Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're doing something a little different – a "Listen and Learn" for the multiple-choice section. I'm going to walk you through four contracts formation questions – two in the classic MBE style and two in the new NextGen format. 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: Welcome back to the Bar Exam Toolbox podcast. Today, we're doing something a little different – a "Listen and Learn" for the multiple-choice section. I'm going to walk you through four contracts formation questions – two in the classic MBE style and two in the NextGen format. Same subject, two different ways of getting tested. By the end, you'll see exactly how the format shift changes, what the question is asking, and how to study so it doesn't matter which version you get.

Lee Burgess: So, why am I doing this episode? I get this question a lot right now: "Lee, the NextGen format looks completely different. Do I have to relearn everything?" Well, the honest answer is "no". The law hasn't changed. Consideration is still consideration. The mirror image rule is still the mirror image rule. What's changing is how the questions are framed. And once you've seen a few, the new format stops feeling alien. So, that's what we're going to do today – four questions, all formation – two MBE style, and two NextGen style. I'll read each one slowly, so you can pause and try them, and then I'll walk through how to get to the right answer. I'm going to specifically pair one of the MBE questions with a NextGen question on the same doctrine, so you can hear the contrast directly. That's the move I think is most useful. Once you feel that pairing in your bones, the new format gets a lot less scary. One thing before we start: The questions I'm using are originals drafted for this episode, not pulled from any commercial bank. So if you want to actually try them, the answers won't be Googleable. Pause when I tell you to. Try and predict the answer before you hear the choices. That's where the learning happens.

Lee Burgess: Okay, here's our first question:

Lee Burgess: On March 1, a wholesaler sent a signed letter to a retailer that read: “We hereby offer to sell you 1,000 widgets at $10 each. This offer is firm and will remain open until April 15.” Both parties are merchants, and widgets are goods. On March 20, before the retailer responded, the wholesaler sent a second letter stating: “We revoke our March 1 offer.” The retailer received the revocation letter on March 22. On March 25, the retailer mailed a letter to the wholesaler accepting the March 1 offer at $10 per widget. The wholesaler received the acceptance on March 28. Did the parties form a contract?

Lee Burgess: Answer A: No, because the wholesaler revoked the offer on March 20, before the retailer accepted.
Answer B: No, because a firm offer is unenforceable without separate consideration.
Answer C: Yes, because the offer was irrevocable until April 15, and the retailer accepted within that period.
Answer D: Yes, but only if the retailer paid separate consideration for the firm offer promise.

Lee Burgess: So, pause here if you want to try it before I walk through. So now let’s walk through this question. Let’s predict the rule before we even look at the answers – that’s the move. Whenever you see merchants, goods, and “We’ll keep this offer open” in the same fact pattern, the words “firm offer” should be lighting up in your head. That’s UCC §2-205. Here’s what the rule says – and you should know this cold: Under the UCC, a merchant’s signed written promise to keep an offer open is irrevocable for the time stated, up to a maximum of three months. No consideration needed. Here’s that last part again: No consideration needed. That’s the whole point of the firm offer rule. It’s the UCC’s way of saying, “We’re going to make commercial life a little easier than the common law makes it.” So, compare that to the common law option contract. Under the common law, if I want to keep an offer open, I have to pay you something for it – a peppercorn, a dollar, whatever, but there has to be consideration. The UCC said, “Too clunky for merchant transactions.” So, §2-205 strips the consideration requirement out, as long as you’ve got a merchant, a signed writing, and you’re under three months.

Lee Burgess: Now to our answer choices. Answer A says no contract, because the wholesaler revoked. This is the classic trap. Yes, the wholesaler tried to revoke, but you can’t revoke an irrevocable offer. The whole point of firm is firm, so A is wrong. And while we’re on the timeline, notice the retailer mailed acceptance on March 25, and the wholesaler received it on March 28.Under the mailbox rule, acceptance is effective on dispatch, so the contract was locked in on March 25 –

well before the April 15 deadline. Even if you wanted to use receipt, March 28 is still timely. Either way you slice it, the acceptance is in time.

Lee Burgess: Answer B says no contract, because the firm offer wasn't supported by consideration. This is the answer the bar examiners write for the student who studied common law options and forgot the UCC carve-out. B is wrong, because it imports the wrong body of law.

Lee Burgess: Answer C says yes, because the offer was irrevocable until April 15, and the retailer accepted within that period. Well, that's the right rule applied correctly. The March 1 letter was signed by a merchant for goods with a stated time under three months, so it's a firm offer under §2-205. The retailer accepted on March 25 – well within the April 15 window.

Lee Burgess: Answer D says yes, but only if there's separate consideration. Same mistake as B – borrowing the common law rule. So, the right answer is C.

Lee Burgess: The teaching moment here is: When you see a firm offer fact pattern, your brain should not be asking, "Was there consideration?" It should be asking three things, and three things only: Is the offeror a merchant? Is the offer a signed writing? Is the time stated three months or less? If "yes, yes, yes", it's irrevocable, and move on. That's the kind of pattern recognition that separates students who can answer contracts questions in 90 seconds from students who burn three minutes second-guessing themselves.

Lee Burgess: Now, let's move on to our second question. This one is on consideration, and I want you to pay attention to this one because in a few minutes, we're going to take this exact doctrine and see what happens when the NCBE re-skins it for the NextGen. So this isn't just a question, it's a setup. Here we go:

Lee Burgess: A homeowner hired a contractor to renovate her kitchen for $20,000, with completion by June 1. On May 15, the contractor told the homeowner that he would not finish on time unless she agreed to pay an additional $3,000. The homeowner, anxious to have the kitchen done before her daughter's wedding, signed a one-page document agreeing to pay the extra $3,000. The contractor finished the kitchen by June 1. The homeowner paid the original $20,000 but refused to pay the additional $3,000. Is the contractor entitled to the $3,000?

Lee Burgess: Answer A: Yes, because the homeowner signed a written agreement to pay it.
Answer B: Yes, because finishing the kitchen on time was valuable consideration.
Answer C: No, because the contractor was already obligated to finish on time under the original contract.
Answer D: No, because the modification must be supported by a writing signed by the contractor.

Lee Burgess: So, pause now if you want to work through it before hearing our analysis. So let's walk through this question. Predict the rule first. What kind of question is this? Two parties had a contract. One of them wanted more money mid-performance. The other one agreed under pressure. That's a modification problem. And the second you see modification, you should be asking, "Common law or UCC?" Because the rules are very different. Under UCC §2-209, modifications to a goods contract don't need any new consideration at all. Good faith is enough. But under the common law, you absolutely need new consideration. So your very first move on a modification problem is to figure out which body of law you're in. This is a services contract – kitchen renovation – so we're in common law land. And under the common law, modifications need new consideration. That's the pre-existing duty rule. A promise to do something you're already legally obligated to do is not consideration.

Lee Burgess: So now let's apply it. The contractor was already obligated to finish by June 1. That was in the original contract. So when he promised to finish on time in exchange for the extra $3,000, he wasn't promising anything new. He was promising to do what he had already had to do. No new consideration, no enforceable modification.

Lee Burgess: Now, the exception, if you're wondering, is genuinely unforeseen circumstances where the modification is fair and equitable in light of those circumstances. If the contractor had hit unexpected rock under the foundation and renegotiated for the extra labor, courts will sometimes enforce that. But this fact pattern doesn't have unforeseen circumstances. It just has a homeowner under emotional pressure because of a wedding deadline. That is not enough.

Lee Burgess: Now to our answers. Answer A says yes, because the homeowner signed it. This is the trap for students who think a writing is magic. A writing is just a writing. It doesn't create consideration, so A is wrong.

Lee Burgess: Answer B says yes, because finishing on time was consideration. This is the trap that catches more people. Finishing on time looks like something, it feels like something, but it's not new something. The contractor already owed it, so B is wrong.

Lee Burgess: Answer C says no, because the contractor was already obligated. That's the pre-existing duty rule said in plain English, so C is right.

Lee Burgess: Answer D says no, but for the wrong reason. There's no general rule that the contractor has to sign the modification, so D is wrong. Our right answer is C.

Lee Burgess: So, when you see a mid-contract demand for more money, ask yourself, "What new thing is the demanding party giving in exchange?" If the answer is, "Nothing, they're just doing what they already promised", that's a pre-existing duty. No enforceable modification. Burn this pattern in, because here's what happens next.

Lee Burgess: So, what changes on the NextGen? We've done two MBE-style questions. Now I want to walk you through what the NextGen format actually looks like, because the doctrine is the same. The way the question gets asked is different. Three things change. Number one: the perspective. MBE questions are written from a neutral third-person frame: "A homeowner hired a contractor." NextGen questions put you in a professional role: "Your client is a homeowner who hired a contractor." You're an associate, you're advising. The whole question is written like a real lawyering moment.

Lee Burgess: Number two: the call shifts from outcome prediction to professional judgment. Instead of, "Is the contractor entitled to the money?", you'll get something like, "What is your client's best argument?" or, "What topics are most important to research?" It's testing the same legal knowledge, but in a way that asks you what you'd actually do with it.

Lee Burgess: Number three: there's a brand-new format that doesn't exist on the Legacy MBE – six options, pick two. We'll do one of those at the end, so you can hear it. I want to be really clear about one thing. The substance you need to know does not change. Pre-existing duty is still pre-existing duty. The mirror image rule is still the mirror image rule. If you know the law cold, you can answer either format. The format dressing is just dressing. Now let me show you. We're going to take that same pre-existing duty fact pattern from Question 2 and change it for the NextGen. Here we go:

Lee Burgess: Your client is a homeowner who hired a contractor to renovate her kitchen for $20,000, with completion by June 1. On May 15, the contractor told your client that he would not finish on time unless she agreed to pay an additional $3,000. Your client, anxious to have the kitchen done before her daughter's wedding, signed a one-page document agreeing to pay the extra $3,000. The contractor finished the kitchen by June 1. Your client paid the original $20,000 but is refusing to pay the additional $3,000. The contractor has now sent a demand letter threatening to sue. Your client asks whether she can avoid paying the $3,000. What is your client's best argument that she does not owe the additional $3,000?

Lee Burgess: Answer A: The agreement to pay the additional $3,000 is unenforceable, because the contractor's promise to perform on time was not supported by new consideration.
Answer B: The agreement to pay the additional $3,000 is unenforceable, because your client signed it under duress.
Answer C: The agreement to pay the additional $3,000 is unenforceable, because it was not part of the original contract.
Answer D: The agreement to pay the additional $3,000 is unenforceable, because the contractor breached the implied covenant of good faith and fair dealing.

Lee Burgess: So, pause if you want to work through this question before hearing my explanation. So, hopefully you're already feeling something here. The facts are basically the same as Question 2. The rule you need is the same – pre-existing duty – but the question feels different, doesn't it? Well, that's because the call is different. It's not "Is the contractor entitled to the money?" It's "What is your client's best argument?" That word, "best", does a lot of work. It's not asking what arguments exist. It's asking which one is strongest under the law. And this is where NextGen actually rewards good lawyering instincts. A real lawyer may look at this fact pattern, might think of two or three theories – pre-existing duty, maybe duress, maybe something about good faith. NextGen wants to know if you can sort them – which one is rock solid and which ones are stretches. So, let me walk through each one.

Lee Burgess: Answer A is pre-existing duty, dressed up. The contractor's promise to finish on time wasn't new consideration, because he already owed that performance. This is exactly the same analysis we did in Question 2, just framed as the client's argument instead of an outcome prediction. A is on solid legal ground.

Lee Burgess: Answer B is duress. And I want to be honest with you here – duress is a more plausible argument on these facts than students sometimes realize. The contractor threatened to breach the existing contract to extract more money. That's exactly the kind of bad faith threat the duress doctrine covers. And the homeowner's situation – partial renovation, wedding in weeks – is exactly the kind of corner where "no reasonable alternative" becomes a real argument, not a stretch. A court could find duress here. But here's why it's still not the best argument: Duress is fact-intensive. Was the threat wrongful? Did it actually cause her assent? Were the alternatives truly unreasonable? Every one of those is a place the argument can lose. Pre-existing duty has none of that. The contractor was already obligated to finish on time, full stop. That's why A beats B – not because duress is weak, but because pre-existing duty is cleaner. And best argument on NextGen rewards the cleanest doctrinal hook, not the most creative theory.

Lee Burgess: Answer C says it's unenforceable, because it wasn't part of the original contract. Well, this is just wrong. Modifications are perfectly enforceable when they're supported by new consideration. That's literally what modifications are. C confuses "modification" with "outside the contract".

Lee Burgess: Answer D says the contract breached the implied covenant of good faith. Implied covenant of good faith is a real doctrine, mostly used in performance disputes – refusing to cooperate, sandbagging the other party, that kind of thing. It's a stretch here, and even if applied, it would be a much weaker argument than pre-existing duty. So, our right answer is answer A.

Lee Burgess: So, on the NextGen's "best argument" questions, your job is to rank the arguments. The strongest one is usually the one that requires the fewest factual leaps and rests on the most established doctrine. Pre-existing duty is a black-letter rule with clear elements. Duress requires you to characterize facts in a particular way. The implied covenant requires you to stretch. Now, here's the thing I want you to feel: You just answered the same legal question twice, in two different formats. The second one felt harder when I read it, didn't it? The fact pattern was a little longer, the call was framed differently. The wrong answers had more legal-sounding distractors. But the rule you needed was identical. Identical. That's the entire transition in a nutshell – same law, different dressing. If you know the law cold, the dressing barely matters. If you don't know the law cold, no format on Earth is going to save you.

Lee Burgess: Okay, last question. This is the format that does not exist on the Legacy MBE – six options, choose two. The call is almost always some version of "What topics are most important to research?" It's testing your ability to spot the legal issues that matter most in a fact pattern – the way a real lawyer triages a new file. The fact pattern is a little longer, so I'm going to read it slowly, and then read the call, and then the six options. Don't try to memorize every detail on the first pass. Listen for the legal moves. We'll come back to specific facts as we work through it. So here we go:

Lee Burgess: Your supervising partner has asked you to research issues for a new client. The client, a small business owner, has come in with the following situation: On April 1, the client emailed a software developer the following message: "I'd like you to build me a custom inventory app for $15,000. Please confirm by April 5." The developer replied on April 3 with this message: "Sounds great. I can do it for $15,000, payable half upfront and half on delivery. Let me know." The client did not reply to the developer's April 3 email, but on April 7, the client wired the developer $7,500. The developer began work, but on May 1, the developer emailed, "I've decided to stop working on this. Refund coming." The client now wants to sue to force the developer to complete the app. Your partner has asked you to identify the topics that will most affect whether the client and the developer formed an enforceable contract. Which two topics are the most important to research?

Lee Burgess: Now, before I read the options, let me set the scene one more time. Client emailed a $15,000 offer for a custom inventory app. Developer responded – looks like acceptance – but added a payment schedule of half upfront, half on delivery. Client didn't reply, but wired the $7,500. Developer started to work. Then on May 1, developer quit. Client wants to sue. Six options, pick two. Here we go.

Lee Burgess: Answer A: Whether the developer's April 3 email was a counteroffer or an acceptance.
Answer B: Whether the contract is governed by Article 2 of the UCC or by the common law.
Answer C: Whether the parol evidence rule bars introduction of the April 1 email.
Answer D: Whether the statute of frauds applies and is satisfied.
Answer E: Whether specific performance is an available remedy.
Answer F: Whether the developer's offer was supported by consideration.

Lee Burgess: So, pause and try it before I walk through the answers. Remember, pick two.

Lee Burgess: Okay, the trick to these “select two” issue-spotting questions is to remember what the call is asking. It’s not “List every legal issue you can think of”. It’s “What are the most important topics to research?” “Most important” meaning “most likely to be dispositive”. The threshold issues – the ones that if they go a certain way, the rest of the analysis doesn’t even matter. So let me walk through these one at a time.

Lee Burgess: Answer A: counteroffer or acceptance. Look at what the developer wrote. The client offered $15,000. The developer said, “Sounds great. I can do it for $15,000, but payable half upfront and half on delivery.” That extra term – payment schedule – is new. Under the common law mirror image rule, adding new terms is a counteroffer, which would mean no contract was formed by that email. Under UCC §2-207, the new term might or might not become part of the contract. And between merchants, the analysis gets even more involved. And there’s a second layer here that’s actually the most interesting part of the question. The client then wired $7,5000 – exactly the half upfront amount the developer had proposed – and the developer started work. That’s acceptance by conduct. A court could find that even if the email exchange alone was a counteroffer and no acceptance, the parties formed a contract through their behavior – possibly on the developer’s terms, since the client paid the amount the developer asked for. When the conduct counts and on whose terms is exactly the kind of analysis A is asking you to research. So, A is a multi-layered formation question, and it’s a threshold issue. A is in.

Lee Burgess: Answer B: UCC or common law. Why does this matter? Because a custom-built software app is a hybrid. Service is to design and build it, but you’re delivering a thing at the end. Some courts treat custom software as goods, some treat it as services, some apply the predominant purpose test. And here’s the kicker: Your answer changes depending on which body of law applies. Under the common law, the developer’s “payable half upfront, half on delivery” line is a counteroffer that kills the original offer. Under §2-207, it might be a binding acceptance with proposed additional terms. Same facts, different result, depending on which body of law governs. That makes B foundational. It’s the threshold question that drives every other formation issue. So, B is in.

Lee Burgess: Now, let me show you why the others are wrong, because that’s where the learning happens. Answer C: parol evidence. The parol evidence rule bars introduction of prior or contemporaneous agreements that contradict a fully integrated written contract. We don't even have a fully integrated written contract here yet. We have two emails. Parol evidence isn't the issue. This is a distractor for students who hear "contract dispute" and reach for parol evidence reflexively. C is out.

Lee Burgess: Answer D: statute of frauds. This is the closest call of the four wrong answers, because statute of frauds is a threshold defense to enforcement – it's not just downstream. But notice how it interacts with B. Whether the statute of frauds even applies depends entirely on which body of law governs. Under Article 2, the statute of frauds kicks in at $500 in goods. A $15,000 software contract is in. Under the common law, the only potentially relevant trigger is the one-year provision, and that only catches contracts that can't be performed within a year. A custom software app probably can be done in under a year, so under common law, the statute of frauds likely doesn't apply at all, which means D isn't just downstream of B, it's contingent on B. You can't even know if D is a real issue until you've answered B. B is foundational, D is entirely dependent, so D is out.

Lee Burgess: Answer E: specific performance. This is a remedy question – whether the client can force the developer to finish. It's only relevant if there is a contract and there is a breach. Same problem as D – downstream. E is out.

Lee Burgess: Answer F: consideration. Look at the deal. The client proposed $15,000, the developer promised to build an app. That's textbook bargained-for exchange. Consideration is not a real issue here. It's the world's softest distractor. F is out. So, the right answers are A and B.

Lee Burgess: The teaching moment for these issue-spotting questions is this: When the call says, "Most important to research", you are not being asked for a complete issue list. You are being asked to triage, to find the threshold questions whose answers determine whether anything else matters. Top of the funnel, not bottom. The skill being tested is the same skill a partner is testing when they hand you a memo assignment and ask you to identify what to research first. They don't want every issue; they want the dispositive ones. And here's something I really want you to take away from this format: The wrong answers aren't wrong in the sense that they're unrelated. Statute of frauds is a real contracts issue. Specific performance is a real contracts issue. Consideration is a real contracts concept. They're just not the most important topics in this fact pattern. NextGen distractors are written to pull you toward issues that could be relevant but aren't threshold. Your job is to stay disciplined.

Lee Burgess: Okay, we've done four questions, so let me give you three patterns to take into your next practice session. Pattern number one: Predict before you peek. On every multiple-choice question – MBE-style or NextGen – read the fact pattern, read the call, and try to formulate an answer in your head before you look at the options. The options are designed to make wrong answers feel right. If you've already committed to your reasoning before you look, the trap distractors lose most of their power.

Lee Burgess: Pattern two: When you see a doctrine, predict the exception. The bar examiners love to test the exception, not just the rule. Firm offer – they're testing the no consideration carve-out. Modification – they're testing pre-existing duty. Mirror image – they're testing §2-207. The rule itself is rarely the trap. The exception almost always is.

Lee Burgess: Pattern three: Format is dressing, doctrine is muscle. The NextGen looks different. The lawyer framing, the "best argument" calls, the six-option select-twos – they're new wrappers, but the legal knowledge inside is the same legal knowledge that's been on the bar forever. If you build the doctrine into long-term memory, you can handle either format. If you don't, no amount of format shopping will save you. That third one is the whole game, honestly. Fluency over familiarity, knowing the rule cold, not just having seen it before. That's the kind of work I want you doing for every contracts subtopic. Predict, walk through, identify the trap, name the rule out loud. And then do it again two days later, and again a week after that, because retrieval plus spacing is what builds the kind of fluency that makes either question format feel manageable.

Lee Burgess: This is also exactly what we built RAMP for. Our team designed it to specifically drill rule recall across both formats – MBE style and NextGen style – with adaptive scaffolding so you get support when you need it, and the support fades as you get better. Same rule, scaffolded across the formats it actually gets tested in. If you want to try it, the Business Associations module is free. Go to BarExamToolbox.com and there'll be a link in the show notes. Sign-up takes about 30 seconds, no credit card. Try it on a subject and see if the approach works for you. RAMP Learning – rule recall across all 10 subjects – is $295. Full NextGen RAMP, which adds multiple-choice practice and written exercises, is $895. Both stated plainly, both linked in the show notes. And if you've been putting off NextGen prep because the format change feels overwhelming, I get it. But I hope today helped you see it's not as different as it looks. Same law, different dressing. Get the law cold and you can handle whatever format they put in front of you. Thanks for listening! Keep practicing, and I'll talk to you soon.

Lee Burgess: 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're still in law school, you might also like to check out our popular Law School Toolbox podcast as well. 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 via our website contact form at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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