

## Class Action Legal Noticing: Plain Language Revisited

*Law360, New York (April 05, 2013, 11:33 AM ET)* -- With every passing year, the focus on effectively communicating with potential class members through the notice process increases. Notices need to both motivate class members to review the notice and help them understand their rights. The challenge lies in designing class action legal notices that convey significant legal concepts and information, while remaining visually appealing and possible for class members to understand. By striving to put legal notices into plain language, even the most complex settlement can transform into notices that class members can comprehend and act upon.

### Plain Language Requirement

According to Fed. R. Civ. P. 23(c)(2)(B), a class action certified under Fed. R. Civ. P. 23(b)(3) must provide a notice to all class 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;
- (vi) the time and manner for requesting exclusion; and
- (vii) the binding effect of a class judgment on members under Rule 23(c)(3).”

### Judicial Input

No significant body of case law has developed to guide or dictate specific rules for incorporating plain language into legal notices. As one federal judge concluded in *Larson v. Sprint Nextel Corporation* (D.N.J.), “[T]he Court is aware that notices can never be perfectly drafted and that there is a fine line between writing them in “plain” language and incorporating all of the relevant information.” However, there are a number of valuable resources available to help guide practitioners in the how-to of incorporating plain language into legal notices.

On its face, plain language is a straightforward concept. However, taking a complex settlement, conveying the parameters of the settlement to a layperson audience unfamiliar with a case, and communicating via a streamlined, easy-to-understand legal notice can be an art. In 2001, the Federal Judicial Center posted their “illustrative” forms of class action notices that have since served as a guide for how full and summary notices should be written.[1] In 2010, a Plain Language Notice Guide was added to address the structure of communications with class members in regards to plain language.[2]

The Plain Language Notice Guide includes such helpful recommendations as:

- For a detailed notice, page one should be an overall summary of the notice, which includes the court's name at the top and a large headline followed by bullets with important information to encourage the reader to continue to read the notice.
- The main content of a detailed notice should be a Q&A format with short answers to even obvious questions, which includes all rights and options of class members, while not including every detail of the settlement in the notice.
- For a summary notice, again a large headline followed by a short but comprehensive explanation of all the requirements of Fed. R. Civ. P. 23 conveyed with plain language in a simple and clear summary manner.

### **Plain Language Requirements Beyond Legal Noticing**

The need for plain language has extended beyond class action legal noticing. In 2010, Congress enacted the "Plain Writing Act of 2010."<sup>[3]</sup> The law requires federal agencies as specified to use plain language writing, which is defined as "writing that is clear, concise, well-organized, and follows other best practices appropriate to the subject or field and intended audience."<sup>[4]</sup>

A subsequent executive order issued by The White House further explains that the general purpose of the "Plain Writing Act of 2010" is to "ensure that regulations are accessible, consistent, written in plain language, and easy to understand."<sup>[5]</sup> As a result of this new requirement for "plain writing," recently, a number of federal agencies have developed new plain language resources in response to the Plain Writing Act of 2010.

### **The How To for Incorporating Plain Language**

One of the most comprehensive resources developed in response to the Plain Writing Act of 2010 is The Federal Plain Language Guidelines, which sets forth strategies and techniques for using plain language.<sup>[6]</sup> Although these resources are not specific to class action legal notices, the principles all still apply. Here are some examples from the guidelines of how to use plain language successfully.

- Write for your audience. Use language your audience will know and address separate audiences separately. A perfect example of this is a combined opt-out/opt-in notice in the case of a class action and a collective action regarding employment law allegations. If you have two sub-classes with separate exclusion processes, consider separating descriptions regarding the exclusion processes into two sections. In a recent employment case, *Butler v. American Cable & Telephone LLC* (N.D.Ill.), the court upheld a notice that addressed multiple subclasses in the face of arguments that the notice was incomprehensible.
- Start with general information first. Add specific details regarding the settlement, claim process, etc. to the main body of a notice. Too many details at the start of notice tend to overwhelm a reader, causing them to stop reading the notice
- Address one person, not a group. Don't refer to individuals or groups — instead, address the reader directly in the second person. For example, instead of writing "the bank customer must file a claim by x date," write "you must file a claim by x date." This also helps connect the reader to the content of the notice.

- Avoid examples that don't add value. In *Adoma v. University of Phoenix Inc.* (E.D.Cal.), the court held that hypothetical examples should be removed from a proposed class notice since the hypotheticals did not add clarity to the notice. In other cases, hypotheticals have been an excellent tool to illustrate a complex process. Try to see them as a layperson would and judge whether it improves clarity.
- Use bold and italics to highlight important text. Key dates and deadlines are good examples. Avoid using all caps and underlining text, including URLs, as that can disrupt the flow of a sentence and is hard to read.
- Use an active voice. Rather than saying "The following information must be included with your claim to be considered complete," say, "You must include the following information with your claim."
- Simplify text and avoid hidden verbs. Hidden verbs have endings like "ment," "tion," "sion" and "ance." Simple sentences are easier to understand as well. For example, instead of saying, "If you did not make a payment for service" say, "If you didn't pay for service."
- Eliminate unnecessary words. Instead of "in order to," use "to." Instead of "be responsible for," use "must." Removing unnecessary words makes the text easier to read.
- Use lists and bullets. A list of important points with bullets is easier to read and comprehend than a lengthy detailed sentence or paragraph.
- Avoid unnecessary legal language. Here is a list of words to avoid when drafting legal notices:
  - above-mentioned
  - aforementioned
  - foregoing
  - henceforth
  - hereafter
  - hereby
  - herewith
  - shall
  - thereafter
  - thereof
  - therewith
  - whatsoever
  - whereat
  - wherein
  - whereof
- Avoid cross-references. Flipping back and forth within a document can be frustrating to the reader and deter further reading of the notice.

## Conclusion

Although the plain language requirements of Fed. R. Civ. P. 23 have not received notoriety in the judicial system, plaintiff and defense counsel alike should be aware of them when drafting legal notices. Ultimately, incorporating plain language into class action notices and other communications will aid readers in understanding even the most complex message. A legal noticing expert that specializes in drafting plain language legal notices can also be a valuable resource to ensure the plain language requirements are satisfied while still conveying the specific legal details of an individual settlement.

—By Cameron Azari and Stephanie Fioreck, Hilsoft Notifications, a wholly owned subsidiary of Epiq Systems Inc

*Cameron Azari is director of legal notice at Hilsoft Notifications in Beaverton, Ore., a subsidiary of legal technology consulting firm Epiq Systems Inc. He has more than 12 years of experience in the design and implementation of legal notification and claims administration programs. He is a nationally recognized expert in the design of notification campaigns in compliance with Fed R. Civ. P. 23(c)(2) (d)(2) and (e) and similar state class action statutes.*

*Stephanie Fioreck is manager of legal notice at Hilsoft Notifications in Beaverton. She has more than 12 years of class action, bankruptcy and litigation experience and is an active member of the Oregon State Bar.*

[1] See Federal Judicial Center, The Federal Judicial Center’s “Illustrative” Forms of Class Action Notices, available at <http://www.fjc.gov/> - Class Action Notices Page.

[2] See Federal Judicial Center, Judge’s Class Action Notice and Claims Process Checklist and Plain Language Guide, 2010, available at [http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/\\$file/NotCheck.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf).

[3] Public Law 111-274 – Oct. 13, 2010.

[4 ] Id. at Sec. 3(3).

[5 ] Federal Register, Vol. 76, No. 14, Sec. 1, Jan. 21, 2011.

[6] See PlainLanguage.Gov, Federal Plain Language Guidelines, March 2011, Rev. May 2011, available at <http://www.plainlanguage.gov/howto/guidelines/FederalPLGuidelines/FederalPLGuidelines.pdf>.

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