EXAMINERS' ANALYSIS OF QUESTION NO. 3

The examinee should recognize that the legal analysis Carlton provided to Donovan constitutes an attorney-client communication, the report prepared by Boothe may constitute work product, and Carlton's interview notes are likely to constitute work product. In addition, the examinee should recognize that, even if the Boothe report is work product, portions of the Boothe report and interview notes of the two residents who have been deployed to Afghanistan are likely discoverable. These issues are discussed separately below.

1. Carlton's Legal Analysis

The examinee should conclude that the court should deny Peters' motion to compel the production of Carlton's legal analysis to Donovan based on the attorney-client privilege.

"It is well settled that Michigan follows an open, broad discovery policy that permits liberal discovery of any matter, *not privileged,* that is relevant to the subject matter involved in the pending case." *Augustine v Allstate,* 292 Mich App 408, 419 (2011) (emphasis added) quoting *Leibel v General Motors Corp,* 250 Mich App 229, 616 (2002). See also MCR 2.302(B)(1). "The attorney-client privilege attaches to direct communication between a client and his attorney. . . ." *Augustine,* 292 Mich App at 420 quoting *Reed Dairy Farm v Consumers Power Co,* 227 Mich App 614, 618 (1998). See also *Leibel v General Motors Corp,* 250 Mich App 229, 236 (2002).

Here, Donovan hired Carlton after being advised by PI that it represented Peters in connection with the injuries he suffered after the balcony collapsed. Carlton's report to Donovan containing its legal analysis of the accident constituted a direct communication with Donovan to which the privilege attached. Thus, under *Augustine, Leibel,* and MCR 2.302(B)(1), discovery of Carlton's report is not permitted.

2. Interview Notes

The examinee should conclude that the court may grant Peters' motion to compel production of the interview notes of the witnesses deployed to Afghanistan. The court should deny

the motion to compel production of the remaining interview notes.

A. Applicability of Work-Product Privilege

The examinee should recognize that an attorney's interview notes of a witness are work product. *People v Holtzman,* 234 Mich App 166, 189 (1999). The examinee should also conclude that the interview notes were prepared in anticipation of litigation. Again, Donovan's immediate hiring of Carlton to lead the investigation into the cause of the accident was prompted by PT's letter, signifying that Donovan expected to be sued by Peters, wanted to begin preparing its defense, and hired a law firm to lead that effort. In turn, Carlton began preparing for that defense by interviewing residents of the apartment complex to determine who may have relevant information about the accident and capturing that information in notes. It does not matter that a specific claim had not yet arisen.

The examinee should receive extra points for recognizing that the more informal the interview notes are, the more difficult they are to discover. Under MCR 2.302(B)(3)(b) and (c), a person (whether a party or a nonparty) who made a formal statement, i.e., a written or recorded statement, may later obtain that statement in discovery without the showing of undue hardship, as discussed below. Thus, while Peters may not be able to discover directly the statements made by the residents of the apartment complex, he is free to ask any of the residents who made formal statements to request their statements from Carlton, who may then disclose them to Peters.

B. Substantial Need and Undue Hardship

With regard to the two apartment residents who were deployed to Afghanistan, the examinee should recognize that Peters has a substantial need for the interview notes and may face an undue hardship in locating and attempting to interview them in Afghanistan, and that, as such, the court should order disclosure of the factual, not deliberative, aspects of Carlton's interview notes for these two residents. See *Augustine,* 292 Mich App at 421; MCR 2.302(B)(3)(a). An examinee may also receive extra points for recognizing that if those residents returned from Afghanistan on leave and were available to be interviewed locally, Peters may be unable to show undue hardship.

Finally, the examinee should conclude that the court should deny Peters' motion to compel the production of the remaining witness interview notes, as nothing in the facts identifies any undue hardship to Peters in locating and interviewing the other apartment residents. See *Messenger,* 232 Mich App at 638.

3. Boothe Report

The examinee should conclude that the court may grant Peters' motion to compel production of portions of the Boothe report.

A. Applicability of Work-Product Privilege

"Mork product is cloaked with a qualified immunity without regard to whether [it was] prepared by an attorney or by some other person and whether such other person was engaged by an attorney." *D'Alessandro Contracting Group, LLC v Wright,* 308 Mich App 71, 77-78 (2014)quoting *Leibei v Gen Motors Corp,* 250 Mich at 245 (citations omitted). "[T]he doctrine does not require that an attorney prepare the disputed document only after a specific claim has arisen." *D'Alessandro* at 78 quoting *Leibel,* 250 Mich App at 246 (citations omitted). "The doctrine does require, however, that the materials subject to the privilege pertain to more than just 'objective facts.'" *D'Alessandro* at 78. MCR 2.302(B)(3)(a) provides:

> Subject to the provisions of subrule (B)(4), a party may obtain discovery of documents and tangible things otherwise discoverable under subrule (3)(1) and prepared in anticipation of litigation or for trial by or for another party or another party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only on a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

First, the examinee should recognize that expert reports may constitute work product. However, the court may need to conduct an in-camera inspection to determine whether any parts, i.e., objective facts, are not subject to the work-product protection. See *D'Alessandro,* 308 Mich App at 80.

The examinee should also determine from the facts that the Boothe report was prepared in anticipation of litigation. Donovan's immediate hiring of Carlton to lead the investigation into the cause of the accident was prompted by PI's letter, which signifies that Donovan expected to be a defendant in a lawsuit filed by Peters, wanted to begin preparing its defense, and hired a law firm to lead that effort. in turn, Carlton began preparing for that defense by hiring a consultant, Boothe, to opine how the balcony collapsed. It does not matter that a specific claim had not yet arisen.

B. Substantial Need and Undue Hardship

Second, the examinee should identify that because the balcony was reconstructed after Boothe's report was prepared, the best evidence as to why the balcony collapsed would likely not be available to Peters in bringing his action against Donovan. Thus, any investigator hired by Peters to develop a theory of negligence against Donovan would be significantly hampered in its investigation of the cause of accident. These facts establish a substantial need for and an undue hardship to Peters in obtaining the substantial equivalent of the Boothe report, thus warranting a limited breach of the work-product privilege to compel production of the Boothe report. MCR 2.302(B)(3)(a). Therefore, to the extent the Boothe report is work product, the court should order Donovan to disclose the factual, not deliberative, aspects of the Boothe report, meaning any conclusions about the cause of the accident or recommendations for future construction Boothe may have stated in its report, should be protected from disclosure, while only the detailed structural findings Boothe made as it investigated in the aftermath of the balcony collapse would be subject to production. See *Augustine,* 292 Mich App at 421; MCR 2.302(B)(3)(a).

An examinee may receive extra points for articulating that Donovan may credibly argue that until Peters definitively demonstrates that its expert is unable to render an opinion without reviewing the Boothe report, Peters has failed to establish an undue hardship warranting disclosure of the report.

The examinee could propose that Donovan might challenge Peters' claim of undue hardship by indicating that a representative of Boothe will be listed as an expert witness for Donovan. See MCR 2.302(B)(4). Thus, the examinee may credibly argue that even if Peters claims he will face an undue hardship in learning certain factual aspects of Boothe's report without disclosure of the report, Donovan can maintain that Peters may propound interrogatories and take a deposition to learn Boothe's opinions and the facts upon which those opinions rest. Thus, Peters may be unable to show a substantial need and the inability to obtain the information without undue hardship. See *Messenger v Ingham County Prosecutor,* 232 Mich App 633, 638 (1998).

3. Boothe as a trial witness

An examinee may also receive extra points by recognizing that Boothe was clearly consulted in anticipation of litigation, and therefore, if he will not be a trial witness, discovery of his report is not permitted unless there has been a showing of exceptional circumstances such as the undue hardship in learning the facts. See MCR 2.302(B)(4)(b)(ii).

C. Disclosure of Work-Product to Insurer

An examinee should also receive points for discussing whether the distribution of the Boothe report to Ajax constitutes a waiver of the work-product privilege. Donovan may argue that its disclosure to its insurer cannot constitute a waiver because the court rule recognizes disclosure to an insurer as falling under the parameters of the privilege. See MCR 2.302(B)(3)(a). Peters can argue to the contrary that the rule requires that the report be prepared "by or for" the insurer. In this case, the report was only provided to Ajax after its preparation. See *D'Alessandro,* 308 Mich App at 82.

However, the common-interest doctrine prevents a disclosure to an insurer from constituting a waiver where there was a reasonable expectation of confidentiality. *D'Alessandro,* 308 Mich App at 82-84. Here, Donovan had a reasonable expectation of confidentiality in sharing the Boothe report with Ajax, particularly given that Ajax shared an interest in knowing the strengths and weaknesses of any potential litigation filed by Peters. Moreover, the disclosure did not substantially increase the risk of Peters obtaining the report. See *D'Alessandro,* 308 Mich App at 85-86.