

KERN COUNTY COLLEGE OF LAW

Civil Procedure II  
Final Examination  
Spring 2020  
Prof. L. Peake

INSTRUCTIONS:

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

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QUESTION# 1

Orchard School District in California initially approved a planned Cinco de Mayo rally being planned by three senior Hispanic students at Almond High School, one of the District's schools, with the rally to take place there on Almond High's football field. Fearful of a possible race riot based upon learning of numerous threatening social media postings, the District retracted its rally approval. The three Hispanic students then filed a class action suit as its class representatives against the School District in Federal Court for violation of First Amendment right of assembly, asserting rights to injunctive relief and damages under 42 USC 1981 et seq. on behalf of themselves and approximately five thousand of the School District's Hispanic students in grades one through twelve located in schools throughout the District. The District Court, over objection by the School District, issued an Order that certified the defined class as consisting of all Hispanic students enrolled in Orchard School District and ordered notice to class members be given in the local English language newspaper, and ordered the School District to pay the costs of the publication.

Was the District Court's certification of the class and ordering of service of notice and payment of costs correct?

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QUESTION# 2

Plaintiff Kandis, suffering from chronic pain syndrome, filed a diversity suit in Federal Court against an on line drug company, Drugs R Us for product liability claiming that its CBD product line exacerbated her symptomology. Drugs R Us successfully obtained an order from the District Court that Kandis submit to a physical examination to be performed by Dr. Harry Edwards, Board Certified medical expert in both neurology and pain management.

Dr. Edwards authored a report which, although not requested by Kandis' attorney, was served by Drugs R Us on Plaintiff Kandis' lawyer. Dr. Edwards' report stated that he could not find anything wrong with Kandis from a neurological nor pain management standpoint within his areas of expertise, but that he could not rule out a possible orthopaedic etiology/basis for Kandis' subjective complaints of pain, nor whether any of her complaints as may be orthopaedic in origin were exacerbated by use of Drugs R Us CBD products.

Drugs R Us has now filed a motion with the District Court seeking a second medical examination of Kandis by Dr. Dan Hue, a Board Certified Orthopaedic surgeon, asserting that the examination is needed due to Dr. Edwards' qualifying the scope of his opinions as not extending to orthopaedic etiologies. Kandis' attorney objects and opposes the motion.

How should the District Court rule on Drugs R Us' motion, and why?

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### QUESTION# 3

Plaintiff Brie filed a diversity suit in Federal District Court in Nevada alleging gender discrimination against defendant concert promoter Jive Station when she discovered that her band was not being hired or promoted by Jive Station because it has a "strong female lead singer". The suit proceeded to trial, and during voir dire one of the jurors intentionally did not disclose that he was gay, and that such juror knew that Plaintiff Brie's expert economist, whose name was read by the trial judge during voir dire to be an anticipated expert witness, was also gay based upon a prior relationship between the economist and the juror's now husband. After an adverse 8-0 jury verdict awarding Brie \$1,000,000, defendant Jive Station's attorneys did research and discovered information from individuals and social media postings by the juror that disclosed the gay juror's sexual orientation and familiarity with Brie's economist. Defendant has now appealed the jury verdict, asserting prejudicial juror misconduct by the subject juror, claiming that had Jive Station known of the foregoing information, it would have moved to exclude the juror for cause; and that, if not granted, Jive Station would have used a peremptory challenge to exclude the gay juror.

How should the appellate court rule on Jive Station's appeal, and why?



Civil Procedure II: Spring Semester, 2020 Final Exam (KCCL)

EXAM QUESTION #1 ANSWER

Question #1 is intended to have students address three principle issues dealing with Class Actions applying FRCP 23 and cases from Friedenthal.

First:

ISSUE: Did the District Court err in certifying the class action against School District?

RULE: A class action may be certified when the class has sufficient numerosity involving common questions of law or fact, and claims of the representative parties are typical of the class ("typicality").

APPLICATION: The fact pattern here raises issues of typicality and commonality. Students will be expected to discuss that the class action is sought as to ALL Hispanic students grades 1-12...while the class representatives are all seniors. FRCP 23(a),(b), and (c).

In addition, students will be expected to note that the rally was for Almond High School...NOT other schools in the District, raising issues of typicality and commonality (as to questions of fact). (FRCP (a). (b).

Students might address the potentiality of creation of a subclass, as to Almond High School students; as well as the Court ordering the class to be composed of Hispanic students, when non Hispanic students were also potentially subject to a claimed denial of their First Amendment right of assembly. FRCP(c).

Students may note that numerosity appears to be met; and that, with a narrowed definition of the class, that commonality might be met. FRCP 23(a).

Second:

ISSUE: Did the District Court err in ordering class certification notice to be served in an English language local newspaper?

RULE: Notice to class members is to be the best notice practicable under the

circumstances to all class members identifiable through reasonable effort.

**APPLICATION:** Students should note that publication in a newspaper is arguably not the "best notice practicable" here, where the identity of students could arguably be found through School District held information.

Students may be expected to note, however, that School District records may not note who self identifies as Hispanic, in which case notice would have to be served in some manner...possibly electronically, if available, to all District students.

In addition, Students will hopefully address the potential due process implications of a class composed of Hispanic students (Grades one through twelve) being given notice in an English ... not Spanish ... publication, nor the FRCP 23 notice being required to be in both English and Spanish. FRCP 23©.

Three:

**ISSUE:** Did the District Court err in ordering the defendant School District to pay for the publication of the Class certification notice?

**RULE:** The Court may potentially order a defendant to pay costs of Notice in certifying a class action. *Oppenheimer Fund v Sanders* 437 US 340 (1978); *Hunt v Imperial Merch. Servs., Inc.* 560 F. 3d 1142 (9<sup>th</sup> Cir 2009)

**APPLICATION:** It is anticipated that based upon reading of Friedenthal that students can appropriately address propriety of Court's discretion to order School District to pay the costs of the initial class certification notice...as opposed to a notice of settlement of a class action. Friedenthal, page 516, 517.

**CONCLUSION:** On all three of these issues, all that is sought is that the student's conclusion reasonably is supported by the student's preceding analysis/application of the relevant rule to the facts.



1)

Question #1:

**Was the District Court's class action certification of the class and order of service of notice and payment of costs proper when the class consisting of "all Hispanic students enrolled in Orchard School District?"**

**Class action**

In a class action, in addition to there being an identifiable class, the court authorizes a single person (representative plaintiff) or a small group of people to represent the interest of a larger group. In addition to there being an identifiable class, in every class action, four requirements must be met: numerosity, commonality, typicality, and adequacy of representation.

The class action 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, the three seniors filed a class action with the description of the class and identified the class on behalf of themselves and approximately 5,000 of the School District's Hispanic students in grades 1 - 12 located in schools through the District.

Therefore, the class action complaint does contain a description of the class.

**Identifiable class**

The class action 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 a necessary determination as to who gets "notice" and who will be bound by the class action judgment.

Here, the identifiable class as certified by the District Court is "all Hispanic students enrolled in Orchard School District." The three seniors Hispanic students at Almond High School are the only three plaintiff filing the suits and selected to file it as a class action suit with them being the class representative against the School District in Federal Court for violation of the First Amendment right of assembly on behalf of themselves and approximately 5,000 of the School District's Hispanic students in grades 1 through 12 located in schools throughout the District.

Therefore, there is an identifiable class.

### **Numerosity**

Under the numerosity requirement the class must be so numerous that the joinder of all members would be impractical.

Here, the three Hispanic students, seniors at Almond High School, have filed a class action lawsuit on behalf of themselves and approximately 5,000 of the School District's Hispanic students in grades 1 through 12 located in schools through the District. The numerosity must be so numerous that joinder of all members would be impractical. It is a judicial economy issue where there may be potentially too many individual lawsuits that would make it impractical to join them all. However, the focus is not on specific numbers, but it must be so numerous that the court making factual finding as to the approximate size of the class based on evidence and apply the legal standard of numerosity. Because there may be potentially over 5,000 individual lawsuits, it does appear too numerous that it would be impractical to join the all.

Therefore, there this class action suit does meet the numerosity requirement.

### **Commonality**

Commonality requires that the members of the class must share common questions of law or fact. In many jurisdiction, only one significant question of law or fact will be sufficient.

Here, the class representatives are the three senior Hispanic students at Almond High School and their class action lawsuit theory against the School District is for violation of First Amendment right of assembly, asserting rights to injunctive relief and damages under 42 USC 1981 et seq. At least one common question of law or facts must be common to meet this commonality test. The class of "all Hispanic students enrolled in Orchard School District," consisting of Hispanic students in grades 1 - 12 is overly broad.

The lower grades and younger students (e.g. grades 1 - 6) may not have rally in school or even a football field. Not all school have football field where they will not necessarily have rally as in the case with the senior Hispanic students based for violation of their First Amendment right of assembly claim. The common claims and defenses they are arguing may not be the same such as right to assembly and right to have a rally when the lower grades does not have such need. The high school seniors age range are most likely between 17- 19 years old and the age of the students in the lowest grade, grade 1, is most likely 5 years old. A teenager's interest will not be common to

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that of a five-year-old child. Their common defense are also going to be different when the claims are different. The students in grades 1 - 6 (elementary) would not have been injured by not having a rally to take place on Almond High's football field. In other words, the capacity of a classwide proceeding to generate a common answer sufficient to drive the resolution of the suit is not common enough.

Therefore, it appears this class action suit fail in commonality test.

### **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 approximately 5,000 of School District's Hispanic students in grades 1 - 12 located in schools throughout the District. The representatives are the three senior Hispanic students at a high school and their claims and defenses may not be typical of the lower grades (e.g. grades 1 - 6) who do not have need to rally. They typicality does not appear to be coming from the same event or same practice or same interest that arise from same facts or event. Typicality is focus on whether the claims of the class representative, the named plaintiff, are typical of those in the class such that the named plaintiff must have the "same interest" or same course or event and each makes similar legal arguments or same injury to prove the school's liability.

Here, the students are overly broad and ranges from 1 - 12. The younger students grades 1 - 6 are in elementary school and their interest are not typical of students in high school, as are the class representative, the three high school students. There may or may not be a need for a football rally for elementary school students at all. Some elementary school may not have such a need or desire for a rally or an athletic department. While typicality does not need to be coming from the exact same event or same practice or same interest that arise from same facts or event, typicality must be typical of those in the class that the named plaintiff must have the same interest. The high school students are teenagers with age range from 17 - 19 years old, which their interest would not be typical of students in grades 1, who are only 5 years old. Their interest would clearly be different. For one, 5 years old still likes cartoons and are disgusted of the opposite sex. On the other hand, a 17 - 19 years old teenager's motive for a rally is to show off their athleticism and to impress girls or boys. They may desire the right to assembly, but the 5 year old child would not be interested in such activity.

Therefore, this class action suit also fail in typicality.

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### **Adequacy of representation**

Adequacy of representation requires the class representative to fairly and adequately represent and protect the interest of the class members. The court may cure "inadequate representation" problems by appointing a number of representative, lawyers, or creating subclasses.

Here, the class representative are three senior Hispanic students at a high school. The class consist of Hispanic students in grades 1 - 12. It is highly unlikely that the representative will adequately represent all the Hispanic students in grades 1 - 12. The requirement of adequacy of representation serves to uncover conflicts of interest between named parties and the class they seek to represent where fundamental conflict may be a form of inadequacy, but speculative conflict should be disregarded.

Here, there is clearly a conflict and it is regarding the interest of the older members whose wants a football rally where the lower grades, elementary students, most likely do not have such interest. Teenagers will not likely know of 5 years old interest or even 10 years old student's interest. Their likes and dislikes are completely different. The fundamental interest of right of assembly is not necessarily heightened in younger children who has no desire to exercise such right or feel there's any harm not not having such opportunity.

Therefore, the three seniors as class representative of the entire 5,000 Hispanic students enrolled in Orchard School District, grades 1 - 12 would not be an adequate representation of the class.

### **Cure**

The court may cure inadequate representation problems by appointing a number of representatives, lawyers, or creating subclasses. It would appear the subclasses could be as follows:

- 1) Hispanic students in grades 1 - 6, elementary students,
- 2) Hispanic students in grades 7 - 8, junior high or middle school students, and
- 3) Hispanic students in grades 9 - 12, high school students.

The court may appoint representatives or layers in each of these subclass to ensure they have adequate representation because their interest may be different in each of the subclasses based on their ages, needs, developments, and the like. However, the fundamental issue is whether the elementary grade students or junior high/middle school students even have an interest in a football rally to take place on Almond High's football field. Many of the other students, class members,

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especially grades 1 - 8, attend Almond High School that the three seniors alleged injury. While arguably, junior high/middle school students may have some interest in attending a football rally, this interest would appear absent in elementary school students who may not find any desire to partake in a rally nor would find a violation of First Amendment right of assembly claim.

### **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 "damages" class action. A prejudice class action is one which is necessary to avoid harm either to class member or to party opposing the class. An injunction or declaratory relief class action is one in which the entire class requests injunctive relief from the defendant or his actions. A damages class action, most frequently used, must involve questions of fact or law by the class, predominate over individual differences and the class action is a superior method to handle the dispute. For a damages class action, the court must NOTIFY all reasonably identifiable class of their right to opt out of the class action.

### **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 representative is seeking rights to injunctive relief and damages on behalf of themselves and approximately 5,000 Hispanic students in grades 1 - 12.

Therefore, this class action is not that of the prejudice category.

### **Injunction or declaratory relief (B)(2)**

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

Here, the class representative is seeking rights to injunctive relief and damages on behalf of themselves and approximately 5,000 Hispanic students in grades 1 - 12. The defendant is the School District who were in fear of a possible race riot based upon learning of numerous threatening social medial postings, retracted its rally approval. The initially approval for the football rally is to take place on Cinco de Mayo, which is on a specific day. However, it would appear their injunctive



relief and ultimate goal is for the defendant to allow the rally to take place on that 5th of May, and appearing to be too late.

Therefore, this class action is that of the injunction or declaratory relief category, albeit it may be late by the time the suit is decided giving that it's a class action lawsuit.

### **Damages (B)(3)**

A damage category look for the common questions of law and fact by the class that predominate over individual differences and that the class action is superior method to handle the dispute. For damages class action, the court must notify all reasonably identifiable class members of their right to opt out of the class action. If they fail to opt out, they will be bound by the judgment and they can entire a separate appearance through counsel.

Here, the class representative is seeking rights to injunctive relief and damages on behalf of themselves and approximately 5,000 Hispanic students in grades 1 - 12. The defendant is the School District who were in fear of a possible race riot based upon learning of numerous threatening social medial postings, retracted its rally approval. The initially approval for the football rally is to take place on Cinco de Mayo, which is on a specific day. The common questions of law and fact would predominate over individual differences because they are citing violation of First Amendment right of assembly.

Therefore, this class action is that of the damage category; however, this class action lacks commonality.

### **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 and the class claims, issue or defense, as well as appoint class counsel who fairly and adequately represents the class' interests. 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, issues, or defenses, and the binding effect of a class judgment. The notice may be by one or more of the following: United States mail, electronic mail, or other appropriate means.

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Here, the District Court, over objection of the defendant issued an Order the certified the defined class and ordered notice to class members be given in the local English language newspaper and ordered defendant, School District to pay the costs of publication. It is highly possible that all members would be identifiable because the school district would have the names of all students attending who are the class members. In addition, the class is for all Hispanic students, but the publication is given in an English language newspaper. While there are some expectation that people could read in English, the class consist of "All Hispanic" and it would be more reasonable for any publication to at least be in a Hispanic paper, but that would not be sufficient because individual notice would be reasonable for the class members could potentially be identifiable upon reasonably discovery methods.

The class category under injunctive relief is a mandatory class action.

All members except those that opt out of a damages class action in (B)(3) class are bound by a class judgment. The minimum contact requirements that must be met for the assertion of personal jurisdiction need not be satisfied to bind absent members of the plaintiff class suit who chose not to opt out. This allows the state or federal court to bind person to a class action judgment even though they have not contact with the state.

Here, since the class representative and potential 5,000 class members are students in the school district, they most likely are living in the state and personal jurisdiction is not an issue.

Even if the court found that the class representative will adequately protect the class member's interest, if in fact he does not provide adequate representation then the class members, citing the Due Process Clause, may not be bound by the class action judgment.

Plaintiff should be responsible for their own service fees and publication should not have been allowed when all members could reasonably be identifiable.

### **Conclusion**

Therefore, the District Court's certification of the class and ordering the service of notice and payment of costs was not proper.

The three high school seniors should have filed their suit as a regular civil action and not as a class action.

**END OF EXAM**

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2)

**Should the court grant Drugs R Us' motion seeking a second medical examination of Plaintiff?**

**Discovery**

To determine if litigants have an opportunity to obtain and review pertinent evidence prior to trial the information sought must be within discoveral material Discoery devices are disigned to elicit informaiton within a permissible scope of discovery. Here, a second medical examination is sought by Drugs R Us'.

**Scope of Discovery**

Under FRCP 26, a litigant is entitled to discover all non-privileged information relevant to the subject matter of the litigation as long as the requests are not disproportional to the needs of the litigation. Relevant information is obtainable by using a number of discovery devices relevant to a claim or defense and is proportional to the needs of the case that is reasonably calculated to lead to admissible evidence. Evidence does not have to be admissible to be discoverable.

Non-priviledged materials are relevant materials if they are not privileged and arise under the consitution and the law of evidnece. Work product created in furtherance of litigation that includes the attorney's thoughts, attorney-client communicaiton not made in the presence of a third party is privileged and doctor patient is generally privileged material and is not discoverable unless a party's physical or mental condition is at issue.

Here, Kandis' medical examination is relevant and non-privileged because her medical condition, the exacerbation of her pain, possibly arising from the use of defendant's product is at issue. Thus, within the scope.

**Disclosures**

**Initial**

Parties are required to disclose some information upon commencement of litigation. Mandatory disclosures are required by both parties and including names, contact information of witnesses and

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potential witnesses, documents, ESI and other tangible things to support a claim or defense. Initial disclosures are not an issues here.

### **Expert**

If a party plans to use an expert witness, their disclosure must be accompanied by the expert's final written report if requested. If not the expert must state the subject matter to testify and a summary of facts and opinions. Facts show Dr. Edwards disclosed a final report to Drugs R Us with his findings, facts and opinions. The fact that it was unrequested is a non issue because it's a mandatory disclosure. Without this disclosure Drugs R Us would have a difficult time defending their CBD product line because written in Dr. Edwards final report, in his opinion Kandis' pain may be orthopedic in origin.

### **Medical Examination**

Under rule 35 when a party's condition is in controversy, a physical or mental examination may be requested but is only discoverable with good cause in advance and requires a court approval. The physician must be a suitable licensed examiner, and there must be agree upon the time and place. The court should limit the physical exam within the scope of the issue in controversy.

Here, initially Drugs R Us successfully obtained an order from the court for Kandis to submit a physical examination performed by Dr. Harry Edwards, a Board Certified medical expert in both neurology and pain management. After the examination he properly served Kandis's lawyer a report with his findings, but noted he could not rule out a possible orthopedic etiology as a basis of her complaint.

This new information is now beyond the scope of Dr. Harry Edwards, and Drugs R Us must supplement a new witness, since their initial expert is not an Orthopedic expert. Although Kandi's council will object to a new expert witness, there was no way Drugs R Us would have foresee that a person with a diagnosis of chronic pain syndrome, complaining of exacerbated pain, would end up with possible orthopedic issues.

To further the investigation related to Kandis's issue in controversy, Drugs R Us must request a second medical examination of Kandis by Dr. Dan Hue, a Board Certified Orthopedic surgeon. Drugs R Us asserts that the medical examination is needed due to Dr. Edwards limited knowledge related to Orthopedic etiology.



Kandis' council should object to a second exam, because it's too burdensome, time consuming and embarrassing. They should also request Dr. Dan Hue produce a written report to establish his qualifications as an expert. and limit the scope of the examination.

### **Sanctions**

The court may impose sanctions that may include reasonable expenses and attorneys fees incurred by any party on the person who impedes delays or frustrates the fair examination of a party or witness.

Kandis' council should request a Protective Order. The court may issue an order protecting a party from annoyance, embarrassment, oppression, burden or expense or limit terms, inquiry or discovery methods.

Drugs R Us has filed a motion seeking a second medical examination of Kandis due to Dr. Edwards's limited scope. Here, the court should limit Dr. Dan Hue's examination only to Kandis's orthopaedic etiologies.

### **Pre-Trial Conference**

At least 21 days before a rule 16 meeting parties must meet and confer to find out their claims and defenses, the possibility of settlement, initial disclosures, any issues concerning the preservation of evidence and a discovery plan. These required initial disclosures and discovery plan must be submitted at lease 30 days before trial and within 14 days after disclosures are made. The judge will issue the scheduling order as soon as practicable, unless for good cause for delay within 90 days after the defendant is served with the complaint or 60 days after any defendant appeared. Although this new request may delay and burden Kandis, Drugs R Us request for a motion of a second medical exam by a different expert in good faith to to help their discovery plan should be permitted.

### **Conclusion**

The District Court should grant Drugs R Us's motion for a second exam.

3)

**Should the court grant Jive Station's appeal and reverse the trial court's decision or order a new trial based on the misconduct of the juror?**

### **JURY TRIAL AND SELECTION**

#### **Jury Trial**

A jury decides questions of fact and are instructed on the law by the judge. The 7th Amendment preserves the right to a jury in civil action at law where the amount in controversy exceeds twenty dollars, but not in suits in equity.

Here, Plaintiff Brie filed a gender discrimination lawsuit against defendant when she discovered that her band was not being hired or promoted by Jive Station because it has a "strong female lead singer."

The facts are silent as to what damages Brie is seeking. Brie is most likely seeking monetary damages for any lost income due to being hired or promoted by Jive Station. The amount is most likely to be over twenty dollars. Further the facts state that the suit proceeded to trial and a jury was selected.

Therefore, Brie's trial is by jury.

#### **Jury Selection**

Due Process requires that the method used to select a jury is fair and partial. The federal jury is selected by the voir dire process in which prospective jurors are questioned about their backgrounds and potential biases before being chosen to sit on a jury.

#### **For Cause Challenges**

A lawyer may exclude for a prospective juror by exercising unlimited challenges for cause such as bias (implied or actual), prejudice, or a felony conviction related to the parties.

In this case, Jive Station would have been able to remove the juror for cause. The juror intentionally did not disclose 1) that he was gay, and 2) that the juror knew that Plaintiff Brie's expert economist, whose name was read by the trial judge during voir dire to be an anticipated expert witness, was also gay based upon a prior relationship between the economist and the juror's now husband.

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Although sexual preference is not a bias, the fact that this case involved a question of gender discrimination created a possible bias. The juror could have potentially sided favorably towards the Plaintiff because of his sympathy towards the type of discrimination, or the fact that he has possibly been discriminated against for his sexual orientation. Further, Jive Station would argue that the juror had a further bias as he knew the economist was testifying and he knew the economist was gay. Jive Station will argue that Jive Station would agree with the testimony of the economist and not question his testimony due to the fact that he was also a gay man. Plaintiff will argue that there was no bias because the economist was once married to the juror's now husband and there could be some bad feelings there. That would have potentially harmed Plaintiff and benefitted the Defendant.

The court may have Jive Station's request to exclude the juror for cause.

### Peremptory Challenges

A lawyer may also exclude a prospective juror by exercising any of the lawyer's three peremptory challenges for any reasons other than race or gender, as that would be unconstitutional.

If Jive Station's move to remove for cause was not granted, Jive could have used a peremptory challenge to exclude the gay juror. Jive would not have been excusing the juror for race or gender. Plaintiff would have argued that Jive was removing the juror due to his sexual orientation. However, sexual orientation is not gender. Further, Jive would not be removing the juror for his sexual orientation rather his bias.

Therefore, Jive could have removed the juror using a peremptory challenge.

### **Jury Number**

A federal jury can be composed of a minimum of six jurors and a maximum of twelve. If there is a six member jury, the decision must be unanimous.

The facts indicate that there was 8-0 jury verdict awarding Brie \$1,000,000. Since there was an eight member jury panel, the decision did not need to be unanimous.

### APPELLATE REVIEW

Generally only final orders are reviewable on appeal. A final order is one that disposes of the whole case on its merits, by rendering final judgment not only as to all the parties but as to all causes of action involved.

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Here, the facts indicate that there was a jury verdict that was 8-0 in favor of Brie. Therefore, it is likely that the verdict decided the whole case on its merits.

The jury verdict is appealable.

## **Reviewability**

### Newly Discovered Evidence

Newly discovered evidence, evidence of jury misconduct, or other evidence coming to light after trial may not be presented directly to an appellate court. Such evidence must be presented to the trial court in a new trial, after remand by the appellate court.

Here, after the trial was over and the jury gave its verdict, defendant's attorneys did research and discovered information from individuals and social media posting by the juror that disclosed the gay juror's sexual orientation and familiarity with Brie's economist. The newly discovered evidence is evidence of jury misconduct and the information came to light after trial.

While the evidence must be presented to the trial court in a new trial, Jive Station should be able to raise the issue of newly discovered evidence in appeals.

### Harmless v. Prejudicial Error

The appellate court may review any trial court action or decision and the conduct of the persons before the court to determine if there were any legal errors in the proceedings. If such errors existed, the appellate court may reverse and order a new trial. The court will review to see if there was such error and if it was harmless or prejudicial. A harmless error is a ruling by the trial court that, although mistaken, does not meet the burden for a losing party to reverse the original decision of the trier of fact on appeal, or to warrant a new trial. An appellate court may not reverse a judgment below unless the error was prejudicial, i.e., determined the outcome of the case.

Defendant Jive Station appeals the jury verdict asserting prejudicial juror misconduct by the subject juror. Jive Station will contend that the error was prejudicial. Had the juror disclosed his sexuality and his familiarity with Brie's economist he would have been able to remove the juror using either a challenge for cause or a peremptory challenge. Based on the analysis above, the court will most likely have allowed Jive to remove the juror. Further, in removing the subject juror, Jive would have been able to choose another non-biased juror who perhaps would have ruled in his favor.



However, the court will find that there was harmless error. While Jive Station was precluded from exercising a for cause or peremptory challenge, the error did not play a significant role in determining the outcome of the case. The facts indicate that the juror verdict was 8-0. Due to the fact that there was an 8 member jury panel, the verdict did not need to be unanimous. Had Jive had the opportunity to remove the subject juror, the outcome could have possibly been 7-1. However, that would have still given Brie a favorable outcome.

Therefore, the court will most likely deny Jive Station's appeal for reversal of the trial court's order or new trial as he will most likely not meet the burden for a losing party to reverse the original decision of the trier of fact on appeal, or to warrant a new trial.

**END OF EXAM**