

Kern County College of Law

CIVIL PROCEDURE II

Final Examination

Spring 2024

Prof. L. Peake

Instructions:

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

KCCL
Civil Procedure II
Final Exam
Prof. L. Peake

Question #1

Mercedes, a Nebraska domicile, is the president of a Kansas corporation called, "Mercedes Magic Mushies" ("MM") which grows Class One mushrooms in Kansas using "Bug Death, a pesticide made by Samule, an Idaho domicile, in Sam's garage. Sam ships the Bug Death ("BD") to MM in Kansas, where MM has its home office and a website that advertises throughout the USA. Class One mushrooms are illegal under U.S. Federal law and state laws of Kansas, Idaho and Nebraska.

MM shipped some of its Bug Death grown mushies to Lidia, also a Nebraska domicile (and also Mercedes' roommate). Lidia does business as "Lit By Lidia" ("LBL"), selling various mushroom produces over the Internet, including MM's mushies, to Idaho. Alondra, and Idaho domicile, purchased mushies from Lidia, which LBL shipped from Nebraska to Idaho.

Elvira, a California domicile, while visiting Alondra in Idaho, found and took some of Alondra's mushies and became ill. Following a week's hospital stay (incurring medical expenses of over \$80,000), Elvira is now staying in Idaho indefinitely until she is well enough to return to California.

Elvira hired David, an Idaho attorney working for his lawyer uncle, to file suit in Idaho District Federal Court against Lidia dba "Lit By Lidia" and MM, Inc., asserting both Idaho state law negligence and product liability claims (including based upon violation of Federal pesticide standards), and a Federal law Racketeering and Corrupt Organizations Act (RICO) claim, with the suit assigned to Judge Daniel Patrick. The complaint as filed asserted claims seeking to obtain class action certification on behalf of Elvira and all others residing in the United States who claimed to have suffered bodily injury, property damage or wrongful death loss of society and comfort, with David requesting appointment as the attorney for the class. The complaint asserted upon information and belief that the class would carry a value in excess of \$1,000,000 and have over 100 members.

MM, Inc. and Lidia have filed opposition to David's request for class action certification.

How should Judge Patrick rule on David's request for class certification?

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Question #2

Assume all the facts contained in Question #1 along with the following:

After successfully serving the summons and complaint upon MM, Inc. and Lidia, both of such defendants impleaded Samuel as the maker of "Bug Death" as a third party defendant and Alondra for negligence in allowing access to the mushies to Elvira; and after initial FRCP 26 disclosures, Plaintiff Elvira's attorney, David, served requests for admissions to MM, Lidia and Sam asking each to admit the following:

"Admit that the mushies ingested by Plaintiff Elvira as obtained from defendant Lidia by Alondra contained Bug Death so as to cause injury to Elvira."

David served a demand for production of documents to MM, Lidia and Sam requesting that each produce:

"All document substantiating any response to the requests for admissions served herewith that support any response which is not an unqualified admission."

MM and Lidia responded to the request for admission with, "Admit." Sam responded with, "This responding party lacks sufficient information and/or belief to admit or deny this request."

MM's attorney, Max Mendez, and Lidia responded to the request for production with, "This responding party has no documents responsive to this request, as an unqualified admission has been given."

Sam, however, produced numerous emails and an invoice to MM, Inc. reflecting prior sales of Bug Death to MM, including emails sent to and from Sam's attorney regarding possible retention on an expert for Sam on the potential that Bug Death caused Elvira's injuries. Sam's attorney, James, while preparing for Sam's deposition, found that Sam's secretary had erroneously included the emails in Sam's document production, and directed a letter to David demanding return within five days of the emails and any copies of the emails. David did not respond within five days, and on the sixth day James brought a motion before Judge Patrick demanding that David return all the emails and copies and be prohibited from referencing them or their contents at trial, and for monetary sanctions against both David and Elvira.

How should Judge Patrick rule on James' motion?

Question #3

Assume all the facts contained in Questions #1 and #2 along with the following:

Following the pretrial conference on the Elvira v. MM, Inc. et al. matter, a jury of six individuals was seated. On the ninth day of trial, Lidia called to the stand as her first witness P. Maxwell, an individual who had not been included in Lidia's initial disclosure or pretrial conference witness list who Lidia immediately began to have testify as Lidia's LBL foreman that invoice dates prove Bug Death was actually NOT in the shipment of mushies that LBL sold to Alondra that Elvira ingested. Lidia did not discover P. Maxwell's use or ability to so testify until the day before trial started when Lidia was preparing for trial.

Shortly after P. Maxwell took the stand and began testifying, Juror #6, T. Poe, raised his hand and told Judge Patrick, "Your Honor, I know this guy - he's my former boyfriend."

David, on behalf of Elvira, began checking Lidia's witness list when P. Maxwell took the stand, and upon not seeing P. Maxwell's name listed, and hearing Juror #6's statement about T. Maxwell, made the following objections and motions to Judge Patrick:

1. To preclude witness P. Maxwell from testifying further;
2. To specifically preclude P. Maxwell from testifying further that Bug Death was not in the mushies Elvira ate as Alondra obtained from Lidia and to strike such testimony;
3. To excuse Jury #6, T. Poe, from sitting as a juror; and
4. For a mistrial.

How should Judge Patrick rule on David's motions?

Kern County College of Law - CIVIL PROCEDURE II

ANSWER OUTLINE - Spring 2024- Prof. L. Peake

Question #1 Answer Outline

Issue: Whether class certification should be given under FRCP 23

Rule: Class certification under FRCP 23 should be given where four conditions are present: Commonality, typicality, numerosity and adequacy of representation of the proposed class by the named class representative and attorney for the class.

Analysis/application:

Commonality:

Here, the complaint proposes the class be composed of all U.S. citizens suffering any of the following types of damages: bodily injury, property damage or wrongful death loss of society and comfort.

Plaintiff Elvira has sustained bodily injury and medical specials, but not property damage nor wrongful death loss of society and comfort.

Elvira will argue that her bodily injury and medical expense claims yield sufficient commonality to encompass unnamed class members asserting claims for property damage or wrong death loss of society and comfort. Elvira will likely also argue in the alternative that a subclass should be allowed as to property damage or wrongful death loss of society and comfort claims, if the court feels necessary, and to provide Elvira with sufficient time to find one or more named class representative plaintiffs as to such damage claims; or, in the alternative, that Plaintiff be allowed to amend her complaint to drop from the proposed class any members not limiting their claim to bodily injury.

MM and Lidia in opposition will most likely assert that there is a fatal lack of commonality where, as here, Elvira's claim is only for bodily injury, and not for property damage nor loss of society and comfort from wrongful death.

As to the element of commonality, it would appear more probably than not that such element is not met by Plaintiff Elvira's complaint as pleaded.

Typicality:

The element of typicality is often considered to be subsumed by the element of commonality (that there exist one or more common questions of fact or law among named and unnamed class members), with typicality testing whether the position of the named plaintiff is sufficiently similar to the position of unnamed class members.

Here, while Plaintiff's class action for bodily injury is an FRCP 23(b)(3) claim for monetary damages as would unnamed class members' claims for property damage and loss of society and comfort, the nature of such damages is so distinct from bodily injury claims, particularly as to causation issues, so as to undermine the extension of Elvira's representation as the sole class representative to such claim.

Thus, it appears that the proposed class as to which certification is sought does not meet the test of typicality.

Numerosity:

For numerosity to be present in an FRCP 23 class action, there must be sufficient anticipated class members such that joinder of all class members is impracticable.

Here, over 100 members are assertedly included in the class, which should be considered as sufficient to meet the

Adequacy of Representation:

FRCP 23 required that both the named representative and the attorney for the class be capable of providing adequate representative for the class.

Here, Plaintiff Elvira's claim is limited to bodily injury, while her complaint seeks certification of a class that extends to individuals sustaining either (or both) property damage or wrongful death lack of society and comfort. Adequacy of representation by Elvira for the scope of class members sought would not appear to exist.

In addition, Attorney David, an attorney working for his lawyer uncle in Idaho, would need to be able to convince Judge Patrick that he has sufficient experience and means to pursue a class action involving over 100 unnamed class members and exposure in excess of \$1 million.

It does not appear from the information provided that the element of adequacy of representation is met as required by FRCP 23(a)(1).

Whether Class Action Fairness Act is available to Plaintiff Elvira to certify the proposed class:

Rule:

The Class Action Fairness Act (CAFA: 28 USC 1332, 1453, 1711-1715) provides for certification of a proposed class action where minimum diversity is present between the named class representative and any defendant; over 100 class members will be involved as plaintiffs; and over \$5,000,000 exposure to defendant(s) assertedly exists.

Here, the facts assert minimum diversity is present as between Elvira, a California domicile, and defendants MM, Inc. (Kansas corporation) and Lidia (Nebraska domicile).

However, while sufficient numerosity (over 100 members) assertedly exists, the complaint asserts only \$1,000,000 in damages for the class, which fails to meet CAFA's requirement of over \$5,000,000.

Conclusion:

It appears more probably than not that Judge Patrick should not certify the proposed class action, either under FRCP 23 or CAFA.

KCCL Civ Pro 2024 Final Question #2 Answer Outline

Issue: Whether Judge Patrick should grant Defendant Sam's motion to return emails and for monetary sanctions

Rule: FRCP 26(b), (c) and 37 allow for a motion to be made to "claw back" protected materials inadvertently produced following a demand for return of such documents and a meaningful meet and confer effort to resolve a dispute regarding such production and demand for their return. FRCP 37 allows for recovery of monetary sanctions against a party unsuccessfully...and unreasonably...making or opposing a motion for protective order.

Analysis/application:

FRCP 26(c) allows a party to seek a protective order to, inter alia, "claw back" protected materials inadvertently produced in response to an FRCP 34 demand. A good faith attempt to meet and confer to resolve the inadvertent production issue (by return of the documents and any copies; and that no reference to their contents be presented, directly or indirectly, at trial) be made before the party seeking the

protective order brings such motion.

Here, emails regarding possible retention of an expert for defendant Sam on the potential that Bug Death, Sam's manufactured product, caused plaintiff Elvira's injuries were erroneously included by Sam's attorney's secretary in a document production to Elvira's attorney. Such documents appear to constitute both attorney work product and attorney client privilege materials.

Thus, the emails produced would appear to be properly returned by Elvira's attorney, David, in response to a reasonable request by Sam's attorney, James. Here, however, James has provided only five days to Elvira's attorney to return the documents (and any copies). David, Elvira's attorney, will argue that five days is insufficient, and not a good faith attempt to resolve the issue; and that the lack of response by David was due to the unreasonably short time period of five days to respond.

David will also argue to Judge Patrick that the bringing of the FRCP 26(c) protective order with FRCP 37 monetary sanctions on the sixth day...one day following the unreasonably short period of five days...does not constitute a good faith effort by Sam's attorney to meet and confer to resolve this discovery dispute.

Conclusion:

Judge Patrick should find that while the materials involved constituted protected documents as work product and attorney client privilege, that there was a failure by Sam's attorney, James, to engage in a "good faith" meet and confer (or attempt to meet and confer), and thus deny the motion by James including the request for monetary sanctions as sought against both David and Elvira.

KCCLCiv Pro 2024 Final Exam Question #3 Answer Outline

Issue:

Whether Judge Patrick should allow witness P. Maxwell from testifying further

Rule:

FRCP 26(a) requires a party to disclose the identity of all witnesses the party intends to call to testify at trial; and FRCP 16 requires that parties at the final pretrial conference to disclose a final witness list.

Analysis/application:

Here, Lidia on the ninth day of trial called a witness, P. Maxwell, not previously listed in Lidia's Rule 26(a) disclosure nor final pretrial conference witness list. Scheduling Conference orders are intended to control the litigation through trial, subject to any amendments allowed at the final Rule 16 pretrial conference.

Here, Elvira's attorney, David, objected to P. Maxwell testifying as soon as David realized that Maxwell had not been previously disclosed.

Lidia will argue that David's objection to Maxwell was untimely where, as here, Maxwell had already testified by the time of such objection that Lidia's product as used by Elvira did not contain Bug Death.

Lidia will further argue that Maxwell could not have reasonably been disclosed in her Rule 26 or 16 witness lists as his identity was not discovered until the day before the trial began.

Attorney David will argue that no opportunity has been provided for the parties to depose Maxwell before trial and

prepare rebuttal evidence to his testimony as provided and as further proposed to be elicited, and that the prejudice to the remaining parties is significant.

Conclusion: Judge Patrick will most probably preclude any further testimony from witness Maxwell.

Whether Maxwell, if allowed to testify, should be allowed to testify that Bug Death was not in the mushies Elvira ate as Alondra obtained from Lidia

Rule: A party cannot introduce evidence that contradicts a previously given response to a request for admission absent the trial court determining that doing so would not prejudice the requesting party. FRCP 36(b).

Analysis/Application:

Here, Lidia provided an unqualified admission to Elvira's prior request for admission that Bug Death was in the mushies Elvira ate as were obtained by Alondra from Lidia. To allow Lidia to withdraw (or amend) such response by allowing testimony that the particular mushies that Lidia bought from MM, Inc. would effectively eviscerate...dramatically prejudice...Elvira's case against Lidia, MM, Inc. and Samuel.

In addition, the proposed previously undisclosed witness, P. Maxwell, is stated to have been Lidia's foreman. It would not appear that Lidia can persuasively argue that she should not have been aware of his potential use as a witness until the day before the trial began had Lidia used due diligence in preparing Lidia's Rule 26(a) and Rule 16 witness disclosures.

Conclusion: Judge Patrick should preclude P. Maxwell from testifying further regarding Bug Death's absence from the mushies ingested by Elvira, and should strike Maxwell's testimony as given prior to Plaintiff's attorney's objection.

Issue: Should Judge Patrick excuse Juror #6, T. Poe, from sitting as a juror?

Rule: FRCP 47(c) provides that jurors holding actual or implied bias should properly be excluded from sitting on a jury.

Analysis/Application: Here, Juror #6, T. Poe, has disclosed during trial that witness P. Maxwell was Poe's former boyfriend. That relationship would appear, more probably than not, to create an implied, if not rising to an actual, bias for Poe to continue to sit on the jury. Elvira would argue that this issue of bias resulted from Lidia's failure to properly disclose Maxwell as an intended witness, and thus no failure to timely object on Elvira's part has occurred.

Lidia would likely argue, however, that if Judge Patrick grants Elvira's motion to strike Maxwell's testimony and to further preclude further testimony by Maxwell that no need exists for Poe to be excused, particularly if the jury is admonished to disregard Maxwell's testimony. Lidia would also likely argue that Juror #6 (Poe) only heard Maxwell's testimony because of Elvira's attorney belatedly objecting to Maxwell having been called to the stand.

Conclusion: Judge Patrick should appropriately excuse Poe as a juror on the basis of implied bias.

Issue: Should Judge Patrick grant Elvira's request for a mistrial

Rule: A mistrial may be granted in the court's discretion when less than six jurors unanimously vote (or are available to vote) for a verdict in a case where a jury trial has been appropriately requested and is seated. FRCP 48(a); 59(a), (b).

Analysis/Application: If Judge Patrick excuses Juror #6 (Poe) for cause during the trial, there will only be five seated jurors. FRCP 48 requires a minimum of six jurors in a jury trial.

Conclusion: If Juror #6 is excused, Judge Patrick should grant Plaintiff Elvira's request for a mistrial.

(80)

PLEASE BE SURE TO
ARGUE BOTH SIDES OF EACH
ISSUE - HOW WOULD THE
DEFENDANTS ARGUE
AGAINST EACH ELEMENT

1)

Attorney David's request for class action certification:

For a class action suit to receive certification the Court must determine at an early time whether to allow the case to proceed as a class action. If the class is certified the court must define the class, the class claims, issues, and defenses. Additionally, the court must appoint class counsel that will fairly and adequately represent the interest of the class as a whole. The purpose is to accomplish judicial economy by combining multiple suits, and to protect the rights of persons who might not be able to present claims on an individual basis. The most common class action type used seeks primary relief sought in damages. A judgment would only bind class members. Notification is required to all reasonably identifiable class members that have right to opt-out or seek separate counsel. Under FRCP Rule 23, states that named representatives will be permitted to sue on behalf of class if provided certification of actions having both personal and subject matter jurisdiction (SMJ), where a proposed class has sufficient; (1) numerosity, (2) commonality, (3) typicality, and (4) adequate representation.

Numerosity: The class is so numerous that joinder of all members is impracticable.

Here, Elvira a resident from California who is domiciled in Idaho is submitting a claim for class action against Lidia owner of "Lit by Lidia" (LBL) and Mersades owner of "Mersades Magic Mushies" (MM) in Idaho District Federal Court for state law negligence and product liability claims. The facts state that there are "others residing in the United States" claiming they have suffered bodily injury, property damage or wrongful death loss of society and discomfort. David, the attorney filing the class action claims there are over 100 members in the class. If so, the class would be considered numerous enough to be a class action because it would be impracticable to have all affected parties living in different states to file separate cases or joinders to a case.

The court would find that this suit has numerosity.

Commonality: There must be similar questions of law or fact common to the class. To justify a class action treatment, there must be common issues to the class as a whole, and relief shall apply the same to all class members. Therefore, certification is proper only where common issue of fact or law are of sufficient importance to the case that the most effective method to determine the rights of parties is through a class action.

Here, the claims arisen out of this lawsuit are similar as all class members that are claiming they have suffered bodily injury, property damage or wrongful death loss of society and discomfort from the products sold by LBL and MM.

WALMART v DUKES? COMMON INJURY REQUIRED - PRESENT HERE? THIS IS THE ISSUE TO ARGUE/DISCU

The court would find that this suit has commonality

Typicality: The named parties' interest are typical of the class. If a claim arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory as their claims. It is not necessary that all class members suffer the same exact injury as the class representative.

HOW CLOSE ARE THE CLASS REPS CLAIM TO THOSE OF UNNAMED MEMBERS?

Here, the class is bringing claims arising out of the mushrooms purchased from MM and LBL. The claims are regarding the same product and the damages it has caused. Elvaira the class representative claims her injuries are from the mushrooms sold. Even if class members have suffered different injuries, losses or damages, they may still have typicality in the claim.

The court would find that this suit has typicality sufficeint for a class action suit.

NO DIFFERENT DAMAGES

Adequate Representation: The named representative will ensure the fair and adequate representation of interest of all class members including absent class members.

ELVIRA AS REP FOR ENTIRE CLASS - WHERE WRONGFUL DEATH

Here, David is requesting appointment as the attorney for the class. If the court finds that he can represent the class fairly and adequately including absent or reasonably identified class members, then he may represent the class.

PROPERTY DAMAGE CLAIMS ARE INCLUDED AND SHE HAS NO SUCH DAMAGES

The court would find that this suit has adequate representation.

Judge Patrick would rule in favor of David's request for class certification because the suit meets all the certifications to be considered a class action lawsuit including personal and subject matter jurisdiction.

Class action suit under Class Action Fairness Act (CAFA):

A class action may also be subject to certification under CAFA. The act relaxes federal jurisdiction requirements for some class actions in an effort to make it easier for plaintiffs to file in federal court. To obtain SMJ the class must: (1) class members must be diverse citizens from any defendant, (2) all claims must exceed \$5 million, and (3) 100 plus members must be in the proposed class.

Here, the class is from diverse citizenship and the proposed class is made up of over 100 members. However, the claim is only for \$1 million and does not exceed the \$5 million certification to be considered a class action under CAFA.

David would not be able to seek class action certification under CAFA.

2)

How should Judge Patrick rule on James' motion?

DISCOVERY TOOLS:

REQUEST FOR PRODUCTION:

A request for production is a written request for the production and or inspection of documents, electronically stored information (ESI), and tangible items. Once received the responding party has 30 days to respond. A request for production can be served to non-parties as well, however, they must be accompanied with a valid subpoena. *A RULE STATE IMMEDIATELY BE FOLLOWED BY AN ANALYSIS OF RELEVANT FACTS AND A*

REQUEST FOR ADMISSIONS

AND/OR OBJECT

CONCLUSION - AN IRAC

REQUIRES

A request for admissions is a form of written discovery that implores the responding party to admit or deny to questions of fact in the instant case. Once received the responding party has 30 days to respond. A request for admissions can only be served on a party to a case and not to non parties. *WITHOUT OBJECTION* A non-response is considered to be an admission.

Here, the facts show that David utilized these discovery tools and served them on MM, Lidia, and Sam (who had just been impleaded)--thus, David served these on parties to the case. Since MM, Lidia, and Sam are all parties to the case, David was not required to send a subpoena with the request for production.

SCOPE OF DISCOVERY

FRCP 36 provides that items are discoverable if they are relevant to any claim or defense by a party in the case and if the propounding party's need (i.e. how important is it to the case) of the items outweighs the burden of the responding party's production of the items.

However, there are certain items that are not discoverable and this includes confidential communications between attorney and client, AKA attorney client privilege. Additionally, work product--, otherwise known as anything prepared in anticipation of litigation by the attorney or an agent of the attorney--is also not discoverable.

Here, Sam's secretary inadvertently provided e-mails between him and his attorney with his responses to David's request for the production of documents. These, e-mails between Sam and his attorney James, constitute confidential communications between an attorney and his client as they were intended to be confidential and concern a very delicate issue in Sam's Case.

Thus the e-mails are not discoverable.

RELEVANT

ARGUE BOTH SIDES - DISCLOSURE REQUIRED UNDER FRCP 26?

CLAWBACK PROVISION

The FRCP provides that in the event of inadvertent disclosures, the party that inadvertently disclosing party has the ability to "claw back" what was accidentally provided to the propounding party and require that the party do not use or reference that information during the course of litigation. It is required that the responding party notify the propounding party demanding return of the inadvertently disclosed documents within a reasonable time.

Here, James, did not discover the e-mails that were wrongfully provided to David until near the time of Sam's deposition. The facts are not clear as to how much time had elapsed between the inadvertent disclosure and the time of James' discovery of the inadvertent disclosure. What is known, is that the subject e-mails are not discoverable.

ARGUABLY WORK PRODUCT.

Thus, James is entitled to have the e-mails returned to him.

ENFORCEMENT OF DISCOVERY:

PROTECTIVE ORDER

A protective order is sought by a party responding to propounded discovery that has been subject to undue burden or expense. The moving party is requesting protection from the court.

FOR RETURN OF EMAILS AND ANY COPIES

Here, James is seeking a protective order to ensure that David's client, Elvira be prohibited from utilizing or referencing the privileged e-mails during trial. The fact that privileged communications have been inadvertently disclosed to Elvira would constitute such a burden that would give rise to James seeking a protective order.

MEET AND CONFER REQUIREMENT

FRCP 37 provides that a party that moves for a motion to compel or a protective order must certify that they have, in good faith, conferred or attempted to meet and confer before they can move forward in their request for relief from the court and potentially obtain sanctions.

What constitutes a valid meet and confer effort boils down to two things: 1) method and 2) time limit for compliance.

The ideal situation that the court prefers, is for the parties to meet face to face and work together to settle the discovery issues while maintaining a reasonable timeframe for compliance. On the other hand, a voicemail that demands compliance within twenty four hours would be considered the opposite of ideal.

Here, James sent one letter to David where he attempted to confer with David and request the return of all the privileged e-mails. James gave David 5 days to return all the privileged e-mails. The timeframe for compliance isn't made in good faith because by the time David receives the letter he may only have 2-3 days to actually go through his file and return the e-mails to James. Additionally James, a millennial, could have easily surmised that the best method to reach out to David, another millennial, was not by "snail" mail but by e-mail, a phone call, or a text.

Thus, Judge Patrick will find that James did not make a good faith effort to meet and confer because James' timeframe for compliance was unreasonable, and he should have made more than one attempt and tried better methods.

CONCLUSION

Ultimately, Judge Patrick, will grant James' motion in part (as to prohibition and return of e-mails) and deny in part (as to sanctions).

→ IF MEET AND CONFER NOT "REASONABLE"
THEN COURT CANNOT CORRECTLY GIVE
RELIEF / GRANT MOTION

3)

ADDRESS EACH
4 MOTIONS A
SEPARATE ISS
WITH OWN TR

How should Judge Patrick rule on David's motion and objections?

Under FRCP 26, the court may hold a pretrial conference as necessary to expedite trial and foster settlement. Under FRCP 16, the purpose of a pretrial conference in any action is for the court to (1) expedite disposition of the actions, (2) establish early and continuing control, so that the case will not be protracted because of lack of management, (3) to discourage wasteful pretrial activities, (4) to improve the quality of the trial through more thorough preparations and to (5) facilitate settlements. Under FRCP 26 if a party discovers a new witness or calls a witness after its FRCP 26 disclosures. They can serve supplemental disclosures. The use of initially non disclosed witnesses, including expert witnesses, is subject to excluding at trial by the court upon objection by another party claiming undue prejudice where a late disclosure has been proffered.

Here, Lidia did not discover witness, P. Maxwell until after the pretrial conference and right before the trial. Lidia did not have the reasonable time to file supplemental witness list to opposing counsel. David may argue that under the federal rules she must disclose the witness as soon as it becomes available to her. However, doing so would have caused an unjust delay in trial that was scheduled the next day. P. Maxwell seems to be an important witness because it proves that the Bug Death was not in the mushrooms that the plaintiff ingested. Therefore P. Maxwell testimony is very important to the case.

Under FRCP 48, federal juries must be composed of at least 6 jurors and no more than 12. Verdicts must be unanimous unless otherwise stipulated by all parties.

Here, juror # 6, T. Poe, claims she dated one of the now key witnesses to this case. Therefor this would cause a significant irregularity in the court proceedings and be jury misconduct because the juror may have bias due to the fact she knows the witness.

Under FRCP 59, it provided for the right to a new trial, may be granted for a significant error of law, irregularity in the court proceedings, and/or jury misconduct.

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IT IS AN ISSUE T
ARGUE PRO AND C

Here, juror number 6 knows one of the witnesses in the case and therefore can not be a part of the jury.) FRCP 48 states there must be a minimum of 6 jurors on the jury, the facts

do not state that there is any alternate jurors or that the parties would stipulate to a lesser jury.

Judge Patrick would rule in favor of David's motion to dismiss juror # 6 and issue a mistrial due to the lack of adequate juror members in the case, and request for a new trial. The witness P. Maxwell shall be allowed to testify if disclosed in the new trial.

END OF EXAM

ISSUE: WITNESS ALLOWED TO
TESTIFY CONTRARY TO
AN ADMISSION UNDER
FOCP 36?