ESSAY QUESTION NO. 1

Answer this question in booklet No. 1

In 2004, Acme Tourist Corporation (ATC) purchased the Tazlina Mine, a disused gold mine that had been active in the 1930s. ATC began preparations to develop the site as a tourist destination. Shortly after the purchase, a utility company's survey crew was on the site, and as they worked they observed the Rockhound family picnicking and exploring nearby. Bart Rockhound, a young man, clambered onto a large ore crusher. Perhaps triggered by his weight, the device's jaws began to close on him. He jumped free just in time, but was injured in making his escape.

The foreman of the survey crew immediately called 911 and then called ATC's in-house counsel, Corinne. Hurrying to the scene, Corinne arrived just as Bart was being taken to the hospital. She encountered Sabrina Rockhound, Bart's sister, and asked her what happened, using her Dictaphone to record Sabrina's response. After Corinne recorded Sabrina's story, she realized that the accident could lead to litigation. Accordingly, she interviewed the survey crew as well, making notes of the responses on her legal pad.

The next day, Corinne hired two local experts in old mining machinery, Dash and Ernest. Each visited the site and submitted a report to her. Dash concluded that the crusher had been properly secured by a coupling and that Bart must have used tremendous strength to break the coupling and put it in motion. Ernest concluded that the crusher had been unstable and would have been easily triggered without any deliberate effort; his report opined that the machine "was an accident waiting to happen." "Not only that," Ernest elaborated in a phone call to Corinne, "I checked that crusher out three months ago and told those bozos at ATC headquarters they'd better be careful if they bought it. Guess they didn't pay me no mind."

In 2005, Bart sued ATC for negligence in Alaska Superior Court, alleging that ATC knew or should have known that the crusher was dangerous to casual visitors to the property. Corinne appeared for ATC. She immediately served Bart with a request for admission under Alaska Rule of Civil Procedure 36, saying "Please admit that the crusher was secured by a coupling, such that great force had to be applied to break the coupling in order to set the crusher in motion." Bart made no response to the request for admission.

A few months afterward, the parties made their Rule 26 initial disclosures and expert disclosures in the manner scheduled by the court. Corinne identified Dash as an expert to be used at trial and turned over his report. She listed Bart, herself, Dash, Ernest, Sabrina, the members of ATC management, and the members of the survey crew as individuals likely to have discoverable information, without indicating what they might know. She did not turn over

or identify any papers or recordings mentioned in this question, other than the Dash report.

A week after making her Rule 26 initial disclosures, Corinne served on Bart an offer of judgment under Rule 68 in the amount of $150,000. Bart ignored it.

1. You take over as counsel for ATC in 2006. You learn the above facts. Does your client have a duty under the Alaska Rules of Civil Procedure to supplement Corinne's Rule 26 disclosures as to Sabrina, the survey crew, and Ernest? In what respects? Explain.

2. At a pretrial conference, Bart says he wants to offer evidence that the crusher was not secured by a coupling. Does the request for admission preclude this? Why or why not?

3. At the conclusion of the trial, Bart obtains a judgment of $100,000. Each party has incurred reasonable actual attorney fees of $100,000. How should the court calculate the fee award in this case?

GRADER'S GUIDE

***** QUESTION NO. 1 *****

SUBJECT: CIVIL PROCEDURE

Question 1 (50 points)

A. Duty to Supplement

Rule 26(e)(1) puts parties under a duty to supplement their Rule 26 disclosures if they learn "that in some material respect the information disclosed is incomplete or incorrect" and if the complete or correct information has not otherwise been made known to the adverse party. The rule extends to the contents of expert reports that are required to be turned over to the other side.

In order to answer this question, one must review the various items not disclosed in Corinne's Rule 26 production and determine whether each was an item whose disclosure was required. Rule 26(e) requires supplementation as to each item that was wrongly omitted, assuming the item has not otherwise been disclosed. In this case, the facts give no basis to suppose that these items have otherwise been disclosed.

B. The Undisclosed Items

1. Subject matters of witness knowledge

Rule 26(a)(1)(B) requires a list of all individuals "likely to have discoverable information," along with identification of "the subjects of the information." Corinne complied with the first requirement but not the second. Since the disclosure was incomplete, it must be supplemented.

2. Interview of Sabrina

a. Revealing that Sabrina's statement was taken

Rule 26(a)(1)(C) requires automatic disclosure of the name and contact information (if known) of each person who has written or recorded a statement about the subject matter of the litigation. Sabrina gave a recorded statement. Corinne's disclosure failed to identify Sabrina as someone who had given a statement. Therefore, it must be supplemented to correct this omission.

Some examinees may note that Corinne listed Sabrina as a person likely to have discoverable information. That disclosure represented partial compliance with Rule 26(a)(1)(B), but it does not satisfy the separate, and important, requirement that those who have given witness statements be identified.

b. Turning over the statement or revealing its custodian

Rule 26 goes on to require that a recording of a statement actually be turned

over or that its custodian be identified, "unless the statement is privileged or otherwise protected from disclosure." Here, Corinne did not turn over the recording or identify its custodian, so supplementation to correct that omission will be required unless the statement was privileged or otherwise protected.

Sabrina's statement was not protected by any privilege, such as attorney-client privilege. The only potential basis for withholding it would be the doctrine of work-product immunity. Generally codified in Rule 26(b)(3) under the heading "Trial Preparation: Materials," this doctrine protects from discovery materials an attorney or the attorney's representative has developed in anticipation of litigation or in preparation for trial. It applies to both documents and "tangible things," and therefore can encompass tape recordings. *See, e.g., In re Pfohl Bros. Landfill Litigation*, 175 F.R.D. 13, 26 (W.D.N.Y. 1997). Such materials are not given absolute protection from discovery (unless they are in the special category of "opinion work product" addressed below), but they are immune unless the adverse party makes a showing of substantial need for the materials and undue hardship if required to obtain them elsewhere. For two reasons, the doctrine cannot apply in this instance.

First, work product immunity is for items prepared in anticipation of litigation. The facts given in the question show that Corinne did not anticipate litigation until after she recorded Sabrina's statement.

Second, in Alaska (in contrast to some other jurisdictions), the work product doctrine is quite narrowly applied with respect to witness statements. Thus in *Van Alen v. Anchorage Ski Club, Inc.,* 536 P.2d 784, 787 (Alaska 1975), our Supreme Court held that "[a]s long as earlier impressions of a witness have been recorded, they should be made available to all parties . . . ." *See also Miller v. Harpster*, 392 P.2d 21 (Alaska 1964). As the work product doctrine has been interpreted in Alaska, it could not apply to a verbatim recording of a witness statement such as this one.

An examinee who is not aware of the settled interpretation of the work product doctrine in Alaska can review the general outlines of the doctrine as it is applied nationally, as well as its purposes, and potentially reach a similar result. The wellspring of the doctrine is *Hickman v. Taylor,* 329 U.S. 495 (1947). Under that case and its progeny, work product immunity has become "a qualified privilege for witness statements prepared at the request of the attorney and an almost absolute privilege for attorney notes taken during a witness interview." *In re PCB*, 708 A.2d 568, 570 (Vt. 1998); *see also Hickman*, 329 U.S. at 495, 91 L. Ed. 2d at 451. In general, the mental impressions, conclusions, opinions and legal theories of an attorney are almost absolutely protected from discovery regardless of any showing of need (now usually called "opinion work product"), while materials not revealing the attorney's thought processes are given less absolute protection ("ordinary work product"). *See*

Hickman, 329 U.S. at 495. As in Alaska, the doctrine is universally limited to materials developed in anticipation of litigation. *United States v. Adlman*, 134 F.3d 1194, 1197-98 (2d Cir. 1998).

Applying the doctrine as commonly interpreted outside Alaska, *there would still be no protection* because the tape was not prepared in anticipation of litigation. Beyond that, the verbatim statement of an obviously key witness recorded on tape just after the event would reveal nothing of an attorney's mental impressions, conclusions, opinions, and legal theories. Hence, even under the generally broader application of the work product doctrine often applied outside Alaska, this tape would not be "opinion work product" and would not enjoy absolute protection. Had it been prepared in anticipation of litigation, it would likely be classed outside Alaska as ordinary work product, subject to disclosure upon a showing of substantial need and undue hardship.

Since the recorded statement is not "privileged or otherwise protected," ATC's Rule 26 initial disclosure must now be supplemented to correct the omission of this item from the disclosure.[1]

3. Interview of survey crew

Corinne's discussion with the survey crew generated a document--her notes--that could potentially be subject to automatic disclosure under Rule 26(a)(1)(D). That rule lists among the initial disclosure items "a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are relevant to disputed facts alleged with particularity in the pleadings."

The fact pattern establishes that these notes, however, were generated by Corinne after she anticipated litigation. They are work product. Accordingly, under Rule 26(b)(3) they would not be subject to disclosure except upon the showing of substantial need and undue hardship discussed in the preceding section. Moreover, Rule 26(b)(3) completely prohibits courts from requiring disclosure that would reveal the "mental impressions, conclusions, opinions or legal theories of an attorney," codifying the core restriction from the *Hickman* case discussed above. An attorney's notes from an interview reveal mental impressions and legal theories through the line of questioning chosen, the portions of the answers chosen for recording in the notes, and any gloss put on the answers by the note-taker. *See, e.g., Director, Office of Thrift Supervision v. Vinson,* 124 F.3d 1304, 1307-08 (D.C. Cir. 1997). As such, at least portions of the material, if not all of it, would be "virtually undiscoverable." *Id.* (discussing whether the near-absolute protection for mental impressions and legal theories would cover the entirety of the contents of an attorney's witness interview notes, or whether a portion of the content might receive lesser protection).

[1] An examinee who erroneously concludes that the statement is privileged should discuss the need to disclose and describe the statement under Rule 26(b)(5), which is discussed in Part B-3 below.

Rule 26(a)(1)(D), the subdivision that potentially covers the notes, starts with the preamble "subject to the provisions of Civil Rule 26(b)(3)." Rule 26(b)(3), as previously noted, is the codification of the work product doctrine. Since Corinne's notes from this interview are unquestionably attorney work product of one kind or another, they do not fall under the automatic disclosure process in Rule 26(a)(1).

Nonetheless, to be in perfect compliance with Rule 26, supplementation is required as to these notes in one limited respect. Rule 26(b)(5) provides:

> When a party withholds information otherwise discoverable under these rules by claiming that it is . . . trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

"Trial preparation material" is the Rules' shorthand for work product. Rule 26(b)(5) qualifies the immunity given to work product in Rule 26(b)(3), the provision that is incorporated by reference into the Rule 26(a)(1)(D) disclosure requirement. Hence, full technical compliance with Rule 26 calls for supplementation of the prior disclosure to reveal the existence of Corinne's notes and the circumstances under which they were taken.

4. Ernest's report

Rule 26(a)(2) governs the disclosure regarding experts. Corinne was not required to turn over Ernest's expert report to Bart. Both the rule and its judicial interpretation make clear that the turning over of expert reports (and ordinarily any other discovery regarding experts) is confined to experts retained to give expert testimony at trial. *See Munns v. Volkswagenwerk, A. G.,* 539 P.2d 1180 (Alaska 1975). Since ATC's counsel presumably does not plan to offer Ernest's unfavorable opinion at trial, no supplementation to produce his report is required.

Ernest, however, is not just an expert. He is also a fact witness as to his warning to "those bozos at ATC headquarters." The fact pattern shows that Ernest has already been disclosed as an individual likely to have discoverable information. As discussed in B-1 above, supplementation is needed to identify the subjects on which he has "discoverable" knowledge. In his case, the subject on which he has discoverable knowledge is his pre-accident inspection of the crusher and his communication with ATC management about the same.

Question 2 (25 points)
This question tests the examinee's knowledge of the procedure for seeking a Rule 36 admission and the consequences of an admission.

Rule 36 allows a party to request an adversary to admit the truth of any matter relevant to the litigation, including "statements or opinions of fact or of the application of law to fact." Corinne's request for admission to Bart is within this scope. There is no problem with the early timing of the request; under Rule 26(d)(2)(C), requests of this kind may be served on a plaintiff at any time after the commencement of the action.

Rule 36(a) provides that "[t]he matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow or as the parties may agree to in writing, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . ." In this case, Bart made no answer or objection, and hence the statement in Corinne's request was admitted. Rule 36(b) establishes the effect of an admission: "Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission."

Unless Bart moves to withdraw or amend the admission and the court grants his motion, Bart should not be free to offer the evidence he proposes. The evidence is not relevant because it is offered in relation to a matter that has been conclusively admitted.

If Bart does move to withdraw or amend the admission, his motion will be governed by Rule 36(b), which allows the court to permit withdrawal or amendment "when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party." The fact pattern supplies insufficient data to fully evaluate whether such a motion should be granted or denied. However, it does seem clear that presentation of the merits would be enhanced by withdrawal of the admission, since we know from the divergent opinions of Ernest and Dash, and Ernest's warning to management, that there is a basis for serious disagreement about the coupling. Moreover, it would likely be difficult for ATC to claim prejudice, since notwithstanding the admission ATC put forward Dash as a testimonial expert on the very issue covered by the admission. Thus, ATC seems well prepared to try the merits of the issue. It is therefore probable that, if Bart moves to withdraw the admission, the court will grant the motion.

Question 3 (25 points)
This question tests the examinee's knowledge of Rule 68.

ATC made a Rule 68 offer of judgment of $150,000. Had Bart accepted it within ten days, judgment would have been entered in that amount. Since he ignored it, by operation of Rule 68(a) the offer expired.

The question then becomes whether Bart beat the offer. In this single defendant case, if the judgment at the end of the case is at least five percent less favorable to Bart than the offer, Bart becomes liable for attorney fees to ATC under the Rule 68 formula. In fact, Bart did not beat the offer because his judgment is 33% less favorable than the offer.

Rule 68 sets up a graduated scale for attorney fees depending on how early in the case the offer was made. Since this offer was served within 60 days of the Rule 26 initial disclosures, the rule provides that Bart is liable for 75 percent of ATC's reasonable actual attorney fees "*from the date the offer was made*" (emphasis added).[2] The fact pattern does not supply enough information to determine the fee this calculation would yield, because we do not know what portion of ATC's $100,000 in fees was incurred after the date of the offer.

Rule 68(c) provides two important principles about the interaction of Rule 68 with Rule 82. First, if a party is entitled to fees under Rule 68, that party becomes the prevailing party for purposes of Rule 82. Thus, even though Bart obtained a judgment in this case, ATC is the prevailing party and Bart is entitled to no fee under Rule 82.

Second, a party that has prevailed through operation of Rule 68--in this case, ATC--is entitled to a Rule 82 fee rather than a Rule 68 fee if the Rule 82 award would be greater than the Rule 68 award. In this case, as a prevailing defendant, ATC's potential Rule 82 award would be 30 percent of its total reasonable actual attorney fees for the entirety of the case. Hence ATC could receive a fee award of $30,000, if that amount is greater than the amount Rule 68's schedule would yield. As noted above, one cannot determine the Rule 68 fee, because the facts do not indicate how much of ATC's fee was incurred after the offer was made.

Had there been no Rule 68 offer in this case, Bart would have been entitled to a fee award of 20% of the first $25,000 of his judgment and 10% of the next $75,000. This works out to a fee award of $12,500.

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[2] Bart could attempt to argue that the offer was actually not made within 60 days of the initial disclosures, because the initial disclosures were defective. This would be a creative but somewhat unconventional argument, on which there is no case law. If successful with the argument, Bart might persuade the court to apply a lower percentage to ATC's post-offer fees. The two other percentages available in Rule 68 are 50 percent (more than 60 days after initial disclosures and more than 90 days before trial) and 30 percent (between 90 and 10 days before trial).