



Lee Burgess:

Welcome to the Bar Exam Toolbox Podcast. Today we are talking with MBE expert, Sean Silverman, and walking through and discussing actual MBE questions together. 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](#), [Bar Exam Toolbox](#), and the Career related website [Career Dicta](#). Alison also runs [The Girl's Guide to Law School](#).

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With that, let's get started.

Welcome back. Today we are chatting with MBE expert Sean Silverman, who will be walking us through some MBE questions. Super exciting, right? Sean is an MBE expert who also tutors folks for the MBE and the Florida and UBE Bar Exams.

So, for those who don't know or might be new to the bar exam, the MBE or Multi-state Bar Exam, is a 200-question multiple choice exam that takes place on the second day of the bar exam in almost every state, right, Sean? Now it's every state does it the second day I think.

Sean Silverman:

I believe so.

Lee Burgess:

New Jersey used to be different, but now I think they're the UBE so I think it's everybody. It is unlimited fun or not, I don't know. Depends on who you ask. For many folks, this is the most challenging part of the exam. It was for me for sure. So today Sean and I are planning to walk through some MBE questions and discuss what makes them hard and how you can get better at doing these questions with deliberate practice and a plan of attack.

I will be honest, preparing for this podcast was not my favorite episode to prepare for, because I found myself starting to fall for some MBE tricks if I don't read the questions carefully enough. It's so embarrassing to admit after all these years.

We are going to walk through some released questions from the National Conference of Bar Examiners who actually writes the MBE. We're going to [link](#)



[to a PDF in the show notes](#) where you can find these questions if you want to read along while listening to the podcast or review afterwards.

All right, Sean, thanks for joining us to chat about the MBE.

Sean Silverman: Thanks for having me back.

Lee Burgess: I think you're one of the few people who I can send an email to and say, "Hey, do you want to talk about some multiple choice questions for me on the podcast," and you're like, "That sounds great."

Sean Silverman: I was thinking the same thing. I'm guessing there probably aren't too many people who want to do this as opposed to who can do it.

Lee Burgess: Exactly.

Sean Silverman: We're among them.

Lee Burgess: Exactly. Exactly. All right. So, let's start with question number one on the released questions. So I'll go ahead and read the question and then you and I can kind of talk about how you go about getting to the right answer.

Sean Silverman: Okay.

Lee Burgess: A father lived with his son who was an alcoholic. When drunk, the son often became violent and physically abused his father. As a result, the father always lived in fear. One night, the father heard his son on the front stoop making loud, obscene remarks. The father was certain that his son was drunk and was terrified that he would be physically beaten again. In his fear, he bolted the front door and took out a revolver. When the son discovered that the door was bolted, he kicked it down. As the son burst through the front door, his father shot him four times in the chest, killing him. In fact, the son was not under the influence of alcohol or any drug and did not intend to harm his father.

At trial, the father presented the above facts and asked the judge to instruct the jury on self-defense. How should the judge instruct the jury with respect to self-defense?

So like all MBE questions, there are four options. So, option A, give the self-defense instruction because it expresses the defense's theory of the case. Option B, give the self-defense instruction because the evidence is sufficient to raise the defense. Option C, deny the self-defense instruction because the father was not in imminent danger from his son. And D, deny the self-defense instruction because the father used excessive force.



That was a lot of words for some options. I guess these aren't designed to be read aloud like a narrative. So, Sean, let's say this is number one in your packet. What's the first thing you do when you get to an MBE question other than read it?

Sean Silverman: Right. So, and I think that this part really differs because, you know, students will talk to me about maybe they've been tutored by other tutors and so forth, and different tutors come about it in different ways. But I tend to recommend reading the question first. I'm wondering if you do the same, Lee, because it is sort of a very I think like personal thing for tutors, how they go about answering questions.

Lee Burgess: They read the entire question or just the call?

Sean Silverman: The call of the question to kind of get a feel for what it is that we're going to need to do. Do you do that?

Lee Burgess: So personally, I don't, but I've had students who that really benefits. I do think it's something that you have to try both ways. I think for me personally I've always liked the story first, and I find that the answer choices can cloud my version of reading the facts.

Sean Silverman: Oh, right. Right.

Lee Burgess: Because maybe I get caught up on one of these options and then I'm looking for the facts instead of just reading the facts for what they are.

Sean Silverman: Yeah.

Lee Burgess: But I definitely have a lot of students who need that grounding kind of "stake in the ground" of okay, this is about a jury instruction. This is about self-defense, and going back and reading the facts with that in mind. So I think for our listeners, if you've never tried it both ways, I think it makes sense to see if your accuracy changes when you do read the call of the question first or whether you read the facts first.

Sean Silverman: I agree with that, and I don't actually recommend reading the answer choices.

Lee Burgess: Oh, okay.

Sean Silverman: Yeah. I do know that that is something that is recommended. So I think there's just a lot of different things that people do. I don't like the idea of reading the answer choices. What I would tell a student is just that question where it says,



"How should the judge instruct the jury with respect to self-defense?" Sort of before reading the facts.

Lee Burgess: Mm-hmm (affirmative).

Sean Silverman: The reason for that is ... Well, I'd say two. One, is keep in mind the questions are all jumbled together. I think a lot of times when people practice for the test, they might do 40 contrast questions, and then another day maybe they'll do property questions, but then the day they take it, they're all mixed up and jumbled together.

Lee Burgess: Yeah.

Sean Silverman: So the first thing is now we know what subject we're in hopefully, not always. Sometimes it's pretty vague. But we'll probably know what subject we're in, and I think that alone helps to know that. And more importantly though, it's like we kind of have an idea of what we're looking for when we read the facts. I don't like the idea of reading the facts and trying to figure out what it is I'll later be questioned on as opposed to kind of like knowing ahead of time what it is I'm going to have to do at the end and trying to figure it out as I read.

Lee Burgess: That's a very good point, and it allows you to look for those legally significant facts because just by reading the prompt here of how should the judge instruct the jury with respect to self-defense, when you read the facts, you can say to yourself, "Okay. I'm looking for legally significant facts about self-defense."

Sean Silverman: Exactly, and it gets a little bit more difficult in my mind to read it without knowing where I'm sort of headed. But then just with that said, occasionally I will have students tell me that they read the question first. They're just thinking about that instead of focusing on the facts, and that's the risk.

Lee Burgess: Yeah.

Sean Silverman: So I think it's just a matter of, like you said, trying it, trying both, seeing which one works better. For this one, the father presented the above facts and asked the judge to instruct on self-defense. So, if I had read that first, I would be reading the facts and knowing the elements of self-defense, knowing what they're asking about trying to figure out if those elements have been satisfied. That's what I would be as I read it.

Lee Burgess: And I think one of the things that oftentimes students forget about multiple choice, unlike the essays, is because the answer's on the page, I think sometimes people forget that you need to then recall all the elements of self-



defense and what is necessary and apply it to these facts. It's similar steps to what you would do if you were writing out a short answer.

Sean Silverman: Mm-hmm (affirmative). Exactly.

Lee Burgess: Because sometimes I think they just go in and they're like, "Right. Self-defense. Yeah, I kind of know what that is." And then you start reading the facts.

Sean Silverman: Yeah. Right. I mean, even that, at least you know it's self-defense, right? I mean, there's just so many that that could be tested. And at that point knowing it's self-defense, knowing what I'm looking for, as I read the facts, it looks to me, from listening to you reading the facts and from reading them, that there could be a self-defense argument here.

Lee Burgess: Right.

Sean Silverman: Now what struck me was sort of the last line I think. Let's see, "In fact, the son was not under the influence of alcohol or any drug and did not intend to harm the father." They're just tossing that in at the very end, right?

Lee Burgess: Yeah.

Sean Silverman: But not really to help.

Lee Burgess: Right.

Sean Silverman: Right. That line is sort of there to take you away from the right answer a little bit.

Lee Burgess: Right. Because that made me think of imperfect self-defense or other issues that could come up because he wasn't actually under the influence of alcohol, or it made me think of lots of different things other than what I needed to be thinking about for this individual question.

Sean Silverman: Very end. It's at the very end so it's the last thing that you're going to be thinking about when you go to the answers. So actually, I mean, sometimes I do notice that I'm a little too cynical after doing this test for so long, but I think they're not going to give you such a helpful line at the very end. They're probably somewhere in the middle, right? Right in the center, you might miss it. So if they're telling you that at the very end, I'm going to be a little bit skeptical about it because they're trying to make me think that he did not intend to harm the father. Okay. But if somebody doesn't intend to harm me, but I have every reason to believe that they do, I can still use self-defense.



- Lee Burgess: Right.
- Sean Silverman: Even if they don't intend to harm me, but, of course, one of the wrong answer choices could be no, it's not self-defense because he didn't intend to harm.
- Lee Burgess: Right.
- Sean Silverman: Something like that.
- Lee Burgess: Right.
- Sean Silverman: So with that said, how do you go about the answers? Do you run down them and read all four sort of before you pick one, or do you see one you like, do you pick it? It's such a time constraint. But I sometimes don't ... I think it depends sometimes. If I see something that I really like and I'm very sure that it's correct, I could just pick it. But my general approach is to read all four.
- Lee Burgess: Yeah, I think that's my general one as well unless I'm worried about maybe I skimmed them and I'm like, "Oh, I can't decide. They're too close." So sometimes what I do is I just ignore the answer choices and ask myself what would be my answer if this was a short answer. That's probably because I'm much better on essay questions than I am on multiple choice questions, and so then I might say to myself, "Okay. Can he get self-defense?" I apply the line of self-defense. It's about his reasonable fear, and then I would think, "Okay. Then yes, I think he does have a reason to get that self-defense instruction," and then maybe I go back to the answer choices and kind of parse through them. But maybe that way I don't get so sucked in by some of the quality answer choices that are made to sound wrong or are made to sound right but they are wrong.
- Sean Silverman: Yeah. Like the distracters.
- Lee Burgess: The distracters. Yeah.
- Sean Silverman: So I would do the same, and if I do think it's self-defense, I might still look at the other two, the two that go against what I'm thinking. Let me just confirm, right? Oh, most likely, once you have a feeling of which way it should go, the two that are wrong ... It's rare that they're going to pull you back.
- Lee Burgess: Got it.
- Sean Silverman: If you think it's A or B in this case, chances are C and D won't sort of pull you back. But it is good to confirm it. So like, for example, C, deny self-defense because the father was not in imminent danger. I mean, there's that last line that they threw in, right?



Lee Burgess: Right.

Sean Silverman: We just have to know a little bit about self-defense to know that that's not true. You call that like a mistake of law. There's different ways to categorize these wrong answers, but C is wrong. And then D, deny the self-defense instruction because the father used excessive force. Well, it's sort of like a judgment call first, right? Did he use excessive force? Did he not? They seem to be implying that he definitely did use excessive force, but if he believe his life was in danger, then I don't know what is excessive there. You can kill. So I don't know what would be more excessive than that. So neither of those seem right. I think in this questions A and B are pretty tricky though actually.

Lee Burgess: Yeah.

Sean Silverman: It's like a little bit procedural. A says give the self-defense instruction because it expresses the defense's theory of the case, or B says give it because the evidence is sufficient to raise the defense. What were you thinking about those two? I thought it was hard.

Lee Burgess: Yeah, I thought it was tricky too. I think what's interesting is with A they say because it expresses the defense's theory of the case. Just because the defense has a theory doesn't mean that it's legally correct to give jury instruction. But I think that my initial thought was, "Well, that's a pretty good answer because clearly they're going to argue self-defense because all these facts of fear." And so I thought A and B really made you kind of think about which one was the better answer, which is why this test just drives me absolutely bonkers, because A is kind of right sort of, but B is more right. I guess I just let the cat out of the bag. But B is the right answer. I think that's where it becomes really tricky and that's why you have to practice and be so methodical about these.

Sean Silverman: Right. And I think this test, it's not the LSAT, right? But it is a test of logic in a sense, and I think that's more about what the difference between A and B might be, more about logic than knowing the law of self-defense. Because, as you were saying, it says because it expressed the defenses theory of the case and A, and that does seem to imply that even if the evidence wasn't sufficient to raise the defense, then they would still be able to.

Lee Burgess: Right.

Sean Silverman: Because they seem to be saying all we need to know is that it expresses the defense's theory of the case, but then we have this other qualification in B which seems relevant. That's the way I would probably tell students. I think this is a pretty tough question, but how to distinguish between A and B would be to ask whether or not the new qualification they put into B was relevant. It seems



to be. It's sufficient to raise the defense. I mean, so if it weren't, let's say that they threw in some irrelevant qualification after the word because in B, then I think A might be the better answer there.

Lee Burgess: Yeah, and I think it's also interesting that they are asking about jury instructions here and not about whether or not the defendant can raise self-defense at all.

Sean Silverman: Mm-hmm (affirmative).

Lee Burgess: Because I could see it being if you're thinking about it and saying like, "Well, can he raise self-defense as a defense in court," I think the answer could be sure because that's their theory of the case. But we're asking about a jury instruction. We're at the end of the trial and now the judge is deciding what to ask the jury, and so I think that's another tip that it's more about evidence. It's a decision based on what was presented at trial and not just the theories of the case.

Sean Silverman: Right, and they gave us enough facts, if you were to look back at the facts, they indicate that there was, at the very least, potentially self-defense here.

Lee Burgess: Right.

Sean Silverman: And the jury should consider it.

Lee Burgess: Yeah.

Sean Silverman: But not only because the defense believes they should, which I think is what A kind of says. The defense thinks that self-defense is valid. Therefore, the jury should hear about it. Whereas B says well, enough evidence has been presented whereby the jury should hear about it. So it's a little bit of a better answer, but I was definitely looking at those two. What I'd tell students is when you're down to two, that is ultimately the goal, first of all. Unfortunately, sometimes, maybe you've heard this, students will come out of the test and say they got it down to two on every question. And like, that means that maybe they did excellent on the test or maybe they got every one wrong. They don't know because they got it down to two. So ultimately, we do want to get it down to one, but I think the goal, the first goal is to get it down to two and then kind of look for the one that's worse. That's what I've learned over time with this test is if I'm down to two, I'm actually trying to find something wrong with one of them.

Lee Burgess: That's good.



Sean Silverman: I think you had mentioned it earlier that there might not be a perfect answer. So if we're looking for it, we might not find it. But we'll find something wrong with one of them.

Lee Burgess: That's true. As my father told me the morning of the MBE, "At least the answer is on the page."

Sean Silverman: It is. Yeah.

Lee Burgess: I was like ...

Sean Silverman: Just a little hard to find.

Lee Burgess: It can be hard to find. it was like, "Thanks, dad." My dad, well, my parents are both lawyers, so they have lots of advice.

Sean Silverman: He took the test.

Lee Burgess: Yes.

Sean Silverman: Okay.

Lee Burgess: At some point, yeah. A few moons ago. Let's just put it that way.

Sean Silverman: Yeah.

Lee Burgess: I don't think he listens to the podcast on a regular basis so I won't out him for how many years he's practiced law.

Sean Silverman: Got it. Yeah.

Lee Burgess: All right. Okay. Well, let's go on to number two on the PDF of release questions. A man sued a railroad for personal injuries suffered when his car was struck by a train at an unguarded crossing. A major issue is whether the train sounded its whistle before arriving at the crossing. The railroad has offered the testimony of a resident who has lived near the crossing for 15 years. Although she was not present on the occasion in question, she will testify that whenever she is home, the train always sounds its whistle before arriving at the crossing.

Is the resident's testimony admissible?

So starting with that you mentioned before, if you do read kind of the call of the question, "is the resident's testimony admissible," that at least tells us that we're in the evidence realm.



Sean Silverman: Right. Agreed. Yeah, and that, of course, is scary for many people.

Lee Burgess: Right.

Sean Silverman: People find that subject to be maybe the toughest one on the test. But certainly, that's the only subject where they're going to ask that.

Lee Burgess: Yeah.

Sean Silverman: Is the testimony admissible. It doesn't really help other than that, right? I mean, there are some questions that actually clue you in to what issue you should be searching for. For this one, we will be looking to see if the evidence is admissible, but other than that, it would be tough to know what exactly to look for.

Lee Burgess: Yeah. So it's a short fact pattern but a very open ended call.

Sean Silverman: It is.

Lee Burgess: Yeah.

Sean Silverman: And as I'm reading it, evidence does come to mind I think. As you were reading it, is that something that you would've thought of? I think it's a little subtle though because ...

Lee Burgess: Yeah.

Sean Silverman: Yeah.

Lee Burgess: Personal knowledge was the first thing that came to mind, it was that there's a problem because she wasn't there the day that the accident happened. As I was reading the facts, that was the first thing that kind of popped into my mind was that that could be a problem about her testimony. But then the question becomes, okay, while if she didn't have personal knowledge of the day, is this evidence of value at all? So you have got to find a different kind of bucket it could fall into.

Sean Silverman: Mm-hmm (affirmative). Exactly. And I would think perhaps the only way to get this in might be habit.

Lee Burgess: Yeah.

Sean Silverman: Then I look for some keywords. She will testify that, the word always is kind of important in the last line. The train always sounds its whistle. I'm noticing the



questions a lot of times is like if somebody does something often but not always, it might not satisfy the habit requirement. But they're putting that word in there for a reason. So would you have been thinking no or yes on this one?

Lee Burgess: So I think I would have started leaning towards yes once I realized there were other ways that she could get this in other than just the fact that she did have personal knowledge of the day. So once I was like well, this could be a habit or something that could come in an indifferent way than just her saying like, "On this day, November 12th, I was not home," but I'm sure they did it. I think that one of the things that is important to think about, especially with evidence is if you can't remember all of the rules, and I'll be honest, I know a lot of evidence rule, but if you ask me to recite the habit rule from memory, I couldn't. I mean, I know there's a habit rule. I always go back to this idea that they're really worried about reliability.

Sean Silverman: Mm-hmm (affirmative).

Lee Burgess: And whether or not somebody could be fabricating something or that there are other kind of details that make someone's testimony unreliable. So that's why you have to have personal knowledge because if you were there, it's likely that you are a bit more reliable or the rules like presence, or excited utterance, and things like that. So I think one of the things I always go back to if I can't remember exactly what the rule is, would this seem reliable. She lived there for 15 years and she says that they always sound the whistle. That sounds pretty reliable to me.

Sean Silverman: Yeah. So like the policy, and I say that all the time. Sometimes if we can understand why we have the rules, we don't have to memorize.

Lee Burgess: Right.

Sean Silverman: But, as you can see in choice A, personal knowledge is right there for you. You know what I mean? They have an idea of what wrong answer you might have in your mind, and so ...

Lee Burgess: Are they listening to my brain? Are they like ... Are they watching me while I read these questions?

Sean Silverman: I wouldn't hold it against them. But would you have been tempted at all by A or would you have been sort of thinking it's probably not that?

Lee Burgess: I think that if I was under strict time conditions, I think A could have been a sexy answer for me because I saw personal knowledge and personal knowledge was one of the first things that came to my mind. So I think that's where slowing



down and forcing yourself to be methodical through these questions is so important, and I see this with my students a ton is they go quickly. When they see the first answer question that hits terms that they had in their head, they assume that that's the right answer. This test is just too hard for that.

Sean Silverman: Yep, and I would say what I would do with A is it's not the kind of answer that ... For all we know, it could be right. That's the thing. It depends upon what else they've given us.

Lee Burgess: Right.

Sean Silverman: So I might actually hold on to it. I'm not going to be so quick to cross A out. I'm really looking to cross things out. That's my goal with the test. So I'm sure I'll be able to cross out at least one or two of the four, but it might not be A. And so with B, no because habit evidence is limited to the conduct. That's kind of an interesting one in the sense that it seems like it always has applied to persons in just about every question.

Lee Burgess: Right.

Sean Silverman: They're playing off that a little bit I think. But just because it always has applied to persons and not businesses doesn't mean it can't apply to businesses. And maybe we can even fit this into ... I mean, we're talking about the railroad, but somebody is controlling it, right?

Lee Burgess: Right.

Sean Silverman: So I don't even know that B makes that much sense if you think about it because it still is a person doing an act.

Lee Burgess: Yeah, and, I mean, if you study for the bar and you've been studying for a long time and you've never heard of that rule ...

Sean Silverman: Right, that's true.

Lee Burgess: That's when it is like really are they testing on a nuance that nobody's really heard of?

Sean Silverman: Yeah, and they do that though.

Lee Burgess: That's true. They do that for ... Sorry, guys.



- Sean Silverman: Yeah. I think both A and B, B might be easier to cross out. That's the thing. And I've got to cross out some things. So C just notice how they don't use the word habit in C?
- Lee Burgess: Yeah.
- Sean Silverman: The one thing is the right answers are often couched and language that is a little more subtle. Whereas the wrong answer in B is perfectly fine using that word, right?
- Lee Burgess: Right.
- Sean Silverman: This is kind of like make you figure out that routine practice means habit.
- Lee Burgess: Yeah.
- Sean Silverman: And then D, yes as a summary of her ... Buzzwords I think we call those, present sense impression is something in evidence law. But believe it or not, that can make a tempting answer. When you stuff this amount of knowledge in your head, you see present sense impression, you're like, "I read about that."
- Lee Burgess: Right.
- Sean Silverman: That's something that was in my outline. But it doesn't really apply because we're not ... That's an exception to hearsay and all that. It doesn't really fit here. So I think D. I think D can be crossed out. That's when we get it down to two, the reason for using that approach is let's just assume we liked A and picked it, which is definitely something we'd do, I think, especially as the test goes on.
- Lee Burgess: Yeah.
- Sean Silverman: I think of this test as a marathon, and by the last 20 questions or so, you might not be doing everything you did on question one.
- Lee Burgess: Right.
- Sean Silverman: Maybe you're not crossing everything out and doing everything you were doing at question one because you're just trying to get through the thing. If that's the case, we might pick A. But if we read all four, we might actually not realize that A's not right until we read C. So once we read C, that would clue us in that we forgot to think about habit.
- Lee Burgess: Right.



- Sean Silverman: Personal knowledge was what was required but now we'll think about habit. Then at least we'll be able to figure out, is habit a better answer here than personal knowledge? It seems like it would be, and it turns out it is.
- Lee Burgess: Yeah, because actually they also say that they've offered the testimony that when she's home. I mean, the testimony isn't about the day.
- Sean Silverman: Mm-hmm (affirmative).
- Lee Burgess: Testimony is about what happened over the 15 years, and so I think that's if you've got to go back to the facts, sometimes when I also get it down to two, I go back to the facts and I can say what are they giving me in those facts. They're giving me more facts about something. They don't give me very many facts about her personal knowledge, but they give me more facts about the fact that she always hears the train whistle.
- Sean Silverman: That's true. And I think this just comes, we've been around the test awhile. I think doing all these things we're doing is tough to do when you're first learning the law. So that's why you want to get to this point. You might not be doing it to the extent we're doing it, but it will get you better at this test if you start using strategies like you're talking about.
- Lee Burgess: Yeah.
- Sean Silverman: And so half the battle is knowing the law, but the other half is kind of using these kind of strategies that we're talking about.
- Lee Burgess: And slowing down. I think that speeding through these questions is really such an easy way to trip yourself up, and I find, especially ... I don't know if you see this in your practice too, Sean, but there's so many more people who are studying and working these days. When you're doing these late at night especially, I have so many people who study MBE questions at 10 o'clock at night, which you're tired. I mean, I was prepping for this podcast at 7:30 last night and I was like, "Wow. I'm going cross-eyed." So I think you have to be really thoughtful about when you study for this because exhausted, unfocused study is just going to lead you down the wrong road, and you're not going to be able to catch these tricks as presented to you.
- Sean Silverman: So true, and then there's the balance, right? I always forget the exact amount, but I think it's like 1.8 minutes per question. Something like that. So you don't want to go too fast and you want to be careful about not going too slow, right?
- Lee Burgess: Yep.



Sean Silverman: So it comes with practice. There's also quite a lot of strategies, of course, about when to skip a question and things like that. Probably tough for us to get into everything, but certainly if you come to a question, and there can be times because when I took it, it happened, and there can be times when you're just reading the facts and you just don't know what's going on. It's you're completely lost. It's better to probably take the hit on that question and just move right along. If you spend three minutes on it, let's just say maybe a little more than three minutes. We'll say twice the amount of time you're supposed to spend on a question. Well, one possibility is you get it right, okay?

Lee Burgess: Right.

Sean Silverman: But you're not going to probably get to some question at the end now, and so that one, unless you happen to guess right, that one's going to be wrong. So it's all going to even out. Or you'll get the one wrong that you spent three minutes on and then you'll get that later one wrong. So it's better sometimes to just say, "You know what, I'm going to pick a letter and move right along," if that happens.

Lee Burgess: Yeah because it's a point collection game.

Sean Silverman: Yeah. Exactly.

Lee Burgess: If you have never gotten the rule against perpetuities right ever in your life, then maybe you shouldn't spend a lot of time struggling with this question.

Sean Silverman: Right. And they continue to test it.

Lee Burgess: They do because they love it. It's so exciting. That and prior bad acts and mortgages.

Sean Silverman: Oh yeah.

Lee Burgess: All right. Let's move on to our next question, which is number four on the PDF. A man has four German Shepherd dogs that he has trained for guard duty and that he holds for breeding purposes. The man has "Beware of Dog" signs clearly posted around a fenced in yard where he keeps the dogs. The man's next-door neighbor frequently walks past the man's house and knows about the dogs' ferocity. One summer day, the neighbor entered the man's fenced in yard to retrieve a snow shovel that the man had borrowed during this past winter. The neighbor was attacked by one of the dogs and was severely injured.

In a suit against the man, is the neighbor likely to prevail?



Our options are: No, because the neighbor knew that the man had dangerous dogs in the backyard; Two, no, because the neighbor was trespassing when he entered the man's property; Yes, is option C, yes, because the neighbor was an invitee for the purpose of retrieving the shovel; and D, yes, because the man was engaged in an abnormally dangerous activity.

Oh, mean dogs. They always seem to show up.

Sean Silverman: They're on every test. So I think the first question is whenever I see somebody go on land, I'm trying to figure out what's their status. Are they a licensee? Are they invitee? And then, of course, they tried to play into that in choice C there. Personally I don't see why he wouldn't be a trespasser here.

Lee Burgess: Yeah.

Sean Silverman: Are you having the same thought? I mean, he was ...

Lee Burgess: I was too.

Sean Silverman: I mean, I guess they to tell us that, let's see, that he did it often. Did they tell us that or did he ...

Lee Burgess: No, I think they just said one day in the middle of summer he just decided to get his snow shovel, which I thought was super weird.

Sean Silverman: Right. Doesn't seem to care about the sign.

Lee Burgess: Right.

Sean Silverman: Or either didn't see it or didn't seem to care about it. But it says clearly posted so I'm assuming he probably saw it.

Lee Burgess: Yeah.

Sean Silverman: And then he goes on there. But yeah, he does seem like a trespasser to me. I'm just saying that would be step one, and then there's those rules about trespassers that we have to deal with, right?

Lee Burgess: Right.

Sean Silverman: So some trespassers, you know about them, maybe they've ... First of all, they come all the time and you don't seem to mind, I guess. But they're still trespassing. So they're just known trespassers and they have more rights than



people who you don't know about. So that's why I was wondering if he knew about this person, but it doesn't look like he did, I guess.

Lee Burgess: It doesn't sound like he invited him on or, I mean, I guess he knew that he had his snow shovel, but it's not ... There's no facts about the fact that he asked if he could come get the snow shovel or that they always had an agreement that he could pop into this backyard. I mean, if I found my neighbor in my backyard, I'd be like, "What are you doing in my backyard?" Even though I don't have ferocious dogs in my backyard.

Sean Silverman: Yeah. And so I think it would've been a tougher question. I mean, it's interesting to think about how it might've turned out. Let's say he was a discovered trespasser.

Lee Burgess: Right.

Sean Silverman: He's the kind of trespasser that you've seen come on your property numerous times in the past.

Lee Burgess: Right.

Sean Silverman: But you don't allow them to come on so they're still trespassers. Even so, I think even in that situation, I think that there would be a tough case for him because if I'm correct about this, I think these even these discovered trespassers, they can only recover if it's some kind of artificial condition that might kill them or something.

Lee Burgess: Yeah, it's pretty extreme. I mean, because if you have somebody who makes a bad choice, you can tell I have a small child. It's all about choices. Good choices and bad choices. But if they make a bad choice and say, "I'm going to go in where I know there are ferocious dogs to get my snow shovel," going back to we were talking about policy with one of the evidence questions, it's kind of like do we think they get to recover because they choose without permission to go into your backyard where they know you have ferocious animals.

Sean Silverman: Right. Right. I mean, it almost sounds like an assumption of risk argument you're making.

Lee Burgess: Yeah. That's true.

Sean Silverman: I was looking for it when I did the question. They don't seem to be going there. I guess because that's more of a defense. If there's no liability, there's no need for a defense.



Lee Burgess: Yeah. That's true.

Sean Silverman: But assumption of risk, it certainly seems like it could be.

Lee Burgess: Yeah.

Sean Silverman: You assume that risk when you enter. And so I would be lead ... It says a suit against the man the neighbor likely to prevail. Because he was a non-discovered trespasser, I would be very heavily leaning towards no.

Lee Burgess: Mm-hmm (affirmative).

Sean Silverman: I think it's an even easier case than if you were discovered. Now, they say no because the neighbor knew that the man had dangerous dogs in the yard. So they don't give answer explanations, right? They only give the answers to these questions, but I would think they might be playing off of assumption of risk a little bit there or perhaps they're just saying if he knew about it, then it's not one of these hidden dangers that maybe he could've recovered for.

Lee Burgess: Right.

Sean Silverman: That's possible. Something like that. Either way it's looking pretty good however we get there.

Lee Burgess: And they gave us a lot of facts about that, right?

Sean Silverman: Right.

Lee Burgess: He's got "Beware of Dog" signs. The neighbor frequently walks past his house and knows about to dogs' ferocity. So they have like multiple sentences of knowledge and warning I guess.

Sean Silverman: True, true. B, no, because the neighbor was trespassing when he entered the property. So what do you think about that one? In other words, why is that wrong?

Lee Burgess: Well, I don't think it's completely wrong, but it's definitely incomplete because of what we were just talking about. I think there are situations where a trespasser can still recover.

Sean Silverman: Okay. That does make sense.

Lee Burgess: So even if he was a trespasser and that's one of the reasons why he can't recover, I don't know that that really does it for me. Although I probably



wouldn't completely cross it out. This is where I sometimes find myself going back to the facts and saying, "Okay. Well, do we have a lot of facts about him being a trespasser or do we have a lot of facts about something else?" Here we have a lot of facts about his knowledge about the dogs. So if I had to guess which way it was going to tip toward, I'm like, they gave me facts about knowledge with the dogs. That's probably what's mostly significant here.

Sean Silverman: Right. Right. I think what you said about B, you can be a trespasser and still recover.

Lee Burgess: Right.

Sean Silverman: That makes B look really worse than I thought when I first read it.

Lee Burgess: Yeah.

Sean Silverman: You can be a trespasser and still recover, and it says no, because he was a trespasser.

Lee Burgess: Right.

Sean Silverman: I mean, that sometimes is as simple as just the fact that it's logically wrong to say no, because he was a trespasser when trespassers can recover makes B just wrong from a logical standpoint.

Lee Burgess: Yeah.

Sean Silverman: And then C, yes, because the neighbor was an invitee. That would be an easier one to get rid of. As long as we just know how to sort of satisfy these standards. I don't think he fits that definition.

Lee Burgess: No.

Sean Silverman: Of an invitee.

Lee Burgess: They didn't give us enough facts about it.

Sean Silverman: Right. Right. And he just goes on the property as a trespasser. So C to me is pretty easy to cross out. And then D, yes, because the man was engaged in an abnormally dangerous activity. Those are buzzwords again I think like we said before.

Lee Burgess: Yeah.



- Sean Silverman: They like to do that. I think you just have to know where those words are used. We often see that with like strict liability but a very specific type. Oh, by the way, almost always with explosives, if you've noticed. Somebody will be dealing with explosives or something, and they'll try to keep it as safe as they can, but they'll injure somebody. You'll still liable because you're strictly liable for an abnormally dangerous activity. So doesn't really fit in this fact pattern as far as I can tell. So that's how I would do this question. I would get rid of them. I think we had A and B as the two contenders here, but we were able to get rid of B.
- Lee Burgess: Yeah. I think that makes a lot of sense, and I think it's interesting about the abnormally dangerous activity because it makes me think about the question we just did where there, the last option, had that present sense impression language. Again, didn't really apply but wanted to send you down that road.
- Sean Silverman: Right.
- Lee Burgess: Of hearsay exceptions.
- Sean Silverman: Sure. And they're just playing off the difficulty of this test. It's like so much information you stuffed into your head. It's almost psychology I think.
- Lee Burgess: Yeah.
- Sean Silverman: Just seeing something that you recognize is going to make it tempting, whether it's right or wrong.
- Lee Burgess: Right.
- Sean Silverman: Those words are definitely words that are going to be right in other contexts.
- Lee Burgess: Right because you have a line in your outline that says abnormally dangerous activities, strict liability.
- Sean Silverman: Mm-hmm (affirmative). Yeah. We've got tricks. They've got a lot of tricks as you can tell.
- Lee Burgess: They do have a lot of tricks. Okay. I think that one was a great question to go through, and I think the last thing I would mention is if you go back through this question and you're reviewing it, I think the fact that the right answer choice does not include any terms of art. It's just so interesting to notice. Because option B includes the word trespassing, option C includes invitee, and Option D includes abnormally dangerous activity, but the right answer does not have any of those buzzwords.



Sean Silverman: That's a great point. I think that that's something that I've noticed is that the right answer is like hidden and the wrong answers are kind of like in your face.

Lee Burgess: Yeah.

Sean Silverman: It's just another strategy or trick to use when you're doing this.

Lee Burgess: Yep. With that, we're out of time. I want to take a second to remind you to check out our blog at BarExamToolbox.com, which is full of helpful tips to help you prepare and stay sane as your study for the bar exam. You can also find information on our website about our courses, tools, and one on one tutoring programs to support you as you study for the UBE or California Bar 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 are 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. Thanks for listening and we'll talk soon.

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