

KERN COUNTY COLLEGE OF LAW

**CIVIL PROCEDURE**

Final Examination

Spring 2021

Prof. L. Peake

Instructions:

There are three (3) questions in this examination. You will be given four (4) hours to complete the examination.

Your answer should demonstrate your ability to analyze the facts in the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and facts upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other. Your answer should evidence your ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles; instead, try to demonstrate your proficiency in using and applying them. If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions and discuss all points thoroughly. Your answer should be complete, but you should not volunteer information or discuss legal doctrines that are not pertinent to the solution of the problem.

Exam Question #1

During a protest by fifty people at Warner Sounds ("WS") corporate office in Burbled, California over the mysterious deaths of twenty of WS' artists (resulting in huge posthumous sales), sixty two year old Kandi suffered a heart attack when the crowd disbursed in panic following a discharge of mace by one of two Burbled police officers who had been called by Nan Maintains, one of Warner Sounds' in house corporate attorneys, to control the crowd when its participants became unruly. No announcement of unlawful assembly was made by either of the two officers before the mace discharge. Kandi was survived by two adult sons, California resident Kyle and Utah resident Blake. Kyle hired famed attorney Jules Pettibone to file a wrongful death suit in Central District Federal Court against the City of Burbled for wrongful death of Kandi, and asserting a violation of 1st Amendment right of assembly. Blake, citing religious prohibition of 1 Corinthians 6:7, refused to join as a plaintiff in the suit, despite California law providing that all persons entitled to recover for wrongful death of an heir must be included as plaintiffs in a single lawsuit.

Attorney Nat Tygers, retained to represent the City of Burbled, has filed three concurrent motions:

1. FRCP 12(b)(7) motion to dismiss Kyle's suit for failure to join a necessary party under Rule 19;
2. FRCP 12(b)(1) motion to dismiss Kyle's suit for lack of subject matter jurisdiction;
3. FRCP 12(c) motion for judgment on the pleadings.

Attorney Tygers also wishes to implead WS into the suit on two claims: (1) failure to provide adequate private security on its property to control anticipated protests; and (2) creating the protests by causing the twenty artists' deaths.

How should the Federal Court rule on each of the three motions?

May the City of Burbled implead WS into the suit on each of the two stated proposed claims?

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Question #2

A protest over the mysterious deaths of twenty Warner Sounds ("WS") artists at Warner Sounds corporate headquarters in the City of Burbed ("Burbed"), California resulted in a crowd of fifty people disbanding in panic when one of two Burbed city police officers, called to the WS headquarters by one of WS' in house corporate attorneys, Nan Maintains, when some participants became unruly, discharged mace into the group. Two of the fifty individuals, both California residents, hired famed attorney Jules Pettibone who filed a Federal class action suit on behalf of all fifty individuals, claimed violation of 1st Amendment right of assembly and seeking injunctive relief against the City of Burbed with the two individuals acting as class representatives. The court, over objection by Burbed, certified the class action. Burbed then filed an impleader action for indemnification against WS, which brought WS into the suit as a third party defendant. WS assigned its best attorney, Mariam Martine, to the defense of the impleader action. Attorney Martine immediately had WS' Legal Department Coordinator, Brie Marke, obtain a handwritten statement from Nan Maintains, and a recorded and transcribed statement from a witness (non participant) to the police officer's discharging of mace into the crowd. These two statements were placed by Ms. Marke in the WS litigation file in a folder marked "confidential".

After WS was impleaded into the case, Attorney Pettibone served WS with a demand for production of any and all emails, correspondence, photographs or other materials documenting, referring to, or depicting the protest and/or its disbanding and/or WS corporate policy on WS' use of private security. Martine assigned the task of gathering documents and preparing the response to the production demand to Marke, who did so, with Ms. Marke then asking legal intern Sam UCLA to mail out the gathered documents and return them to the WS litigation file. In doing so, Sam saw the "confidential" file containing the two statements, and assuming Ms. Marke had overlooked them, mailed the statement out with the other documents to Attorney Pettibone. Upon receipt of the two statements, Pettibone reviewed them, and prepared and served WS with interrogatories which were based upon the contents of the two statements, including requests that WS confirm WS' possession of the originals of them.

Ms. Martine and Ms. Marke, upon receipt of the interrogatories, immediately demanded the return of any copies of the two statements from Pettibone, which Pettibone refused. Martine has now filed a motion for protective order as to any obligation to answer the interrogatories and as to any use of the two statements by Pettibone.

1. Did the Court correctly certify the class action?

2. How should the court rule on WS' motion for protective order as to the Plaintiffs' interrogatories and use of WS' two obtained statements?

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Question #3

A protest over the mysterious deaths of twenty Warner Sounds ("WS") artists at Warner Sounds corporate headquarters in the City of Burbled ("Burbled"), California resulted in a crowd of fifty people dispersing in panic when one of two Burbled city police officers, called to the WS headquarters by one of WS' in house corporate attorneys, Nan Maintains, when some participants became unruly, had discharged mace into the group. Attorney Jules Pettibone filed a Federal class actions suit against Burbled on behalf of the fifty individuals for violation of their 1<sup>st</sup> Amendment right of assembly. Burbled impleaded WS into the suit, alleging complicity of WS for lack of private security and creating the situation that lead to the plaintiffs protest.

Attorney Pettibone did not name Maintains in his initial FRCP 26 disclosure on behalf of the Plaintiffs, nor did he include Maintains as a potential trial witness in his pretrial conference statement that he submitted to the court. Nonetheless, Pettibone subpoenaed Maintains to testify at trial, believing her testimony was needed as to what she said to the Burbled police department dispatcher when Maintians called seeking help in controlling the crowd of fifty people. WS' attorney, Mariam Martine, filed a motion to quash the subpoena with a request that the trial judge prohibit Martine from having to testify. The trial judge denied Martine's motion and the jury selection for a jury panel of six jurors then began, with the judge giving Burbled and WS three peremptory challenges to share, finding (over objection by Martine) that Burbled and WS constituted "one side".

During jury selection, one of the six jurors intentionally failed to disclose that she was a past president of the "Tommy and the Kidney Krushers" fan club, one of the twenty WS artists subject to the protest, as she wanted to be one of the selected jurors. Had this fact been disclosed in voir dire, Maintain would have attempted to use a challenge for cause to exclude her; and if not successful, would have attempted to exclude her by use of a peremptory challenge.

The unanimous jury verdict on special verdict found in favor of the Plaintiffs and allocated fault 90% to Burbled and 10% to WS. Post trial, WS' Legal Department Coordinator, Brie Marke, discovered on social media the juror's past fan club presidency, and has advised WS' attorney Martine of this discovery.

On what issues should WS' attorney Martine bring a motion for new trial and/or file an appeal, and how should the trial and appellate courts rule on each issue?



## KCCL Spring 2021 Civil Procedure Exam Question #1 Outline

Issue #1: Should the Court grant City's FRCP 12(b)(7) motion to dismiss for failure to join a necessary party under Rule 19

Rule: FRCP 19(a) provides that a necessary party in interest must be joined as an involuntary plaintiff if required when excluding the party from the action will not permit the court to provide complete relief.

Application: California's wrongful death statute mandates that all parties be included who are potential takers as heirs of the decedent.

Kyle and Blake are the heirs. Both are necessary parties.

If a party cannot be brought in due to loss of subject matter jurisdiction, the court must dismiss the action.

Here, bringing in Blake would not destroy SMJ as he is a resident of Utah.

In addition, SMJ exists on a Federal question basis (violation of 1<sup>st</sup> Amendment right of assembly).

Conclusion: The Court should grant City's FRCP 12(b)(7) motion or require Plaintiff Kyle to name Blake as an involuntary plaintiff.

Issue #2: Should the Court grant City's FRCP 12(b)(1) motion to dismiss for lack of SMJ

Rule: Federal SMJ may be predicated upon Federal question or diversity with amount in controversy of over \$75,000

Application: The complaint contains two claims, one Federal (1<sup>st</sup> Amendment right of assembly) and one State of California, but arising from the same transaction or occurrence (wrongful death).

While Kyle and WS arguably are from the same state of residency (California) such that diversity jurisdiction does not lie, SMJ may be predicated upon Federal question (1<sup>st</sup> Amendment), if there is a survivorship claim available to Kyle as heir of decedent (would not expect students to be able to discuss survivorship issue of

wrongful death claim: not covered in class materials).

Conclusion: Court should deny FRCP 12(b)(1) motion as SMJ appears to exist on Federal question (with supplemental jurisdiction over state wrongful death action).

Issue #3: Should Court grant City's FRCP 12(c) motion for judgment on the pleading

Rule: A motion for judgment as a matter of law based upon the pleadings may be made after close of pleading.

Application: Here, the 12(c) motion was made concurrently with the 12(b)(1) and (7) motions, and was premature.

Conclusion: The Court should deny City's 12(c) motion as being premature.

Issue #4: May City implead WS into the suit on each of two proposed claims (negligent failure to provide adequate private security; creating protests by causing the death of twenty WS artists)

Rule: A Federal court civil defendant may implead a third party into the suit for indemnity or contribution based upon the third party's asserted actions that gave rise to plaintiff's suit.

Application: WS' asserted failure to provide adequate private security would appear to reasonably subject WS to being impleaded into Plaintiff Kyle's suit for wrongful death and claimed violation of Kandi's 1<sup>st</sup> Amendment assembly rights. The second claim (creating the protests by WS causing the death of twenty of its artists in a scheme to increase anticipated posthumous sales) would appear more problematic, but probably allowable as part of the claimed indemnification/contribution sought by City against WS.

Conclusion: City may implead WS into the suit on the two proposed basis for contribution/indemnification.

## KCCL Spring 2021 Civil Procedure Exam Question #2 Outline

Issue #1: Did the Court correctly certify the class action filed in Federal court for violation of named and unnamed class members' 1<sup>st</sup> Amendment right of assembly?

Rule: An FRCP 23 class is properly certified if the class is so numerous that joinder of all members is impracticable; there are common questions of law/fact present; class or defenses of the representatives of the class are typical of the unnamed members; and the representative parties will fairly and adequately protect the interests of the class.

Application: Here, the class has fifty individuals, so numerosity is met.

There is a common question of law (violation of 1<sup>st</sup> Amendment right of assembly) among class members, and common questions of fact (all were subject to the same disbursement, but arguably not as to being sprayed with mace). Commonality is met.

The class representatives are stated to be two of the fifty individuals present, with no facts indicating they have claims divergent or at odds with the unnamed class members. FRCP 23(a)(3) appears to be met.

The representative parties (two named class members) appear to be in a position to fairly and adequately protect the interests of the class from the facts provided. FRCP 23(a)(4) appears to be met.

Conclusion: The Court appears to have correctly certified the class under FRCP 23.

Issue #2: How should the Court rule on WS' motion for protective order as to interrogatories based upon, and use of, two statements?

Rule: FRCP 26(c) and 37 and FRCP 33 allow for objections to discovery calling for protected attorney work product and to attorney/client communications and potential allowance of protective order as to such information.

Application: Here, there are two statements. Each is subject to different treatment.



The handwritten statement obtained from in house attorney Nan Maintains, obtained during the course of litigation, and at the direction of WS' attorney Mariam Martine, is arguably both attorney work product and attorney client privilege material.

There is a question here of waiver and of timeliness of objection by WS. An objection to discovery seeking protected material must be done as soon as reasonable. The materials were released by WS in a document production. The "claw back" request was not made until sometime later, when WS was served with interrogatories. Since no one was aware (and arguably reasonably so) at WS of legal intern Sam's erroneous serving of protected material to another party (Plaintiffs), while arguments could (and would be) made on both side regarding whether the disclosure was intentional by WS (Sam DID intend to send out the statements), it would appear the more persuasive argument is that the "claw back" was timely under the circumstances.

Conclusion: The Court should grant the motion for protective order as to Maintains' statement.

As to the Witness' statement, it would constitute work product (but not attorney client privilege). As work product, it is potentially subject to disclosure if Plaintiffs' attorney Pettibone can establish that he would be prejudiced by its non-production or ability to use it (i.e., to impeach the witness at trial or deposition, or by showing that it is needed to refresh the witness' recollection). Absent such a showing (not established by the facts as given), the Court should grant WS' motion for protective order as to Witness' statement.

Conclusion: The Court should, more probably than not, grant the WS protective order requested as to obligation to answer the interrogatories and use of the two statements by Plaintiffs' attorney.

The Court should grant the motion for protective order as to need to answer interrogatories and as to use by Plaintiffs' attorney of the Maintains statement.

## KCCL Spring 2021 Civil Procedure Exam Question #3 Outline

Issue #1: How should the trial and appellate courts rule on WS' motion for new trial on Attorney Maintain being allowed to testify at trial?

Rule: FRCP 59 provides for right to new trial. A new trial is properly granted, inter alia, for a significant error of law, irregularity in the court proceedings, and/or jury misconduct.

Application: Here, there was a failure of Plaintiffs to include a witness in Plaintiffs' FRCP 26 initial disclosure and pretrial conference submittal. FRCP 26 requires parties to identify known witnesses it intends to use to support its case; and at the pretrial conference to specify witnesses that the party intends to call in its case in chief.

However, it is up to the trial court's discretion as to whether to relieve a party from such failure, should the party make a showing of mistake, inadvertence, surprise or excusable neglect in failing to comply with FRCP 26. Here, the trial court exercised its discretion and allowed witness Maintains to testify on an issue supporting Plaintiff's case in chief. The testimony was not on a issue subject to attorney client protection, albeit Maintains is an attorney for WS.

WS must establish that any arguable abuse of discretion by the trial court prejudiced a substantial right of WS. This is a difficult hurdle for WS where, as here, the testimony by Maintains was principally directed to Burbed, not WS. WS would argue that since the impleader was for indemnification over and against WS that any testimony adverse to Burbed is necessarily adverse to WS; and that a 10% fault allocation against WS establishes a substantial, adverse impact to WS.

Conclusion: More probably than not, allowing Maintains to testify despite failure of FRCP 26 compliance by Plaintiffs would not constitute an abuse of discretion by the trial court so as to entitle WS to a new trial nor constitute reversible error on appeal.

Issue #2: How should the trial and appellate courts rule on the trial court limiting WS to three peremptory challenges jointly to be shared with Burbed?

Rule: Trial courts have to provide three peremptory challenges to each party pursuant to FRCP 47 and 29 USC section 1870, but may decide that two parties

share the same interests and constitute one "side" and require two parties to share three peremptory challenges.

Application: Here, the interests of WS and Burbed were not reasonably considered to be so shared that they should have been considered "one side" and required to share three peremptory challenges. On this basis, a new trial should properly be awarded by the court provided that WS can establish that it was prejudiced by this trial court error.

It is unlikely that the facts are sufficient to allow WS to establish prejudice of a substantial right by this trial court error. While WS will argue that it would have been able to use a peremptory challenge as to the juror who was a fan club past president, that argument would likely fail since WS was not aware of this potential bias until after the verdict was rendered.

Conclusion: More probably than not, the trial court's error in limiting WS to three jointly shared peremptory challenges will not result in a finding of prejudicial error so as to justify a new trial nor constitute reversible error.

Issue #3: How should the trial court and appellate court rule on juror misconduct by the former fan club past president?

Rule: A new trial is properly granted upon a finding of juror misconduct, including undisclosed bias. FRCP 59.

Application: The subject juror intentionally concealed a material fact (past presidency of a fan club of one of the WS artists underlying the protest in question). Undisclosed bias of a material fact constitutes juror misconduct and, here, would likely have resulted in the juror being excused for cause.

WS will argue that this juror misconduct was prejudicial and adversely impacted a significant right of WS to a jury trial under the 7<sup>th</sup> Amendment untarnished by a biased juror; that had the bias been revealed, the juror in question would have been excused either for cause or by use of a peremptory challenge...if sufficient peremptory challenges had been properly allocated to WS at the beginning of jury selection.

Plaintiffs attorney would argue that even assuming, arguendo, that the past presidency rendered the juror in question biased, that WS could not show that a

different result from the unanimous jury verdict rendered would have obtained.

Conclusion: It is likely that the trial judge would grant a new trial under FRCP 59, and that if not granted that the appellate court would find that the failure to grant a new trial based upon intentional misconduct by the jury was an abuse of discretion.

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**1. Attorney Nat Tyger's FRCP 12(b)(7) motion to dismiss Kyle's suit for failure to join a necessary party under Rule 19**

Compulsory Joinder (Indispensable Parties)

In certain circumstances, a plaintiff must join all interested parties or face dismissal of the lawsuit. A compulsory joinder issue follows 3 steps: (i) should the absentee be joined? (ii) can the absentee be joined? (iii) if not, should the action proceed in his absence?

1. Should the absentee be joined?

Joinder is proper if: (1) in the person's absence, complete relief cannot be accorded; or (2) the person claims an interest relating to the subject matter that a decision in his absence may: (i) impair or impede the person's ability to protect the interest or (ii) leave any remaining party subject to a substantial risk of incurring double, multiple, or inconsistent obligations.

California resident Kyle hired an attorney to file a wrongful death suit in Central District Federal Court against the city of Burbed for wrongful death of his mother, Kandi, and asserting a violation of 1st Amendment right to assembly. Kandi has one more son, Blake, as resident of Utah. Blake refused to join as a plaintiff citing religious prohibition, despite California law providing that all persons entitled to recover for wrongful death of an heir must be included as plaintiffs in a single lawsuit. In the absence of Blake, complete relief may not be accorded. Blake would share in the monetary award from the wrongful death suite. Without him in the suit, only Kyle would get the monetary award. Also, without Blake in the lawsuit, SMJ may fail due to no diversity with regard to the wrongful death aspect. Kyle is from California, and so is City of Burbed. However, Blake is from Utah, which would bring the diversity.

2. Can the absentee be joined?

Whether the court can obtain PJ over the absentee and whether the court will still have SMJ over the action after the joinder of the absentee. If the court has personal jurisdiction over the absentee and the joinder will not destroy diversity or venue, he must be joined.

Here, Blake is the absentee and is from Utah. Under the traditional basis (Pennoyer), Blake did not consent. In fact he objected when he did not want to be named plaintiff due to his religious background. The facts do not indicate that he was present in California and served. His domicile is

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in Utah. Thus, this test fails. The modern basis, *International Shoe*, rules that if he is not present, he must have sufficient minimum contacts with the forum so that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. The facts do not state that Blake had any sort of contact with California. Thus, this test fails as well.

The court cannot obtain PJ over Blake. However, Blake would not destroy diversity as he may be the key factor to satisfy diversity.

3. If not, should the action proceed in his absence?

The court must consider whether "in equity and good conscience" the action should proceed among the parties before it, or should be dismissed. This requires consideration of the following: (i) prejudice to the absentee or available parties of a judgement; (ii) extent to which such prejudice can be reduced or avoided by protective provisions in the judgement, shaping relief, or other measures; (iii) adequacy of a judgement made without absentee; and (iv) whether plaintiff will have adequate remedy if the case is dismissed for nonjoinder.

(i) prejudice to the absentee or available parties of a judgement

The prejudice to the absentee would be that he would not share in the benefit of the wrongful death suit. However, he is also choosing not to be in the suit due to religious beliefs. Ruling the absentee necessary would harm his brother, Kyle, in that it could result in the whole case being dismissed.

(ii) extent to which prejudice can be reduced or avoided by protective provisions in the judgement, shaping relief, or other measures

Prejudice could be reduced if the action proceeded in Blake's absence. Blake does not want to be in the action due to his religious beliefs.

(iii) adequacy of a judgement made without the absentee

A judgement made without the absentee would still be adequate as the action involves the wrongful death of Blake's mother, thus the judgement can still be adequate.

(iv) whether plaintiff will have adequate remedy if the case is dismissed for nonjoinder

Kyle would be harmed if the case were to be dismissed for nonjoinder. His brother, Blake, is simply choosing not to be in the suit, rather than just not being included. Kyle cannot help his brother's religious beliefs.

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### Conclusion

Blake is not a necessary party. He chose to opt out due to his own religious reasons. The court will deny the motion to dismiss Kyle's suit for failure to join a necessary party.

### **2. FRCP 12(b)(1) motion to dismiss Kyle's suit for lack of SMJ**

The court must have authority over the matter. SMJ refers to the court's ability to hear a type of case and is not waived by failing to raise the issue at trial. Federal courts can only hear cases that pertain to Federal issues or when there is diversity of citizenship among the parties.

### Federal Question

This type of jurisdiction requires the P pleaded a well-pleaded complaint that sets forth a cause of action that would arise under federal law.

Kyle's assertion of the violation of 1st Amendment right of assembly would be federal question. However, Kyle also asserts the wrongful death of his mother.

### Diversity of Citizenship Jurisdiction

Requires (i) complete citizenship diversity at the time the suit is filed, and (ii) the amount in controversy to exceed \$75,000.

Here, Kyle filed the suit without Blake. Kyle is a citizen and domiciled in California. City of Burbed is also in California. Thus there is no diversity here.

### Supplemental Jurisdiction

A claim may be joined that could not by itself invoke federal question jurisdiction or diversity jurisdiction. The supplemental claim must arise from a common nucleus of operative fact as the claim that invoked the original SMJ.

Here, the assertion of the 1st amendment violation satisfies federal question. Thus, this may be joined by the wrongful death claim under supplemental jurisdiction since the wrongful death arises out of a common nucleus of operative fact since both resulted from the protest at Warner Sounds.

The Court should deny the motion to dismiss Kyle's suit for lack of SMJ.

### **3. FRCP 12(c) motion for judgement on the pleadings**

Under rule 12(c) in order for one to move for a motion for judgement on the pleadings, the pleadings have to be closed before moving for this motion.

Here, the pleadings are not closed as Attorney Nat Tygers has filed all three of these motions.

The court should deny the motion for judgement on the pleadings.

### **Can the City of Burbed implead WS into the suit on each of the two stated proposed claims?**

#### Impleader

The defending party may implead a nonparty, only if the nonparty is or may be liable to her for any part of a judgement that the plaintiff may recover against her. If indemnity or contribution claim by defendant party against 3rd party defendant does not meet requirements for diversity of citizenship or federal question jurisdiction, it will invoke supplemental jurisdiction because claims are from common nucleus of operative fact. Therefore, the defending party can assert such claim in federal court even though no diversity exists and the 3rd party defendant and the 3rd party claim is based on state law.

WS may very well be liable to the City of Burbed for any part of a judgement that the plaintiff may recover. Here, supplemental jurisdiction may be invoked because the claims are from a common nucleus of operative fact. The common nucleus being that these claims stem the whole suit brought by Kyle for wrongful death and violation of 1st Amendment rights. These two new claims of failure to provide adequate private security and creating the protests by causing the twenty artists' death directly relate and come out of the same common nucleus as the claims by Kyle with regard to the protests.

#### Conclusion

Thus, the city of Burbed may implead WS into the suit.

**END OF EXAM**

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**1.) . Did the court correctly certify the class action?**

**Class Action**

In a class action, in addition to being an identifiable class, the court authorizes a single person or small group of people to represent the interest of a larger group. In order to be a certified class action, there must be numerosity, commonality, typicality, and adequacy of representation. The class complaint must contain a description of the class, which will permit the court to determine who falls within the class and who doesn't. This is necessary to determine who gets "notice" and who will be bound by the class action judgment.

Here, two of the fifty individuals filed the class action with the description of the class action, violation of 1st amendment right of assembly. Further, this class action was filed on their behalf and on the behalf of the other forty eight individuals.

Thus, the class action complaint did contain a description of class, individuals who had their right to assembly violated.

**Numerosity**

For Numerosity to be met, the class must be so numerous that joinder is impracticable. There must be a strong showing of litigation hardship or inconvenience if there was no certification

Here, it would be an issue of judicial economy and occupying too many resources for the same common issue. It would make it impractical to join all the members because we do have numerosity.

Therefore, the numerosity requirement is met.

**Commonality**

There must be a question of law or fact in common, that give a common answer. The plaintiff must demonstrate that the class members have suffered the same injury, not that all have suffered a violation of the same provision of law.

Here, all fifty members share one common issue that was violated. They are all claiming the violation of their first amendment right of assembly.

Therefore, it appears that the class action suit meets the commonality requirement.

### **Typicality**

Typicality requires that the claims or defenses of the claim representative must be typical of the members of the class such as a similar legal arguments or same injury to prove defendant's liability.

Here, the class consists of a total of fifty people who all pose the same legal argument and same injury. The fifty members are all claiming a violation of their first amendment right to assembly as they all suffered this same harm.

Thus, the typicality requirement is met.

### **Adequacy of Representation**

The requirement of the adequacy of representation means that the class representatives are fairly and adequately protecting the interest of the class. This is weighed on the lawyers, whether they are competent and not antagonistic to the case.

Here, there does not appear to be any conflicts among the class members. All the class members seem to have the same interest and thus there should not be an issue with the representation.

Thus, there is adequacy of representation.

### **Class Categories**

In addition to the factors listed above, before a class action can be certified, it must fit within one of the three types of class action: "Prejudice" class action, "injunction or declaratory relief", or

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"damages" class action. An injunction or declaratory relief class action is one in which the entire class requests injunctive relief from the defendant or his actions.

### **Prejudice (B)(1)**

A prejudice class action is one which is necessary to avoid harm either to the class member or a party opposing the class.

Here, the class representatives are seeking rights under injunctive relief on behalf of themselves and the remaining class.

Therefore, this would not be a prejudice category.

### **Injunction or Declaratory Relief**

An injunction or declaratory relief class action is one in which the entire class requests injunctive relief from the defendant or his actions. This class does not provide the right to opt out.

Here, the class representatives are seeking rights to injunctive relief on behalf of themselves and the remaining class because of violation of their 1st amendment right of assembly. The class is merely seeking a relief for a federal right they have.

Therefore, this class action is that of an injunction relief category.

### **Notice**

The court must determine at an early practicable time whether to certify the case to proceed as a class action. If the court certifies the class it must define the class claims, issue or defense, as well as appoint class counsel who fairly and adequately represents the class' interest. In certifying the class, the court should consider the following factors: Interest of individual control, extent and nature of litigation elsewhere on the same subject, the desirability of having the whole package in this court, and the difficulties in managing the class action.

Once the class has been certified, the court must give individual notice to all members reasonably identifiable. The notice must state the nature of the action, the definition of the class, the class claims, issue or defenses and the finding effect of a class judgment. The notice may be by one or more of the following: US mail, electronic mail, or other appropriate means.

Here, the Court, over Burbed's objection certified the class action. After the class has been certified the court should give notice to all reasonably identifiable members. The notice must state the nature of the action, the definition of the class along with the claims and issues. The class category under injunctive relief is a mandatory class action.

### **Conclusion**

Therefore, the court correctly certified this class action under a class action seeking injunction relief.

## **2.) How should the court rule on WS' motion for protective order as to the Plaintiffs' Interrogatories and use of WS' two obtained statements?**

### **Discovery**

Under rule 26, a party may seek discovery of any non-privileged evidence which is relevant to a claim or defense provided that it is reasonably calculated to lead to admissible evidence.

### **Interrogatories (ROGS)**

ROGS are written questions that must be answered by another party in writing under oath. ROGS may be served on parties to an action. Each party may submit up to 25 questions on any other party. ROGS must be answered in writing, under oath, within 30 days after service of them.

### **Attorney-Client Privilege/Work Product**

The attorney client privilege protects communications between an attorney and his client and will cover matter of legal theory similar to the work product doctrine and how it protects all things created in preparation of litigation by the attorney or reasonably necessary staff within the law office.

### **Protective Order**

A protective order would bar the responding party from making further request between the parties and asking the court to narrowly tailor the scope of discovery.

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### **Claw Back Agreement**

Production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances.

Here, the documents that were in the folder were clearly marked as confidential and Attorney Pettibone should have reasonably known that this was not intended for their eyes and belonged to Martine and Marke as attorney work product. Thus because this was clearly documentation privileged by the attorney work product, attorney Pettibone could not compel answers to these interrogatories.

### **Conclusion**

The court would likely grant WS' motion for protective order.

**END OF EXAM**

3)

-- Should WS file an appeal based on the judge's discretion to allow Maintain to testify?

Generally, only final orders are reviewable on appeal. A final order is one that disposes of the whole case on its merits. For a successful reversal of judgment, a party must establish prejudicial error as a matter of law. The party must prove that the error was of material fact and is prejudicial enough that a different result would have occurred.

On appeal, the standard of review is whether a judge "abused her discretion" in making her decision. The judge's ruling will not be overturned unless it is plainly wrong or without appropriate basis.

In order to determine whether the judge abused her discretion, the appellate court will look to see if the testimony of Maintain resulted in prejudicial error.

At least thirty days before trial, each party must provide to the other parties certain information about evidence that it may present at trial, including the names and contact information of witnesses the party expects to present and may call if needed, a list of witnesses whose testimony will be presented through deposition, and a list of documents or physical evidence the party expects to present if needed. If a party leaves off a witness in the disclosure, the party must supplement the witness list if he learns of any additional witnesses after he first discloses the list to the defendant.

In Pettibone's pretrial disclosures, Maintain should have been listed as a potential witness that Pettibone might call at trial. Pettibone did not even attempt to supplement his disclosures to WS and/or Burbed. Had WS or Burbed known Maintain was going to testify for Pettibone, they would have prepared their case differently.

If a party completely leaves off a witness in his pretrial conference statement, the party must show the court that he did not have the information at the time of the conference due to surprise, mistake, inadvertence, or excusable neglect.

The facts do not say the reasoning that Pettibone left Maintain off the witness list. Pettibone knew Maintain's testimony was needed for his case and he neglected to put her on the witness list or supplement the witness list at any point in the trial. Maintain's testimony is highly probative for the plaintiff's case and without it the case could have gone a different way. Maintain is the one who

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called the police and without that testimony the information on the dispatch call might not be admissible.

The use of Maintain constitutes prejudicial error and therefore the court should grant the appeal and reverse the judgment.

-- Should WS bring a motion for a new trial or file an appeal based on jury misconduct?

A party can request a new trial if during trial the party becomes aware of jury misconduct. If a party becomes aware of jury misconduct after trial, the party must file an appeal and show prejudicial error. Prejudicial errors are those that could have influenced the jury's verdict, or errors that did affect the outcome of the litigation. Harmless errors do not affect a party's substantial rights and may be un-reviewable.

In order to determine whether the juror's conduct would be considered prejudicial or harmless, the court would need to review the jury selection process.

During jury selection, a party may strike prospective jurors using either peremptory challenges or challenges for cause. A peremptory challenge allows a party to strike a juror without giving a reason but cannot be used on inappropriate grounds such as race or gender. A party may challenge a juror for cause when the party believes that a prospective juror cannot be fair and impartial. This can be determined from the juror's own admission or it may be inferred from the juror's statements, experiences, and relationships disclosed during *voir dire*.

In this case, one of the jurors intentionally failed to disclose her affiliation with one of the deceased artists, which would have alerted Martine to her potential bias. Martine found out about the juror's affiliation after trial and had she known, would have dismissed her using either a peremptory challenge or a challenge for cause. For the peremptory challenge, she could have dismissed her without giving a reason, unless Pettibone objected and accused Martine of gender or racial discrimination. Martine could respond with her reasoning after being objected to. She could also use a for cause challenge because of the juror's implied bias and Martine's belief that she could not be impartial.

Even if the juror had been excused, the other jurors could have returned the same verdict. The jury came back with a unanimous verdict, which would mean that the biased juror convinced all the other

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five jurors to side with her. It is not clear that had the juror not been on the panel, that the judgment would have been different - which is what is required for prejudicial error. Even if Martines was successful in proving prejudicial error, WS was only allocated 10% of fault. She would have to argue that the jury would have found 100% of fault for Burbed, which is unlikely.

If WS files an appeal for jury misconduct, the appellate court should deny it.

--Should WS file an appeal based on the judge's abuse of discretion for sharing peremptory challenges?

Generally, only final orders are reviewable on appeal. A final order is one that disposes of the whole case on its merits. There are exceptions to the final judgment rule, including collateral orders, such as those regarding procedural issues.

If an order is not otherwise appealable and circumstances are exceptional, the aggrieved party may seek a writ of mandamus to compel the lower court to act or refrain from acting. A writ of mandamus may be sought in the court of appeal if the lower court abused its discretion.

Here, if the appeal is denied, WS and Burbed should file a writ for the trial court's abuse of discretion for making them share their peremptory challenges. 28 USC 1870 limits each party to three peremptory challenges, however WS and Burbed should argue that they are individual defendants because Burbed impleaded WS in a contribution claim. Since each of the defendants were allocated different amounts of fault, they should argue they should have been treated as separate parties. However, WS and Burbed are both on the defendant side against one plaintiff in the same suit. There are no facts that the use of the three peremptory challenges changed the outcome of the case and constituted prejudicial error.

The appeal and/or writ should be denied.

**END OF EXAM**