Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we're doing another in our "Listen and Learn" series – this one is covering discovery. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the law school and early legal career experience, so you'll be the best law student and lawyer you can be. We're the co-creators of the Law School Toolbox, the Bar Exam Toolbox, and the career-related website CareerDicta. Alison also runs The Girl's Guide to Law School. If you enjoy the show, please leave a review or rating on your favorite listening app, and check out our sister podcast, the Bar Exam Toolbox podcast. If you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on LawSchoolToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Welcome back to the "Listen and Learn" series! Today we're discussing Civil Procedure. And specifically we are, again, diving into the topic of discovery. In this podcast, we will discuss specific discovery topics of motions to compel, interrogatories, and physical/mental examinations.

Lee Burgess: First off, we want to let you know that we already have a couple of "Listen and Learn" episodes covering discovery topics. Those episodes cover the scope of discovery and the work-product privilege, and the additional discovery topics of initial disclosures, Rule 26(f) "meet and confer" conferences, and depositions. Be sure to check out those two excellent episodes, as they will serve as great complements and building blocks for this podcast. We will link to them in the show notes.

Lee Burgess: As a quick refresher, in a civil lawsuit, discovery occurs before the trial begins, as the attorneys prepare for trial. It is the process through which the parties exchange information with each other, especially about evidence and witnesses they may present at trial. But not everything is discoverable. Civil procedure provides a set of rules so each party knows what they must provide and what they do not have to provide to the opposing party.

Lee Burgess: So, let's dive into our first discovery topic, which is interrogatories. Interrogatories are governed by the Federal Rule of Civil Procedure 33, and they are written questions sent by one party to another, which the responding party must answer in writing and under oath. An interrogatory may relate to any discoverable matter. As a short refresher on the scope of discoverable information in federal court, a party in a civil action may obtain discovery of all non-privileged information that is, (1) relevant to any party's claim or defense; and (2) proportional to the needs of the case, considering factors such as the importance of the issues at stake, the amount in controversy, the party's

relative access to relevant information and resources, the importance of the discovery, and the burden expense versus the likely benefit of the discovery.

Lee Burgess: Now let's discuss some specific rules related to interrogatories. First, there is a limit to the number of interrogatories for each party. Unless leave of court is obtained, each party is allowed to serve only 25 interrogatories upon any other party, including all subparts. Second, interrogatories have a timing requirement. Unless leave of court is obtained, interrogatories cannot be served prior to the parties' initial "meet and confer" conference, under FRCP 26(f).

Lee Burgess: There are also specific rules governing how a receiving party may respond to interrogatories. A party responding to interrogatories must serve its answer and any objections within 30 days after being served with the interrogatories. Each interrogatory must be answered separately and fully in writing and under oath, to the extent it is not objected to. And each objection to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived.

Lee Burgess: Before turning to a hypo involving interrogatories, let's cover one more discovery topic first: motions to compel. A motion to compel is a motion that allows a party to move for an order compelling disclosure of a discovery response. The motion must, (1) provide notice to all other parties and affected persons; and (2) include a certification that the movant has in good faith conferred, or attempted to confer, with the person or party failing to provide the discovery at issue in an effort to obtain it without court action. The second requirement is commonly referred to as the "meet and confer" requirement for filing a motion to compel.

Lee Burgess: Further, there are two types of motions to compel. The first is a motion to compel a disclosure, and the second is a motion to compel a discovery response. For motions to compel a disclosure, if a party fails to make a required disclosure, such as initial disclosures, pre-trial disclosure, or expert disclosures, then any other party may move to compel the disclosure and for appropriate sanctions. For motions to compel a discovery response, if a party failed to make a proper discovery response, such as failing to answer a question asked at a deposition, or failing to answer an interrogatory, then the party seeking the discovery may move to compel a response. And that covers motions to compel.

Lee Burgess: Now that we have covered the requirements for interrogatories and motions to compel, let's examine a hypo to sharpen our understanding of the topic. This hypo is adapted from the July 2019 California bar exam:

Lee Burgess: "Plaintiff Pam was shopping at Defendant Discount Grocer's store when a large display of soda cans fell on her, bruising her head and entire body. Following the incident, Pam filed a complaint in federal court against Discount Grocer for

negligently maintaining the display. And she sought damages for medical expenses, pain and suffering, and lost wages. Accompanying Pam's complaint was a set of 26 interrogatories, which included the following interrogatory: 'Interrogatory number 26: Please provide copies of every training manual Discount Grocer has used in training its employees.' Discount Grocer provided the following response to Interrogatory number 26: 'Objection. Exceeds the limit for the number of interrogatories. In addition, the interrogatory is premature in light of the stage of the case.'

Lee Burgess: Upon receiving the response, Pam immediately filed a motion to compel a further response to Interrogatory number 26. Should the federal court grant Pam's motion to compel?"

Lee Burgess: The answer is "no". The court should deny Pam's motion to compel for multiple reasons. First, the court should deny it because Pam failed to comply with the "meet and confer" requirement for filing a motion to compel. Pam immediately filed her motion to compel, without first meeting and conferring in good faith with Discount Grocer and its response to the interrogatory.

Lee Burgess: Second, the court should deny the motion to compel because the court should sustain Discount Grocer's two objections to the interrogatory. Discount Grocer properly objected to Interrogatory number 26 on the grounds that it exceeds the limit on the number of interrogatories that may be served by a party. Each party is only permitted to serve 25 interrogatories. So, Interrogatory number 26 exceeded that limit.

Lee Burgess: In addition, Discount Grocer properly objected to the timing of Interrogatory number 26 on the ground that it was served at a premature stage of the case. Interrogatories cannot be served prior to the parties' initial conference, under Federal Rule of Civil Procedure 26(f). The fact pattern states that Interrogatory number 26 was attached to Pam's complaint at the start of the lawsuit. Thus, both of Discount Grocer's objections to the interrogatory were proper.

Lee Burgess: Before we leave this hypo, it is worth noting that Discount Grocer also might have objected to Interrogatory number 26 on the grounds that it was overbroad because it broadly sought copies of every training material Discount Grocer has used, instead of being limited to training manuals related to erecting product displays. However, because Discount Grocer did not raise this specific objection in its response, the district court could not have considered it in deciding Pam's motion to compel. Each objection to an interrogatory must be stated with specificity, and any ground not stated in a timely objection is waived.

Lee Burgess: Now let's turn to our final discovery topic for today, which is requests for physical or mental examination. In federal court, a court may order a party to

submit to a physical or mental examination by a suitable licensed or certified examiner if three requirements are met. First, a motion is made with notice to all other parties and the person to be examined. Second, the person's physical or mental condition is in controversy. And third, good cause is shown. The court's order requiring the examination must specify the time, place, manner, conditions, and scope of the examination, as well as the person who will perform it.

Lee Burgess: Now that we have covered the requirements for requests for physical and mental examinations, let's examine a hypo related to that topic. This hypo was adapted from a question from the February 2023 California bar exam:

Lee Burgess: "Defendant Drop Tires manufacturers and installs specially coded automotive tires. Drop Tires advertises that its tires will not go flat for the first 7,000 miles of use. Plaintiff Parker purchased four new tires from Drop Tires and had them installed by the company. Parker drove 100 miles on the tires, and then one tire went flat causing Parker to swerve and crash into another car. Parker was not physically injured in the accident. Following the accident, Parker filed and properly served a complaint in federal court against Drop Tires, alleging claims for breach of warranty and negligent installation and manufacture of the tires. In his complaint, Parker alleged that he suffered property damages and emotional distress as a result of the accident. During the discovery phase of the case, after meeting and conferring with Parker, Drop Tires filed and served a motion to compel for Parker to submit to a physical examination. Should the court grant Drop Tires' motion to compel?"

Lee Burgess: The answer is "no". Here, Drop Tires is specifically requesting for Parker to submit to a physical examination. In order to be entitled to such an examination, Parker's physical condition must be in controversy. The facts in the hypo state that Parker was not physically injured in the accident. In addition, Parker did not seek any damages for physical injuries in his complaint. He only sought property damages and emotional distress damages. Therefore, Parker's physical condition is not at controversy in the case. Because Parker's physical condition is not at issue, the court should deny Drop Tires' motion to compel the physical examination.

Lee Burgess: Before we finish with this hypo, it is worth noting that had Drop Tires filed a motion to compel Parker to submit to a mental examination, that motion would likely have been granted by the court. The fact pattern explains that Parker is seeking emotional distress damages as a result of the accident. Therefore, unlike his physical condition, Parker's mental condition is in controversy in the case.

Lee Burgess: And that wraps up our discussion of the discovery topics of interrogatories, motion to compel, and requests for physical and mental examination. Hopefully you found these hypos helpful examples of how to work through any discovery-related question on your exam.

Lee Burgess: If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website contact form at LawSchoolToolbox.com. Thanks for listening, and we'll talk soon!

RESOURCES:

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California Bar Examination – Essay Questions and Selected Answers, July 2019
California Bar Examination – Essay Questions and Selected Answers, February 2023
Bar Exam Toolbox Podcast Episode 204: Listen and Learn – Scope of Discovery and Work-Product Privilege
Bar Exam Toolbox Podcast Episode 237: Listen and Learn – Discovery (Civ Pro)