

Question 5

In March 2008, Pat, a citizen of State A, learned that Devon Corp. ("Devon"), a citizen of State B, may have been illegally releasing toxic chemicals into the air near her home.

In February 2011, Pat sued Devon in federal court, alleging a cause of action for negligence and seeking damages for a persistent cough. The court had subject matter jurisdiction over Pat's lawsuit.

During discovery, Pat requested Devon to produce all documents relating to reports by local residents about foul odors coming from its plant. Devon objected to Pat's discovery request, contending that the plant's odors came from legally produced and harmless chemicals, and that therefore the request sought irrelevant information. In further response, Devon provided a privilege log that listed a document described as a summary of all communications with local residents concerning odors that emanated from the plant. As a basis for refusing to disclose the document, Devon claimed the summary was protected from disclosure under the work product doctrine because it had been created by its counsel, who therein described the underlying facts of the residents' comments as well as counsel's thoughts about them. Pat filed a motion to compel Devon's production of the documents she requested. The court denied Pat's motion.

In October 2012, while the lawsuit was still pending, Pat learned from a scientific report in a newspaper that the chemicals Devon released cause lung cancer.

In November 2012, Pat amended her complaint to add a cause of action for strict liability and sought to require Devon to pay for preventive medical monitoring of her lungs.

Devon moved to dismiss Pat's strict liability cause of action on the basis that the applicable three-year statute of limitations had run.

1. Did the court correctly deny Pat's motion to compel? Discuss.
2. How should the court rule on Devon's motion to dismiss? Discuss.

ANSWER A TO QUESTION 5

1. The trial court incorrectly denied Pat's motion to compel. The scope of discovery is whether the request is reasonably calculated to lead the discovery of admissible evidence. As a general matter and absent any other exceptions, evidence is admissible if it is relevant. Relevance means it has any tendency to make the existence of any fact, that is of consequence to the determination of the action, more or less probable than it would be without the evidence.

Here, Pat requested Devon to produce all documents relating to reports by local residents about foul odors from its plant. Devon objected to the discovery request on the grounds that the plant's odors came from legally produced and harmless chemicals. Pat's lawsuit against Devon is brought under negligence theory and concerns Devon's release of toxic chemicals into the air. Pat's request is within the permissible scope of discovery. Although Devon contends that the odors are legal and harmless, that is not conclusive. During litigation, Pat may gather evidence to support her belief that Devon has been illegally releasing toxic chemicals. She is not required to merely accept Devon's assertion that it is not acting illegally. The reports by local residents may lead to relevant, admissible evidence. If Pat learns that other residents have likewise experienced a persistent cough or other symptoms, or developed cancer, she can use their testimony to rebut Devon's contention that the odors are harmless. Additionally, the reports of local residents are relevant to show that Devon had notice of the harmful effects of the chemical/odors on local residents. Moreover, the evidence could support Pat's assertion that her persistent cough was a reasonably foreseeable result of the chemicals/odors because Devon knew that the chemicals had similar effects on other residents. Therefore, Pat's document request should be granted unless a privilege applies.

In response to Pat's discovery request, Devon produced a privilege log listing a document described as "a summary of all its communications with local residents concerning odors that emanated from the plant," claiming it was privileged under the

work product doctrine. When a discovery request is within the permissible scope of discovery, but it seeks protected or privileged information, the responding party must provide a privilege log describing the privileged document with particularity and asserting why it is privileged. If the summary is in fact privileged, then Devon properly complied with the discovery rules by responding with a privilege log identifying its existence and explaining why it is not required to disclose it.

The work product privilege applies to all materials prepared by an attorney, or a client at the attorney's request, in anticipation of litigation. As the summary was prepared by Devon's counsel, the first requirement is satisfied. However, the facts do not state whether it was prepared in anticipation of litigation. If Devon's counsel prepared the summary before any litigation concerning the toxic chemicals began, then it may not be covered. Pat learned that Devon may be illegally releasing toxic chemicals in 2008, and did not sue until 2011. If there had been previous complaints, Devon very well may have prepared the summary in anticipation of future litigation, even if not specifically for Pat's case. In those circumstances, the work product privilege would nonetheless apply even if it was made before Pat's lawsuit was initiated.

Not all aspects of the work product privilege are absolute. Any mental impressions, opinions, theories of the case, and related information is absolutely privileged and is never discoverable. However, the remaining aspects of a document may be disclosed if the requesting party establishes: (1) there is a substantial need for the information; and (2) he or she cannot obtain the information from any other source. First, Pat can likely establish that she has a substantial need for the information. As explained above, this information will help support her claim that Devon acted negligently, and rebut Devon's contention that the chemicals/odors are harmless. However, Pat may have more difficulty meeting the second requirement. Devon could argue that Pat could simply interview local residents to determine whether they complained to Devon. However, the court will likely find that this would be an undue hardship because Devon could provide Pat with the names of residents who complained and what their complaints were, without requiring Pat to undergo all that effort. Based on the above analysis, the

underlying information in the summary is discoverable. The communications between local residents and Devon do not fall under the work product privilege because they were not made in anticipation of litigation. Rather, they were likely routine business records. Therefore, if the actual reports of communications that were used to compile the summary are separately available, the court should have ordered that the separate reports be produced to Pat. Then, Pat would receive the information she needed and no privileged information would be disclosed. Conversely, if there are no such separate individual reports in existence, then the court may order Devon to produce the summary with counsel's thoughts redacted from the document.

In sum, the court incorrectly denied Pat's motion to compel. First, the documents requested are within the permissible scope of discovery. Second, although the summary of the communications with residents may be privileged under the work product doctrine, the individual separate reports would not be and could have been produced. Finally, if there are no individual separate reports for each resident, then the court should have ordered that Devon produced the summary with counsel's mental impressions redacted because Pat has a demonstrated a substantial need for the information and that she is unable to obtain the information from another source.

2. The court should deny Devon's motion to dismiss. Civil Rule 15 allows a plaintiff to amend her complaint once before the answer is filed or anytime thereafter with leave of court. Rule 15 requires a court to freely grant leave to amend a complaint as justice requires. When a complaint is amended to include a new claim, it relates back to the date of the original filing as long as the claim arises out of the same transaction or occurrence. Here, Pat seeks to amend her complaint to add a cause of action for strict liability. Her strict liability claim arises out of the same occurrence -- Devon's alleged illegal release of toxic chemicals into the air -- as her negligence claim. Accordingly, her cause of action will relate back to the date of the filing of her complaint in February 2011. Pat discovered Devon's illegal release in March 2008, so her strict liability claim accrued, at the earliest, in March 2008. Accordingly, her strict liability claim was timely filed within the 3-year statute of limitations.

Further, Pat's additional request for relief -- that Devon pay for preventative monitoring of her lungs -- is valid. A party may amend his or her request for damages in the complaint. This new claim for damages relates to Pat's new strict liability claim.

Therefore, the court should deny the motion to dismiss and allow Pat to amend her complaint in the interest of justice because she just discovered the scientific report regarding lung cancer.

ANSWER B TO QUESTION 5

Denial of Pat's Motion to Compel

The Scope of Discovery

The scope of discovery under the federal rules includes all materials that are 1) relevant and 2) not privileged.

As to relevance, an item is relevant if it has a tendency to make the existence or nonexistence of a fact of consequence to the action more or less probable than it would be without the item.

As to privilege, the most commonly asserted privilege objections in discovery are attorney-client privilege and work product privilege. The attorney client privilege protects confidential communications between an attorney and her client from disclosure in discovery, and the work product privilege protects materials prepared by a party in anticipation of litigation. Materials protected by the attorney client privilege are absolutely privileged from disclosure in discovery.

Materials, for which the work product privilege is claimed, however, may sometimes be required to be disclosed. If the party seeking discovery can show that 1) the claimed work product materials contain information which is not reasonably available to him by any other means, and 2) his interests would be substantially prejudiced if he were not allowed access to those materials, the court may order disclosure. However, even if the disclosure of work product is ordered pursuant to this standard, the court may not order the disclosure of an attorney's mental impressions or legal theories, because such items are absolutely protected.

Devon's Relevance Objection

In response to Pat's request for Devon to produce documents relating to reports by local residents about foul odors from Devon's plant, Devon objected and refused to produce such documents on the basis that the odors came from legally produced and harmless chemicals and therefore the request sought irrelevant information. Such documents are properly discoverable because they are relevant and not privileged. Information about reports of odors from the plant by local residents are relevant to Pat's claim that the plant was illegally releasing toxic chemicals into the air, because it is more probable that the plant was in fact releasing chemicals if local residents reported that they smelled odors. Such reports may also be relevant to the issue of the quantities, types, and times the chemicals were released into the air, which is relevant to Pat's claim that she had sufficient exposure to the chemicals to cause her persistent cough.

Devon's claim that the documents are not relevant because the odors were "legally produced" and "harmless" should have been rejected by the court. A party may not avoid discovery by self-serving claims as to what its documents would show. Moreover, the issues at the heart of this claim are precisely whether 1) the odors were legally produced, as Devon claims, or illegally produced, as Pat claims, and 2) the chemicals are toxic, as Pat claims, or harmless, as Devon claims. Devon must produce documents that show what chemicals were released and how they were being produced so that Pat and her experts can evaluate for themselves the nature of the chemicals.

Therefore, to the extent Devon claimed a relevance objection to Pat's request, the Court should have overruled that objection and ordered Devon to respond in full to the request.

Devon's Work Product Privilege Objection

Devon has also produced a privilege log indicating that it has a summary of all communications with local residents concerning odors emanating from the plant, and has claimed that the summary is protected by the work product privilege because it was created by Devon's counsel. The mere fact that a document was created by counsel does not mean that it is protected by the work product privilege. Devon must also show that the document was prepared in anticipation of litigation. If Devon's counsel prepared the document, for example, as part of a report that was required to be given to the EPA on a routine basis, it would not be protected by work product. Devon bears the burden of showing that the document is entitled to work product protection.

In addition, even if the document is work product, Pat may be able to discover it if she can show that she cannot get the information by any other means, and she would be substantially prejudiced without it. This is a very fact specific showing. Pat's alternative means of finding out what residents have complained to the plant about regarding odors would be to walk the streets and interview the neighborhood, hire an investigator, place an ad seeking responses with such information, etc. Depending on the size of the area at issue, that may not be reasonably feasible or particularly productive. Moreover, it is possible that some residents who have been extremely bothered have moved out of the area entirely and would not be accessible through such an investigation. The best source of the information is likely what is contained in the plant's summary of complaints, and it would be very difficult for Pat to collect that information otherwise.

To the extent that the document contains verbatim reports of residents' complaints, the court should compel Devon to release it. To address Devon's claim that the document also contains counsel's thoughts about the residents' complaints, that information is mental impressions, and is absolutely protected against disclosure. The court should order Devon to produce the document for in camera review, so that the court can determine to what extent it does in fact contain such information. The court

could also order Devon to disclose the document with the work product material redacted.

Ruling on Devon's Motion to Dismiss

The issue here is whether the court should grant Devon's motion to dismiss the amendment to Pat's complaint adding a claim for strict liability and medical monitoring as barred by the statute of limitations, or whether the complaint relates back to the timely filed original complaint.

Relation Back Standard

An amended complaint filed after the statute of limitations has run "relates back" to the original complaint, and therefore is not time-barred, if: 1) the original complaint was timely filed; and 2) the new claims in the amended complaint arise out of the "same transaction or occurrence" as the claims in the original complaint.

Was the original complaint timely filed?

Here, it appears the original complaint was timely filed because Pat discovered her injury in March of 2008 and filed the complaint in February of 2008 for negligence. If the three year statute applies to personal injury complaints whether asserted under negligence or strict liability claims, the original complaint was timely filed within 3 years, and the first part of the relation back test is satisfied.

Do the new claims arise out of the same transaction or occurrence?

As to the question of whether the claims arise from the same transaction or occurrence, the answer is likely yes. Pat's negligence claim relates to the occurrence of Devon's release of chemicals into the air near her home. Her strict liability and medical monitoring claims arise from the same event - Devon's release of chemicals. She is

simply pleading a new theory of liability and requesting an additional remedy for the same conduct by Devon that was at issue in her original complaint.

Devon may argue that, even if the strict liability claim relates back, to the extent that Pat is making a claim for medical monitoring in her amended complaint, it does not arise out of the same transaction or occurrence because it concerns Pat's fear of lung cancer, not her persistent cough. However, a court would likely reject this argument, especially because Pat only recently learned of the potential for the chemicals to cause lung cancer by the Nov. 2012 news article, and filed her amended complaint within a month of learning that information.

Prejudice to Devon

Devon may argue its interests would be prejudiced by permitting the late amendment because it has been engaging in discovery for nearly two years on the basis of the allegations in the original complaint. However, a court would also likely reject this argument because Pat's allegations against Devon in both the original and the amended complaint concern the health effects of the released chemicals, and therefore the scope of the discovery and the preparation Devon must do to defend is not significantly changed by the amended complaint.

In sum, because the original complaint was timely filed, the amended complaint arises out of the same transaction or occurrence as the original complaint, and Devon would not be prejudiced in having to defend against the new claims, the court should deny Devon's motion to dismiss the amendment as time-barred.