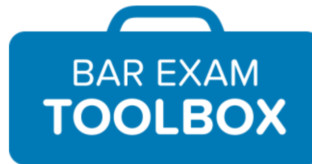
Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, as part of our "Listen and Learn" series, we're discussing Civil Procedure, and specifically, the scope of discovery and the work-product privilege. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, stay sane, and hopefully pass and move on with your life. 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 on your favorite listening app, and check out our sister podcast, the Law School Toolbox podcast. If you have any questions, don't hesitate to reach out to us. You can reach us via the contact form on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast. Today, we're discussing Civil Procedure, and specifically, the scope of discovery and the work-product privilege.

Lee Burgess: Discovery is the phase in litigation in which the parties gather information about the case. The Federal Rules of Civil Procedure require opposing parties to share certain information with one another through written initial disclosures. The rules also allow parties to request certain information from the other side. For example, a party may request that the opposing party answer a series of written questions, called interrogatories, under oath. Or a party may require an opposing party or witness to answer live questions at a deposition. A party may also request that an opposing party admit or deny a series of factual allegations relevant to the lawsuit. And finally, a party may request that the opposing party produce documents, electronically stored information, or tangible things.

Lee Burgess: Exams questions often require students to consider the permissible scope of discovery. In other words, what can a party force the other side to answer or produce in response to their requests?

Lee Burgess: The scope of discovery is pretty broad. Generally, parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense. Relevant information may be discoverable even if that information would be inadmissible at trial. And the relevancy of information depends on the specific circumstances of the case. In particular, the federal rules dictate that the parties' requests must be proportional to the needs of the case and give a party objecting to a discovery request several factors on which to base that objection. Those factors include the importance of the issues at stake, the amount in controversy, the parties' relative access to relevant information, the



parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. When a party objects to a discovery request, the other party may file a motion to compel the discovery with the court. The court will consider these factors to determine whether the discovery is appropriate based on the circumstances of the case.

Lee Burgess: We will practice implementing the general scope of discovery standard with a hypo shortly. But first let's talk about one major limitation on the scope of discovery. The federal rules expressly limit discovery to information that is "non-privileged". Courts have long recognized that some information, even though relevant to a particular case, should be protected from disclosure for policy reasons. For example, the attorney-client privilege protects parties from having to disclose confidential communications between the party and their attorney made in the course of the legal representation. In order to claim that information is privileged from discovery, the party claiming the privilege must file a privilege log describing the allegedly privileged information in sufficient detail to determine whether the privilege applies.

Lee Burgess: Today, we are going to dive a little deeper into a privilege that frequently comes up on exams in scope of discovery questions: the work-product privilege.

Lee Burgess: The work-product privilege bars the production of certain materials that are developed in anticipation of litigation. The phrase "work-product" refers to the types of information that an attorney may have in their file (and to some extent their mind) that are created in the course of investigating and preparing a case. Common examples include notes or recordings of witness interviews, memos on factual and legal issues, trial notebooks, deposition outlines, and emails among co-counsel regarding strategy or litigation planning. But the work-product privilege is not limited to materials prepared by an attorney. Work-product may also include materials prepared by a party or a party's representative other than an attorney. For example, if a party employer has its employee document a workplace incident, the employee's report would trigger the work-product privilege if the employer shows that the report was created in anticipation of litigation, rather than the regular course of business. Additionally, if a party hires a consultant or expert to evaluate a situation and issue a report in anticipation of a lawsuit, that report may trigger the work-product privilege.

Lee Burgess: To determine whether work-product is protected from discovery, the federal rules distinguish between different categories of work-product. One category includes materials that reveal mental impressions, conclusions, opinions, or

legal theories regarding the case. This category is sometimes referred to as "opinion work-product" and it is absolutely privileged from discovery.

Lee Burgess: The other category of work-product includes any other material prepared in anticipation of litigation. Materials that do not reveal mental impressions, opinions, strategy, or thought processes regarding the case are privileged from discovery if they contain information that can reasonably be obtained through other means. However, if the party seeking the materials demonstrates a substantial need for the information, and that the information cannot be obtained through alternative means without substantial hardship, the non-opinion work-product materials may be discoverable.

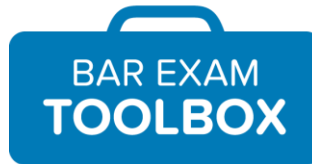
Lee Burgess: For example, assume that a plaintiff seeks the defense attorney's notes regarding witness interviews. Assume also that the witnesses are available and willing to speak with the plaintiff's attorney. In that case, the defense attorney's interview notes are likely protected by the work-product privilege because the plaintiff's attorney can reasonably obtain the information in the interview notes by interviewing the witnesses.

Lee Burgess: But what if the witnesses are not available to speak with the plaintiff's attorney? In that case, the plaintiff may be able to show a substantial need and inability to obtain the same information without substantial hardship. Thus, the defense attorney's interview notes may be discoverable, even if they would otherwise be privileged. However, in allowing the discovery of the interview notes, the court would allow redaction of any mental impressions or opinions in the interview notes before the production.

Lee Burgess: Okay, now that we understand the rules regarding the general scope of discovery and one major limitation – the work-product privilege – let's test our understanding with a hypo. This hypo is adapted from the July 2019 California bar exam:

Lee Burgess: "Priscilla was shopping at Grocery when a very large display of bottled soda products fell on her, bruising her head and entire body. She filed suit in federal district court against Grocery for negligently maintaining the display, and sought damages for medical expenses, pain and suffering, and lost wages. Grocery recognized that jurisdiction was proper and filed an answer denying liability.

Lee Burgess: Priscilla served interrogatories on Grocery. In the interrogatories, Priscilla asked Grocery to provide the names and addresses of every Grocery employee who worked on construction of the soda display. Priscilla also filed a request for



production in which she asked Grocery to provide copies of every training manual Grocery has used in training its employees for the last ten years. Grocery objected to both requests as outside the scope of discovery. Priscilla filed a motion to compel responses. How should the court rule?"

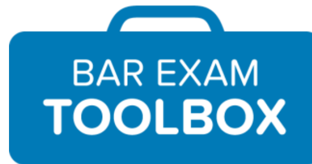
Lee Burgess: Let's first consider Priscilla's request for the names and addresses of Grocery employees who worked on the display. The court should grant Priscilla's motion as to the names of the employees. The names of the employees who constructed the soda display are relevant to Priscilla's claim. In particular, Priscilla may want to depose these employees regarding their training and the construction of the display.

Lee Burgess: However, the court may deny Priscilla's motion to the extent that she seeks personal addresses of the employees. Priscilla will likely be able to contact the relevant employees through Grocery and its counsel. Therefore, disclosure of their personal addresses is likely an unnecessary invasion of the employees' privacy.

Lee Burgess: Regarding Grocery's training manuals for the last ten years, the court should also grant the motion in part and deny it in part. Grocery's training manuals regarding the construction of soda displays or displays generally are likely relevant to Priscilla's claim. But training manuals that have nothing to do with the construction of displays may be irrelevant or out of proportion with Priscilla's needs in the case. Moreover, it is unlikely that all of Grocery's training manuals for the last ten years are relevant. The relevant training materials are those used to train the particular employees who constructed the soda display at issue. Therefore, the court may limit Priscilla's discovery request to require production of relevant training materials that were used to train the employees who constructed the soda display that fell on Priscilla.

Lee Burgess: Now that we understand how a court may limit discovery requests to make them proportional to the needs of the case, let's try a slightly more complicated hypo. This hypo is adapted from the February 2013 bar exam:

Lee Burgess: "Pat learned that Devon Corp. ('Devon') may have been illegally releasing toxic chemicals into the air near her home. Pat sued Devon in federal court, alleging a cause of action for negligence and seeking damages for a persistent cough. The federal court had subject matter jurisdiction over Pat's lawsuit based on its diversity of citizenship jurisdiction.



Lee Burgess: During discovery, Pat requested that Devon 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.

Lee Burgess: 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 privilege because it had been created by its counsel, who therein described the residents' comments as well as counsel's thoughts about them. Devon's privilege log also notes that its counsel created the document shortly after learning of Pat's lawsuit. Devon claims to have no other documents that are responsive to Pat's request regarding resident complaints.

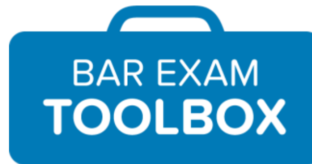
Lee Burgess: Pat filed a motion to compel Devon's production of the summary of all communications with residents concerning odors emanating from the plant. Should the court grant Pat's motion to compel?"

Lee Burgess: To determine if the court should grant Pat's motion to compel, we must first determine whether Pat's request is within the scope of discovery. Then we must determine whether the summary report of Devon's communications with local residents is protected by the work-product privilege.

Lee Burgess: Here, Pat's request is within the scope of discovery, because reports by other residents of a foul odor emanating from the plant are relevant to Pat's claim. Specifically, if other residents complained about odors coming from the plant, Pat could use those complaints to support her claim that Devon released toxic chemicals. Devon's argument that the chemicals were harmless does not change this fact. Pat does not have to take Devon's word as conclusive. Rather, she is entitled to discovery regarding other residents' complaints.

Lee Burgess: Since Pat's request is within the scope of discovery, the court should grant Pat's motion to compel, unless Devon can show that the information is privileged. Here, Devon claims that its counsel's summary of reports by local residents is protected from discovery by the work-product privilege.

Lee Burgess: We know that the work-product privilege protects certain materials that a party or its representative create in anticipation of litigation. Here, Devon may argue that its counsel created the report summarizing complaints in anticipation of



litigation. Devon will point to the fact that its counsel summarized all resident complaints shortly after Pat filed her lawsuit. The timing of the report supports Devon's argument that it was created in anticipation of litigation with Pat and potentially other residents. If Devon shows that the summary was created in anticipation of litigation, it may be protected by the work-product privilege.

Lee Burgess: However, as we discussed today, not all work-product is absolutely protected from discovery. Here, Devon's counsel's summary contains facts underlying the residents' complaints and counsel's thoughts about them. Devon's counsel's thoughts, opinions, or mental impressions of the residents' complaints are absolutely protected by the work-product privilege. But the substance of the residents' complaints is not absolutely protected. In particular, Pat may compel production of the report summaries of the residents' complaints if she can show, (1) a substantial need for the information; and (2) that she cannot otherwise obtain the information without substantial hardship.

Lee Burgess: Pat will likely be able to make this showing here. First, Pat could demonstrate a substantial need for the information, because complaints by other residents would help Pat prove that Devon released toxic chemicals and was on notice of that fact. Additionally, Pat could argue that it would be a substantial hardship to determine which other residents had complained and the substance of their communications by asking around her community. If Pat makes this showing, a court may compel Devon to produce the summary report with its counsel's mental impressions redacted.

Lee Burgess: Now, let's consider whether another fact would change our analysis in this motion to compel. Assume that Devon has a file of all written resident complaints and notes regarding any oral complaints. The court determines that these documents are relevant for the reasons discussed above. And the residents' complaints themselves are not within the work-product privilege. The complaints were created by the residents, not Devon or its representative. Additionally, notes regarding oral complaints from the residents are not privileged, unless Devon can show that these were created in anticipation of litigation. Assume the facts indicate that Devon took notes regarding oral resident complaints as part of its regular business practice to document all resident calls. Under these circumstances, Devon would be compelled to produce the written resident complaints and notes regarding oral complaints.

Lee Burgess: Does the production of the written complaints and notes regarding the oral complaints change our work-product analysis regarding Devon's counsel summary report of the complaints? The answer is likely "Yes". In this case, Pat

could reasonably obtain the discoverable information in the report – facts regarding the substance of the resident complaints – from another source, namely, the written complaints themselves and notes regarding oral complaints. Under these circumstances, a court may not order Devon to produce the summary report.

Lee Burgess: And that wraps up our discussion of the scope of discovery and the work-product privilege. Hopefully you found these hypos helpful examples of how to work through scope of discovery questions on an exam. If you enjoyed this episode of the Bar Exam 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@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us on our website contact form at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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