount of claims; or the value of each claim is not based solely on individual case-by-case facts and negotiations. In such situations potential conflicts of interest stemming from interdependency exist, thus posing a risk of unfairness to individual claimants.**

**When the terms of an aggregate settlement do not determine individual amounts to be distributed to each client, detailed disclosures are required. For example, if a lump sum is offered in an aggregate settlement and the claimants' attorney is involved in dividing the settlement sum, that attorney must disclose to each client the number of his or her clients participating, specifics of each client's claim relevant to the settlement, and the method of dividing the lump sum. In addition, the attorney must disclose the total attorney fees and costs to be paid, payments to be made other than to clients, to their attorneys and for costs, the method by which the costs are to be apportioned among the clients and ultimately the amount each client receives.**

**By contrast, if the terms of the aggregate settlement establish the method of calculating and distributing payments to each claimant, based upon the individual claim for liability and/or damages, the disclosures to each client represented by the same attorney do not**

**need to be as detailed. In that instance, each client should be generally informed of the terms of the aggregate settlement offer, how such terms apply specifically to such client, the fact that the attorney represents multiple clients in the settlement and, if applicable, any contingency in the settlement requiring a percentage of claimants to accept the settlement. The claimants' attorney must also disclose fees and costs to each client (including how costs are apportioned among the joint clients) but attorney fees may be stated as a percentage of the total recovery as opposed to a specific dollar amount.**

See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Parts of the commentary are based on the ALI definition of aggregate settlements, and additional language was drafted by Committee members in order to provide further clarification as to the type and extent of the disclosures required to be made to the client.

**Recommendation 3. Enhanced educational opportunities on procedural and ethical rules relating to class actions and aggregate litigation and settlements should be provided for judges and lawyers.**

It is noteworthy that most potential abuses in the mass tort context are avoidable under the current Rules of Professional Conduct and Rules of Civil Procedure. Additionally, judicial supervision and oversight of cases serve as an important safeguard of fairness and ethical conduct. However, given the large number of jurisdictions in Kentucky and the relative infrequency with which these cases may arise, attorneys and judges may not have been exposed to education as to these procedural and ethical rules.

In order to address this, the Committee recommends that the Kentucky Bar Association and Judicial Education Committees consider the addition of the following topics in future continuing legal and judicial education programs relating to class actions and aggregate litigation and settlements: client intake procedures and forms; the nature of informed consent of clients; judicial supervision and oversight; voluntary and mandatory audits of settlements; and charitable distribution of settlement remainders. If the Court adopts the recommended rule and commentary changes, these may form the foundation of such educational programs. Additionally, these topics should be considered for addition to judicial benchbooks for future reference by judges.

## **Conclusion**

The Committee respectfully submits this Final Report to the Kentucky Supreme Court for its consideration. Committee members are available to meet with the Court and answer any questions the Court may have.

The Committee gratefully acknowledges the significant assistance of Rebekkah Rechter, Staff Attorney to Justice Bill Cunningham and Kelly Stephens, Deputy General Counsel of the Administrative Office of the Courts.

## **Appendix**

<b><i>Current KY Civil Rules 23.01 – 23.05</i></b>	<b><i>Proposed KY Civil Rules 23.01 -23.08</i></b>
<p data-bbox="235 310 792 346"><b>Rule 23.01 Prerequisites to class action.</b></p> <p data-bbox="235 388 792 556">Subject to the provisions of Rule 23.02, one or more members of a class may sue or be sued as representative parties on behalf of all only if:</p> <ul style="list-style-type: none"> <li data-bbox="284 598 792 682">(a) the class is so numerous that joinder of all members is impracticable,</li> <li data-bbox="284 682 792 766">(b) there are questions of law or fact common to the class,</li> <li data-bbox="284 766 792 892">(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and</li> <li data-bbox="284 892 792 1018">(d) the representative parties will fairly and adequately protect the interests of the class.</li> </ul>	<p data-bbox="820 310 1377 346"><b>Rule 23.01 Prerequisites to class action.</b></p> <p data-bbox="820 388 1383 535">Subject to the provisions of Rule 23.02, one or more members of a class may sue or be sued as representative parties on behalf of all only if:</p> <ul style="list-style-type: none"> <li data-bbox="868 567 1383 640">(a) the class is so numerous that joinder of all members is impracticable,</li> <li data-bbox="868 672 1383 745">(b) there are questions of law or fact common to the class,</li> <li data-bbox="868 787 1383 892">(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and</li> <li data-bbox="820 934 1383 1039">(d) the representative parties will fairly and adequately protect the interests of the class.</li> </ul>

<i>Current KY Civil Rules 23.01 – 23.05</i>	<i>Proposed KY Civil Rules 23.01 -23.08</i>
<p data-bbox="235 268 797 300"><b>Rule 23.02 Class actions maintainable.</b></p> <p data-bbox="235 342 797 447">An action may be maintained as a class action if the prerequisites of Rule 23.01 are satisfied, and in addition:</p> <ul style="list-style-type: none"> <li data-bbox="293 485 797 590">(a) The prosecution of separate actions by or against individual members of the class would create a risk of <ul style="list-style-type: none"> <li data-bbox="342 627 797 879">(i) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or,</li> <li data-bbox="342 917 797 1241">(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or</li> </ul> </li> <li data-bbox="293 1278 797 1530">(b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or</li> <li data-bbox="293 1568 797 1890">(c) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent</li> </ul>	<p data-bbox="826 268 1388 300"><b>Rule 23.02 Class actions maintainable</b></p> <p data-bbox="826 342 1388 447">An action may be maintained as a class action if the prerequisites of CR 23.01 are satisfied, and in addition:</p> <ul style="list-style-type: none"> <li data-bbox="885 485 1388 590">(a) The prosecution of separate actions by or against individual members of the class would create a risk of <ul style="list-style-type: none"> <li data-bbox="933 627 1388 879">(i) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or</li> <li data-bbox="933 917 1388 1241">(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or</li> </ul> </li> <li data-bbox="885 1278 1388 1530">(b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or</li> <li data-bbox="885 1568 1388 1890">(c) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent</li> </ul>

<p>to the findings include:</p> <ul style="list-style-type: none"><li>(i) the interest of members of the class in individually controlling the prosecution or defense of separate actions;</li><li>(ii) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;</li><li>(iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;</li><li>(iv) the difficulties likely to be encountered in the management of a class action.</li></ul>	<p>to the findings include:</p> <ul style="list-style-type: none"><li>(i) the interests of members of the class in individually controlling the prosecution or defense of separate actions;</li><li>(ii) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;</li><li>(iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and</li><li>(iv) the difficulties likely to be encountered in the management of a class action.</li></ul>
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<i>Current KY Civil Rules 23.01 – 23.05</i>	<i>Proposed KY Civil Rules 23.01 -23.08</i>
<p><b>Rule 23.03 Determination by order whether class action to be maintained; Notice; Judgment; Actions conducted partially as class actions.</b></p> <p>(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this rule may be conditional, and may be altered or amended before the decision on the merits.</p> <p>(2) In any class action maintained under Rule 23.02(c), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.</p> <p>(3) The judgment in an action maintained as a class action under paragraphs (a) or (b) of Rule 23.02, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Rule 23.02(c), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Rule 23.03(b) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.</p>	<p><b>Rule 23.03 Determination by order whether class action to be maintained; Notice; Judgment; Actions conducted partially as class actions.</b></p> <p>(1) 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.</p> <p>(2) An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under CR 23.07.</p> <p>(3) An order that grants or denies class certification may be altered or amended before final judgment.</p> <p>(4) If an appeal is taken from the Certification Order, as authorized by CR 23.06, notice shall not be given until a final non-appealable order has decided the issue. If no appeal is taken the court, after 11 days from the entry of its Certification Order, shall give notice as follows:</p> <p>(a) For any class certified under CR 23.02(a) or 23.02(b), the court may direct appropriate notice to the class.</p> <p>(b) For any class certified under CR 23.02(c), 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 must clearly and concisely state in plain, easily understood language:</p> <p>(i) the nature of the action;</p>

<p>(4) When appropriate (a) an action may be brought or maintained as a class action with respect to particular issues, or (b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of Rule 23 shall then be construed and applied accordingly.</p>	<ul style="list-style-type: none"> <li>(ii) the definition of the class certified;</li> <li>(iii) the class claims, issues, or defenses;</li> <li>(iv) that a class member may enter an appearance through an attorney if the member so desires;</li> <li>(v) that the court will exclude from the class any member who requests exclusion by a specified date;</li> <li>(vi) the time and manner for requesting exclusion; and</li> <li>(vii) the binding effect of a class judgment, whether favorable or not, on members under CR 23.03.</li> </ul> <p>(5) Whether or not favorable to the class, the judgment in a class action must:</p> <ul style="list-style-type: none"> <li>(a) for any class certified under CR 23.02(a) or (b) include and describe those whom the court finds to be class members; and</li> <li>(b) for any class certified under CR 23.02(c) include and specify or describe those to whom the CR 23.02(c) notice was directed, who have not requested exclusion, and whom the court finds to be class members.</li> </ul> <p>(6) When appropriate, an action may be brought or maintained as a class action with respect to particular issues.</p> <p>(7) When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.</p>
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<i>Current KY Civil Rules 23.01 – 23.05</i>	<i>Proposed KY Civil Rules 23.01 -23.08</i>
<p data-bbox="235 268 795 304"><b>Rule 23.04 Orders in conduct of actions.</b></p> <p data-bbox="235 346 795 462">In the conduct of actions to which Rule 23 applies, the court may make appropriate orders:</p> <p data-bbox="235 514 795 682">(a) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;</p> <p data-bbox="235 735 795 1207">(b) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;</p> <p data-bbox="235 1260 795 1344">(c) imposing conditions on the representative parties or on intervenors;</p> <p data-bbox="235 1396 795 1564">(d) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;</p> <p data-bbox="235 1617 795 1648">(e) dealing with similar procedural matters.</p> <p data-bbox="235 1701 795 1858">The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.</p>	<p data-bbox="820 268 1380 304"><b>Rule 23.04 Orders in conduct of actions.</b></p> <p data-bbox="820 346 1380 409">(1) In conducting an action under this rule, the court may issue orders that:</p> <p data-bbox="876 441 1380 619">(a) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;</p> <p data-bbox="876 661 1380 798">(b) require – to protect certified class members and fairly conduct the action – giving appropriate notice to some or all class members of:</p> <p data-bbox="925 829 1380 871">(i) any step in the action</p> <p data-bbox="925 892 1380 955">(ii) the proposed extent of the judgment; or</p> <p data-bbox="925 976 1380 1228">(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 this action.</p> <p data-bbox="876 1249 1380 1354">(c) impose conditions on the representative parties or on intervenors;</p> <p data-bbox="876 1386 1380 1564">(d) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or</p> <p data-bbox="876 1606 1380 1669">(e) deal with similar procedural matters.</p> <p data-bbox="820 1711 1380 1858">(2) An order under CR 23.04(1) may be altered or amended from time to time and may be combined with an order under Rule 16.</p>

<i>Current KY Civil Rules 23.01 – 23.05</i>	<i>Proposed KY Civil Rules 23.01 -23.08</i>
<p data-bbox="284 239 787 273"><b>Rule 23.05 Dismissal or compromise.</b></p> <p data-bbox="235 310 787 562">A 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.</p>	<p data-bbox="844 239 1347 273"><b>Rule 23.05 Dismissal or compromise.</b></p> <p data-bbox="820 310 1380 592">The claims, issues, or defenses of a certified class may be settled, 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:</p> <ol data-bbox="820 630 1380 1669" style="list-style-type: none"> <li data-bbox="820 630 1380 772">(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.</li> <li data-bbox="820 808 1380 951">(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.</li> <li data-bbox="820 987 1380 1087">(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.</li> <li data-bbox="820 1123 1380 1413">(4) If the class action was previously certified under CR 23.02(c), 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.</li> <li data-bbox="820 1449 1380 1669">(5) Any class member may object to the proposal if it requires court approval under this subdivision (5); the objection may be withdrawn only with the court’s approval upon a showing of good cause.</li> </ol>

<i>Current KY Civil Rules 23.01 – 23.05</i>	<i>Proposed KY Civil Rules 23.01 -23.08</i>
	<p><b>Rule 23.06 Appeals.</b></p> <p>An order granting or denying class action certification is appealable within 10 days after the order is entered. An appeal does not stay proceedings in the circuit court unless the circuit judge or the Court of Appeals so orders. The matter shall be expedited in the appellate courts.</p>

<i>Current KY Civil Rules 23.01 – 23.05</i>	<i>Proposed KY Civil Rules 23.01 -23.08</i>
	<p><b>Rule 23.07 Class Counsel.</b></p> <p>(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:</p> <p>(a) must consider:</p> <ul style="list-style-type: none"> <li>(i) the work counsel has done in identifying or investigating potential claims in the action;</li> <li>(ii) counsel’s experience in handling class actions, other complex litigation, and the types of claims asserted in the action;</li> <li>(iii) counsel’s knowledge of the applicable law; and</li> <li>(iv) the resources that counsel will commit to representing the class;</li> </ul> <p>(b) may consider any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class;</p> <p>(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;</p> <p>(d) may include in the appointing order provisions about the award of attorney’s fees or nontaxable costs under CR 23.08; and</p> <p>(e) may make further orders in connection with the appointment,</p> <p>(2) When one applicant seeks appointment</p>

	<p>as class counsel, the court may appoint that applicant only if the applicant is adequate under CR 23.07(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.</p> <p>(3) 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.</p> <p>(4) Class counsel must fairly and adequately represent the interests of the class.</p>
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<i>Current KY Civil Rules 23.01 – 23.05</i>	<i>Proposed KY Civil Rules 23.01 -23.08</i>
	<p data-bbox="824 268 1382 338"><b>Rule 23.08 Attorney’s Fees and Nontaxable Costs.</b></p> <p data-bbox="824 373 1382 590">In a certified class action the court shall approve or award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement. The following procedures apply:</p> <ol data-bbox="824 625 1382 1262" style="list-style-type: none"> <li data-bbox="824 625 1382 842">(1) A claim for an award must be made by motion to be heard 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.</li> <li data-bbox="824 877 1382 968">(2) A class member, or a party from whom payment is sought, may object to the motion.</li> <li data-bbox="824 1010 1382 1115">(3) The court may hold a hearing and must find the facts and state its legal conclusions under CR 52.01.</li> <li data-bbox="824 1157 1382 1262">(4) The court may refer issues related to the amount of the award to a Commissioner, as provided in CR 53.</li> </ol>

<b><i>FRCP 23</i></b>	<b><i>Proposed KY Civil Rules 23.01 -23.08</i></b>
<p><b>Rule 23 (a) Prerequisites.</b></p> <p>One or more members of a class may sue or be sued as representative parties on behalf of all members only if:</p> <ul style="list-style-type: none"> <li>(1) the class is so numerous that joinder of all members is impracticable,</li> <li>(2) there are questions of law or fact common to the class,</li> <li>(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and</li> <li>(4) the representative parties will fairly and adequately protect the interests of the class.</li> </ul>	<p><b>Rule 23.01 Prerequisites to class action.</b></p> <p>Subject to the provisions of Rule 23.02, one or more members of a class may sue or be sued as representative parties on behalf of all only if:</p> <ul style="list-style-type: none"> <li>(a) the class is so numerous that joinder of all members is impracticable,</li> <li>(b) there are questions of law or fact common to the class,</li> <li>(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and</li> <li>(d) the representative parties will fairly and adequately protect the interests of the class.</li> </ul>

<b><i>FRCP 23</i></b>	<b><i>Proposed KY Civil Rules 23.01 -23.08</i></b>
<p data-bbox="235 273 706 304"><b>Rule 23(b) Types of Class Actions.</b></p> <p data-bbox="235 346 771 409">A class action may be maintained if Rule 23(a) is satisfied and if:</p> <p data-bbox="267 451 795 556">(1) prosecuting separate actions by or against individual class members would create a risk of:</p> <p data-bbox="316 598 795 808">(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class;</p> <p data-bbox="316 850 795 1176">(B) or 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;</p> <p data-bbox="267 1218 779 1470">(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</p> <p data-bbox="267 1512 795 1837">(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:</p>	<p data-bbox="820 273 1339 304"><b>Rule 23.02 Class actions maintainable</b></p> <p data-bbox="820 346 1388 441">An action may be maintained as a class action if the prerequisites of CR 23.01 are satisfied, and in addition:</p> <p data-bbox="876 483 1388 588">(a) The prosecution of separate actions by or against individual members of the class would create a risk of</p> <p data-bbox="925 630 1388 882">(i) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or</p> <p data-bbox="925 924 1388 1239">(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or</p> <p data-bbox="876 1281 1364 1533">(b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or</p> <p data-bbox="876 1575 1388 1890">(c) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent</p>

<p>(A) the class members' interests in individually controlling the prosecution or defense of separate actions;</p> <p>(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;</p> <p>(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and</p> <p>(D) the likely difficulties in managing a class action.</p>	<p>to the findings include:</p> <p>(i) the interests of members of the class in individually controlling the prosecution or defense of separate actions;</p> <p>(ii) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;</p> <p>(iii) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and</p> <p>(iv) the difficulties likely to be encountered in the management of a class action.</p>
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<b><i>FRCP 23</i></b>	<b><i>Proposed KY Civil Rules 23.01 -23.08</i></b>
<p><b>Rule 23(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.</b></p> <p>(1) Certification Order.</p> <p>(A) <i>Time to Issue.</i> 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.</p> <p>(B) <i>Defining the Class; Appointing Class Counsel.</i> 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).</p> <p>(C) <i>Altering or Amending the Order.</i> An order that grants or denies class certification may be altered or amended before final judgment.</p> <p>(2) Notice.</p> <p>(A) <i>For (b)(1) or (b)(2) Classes.</i> For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.</p> <p>(B) <i>For (b)(3) Classes.</i> For any class certified 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 must clearly and concisely state in plain, easily understood language:</p> <ul style="list-style-type: none"> <li>(i) the nature of the action;</li> <li>(ii) the definition of the class</li> </ul>	<p><b>Rule 23.03 Determination by order whether class action to be maintained; Notice; Judgment; Actions conducted partially as class actions.</b></p> <p>(1) 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.</p> <p>(2) An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under CR 23.07.</p> <p>(3) An order that grants or denies class certification may be altered or amended before final judgment.</p> <p>(4) If an appeal is taken from the Certification Order, as authorized by CR 23.06, notice shall not be given until a final non-appealable order has decided the issue. If no appeal is taken the court, after 11 days from the entry of its Certification Order, shall give notice as follows:</p> <ul style="list-style-type: none"> <li>(a) For any class certified under CR 23.02(a) or 23.02(b), the court may direct appropriate notice to the class.</li> <li>(b) For any class certified under CR 23.02(c), 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 must clearly and concisely state in plain, easily understood language: <ul style="list-style-type: none"> <li>(i) the nature of the action;</li> </ul> </li> </ul>

<p>certified;</p> <ul style="list-style-type: none"> <li>(iii) the class claims, issues, or defenses;</li> <li>(iv) that a class member may enter an appearance through an attorney if the member so desires;</li> <li>(v) that the court will exclude from the class any member who requests exclusion;</li> <li>(vi) the time and manner for requesting exclusion; and</li> <li>(vii) the binding effect of a class judgment on members under Rule 23(c)(3).</li> </ul> <p>(3) Judgment. Whether or not favorable to the class, the judgment in a class action must:</p> <ul style="list-style-type: none"> <li>(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</li> <li>(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.</li> </ul> <p>(4) Particular Issues. When appropriate, an action may be brought or maintained as a class action with respect to particular issues.</p> <p>(5) Subclasses. When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.</p>	<ul style="list-style-type: none"> <li>(ii) the definition of the class certified;</li> <li>(iii) the class claims, issues, or defenses;</li> <li>(iv) that a class member may enter an appearance through an attorney if the member so desires;</li> <li>(v) that the court will exclude from the class any member who requests exclusion by a specified date;</li> <li>(vi) the time and manner for requesting exclusion; and</li> <li>(vii) the binding effect of a class judgment, whether favorable or not, on members under CR 23.03.</li> </ul> <p>(5) Whether or not favorable to the class, the judgment in a class action must:</p> <ul style="list-style-type: none"> <li>(a) for any class certified under CR 23.02(a) or (b) include and describe those whom the court finds to be class members; and</li> <li>(b) for any class certified under CR 23.02(c) include and specify or describe those to whom the CR 23.02(c) notice was directed, who have not requested exclusion, and whom the court finds to be class members.</li> </ul> <p>(6) When appropriate, an action may be brought or maintained as a class action with respect to particular issues.</p> <p>(7) When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.</p>
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<b><i>FRCP 23</i></b>	<b><i>Proposed KY Civil Rules 23.01 -23.08</i></b>
<p><b>Rule 23(d) Conducting the Action.</b></p> <p>(1) In General. In conducting an action under this rule, the court may issue orders that:</p> <ul style="list-style-type: none"> <li>(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;</li> <li>(B) require — to protect class members and fairly conduct the action — giving appropriate notice to some or all class members of: <ul style="list-style-type: none"> <li>(i) any step in the action</li> <li>(i) the proposed extent of the judgment; or</li> <li>(ii) 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;</li> </ul> </li> <li>(C) impose conditions on the representative parties or on intervenors;</li> <li>(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or</li> <li>(E) deal with similar procedural matters.</li> </ul> <p>(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.</p>	<p><b>Rule 23.04 Orders in conduct of actions.</b></p> <p>(1) In conducting an action under this rule, the court may issue orders that:</p> <ul style="list-style-type: none"> <li>(a) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;</li> <li>(b) require – to protect certified class members and fairly conduct the action – giving appropriate notice to some or all class members of: <ul style="list-style-type: none"> <li>(i) any step in the action</li> <li>(ii) the proposed extent of the judgment; or</li> <li>(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 this action.</li> </ul> </li> <li>(c) impose conditions on the representative parties or on intervenors;</li> <li>(d) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or</li> <li>(e) deal with similar procedural matters.</li> </ul> <p>(2) An order under CR 23.04(1) may be altered or amended from time to time and may be combined with an order under Rule 16.</p>

<b><i>FRCP 23</i></b>	<b><i>Proposed KY Civil Rules 23.01 -23.08</i></b>
<p data-bbox="284 268 738 342"><b>Rule 23(e) Settlement, Voluntary Dismissal, or Compromise.</b></p> <p data-bbox="284 380 787 632">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:</p> <ol data-bbox="284 674 787 1766" style="list-style-type: none"> <li data-bbox="284 674 787 810">(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.</li> <li data-bbox="284 852 787 1031">(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.</li> <li data-bbox="284 1073 787 1209">(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.</li> <li data-bbox="284 1251 787 1535">(4) 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.</li> <li data-bbox="284 1577 787 1766">(5) 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.</li> </ol>	<p data-bbox="841 268 1349 300"><b>Rule 23.05 Dismissal or compromise.</b></p> <p data-bbox="820 338 1388 621">The claims, issues, or defenses of a certified class may be settled, 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:</p> <ol data-bbox="820 663 1388 1703" style="list-style-type: none"> <li data-bbox="820 663 1388 800">(1) The court must direct notice in a reasonable manner to all class members who would be bound by the proposal.</li> <li data-bbox="820 842 1388 978">(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.</li> <li data-bbox="820 1020 1388 1125">(3) The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.</li> <li data-bbox="820 1167 1388 1440">(4) If the class action was previously certified under CR 23.02(c), 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.</li> <li data-bbox="820 1482 1388 1703">(5) Any class member may object to the proposal if it requires court approval under this subdivision (5); the objection may be withdrawn only with the court's approval upon a showing of good cause.</li> </ol>

<b><i>FRCP 23</i></b>	<b><i>Proposed KY Civil Rules 23.01 -23.08</i></b>
<p><b>Rule 23(f) Appeals.</b></p> <p>A court of appeals may permit an appeal from an order granting or denying class action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.</p>	<p><b>Rule 23.06 Appeals.</b></p> <p>An order granting or denying class action certification is appealable within 10 days after the order is entered. An appeal does not stay proceedings in the circuit court unless the circuit judge or the Court of Appeals so orders. The matter shall be expedited in the appellate courts.</p>

<b><i>FRCP 23</i></b>	<b><i>Proposed KY Civil Rules 23.01 -23.08</i></b>
<p><b>Rule 23(g) Class Counsel.</b></p> <p>(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:</p> <p>(A) must consider:</p> <ul style="list-style-type: none"> <li>(i) the work counsel has done in identifying or investigating potential claims in the action;</li> <li>(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;</li> <li>(iii) counsel's knowledge of the applicable law; and</li> <li>(iv) the resources that counsel will commit to representing the class;</li> </ul> <p>(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;</p> <p>(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;</p> <p>(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and</p> <p>(E) may make further orders in connection with the appointment.</p> <p>(2) Standard for Appointing Class Counsel. When one applicant seeks appointment as class counsel, the court may appoint</p>	<p><b>Rule 23.07 Class Counsel.</b></p> <p>(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:</p> <p>(a) must consider:</p> <ul style="list-style-type: none"> <li>(i) the work counsel has done in identifying or investigating potential claims in the action;</li> <li>(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;</li> <li>(iii) counsel's knowledge of the applicable law; and</li> <li>(iv) the resources that counsel will commit to representing the class;</li> </ul> <p>(b) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;</p> <p>(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;</p> <p>(d) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under CR 23.08; and</p> <p>(e) may make further orders in connection with the appointment,</p> <p>(2) When one applicant seeks appointment</p>

<p>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.</p> <p>(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.</p> <p>(4) Duty of Class Counsel. Class counsel must fairly and adequately represent the interests of the class.</p>	<p>as class counsel, the court may appoint that applicant only if the applicant is adequate under CR 23.07(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.</p> <p>(3) 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.</p> <p>(4) Class counsel must fairly and adequately represent the interests of the class.</p>
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<b><i>FRCP 23</i></b>	<b><i>Proposed KY Civil Rules 23.01 -23.08</i></b>
<p data-bbox="240 268 673 336"><b>Rule 23(h) Attorney’s Fees and Nontaxable Costs.</b></p> <p data-bbox="284 378 795 556">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:</p> <ol data-bbox="292 598 795 1438" style="list-style-type: none"> <li data-bbox="292 598 795 924">(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (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.</li> <li data-bbox="292 955 795 1071">(2) A class member, or a party from whom payment is sought, may object to the motion.</li> <li data-bbox="292 1102 795 1218">(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).</li> <li data-bbox="292 1249 795 1438">(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in <u>Rule 54(d)(2)(D)</u>.</li> </ol>	<p data-bbox="824 268 1380 336"><b>Rule 23.08 Attorney’s Fees and Nontaxable Costs.</b></p> <p data-bbox="824 378 1388 588">In a certified class action the court shall approve or award reasonable attorney’s fees and nontaxable costs that are authorized by law or by the parties’ agreement. The following procedures apply:</p> <ol data-bbox="824 619 1388 1270" style="list-style-type: none"> <li data-bbox="824 619 1388 840">(1) A claim for an award must be made by motion to be heard 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.</li> <li data-bbox="824 871 1388 987">(2) A class member, or a party from whom payment is sought, may object to the motion.</li> <li data-bbox="824 1018 1388 1134">(3) The court may hold a hearing and must find the facts and state its legal conclusions under CR 52.01.</li> <li data-bbox="824 1165 1388 1270">(4) The court may refer issues related to the amount of the award to a Commissioner, as provided in CR 53.</li> </ol>

