

## **Sample Answers**

Civil Procedure Midterm

Fall 2008

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**NOTE:** The answers contained herein are samples and samples only. They are disjointed from reality in that they (or at least some of them) exceed what anyone likely could produce in the amount of time allotted.

Nevertheless, the answers also are not “ideal,” “model,” or “perfect.” Different portions of the questions could be approached in different ways, and the key is not necessarily the conclusion reached but the *analysis* undertaken.

Students thus will be well advised not to grasp the sample answers as talismans, but to see them as study tools. The prudent student will first assess the *questions* and use them as a way to test her own understanding of the material. Only after this would the student review the sample answers provided here, which can be used to identify potential areas for improvement.

## **Short Answer (12 points)**

*Sample answer:*

Plaintiff objects on the grounds that this request (1) is overbroad and unduly burdensome, (2) calls for the production of material that is subject to the attorney-client and attorney work product privileges, and (3) calls almost exclusively for information that is not discoverable because it is neither relevant nor reasonably calculated to lead to admissible evidence.

*Explanatory notes to students concerning the sample answer:*

Note 1: The attorney-client and attorney work product privileges do not apply to the memorandum mentioned in the fact pattern, because that memorandum contained political (not legal) advice, and because it was not prepared in anticipation of litigation. Nevertheless, the privileges likely can be claimed here in response to the document request *as the request is written*, because the request calls for such a broad category of documents (*anything* related to the campaign). Certainly in the context of this fact pattern, that broad a category of information will contain at least some privileged information.

Note 2: The request is overbroad and unduly burdensome for a number of reasons. First, the request calls for a presumably huge number of documents, and it seems unlikely that, substantively, many of them will be useful to the suit. Second, the request is overbroad not just substantively, but temporally as well, because Timberlake was named as the running mate late in the campaign, yet the request calls for all documents related to the campaign, which had gone on for years.

Note 3: Other possible ways to deal with this request would be to move for a protective order or simply to respond. The latter option seems dangerous and unwise, though, even if it were used to bury defendants in paper, because of the likely immense expense of conducting a privilege and substantive review of the documents before they are turned over. Further, would a losing presidential candidate really want to make public, for example, all of the strategy documents from her campaign? The protective order option, on the other hand, would likely rely on the same objections as could be made via a simple narrative objection (see above), but doing so would lack any clear or immediate advantage. Objecting now and moving for a protective order later would get you to the same place, but objecting now might moot the need to ever move for a protective order, thus saving time and expense. Finally, one other option would be for Ventura to attempt to negotiate down with Timberlake's attorneys the scope of what will be considered responsive to the request. Effectively, however, that process is what the simpler narrative objection likely will instigate.

## Essay Question (60 points)

*Sample answer:*

Having weighed both parties' arguments on the motions pending before the Court, the Court rules as follows:

### Plaintiffs' Motion to Amend

The first question presented is whether the Court should allow Madonna's and Eminem's attempt to amend their complaint. Amendments to pleadings are governed under the following five-prong standard: If made prior to service of a responsive pleading (or within twenty days of filing the original pleading, if no responsive pleading is allowed and the matter is not yet on the trial calendar), a party may amend its pleading once as a matter of right. FRCP 15(a)(1). If, however, an amendment is made after a responsive pleading and with the consent of the other party, it shall be allowed. FRCP 15(a)(2). If an amendment is made after a responsive pleading but without the opposing party's consent, then the amendment may be allowed by leave of court, and such leave "should" be "freely" granted where justice so requires. *Id.* Finally, amendments may be made at or after trial, either without the opposing party's objection and in order to conform to the evidence, or if there is an objection, when such amendment will aid in the presenting of the merits or not prejudice the opposing party. FRCP 15(b).

Here, the question is straightforward. Plaintiffs lodged the amendment to their complaint after service of the responsive pleading—defendants' answer—so there is no right to amend. Nor was there any consent, as evidenced by defendants' motion to strike the amendment. However, pursuant to FRCP 15(a)(2), the Court will allow the amendment. The very purpose of the Federal Rules is to promote the speedy, just, and efficient resolution of disputes, and the presumption is that wherever possible, courts will reach the merits of those disputes. This policy militates in favor of allowing the amendment here.

Although McLovin and Bleeker argue that they will be prejudiced by the amendment, they will not. Discovery is still under way, and if the discovery period is not sufficient to allow defendants to challenge these new claims, the Court will entertain a motion to expand the discovery time period, if the parties cannot work that dispute out themselves (which it strongly encourages them to do).

In fact, the Federal Rules anticipate that amendments may be made "at or after trial," which itself implicates that an amendment while discovery is still pending typically will not prejudice the other side. Moreover, where, as here, the claims sought to be added are virtually identical to those already on docket, the risk of prejudice to defendants should be minimal. Allowing the amendment will not visit a new and different burden upon defendants; rather, the claims they will be defending against, and the law on which those claims is based, are virtually identical to the causes of action already at issue here. The Court also notes that it is ironic that McLovin and Bleeker oppose Madonna's and Eminem's amendment when they themselves seek to amend their own answer—an amendment that would expand the scope of this case far more

vastly than what Madonna's and Eminem's amendment does. This undermines defendants' position on the Madonna-Eminem amendment.

Most critical, not only is there a lack of prejudice to defendants here by allowing the amendment, but plaintiffs would face substantial prejudice were the Court not to allow plaintiffs' amendment. It appears that the statute of limitations may have run on plaintiffs' new claims. Thus, if the Court were to disallow the amendment, plaintiffs would be foreclosed from seeking relief on these claims. This heavily weighs in favor of allowing the amendment, particularly given the Federal Rules' policy of promoting resolution on the merits.

As a footnote, the Court points out that Madonna and Eminem improperly filed their amendment as though it was a matter of course under FRCP 15(a)(1). The proper procedure would have been to file a motion to amend, and the Court treats the amendment as such.

That motion is granted. The defendants' motion to strike the amendment on grounds that it is untimely is hereby denied.

#### The 12(b)(6) Motion to Dismiss Plaintiffs' New Claims

McLovin and Bleeker also move to dismiss Madonna and Eminem's new copyright violation claims on grounds that they are barred by the statute of limitations. Admittedly, as noted above, on the face of the complaint and the applicable statute, it appears that these claims would be time-barred, as they were not filed until March 1, 2012, and the statute of limitations ran as of January 21, 2012.

However, the Federal Rules allow for the "relation back" of amendments, meaning that amendments filed after the applicable statute of limitations has run may be treated as having been filed as of the original date of the complaint in certain circumstances. The test for whether relation back is allowed is as follows (see FRCP :

- (A) If the applicable statute allows for relation back; or
- (B) If the amendment attempts to assert a claim or defense that arises out of the same conduct, transaction, or occurrence that was set out in the original pleading, and
  - (i) The amendment does not attempt to change the party or add a party; or
  - (ii) The newly named party received notice of the action within FRCP 4(m)'s time limits, would not prejudice the added party, and the added party knew or should have known within FRCP 4(m)'s time limits that it would have been named but for a mistake on identity.

Again, the application of this rule is straightforward in the circumstances presented here. There is no statute of which this Court has been made aware that allows relation back. Nevertheless, it is clear that the amendment adds claims that arise out of the same conduct, transaction, or occurrence set forth in the original complaint. That complaint named violations

of copyright law for McLovin and Bleeker's alleged pirating of music on their website. Those violations allegedly occurred via streaming of the plaintiffs' music on the defendants' internet site. Likewise, the new causes of action added by plaintiffs' amendment are for the very same behavior occurring during the very same time period—but simply for different songs. Indeed, in assessing whether two sets of claims arise from the same conduct, transaction, or occurrence, the applicable law looks not just to whether there is a “logical relationship” between the claims as there clearly is here, but it does so from the eyes of the plaintiff. See, e.g., *Gold Dust*. This is because the purpose of the “relation back” rule is to ensure that parties receive their day in court on a full and entire dispute, rather than being precluded to reach the merits on a technicality such as when precisely the claim was filed. Here, from the plaintiffs' eyes, there is a single harm being done by a single act by a single set of actors—the unlawful copying of their music for profit by defendants on defendants' website. Thus, the “same conduct, transaction, or occurrence” prong of the relation-back test is met.

Likewise, the addition of a party prong of the relation-back test is easily satisfied, as the amendment does not seek to add or change any parties, but rather adds similar claims to the complaint against the same defendants who are already party to the suit.

Accordingly, the amendment should be treated as filed as of the date of the original complaint, and there is no statute of limitations problem. Defendants' 12(b)(6) motion is hereby denied.

#### Defendants' Motion to Amend

The final question before the Court is the propriety of McLovin and Bleeker's own amendment to their answer / counterclaims.

Applying the same test under FRCP 15 as above, the McLovin-Bleeker amendment cannot be made as a matter of right or by consent, because it is too late for the former and lacking the latter.

The question of whether leave should be granted to allow the amendment is a closer one. Plaintiffs accurately argue that permitting the amendment will vastly expand the scope of this case and also complicate the issues. Currently this case is simply about the alleged copyright violations perpetrated by McLovin and Bleeker on their website. By contrast, adding defendants' new claims sounding in negligence and separate copyright violations of work unrelated to Madonna's and Eminem's would fundamentally alter the core of what this case is now about.

Without question, the Federal Rules contemplate that parties may permissively join any claim against an adversary party in any suit. See FRCP 13(b), 18(a). But the same Rules grant courts discretion to shape how the suit proceeds to minimize any complication that may arise from the aggregation of unrelated claims.

Here, the Court does not see how the car accident in any way relates to the suit at hand. This counterclaim certainly is not compulsory, as it does not arise out of the same transaction or

occurrence that is currently the subject matter of this dispute. See FRCP 13(a). Indeed, just as in *Wigglesworth*, the car accident at issue occurred at a different time and under different circumstances than the alleged McLovin-Bleeker copyright violations. It will also require substantially different evidence and demand the application of different legal standards than the extant copyright claims—namely, evidence of how Madonna was driving versus what McLovin and Bleeker copied, and the application of state common law negligence rules rather than the federal copyright statute. Accordingly, because it would complicate the pending case and because it is not compulsory (and thus plaintiff will not be prejudiced by bringing it elsewhere), the Court denies defendants’ motion to amend as to this counterclaim.

By contrast, the Court will grant defendants’ motion to amend as to the alleged copyright violation by Madonna. Though this cause of action is also not compulsory because it arises out of a separate transaction or occurrence—Madonna’s reaction to McLovin and Bleeker rather than the latter’s copying of her material—it involves similar questions of law, and thus may include similar evidence about what constitutes a copyright violation. The Court acknowledges that this is a closer question than that of the car accident, and that it need not allow the amendment, but it chooses to do so in its discretion. While there apparently was no delay in the lodging of defendants’ proposed amendment, see *Crompton & Knowles*, combining such disparate causes of action would unnecessarily complicate the proceeding.

SO ORDERED.