

EXAMINERS' ANALYSIS OF QUESTION NO. 3

This question tests the examinee's understanding of the proper scope of discovery in general, as well as how the attorney-client privilege and work-product rule can limit discovery in the context of a person who is the corporation's lawyer, but who also serves in a non-lawyer role for the corporation.

Under MCR 2.302(B)(1), a party "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action" Furthermore, "[i]t is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." A protective order can be sought under MCR 2.302(C), and "for good cause shown," the trial court "may issue any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including "(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters."

The analysis should begin with relevancy. Any records held by Daedalus that are not relevant to claims or defenses involving whether the corporation was negligent with respect to the faulty maintenance or design of the conveyor belt should be precluded under the protective order. As for the specific records mentioned in the fact pattern, the quarterly reports would be within the scope of proper discovery--the reports include information about mechanical breakdowns as well as equipment maintenance, and this information would be relevant to a claim or defense involving faulty maintenance or design of the conveyor belt. With respect to the timeframe, the number of pre-incident quarterly reports would be fairly modest (3) and any of them could conceivably have relevant information about past maintenance problems, equipment breakdowns, etc. As for post-incident reports, those may have information diagnosing the problem at issue here, evaluating the financial circumstances around the incident, etc., and this might be relevant or otherwise lead to relevant information. Thus, there is nothing in this record to suggest that the requested timeframe should be shortened.

As for the lawsuit memo presented to the Board by Daedalus, the memo clearly would have relevant information, so the memo (and Daedalus' oral presentation) cannot be precluded from discovery based on relevancy grounds.

Moving from relevancy to privilege or otherwise protected information, Daedalus' role as General Counsel would trigger the attorney-client privilege and could also implicate the work-product rule. For the attorney-client privilege to apply, there must be (1) a confidential communication between (2) a client (including an officer, employee, or agent of the client) and (3) an attorney (4) made for the purpose of obtaining legal advice. *Augustine v Allstate Ins Co*, 292 Mich App 408, 420 (2011). As for the work-product rule, "the notes, working documents, and memoranda that an attorney prepares in anticipation of litigation" are protected from disclosure during discovery. *Id.*; see also MCR 2.302(B)(3)(a) (providing that an "agent" of a party can be covered by the work-product rule).

The quarterly reports would meet elements (1)-(3) of the attorney-client privilege. But, there is nothing in the fact pattern to suggest that the reports were made for the purpose of obtaining legal advice. Rather, the reports were made for the purpose of updating Daedalus—in his role as Senior Vice President of Manufacturing—about the company's quarterly manufacturing results. It is not sufficient, in short, for a report to have been made at the request of an attorney for the privilege to attach; the report must also have been made for the purpose of obtaining legal advice, and there is nothing in the fact pattern to suggest that the quarterly reports were made for that purpose. With respect to the work-product rule, there is nothing in the fact pattern to suggest that the quarterly reports were made in anticipation of litigation—rather, the quarterly reports were prepared in the ordinary course of Proteus Corporation's manufacturing activities. Accordingly, the quarterly reports are not protected from disclosure under the attorney-client privilege or work-product rule, and Daedalus could be deposed about those quarterly reports in his capacity as Senior Vice President of Manufacturing.

With respect to Daedalus' presentation to the Board about the lawsuit, the presentation and the written analysis are protected from disclosure under both the attorney-client privilege and the work-product rule. The intern is an agent of the company, and the intern prepared the analysis at the direction of counsel for the purpose of giving legal advice. Similarly,

Daedalus gave the Board the update for the purpose of giving legal advice to the corporation's decision-making body. In addition, the analysis and Daedalus' presentation are specifically about the lawsuit and clearly fall within the work-product rule. There is nothing in the fact-pattern to suggest that the narrow exception to the work-product rule would apply here, so the analysis and presentation would be prohibited from disclosure, and any deposition of Daedalus would have to avoid these topics.

Accordingly, Proteus Corporation's motion for a protective order should be Granted In Part and Denied In Part as follows:

1. Any record of Daedalus that is not relevant to the claims or defenses of this lawsuit is prohibited from disclosure.

2. Any quarterly report of Daedalus that was created from July 1, 2017, to the present that has information relevant to the claims or defenses of this lawsuit is subject to disclosure as neither the work-product rule nor the attorney-client privilege apply to the quarterly reports.

3. The lawsuit memo, though containing relevant information, is not subject to discovery because it (and the oral presentation) is protected by the work-product doctrine and the attorney-client privilege.

4. Daedalus can be deposed in his capacity as Senior Vice President for Manufacturing, but he cannot be deposed about matters that are covered by the attorney-client privilege or work-product rule (including the lawsuit memo and presentation made to the Board about the current lawsuit).