



Lee Burgess:

Welcome to the Bar Exam Toolbox Podcast. Today, I am discussing a corporations MEE question. This is one of our series of podcasts on how to approach each section of the UBE. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We are 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](#).

If you enjoy the show please leave a review on your favorite listening app and check out our sister podcast the [Law School Toolbox](#)! 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.

With that, let's get started.

Welcome back. Today we are walking through a [corporations MEE question](#). This is part of our series of podcasts talking about how to approach questions on the UBE. Today, I'm going to talk about how to plan an answer. Don't forget to subscribe to our podcast so you won't miss any upcoming essay discussions.

You might be wondering why it is so important that bar studiers practice planning your essay answer and why should one even take time to do this exercise when time is already so limited? These questions only give you 30 minutes. The reality is that planning is how you are the most efficient with writing your answer. With only 30 minutes to answer an MEE question, you don't have any time to discuss anything else other than what is being asked of you. You need to identify major and minor issues to make sure that you spend correct time on each issue, because if it's a minor issue but you spend a ton of time on it, you're not going to get any more points than if it's a major issue.

So just because you're doing a deep dive, you need to be making sure that if you're doing a deep dive, it's in the proper issues and not just talking about something where you've maxed out the number of points possible. Also, with planning, your answer is cleaner and looks more professional, which helps your score as well, because when it comes down to it, this is a professional exam and the graders are looking for people that they think are ready to practice law.

All right, so before we walk through today's question, we want to do a quick review like we've done with other podcast episodes of the law, so you know what you need to know for this question. This is a corporations question that deals with shareholder rights, derivative claims, and the duty of good faith and the business judgment rule.



Some of these rules if you haven't reviewed corporations in a while may seem a little iffy, you may not really recall what they mean, but you can always go back and review your more complete bar outlines. This is really just the bare bones of what law you need to know to answer this individual question.

So, let's start by talking about shareholders' rights. According to the Model Business Corporations Act, which is the MBCA, a shareholder has the right to inspect minutes of board meetings and accounting records for a proper purpose. Then we know that a proper purpose is one that is reasonably related to the person's interest as a shareholder, including finding out whether improper transactions have occurred.

A shareholder who wants to inspect corporate documents must offer credible evidence of some improper conduct. Shareholders are allowed to apply for court orders permitting inspection if the board denies their request. All right, so that's about shareholder rights. Now let's move on to derivative claims. If a shareholder files a derivative action, the board can seek dismissal if a majority of the qualified directors determine in good faith that continuing the action would be against the corporation's best interests. Now a qualified director is one who does not have a material interest in the derivative action, and failure to investigate credible allegations of corporate illegality constitutes a lack of good faith.

Now last, the major rule that we need to know is the duty of good faith and the business judgment rule. According to the MCBA, a director is liable to the corporation or the director's decisions or failures to take action that were not in good faith, or to have found that it constitutes a lack of good faith when corporate directors either consciously violate the law or permit the corporation to violate the law, even if doing so would be profitable for the corporation. The business judgment rule protects the honest business judgments of directors, but it does not protect decisions by directors not acting in good faith.

Okay, so now, let's move on to reading the bar exam question. This is a question from February 2017 on the UBE. We're going to have a link to a web page where you can find this question in the show notes if you'd like to follow along on your own.

A shareholder owns 100 shares of Mega Inc, a publicly traded corporation. Mega is incorporated in state A, which has adopted the Model Business Corporations Act, the MBCA. A shareholder read a news story in a leading financial newspaper reporting that Mega had entered into agreements to open new factories in country X. According to the story, Mega has paid large bribes to country X government officials to seal the deals. If made, these bribes would be illegal under US law, exposing Mega to significant civil and criminal penalties. On May 1, the shareholders sent a letter to Mega asking to inspect the minutes of



meetings of Mega's board of directors relating to the country X factories mentioned in the news story, along with any accounting records not publicly available relevant to the alleged foreign bribes.

The shareholder explained that she was seeking the information to decide whether to sue Mega's directors for permitting such possible illegal conduct. In her letter, the shareholder also demanded that the Mega board investigate the possible illegal bribes described in the news story and to take corrective measures if any illegality had occurred.

On June 1, Mega responded to the shareholder in a letter which stated in relevant part, "the corporation will not give you access to any corporate documents or take any action regarding the matters raised in your letter. We cannot satisfy the whim of every Mega shareholder based on unsubstantiated news stories. Furthermore, given our continuing operations in country X, the board of directors will not investigate or take any other action regarding the matters raised in your letter, because doing so would not be in the best interest of the corporation."

On October 1, the shareholder filed a lawsuit in state A court. Her petition includes, (1) a claim against Mega, seeking inspection of the documents previously requested, and (2) a derivative claim against all of the Mega directors alleging a breach of their fiduciary duties for failing to investigate and take action concerning the alleged foreign bribes.

Mega's board had asked the corporation's general counsel the following questions. Number one, is the shareholder entitled to inspect the documents she requested? Number two, may the board obtain dismissal of the shareholder's derivative claim if the board concludes that it is not in the corporation's best interest to continue the lawsuit, even though the board has not investigated the allegations of illegal foreign bribes.

Number three, is the board's decision not to investigate or take further action with respect to illegal foreign bribes consistent with the director's duty to act in good faith, and is that decision protected by the business judgment rule? How should the general counsel answer these questions? Explain.

All right, so that's your question. The first thing you should do is to take your exam paper where you have your question and assess what is legally significant about each fact in the fact pattern. Now we're going to go fact by fact, and this exercise is something that's really good to do when you're getting comfortable with these questions. You likely will not have enough time on the actual exam to write out or take full notes after each fact, but what you will need to do is to go through fact by fact and determine whether it's legally significant and plop it in



your outline. This is kind of a slower, more methodical way to start the [outlining process](#) as you're getting more comfortable with this material, but as you get closer to the exam you want to get faster and faster and streamline this so you can just do it in a few minutes after you've read the question.

So, let's jump in to each of the facts and talk about why or why not they're legally significant. So first is a shareholder owns 100 shares of Mega, Inc, a publicly traded corporation. So, the fact that she is a shareholder is important for the rules relating to the right to inspect records. Now Mega Corporation is incorporated in state A which had adopted the Model Business Corporation Act. This is going to tell us what law applies.

The next fact is the shareholder read a news story in a leading financial newspaper reporting that Mega had entered into agreements to open new factories in country X. According to the story, Mega has paid large bribes to country X government officials to seal the deals. If made, these bribes would be illegal under US law exposing Mega to significant civil and criminal penalties.

A news story in a leading financial newspaper is generally a credible source of information. It's not like this is kind of a rogue blog that doesn't have any sort of backing. I think that the fact that they called that out is important, because credible evidence is necessary for a shareholder seeking to inspect certain records. I think that they chose to put that language in there about that fact to make it seem credible. Improper conduct by the corporation is one proper purpose for a shareholder to invoke her right to inspect records, so that is also very important.

On May 1, the shareholder sent a letter to Mega asking to inspect the minutes of meetings of Mega's board of directors relating to country X's factories mentioned in the news story along with any accounting records not publicly available and relevant to alleged foreign bribes. So, what's significant about that is the shareholder's right to inspect extends to board meeting minutes and accounting records relating to the proper purpose.

The next fact is the shareholder explains that she was seeking information to decide whether to sue Mega's directors for permitting such possible illegal conduct. So, this relates to what the shareholder must do to assess records. She identified the purpose for her request.

In the letter, the next fact is in the letter, the shareholder also demanded that the Mega board investigate possible illegal bribes described in the news story and take corrective measures if any illegality had occurred. So, this relates to what the shareholder must do to access records. She offered the newspaper as credible evidence of her proper purpose.



Next, on June 1, Mega responded to the shareholder in a letter which stated in relevant part "The corporation will not give you access to any corporate documents or take any action regarding the matters raised in your letter. We cannot satisfy the whim of every Mega shareholder based on unsubstantiated news stories. Furthermore, given our continuing operations in county X, the board of directors will not investigate or take any other action regarding the matters raised in your letter, because doing so would not be in the best interest of the corporation."

So this relates to what the board of directors must do to dismiss a derivative suit, which is conduct a reasonable inquiry, and this also relates to the board's duty to act in good faith. Failure to investigate credible allegations of corporate illegality demonstrates a lack of good faith. That one's kind of a no-brainer, right.

On October 1, the next fact, is that that the shareholder filed a lawsuit in state A. Her petition includes a claim against Mega seeking inspection of documents previously requested and a derivative claim against all of the Mega directors, alleging a breach of their fiduciary duties, because they didn't investigate and take action concerning the foreign bribes.

This relates to derivative suits and the right of the shareholder to inspect. The business judgment rule does not apply when illegal action by the corporation or directors is involved, and because the derivative claim is against all of the Mega directors, none are "qualified" to vote on dismissing it, because they all have a material interest in the claim.

So, as you can see by going fact by fact through this, each fact is relating to one of the legal issues that you need to discuss and it really relates to the legal rules we discussed at the beginning of this podcast. So, when you think about how you're putting together the answer, you in your head will know the legal rules, and then you will read the question and identify which legal rules kind of match up with each fact, and then you will do the analysis of those facts to determine the likely outcome.

So that's really the pieces of putting these exam questions together. Now, what you need to do as you go through these legal facts and decide what's legally significant is really put together your outline. So, when you've got a question like this, you have three parts to what they're asking you. The first part is, is the shareholder entitled to inspect the documents she requested? The second part is, may the board obtain a dismissal of the shareholder's derivative claim if the board concludes that it is not in the corporation's best interest to continue the lawsuit, even though the board has not investigated the allegations of legal foreign bribes?



Number three, is the board's decision not to investigate or take further action with respect to alleged illegal foreign bribes consistent with the directors' duty to act in good faith, and is that decision protected by the business judgment rule?

So, if you have a scratch paper, what you want to do is you want to break it into three parts, one, two, three, or if you feel like you need more room, you can do it over two sheets of paper. I am a big advocate of taking notes on scratch paper for a few reasons. One is, if your computer were to fail in the bar exam, you need to be able to have those notes to hand write the rest of the test. The other problem is when you outline on the screen, I think that it can kind of miss the point of giving you that overview of what you need to look at, partly because as you type the outline itself kind of disappears, and I also think that you get into this habit of just typing in stuff, so typing in long statements of facts, typing in long rule statements and not taking a moment or two to really think about the answer and how you're going to organize it.

So, I highly encourage you to at least test out using scrap paper outlining for a bit to see if it helps you organize your answer and feel a bit more confident about putting together a solid answer on the computer screen. So, the outline is for thinking and determining your answer, the computer screen is for writing it out so the graders can give you points for it.

All right, so how much time should you spend outlining versus writing an answer to this question? With 30 minutes, it's pretty tight. I think you want to try and do it five to seven minutes max. You have to play with it given your individual situation how fast you type, how extensive your outline needs to be. I personally do more skeletal outlines and spend a little bit more time writing. Some people really like to spend a little bit more time outlining and then a little less time writing.

One of the reasons you need to do significant practice is you have to be able to find where that sweet spot is for you, and one of the benefits of getting feedback from say [our tutoring team](#) is that we can help you decide where that sweet spot is and how much you need to write down to collect all the points. Remember, it's not always about having a longer answer, it's having the most complete answer. Just adding in extra stuff that's not going to get you points doesn't help your score, so it's all about writing down what needs to be written down to get where you need to be.

All right, so let's jump in to what the answer to this question looks like. So, as we've discussed, your answer's going to be in three parts. So, the first part is going to be about whether the shareholder is entitled to inspect the documents. Remember our rule is that a shareholder has the right to inspect minutes of board meetings and accounting records for the proper purpose and here our



analysis is that the person at issue here is a shareholder, so we know that. She's requested the board minutes and accounting records that relates to her concerns. So far, we're pretty good.

But the question then becomes what is a proper purpose? The rule for proper purpose is that a proper purpose is one that is reasonably related to the person's interest as a shareholder, including finding out whether improper transactions have occurred. So here we have foreign bribes and they're illegal so those are important transactions on the part of the corporation if they actually happened.

Now, if a shareholder wants to inspect corporate documents, they must offer credible evidence of some sort of improper conduct. So here what's our credible evidence? A news story in a leading financial newspaper. So, your conclusion is the shareholder here is entitled to inspect the board meeting minutes and accounting records that she requested for the reasons we've just discussed.

All right, so now question number two. May the board obtain dismissal of the shareholder's derivative suit if the board concludes that it is not in the corporation's best interest to continue the lawsuit, even though the board has not investigated the allegations of illegal foreign bribes?

So here our rule is if a shareholder files a derivative action, the board can seek dismissal if a majority of the qualified directors, so these are directors who do not have a material interest in the derivative action, determine in good faith and after conducting a reasonable inquiry that the continuing action would be against the corporation's best interest.

So, let's go into our analysis here. Well first, the board refused to conduct any inquiry into the shareholder's claims, so that's not going to look so good, allowing them to dismiss the derivative action, and because of all the directors are named, none of them are qualified to determine that it would be against the corporation's best interest because they're all materially interested in the outcome. So, the conclusion here is that the board may not obtain dismissal of the shareholder's derivative claim even if it concludes that the lawsuit is not in the corporation's best interest because they are all involved.

All right, now part three, the last part of this question. Is the board's decision not to investigate or take further action with respect to alleged illegal foreign bribes consistent with the director's duty to act in good faith, and is that decision protected by the business judgment rule? So, the rule here is that courts have found that it constitutes a lack of good faith when corporate directors either consciously violate the law or permit the corporation to violate the law, even if doing so would be profitable for the corporation, which kind of



makes sense, right. It's like you can't say, "Well, I broke the law because I made extra money." I think that this is why a lot of corporations break the law.

By refusing to investigate credible claims of illegal foreign bribes by the corporation, here the board of directors was intentionally turning a blind eye to prevent potential illegal behavior by the corporation. Does that pass the sniff test? Do you think that will be good for the rules of corporations? Probably not.

Then we also know that the business judgment rule protects the honest business judgment of directors but it does not protect decisions by directors not acting in a good faith. So here we don't have the business judgment rule applying because the directors' decision not to investigate illegal foreign bribes was not made in good faith, so they don't get to use the business judgment rule to get out of ... it's almost their get out of jail free card. The directors therefore, as the conclusion, violated their duty to act in good faith and their decision to do so was not protected by the business judgment rule.

So, I think of the three pieces of this question, number three is probably the thinnest, because it's pretty clear cut that the fact that they didn't investigate the claims is not going to get them out of any sort of liability here. So, I wouldn't have spent a ton of time on that section. You wanted to really just know what you needed to cover, discuss it, lay it out for the grader, and then move on.

All right. Even if you're in a serious time crunch, it can be hard to take time to plan your answer, but really, I want you to try it over and over again. Taking time, you make the process go much more smoothly and you actually save yourself time, so it's really one of those things where planning feels like you're wasting time, but planning makes you more efficient. I know, it's crazy, but it's really, really true. You know they actually say even about meditation that people who [meditate](#) in the morning save way more time the rest of the day because they are clearer headed and they are able to be more focused. I don't know, sometimes I feel like that that's the case, sometimes I feel like it isn't but I do think that planning makes you work faster.

One more example, you head to the grocery store. You have no list. You don't know what you're going to make all week. You spend an hour wandering the aisles trying to figure out what should go in your meal planning list for the week. Do you need cereal? Do you need granola? Do you have vanilla extract at home? You end up buying extra stuff. It can be kind of a mess. But, if you plan your list at home before you go to the grocery store, you can be super-duper efficient, or you can even order your groceries online and then have them delivered. It's even more efficient, but whatever you do, you do want to have a plan.



So over and over again, we continue to learn that going into something with a plan is going to make you more efficient and, unfortunately, the bar exam is no different.

Lee Burgess:

And with that, we're out of time. I want to take a second to remind you to check out our blog at [BarExamToolbox.com](https://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](mailto:Lee@BarExamToolbox.com), or [Alison@BarExamToolbox.com](mailto:Alison@BarExamToolbox.com). Or, you can always contact us via our website contact form at [BarExamToolbox.com](https://BarExamToolbox.com). Thanks for listening. Thanks for listening and we'll talk soon. Good luck with your MBE studying.

#### Resources:

- [Corporations Question \(MEE 4\)](#)
- [How to Skeleton Outline Your Essay](#)
- [MEE and MBE Bar Prep Strategy](#)
- [How to Approach a Uniform Bar Exam Subject Essay](#)
- [Private Bar Exam Tutoring](#)
- [Can Meditation Help You Prepare for the Bar Exam?](#)