



Lee Burgess: Welcome to the Bar Exam Toolbox Podcast. Today, I am discussing a California essay question on professional responsibility and evidence. It is one of our series of podcasts on how to approach each section of the California bar exam.

Lee Burgess: 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](#).

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.

And with that, let's get started.

Lee Burgess: Welcome back. Today we are walking through a California bar exam question on professional responsibility and evidence. This is one of our series of podcasts on how to approach California bar exam questions. Today, I will be discussing how to plan your answer, but don't forget to subscribe to our podcast, so you don't miss any upcoming essay discussions where we'll talk about other important nuances to being successful on the California bar exam.

Lee Burgess: Note, if you are listening to this and sitting for the February 2019 bar exam or later, please make sure that you know that California has made changes to the California Rules of Professional Conduct as of November 1st, 2018. So, if you're using old outlines, some of the law may be outdated and could lead to you using incorrect law on the exam.

Lee Burgess: Professional responsibility almost always shows up on the exam, either as its own question or as a crossover question like this one. Some students wrongly think that because you sit for the MPRE before you typically sit for the bar exam, and that test tests ethics, that ethics are just not tested on the California bar. But that is not true and that is a huge mistake to assume. I guess the bar examiners are really, really worried that we're ethical because this is one subject that you want to know backwards and forwards as it's almost always tested.

Lee Burgess: Today we are going to walk through a question from the July 2017 bar exam. We will [link to the website](#) where you can find the question in the show notes



so you can follow along if you'd like and even take the practice question yourself.

Lee Burgess: As we walk through question, I want you to think about the importance of planning an answer before you write. This is something that our students often agree to in theory, but when it comes time to actually dedicate time, on a California question up to 15 minutes of a 60-minute question, people start to wonder if it is worth it and if they should be spending their time writing out their answer instead.

Lee Burgess: But trust me, after many, many years of helping people, it is worth it. California essay questions are dense and you have a lot of information to cover. Without careful pre-planning before you write, your answer can be disorganized, incomplete, or even discuss legal issues not at issue in the question and those don't get you any points even if it's an amazing philosophical discussion of a legal issue.

Lee Burgess: Everyone's outlining style may be a bit different, but for practice you want to decide how outlining is going to help you write the best possible answer. I personally advocate for outlining on scratch paper. If you've never tried it, maybe today when you're listening to this podcast, you should give it a try.

Lee Burgess: Before we walk through today's question, we need to do a quick review of the law you will want to know to be able to answer this question. Since this covers both evidence and professional responsibility, we'll need to talk about both.

Lee Burgess: So, let's start by talking about evidence, one of everybody's favorite topics. A case filed in California State Court is going to follow the California evidence code rather than the Federal Rules of Evidence. The first rule you need to know here is about attorney-client privilege. Attorney-client privilege under the California Evidence Code requires communications between an attorney and a client made during professional consultation to be privileged from disclosure.

Lee Burgess: Now, there are a few things you want to know about this as well. The client must be seeking professional services at the time of the communication. The attorney-client privilege applies even if the lawyer is later removed from the case. Disclosures made before or after the lawyer accepts or declines the case are covered by privilege, and privilege applies indefinitely. Disclosures must be made by the client or the client's agent. And attorney-client privilege ends when the client dies and the estate is disposed of.

Lee Burgess: Similarly, you need to know the rules about attorney work product. The attorney work product doctrine protects materials prepared by an attorney in preparation for litigation regardless of content. There are a couple of nuances



you need to know about this. Absolute privilege attaches to statements of belief or opinion by the attorney, qualified privilege attaches to statements of fact recounted in work product. This may be overcome if the opposing party can show substantial hardship and that unfair prejudice would result from inability to pursue a claim or defense. And the last thing you need to know is that the work product doctrine survives the death of the client, so that's different than the attorney-client privilege where the attorney-client privilege ends when the client dies and the estate is disposed of.

Lee Burgess: All right, well now let's switch over to professional responsibility. This question asks examinees to discuss ethical violations according to both the California and the ABA rules. And one more time, another reminder, California has recently changed its rules of professional responsibility to more closely align with the ABA rules, so make sure you're please, please, please studying up to date materials.

Lee Burgess: Now, fortunately, none of the rules in this question have been changed since 2017 when it was on the bar exam. This particular question deals with the duty of confidentiality and to a lesser extent the duty to safeguard and return the client's property.

Lee Burgess: The duty of confidentiality is the same under ABA and California rules. An attorney owes the client a duty of confidentiality. A lawyer may not reveal information relating to the representation of a client acquired before, during or after the relationship existed. There is however an exception to ABA rules that does not exist under California rules. According to the ABA, the attorney may disclose the statement if the client is using the attorney to perpetuate fraud and disclosure would prevent financial harm.

Lee Burgess: Under both ABA and California rules, the attorney has a duty to return to the client all materials related to representation at the time representation is terminated. The attorney may not hold onto the client's property in order to get a fee.

Lee Burgess: Right. So that's it. That's all the law that you need to know. Not so much, right? Now, let's move on to reading the bar exam question. This is a question from the July 2017 California bar exam, as I already mentioned, and you can click on the [webpage](#) in the show notes to get a copy of it.

Lee Burgess: Claire has been a customer of Home, Inc., a home improvement company owned by Don. Dissatisfied with work done for her, she brought an action against Home, Inc. and Don in California State Court, alleging that they had defrauded her. Don entered into a valid retainer agreement with Luke, engaging Luke to represent him alone and not Home, Inc.



- Lee Burgess: In Claire's action, Luke then interviewed Don, who admitted he had defrauded her, but added he had never defrauded anyone else before or since. Luke subsequently interviewed Wendy, Don's sister. Wendy told Luke, Don had admitted to her that he had defrauded Claire. Luke told Wendy that Don had admitted to him, too, that he had defrauded Claire.
- Lee Burgess: Luke drafted a memorandum recounting what Wendy told him and expressing his belief Wendy would be a good witness for Claire. Shortly before trial, Don fired Luke. Don soon died unexpectedly. Claire filed an action against Don's estate and a claim against Home, Inc. alleging, as in her action, that they had defrauded her.
- Lee Burgess: As the final act in closing Don's estate, the executor settled Claire's claim against the estate but not against Home, Inc. At trial against Home, Inc., which was now the sole defendant, Claire has attempted to compel Luke to testify about what Wendy told him, but he has refused, claiming the attorney-client privilege. She has also attempted to compel him to produce his memorandum, but he has again refused, claiming both the attorney-client privilege and the attorney work product doctrine.
- Lee Burgess: Should the court compel Luke to testify about what Wendy told him? Discuss. Answer according to California law. This is number one in the prompts.
- Lee Burgess: Number two. Should the court compel Luke to produce the memorandum?
- Lee Burgess: And then there are some sub questions here. Sub question A. To the extent it recounts what Wendy told him? Discuss. Answer according to California law. And B. To the extent it expresses his belief that Wendy would be a good witness for Claire? Discuss. Answer according to California law.
- Lee Burgess: And question prompt number three. What ethical violations, if any, has Luke committed? Discuss. Answer according to California and ABA authorities.
- Lee Burgess: So, let's stop here for a moment and talk about how you would approach these facts. Would you mark up the exam paper or do you write them out as a list on your scratch paper? What's the most efficient use of time here?
- Lee Burgess: So, what we're going to do as an exercise is go fact by fact and talk about why each fact is legally significant. But in the exam room, you may not have time to do this as diligently. You're going to need to be able to move faster through the facts.
- Lee Burgess: So, what I like to do is to mark up the fact pattern and make notes in the margins and make notes on my scratch paper as I've used each fact. But one of



the things you might want to do is use a check mark and check off each fact that you've put into your scratch paper, because there are very few, if any, legally insignificant facts. Almost everything in the question is significant and so, if you are missing a fact or can't find a place for it, it's possible that you have missed a major legal issue.

Lee Burgess: So, as you practice your outlining and planning, make sure you are methodically going through each fact and asking yourself why it was included in the question because that's going to lead you to discussing the right legal issues that you need to get as many points possible.

Lee Burgess: All right, so let's start with the fact that Claire had been a customer of Home Inc., a home improvement company owned by Don, and she was dissatisfied with the work done for her and brought an action against Home Inc. and Don in California State Court alleging that they had defrauded her. So, we know that this means that the California Evidence Code is going to be controlling, we know that this is a civil action and not a criminal action so we do not need to discuss Prop 8. And so, you can leave that out, Prop 8 only applies in criminal actions.

Lee Burgess: We also want to know that the fact that this is an action for fraud means that the fraud is in the past rather than ongoing, which is relevant to the fraud exception of duty of confidentiality. Isn't that nifty how they throw that in there to test whether or not you recognize that nuance?

Lee Burgess: The next fact is that Don entered into a valid retainer agreement with Luke, engaging Luke to represent him alone and not Home, Inc. in Claire's action. So, this discusses the scope of Luke's representation, that Don is his only client.

Lee Burgess: Luke then interviewed Don, who admitted he had defrauded Claire but added he had never defrauded anyone else before or since. So, because this was part of the discussion between an attorney and a client, this should raise for you the issue of whether or not this is covered by attorney-client privilege. Don told Luke this after retaining him as a lawyer, so sounds pretty much like attorney-client privilege to me. But we have the fraud exception. The fraud against Claire happened in the past and he claims that he has not defrauded anyone else. So, there's no indication that Don is using Luke to perpetuate a fraud, so that applies to whether the fraud exception is going to pertain here.

Lee Burgess: The next fact is that Luke subsequently interviewed Wendy, Don's sister. Wendy told Luke, Don had admitted to her that he had defrauded Claire. Now, this also goes to attorney-client privilege. Wendy was not Luke's client and she was not acting as Don's agent. Now, Luke told Wendy that Don had admitted to him, too, that he had defrauded Claire. Well, this should raise the red flags for you of duty of confidentiality. Don told this to Luke during a confidential interview in



the course of Luke's representation of Don. Now, here there's no fraud exception because there's no indication that Luke was trying to prevent Wendy from being defrauded.

Lee Burgess: The next fact is that Luke drafted a memorandum recounting what Wendy told him and expressing his belief that Wendy would be a good witness for Claire. This should trigger for you the attorney work product doctrine. The memo was created in anticipation of litigation. Remember, there's qualified privilege, which is relevant here to the facts in the memo, what Wendy told him, and the absolute privilege is also relevant to Luke's opinions that Wendy would be a good witness for Claire.

Lee Burgess: Shortly before trial, Don fired Luke. It's important to note here that you discuss whether or not this terminated the attorney-client privilege. And we also want to note the rule for safeguarding and returning client's property. Luke had a duty to return the memo to Don on termination of the representation.

Lee Burgess: And then, like many bar exam fact patterns, somebody died. So, Don soon died unexpectedly. And here we need to note that the attorney-client privilege does terminate upon death as soon as the estate settles, and I think that's an important nuance because this is really about a suit with the estate.

Lee Burgess: Claire then filed a claim against Don's estate, and a claim against Home, Inc., alleging, as in her action, that they had defrauded her. As the final act in closing Don's estate, the executor settled Claire's claim against the estate but not against Home, Inc. So, again, we now know that once the estate was settled the attorney-client privilege ended.

Lee Burgess: So, now let's look at how to actually this question. By this point, when you've gone fact by fact, you have a pretty good idea in your outline, that you should be mocking up, what needs to be discussed. And when you think about the rules that we discussed earlier on in this podcast, it becomes clear which rules seem to match with which facts. And they even throw in some very specific facts like Don dying and her suing his estate that really are going to trigger very, very specific rules. So, remember these fact patterns are constructed to get a very specific answer from you and you should be looking for these types of facts to trigger these issues.

Lee Burgess: So, if I was going to start my outline, what I would do is break my paper into three or four parts to mirror the individual questions. Now, note, the second question was broken into two sub parts and it's also noting that the first two questions implicate evidence and the third question implicates professional responsibility. If you've been studying each subject separately, it might be worthwhile to look for these crossover questions and make sure you can switch gears. You do want



to practice questions that cover both one subject but also multiple subjects. That seems to be coming up more and more.

Lee Burgess: So, I mentioned earlier that I would say you want to spend no more than 15 minutes planning on a 60-minute question and I think that that does apply. Some folks might plan a little bit less. Again, that's something that you need to try and test. That's why practice is so important. You need to see, "If I do my reading and planning in 10 minutes or 12 minutes, is that going to get me what I need to do to get all of the necessary legal issues and have enough analysis to get all the points possible."

Lee Burgess: Okay. So we have these three sections, and before we get started I want to make a quick note about how to allocate time between these three questions. And I think you really learn that through the outlining process. You can see when a question is going to require more time by the amount of legal issues raised by that question and also the amount of facts that relate to that question. So, the more facts and the more legal issues, the more time you need to spend. It is not necessary to spend equal time on each question.

Lee Burgess: It is important that you don't assume that because you could end up spending a lot of time on a question that does not have any major issues and then that could be problematic for you because you're wasting time on something that's not going to give you enough points to pass. So, you want to look at the facts, you want to look at the legal issues and decide where you need to spend your time. Sometimes I even like to put a big star next to the major issues, so I note that those are the ones that are going to have a lot of analysis, and then the minor issues are the ones that you really just go through quickly, collect the points possible and then move on.

Lee Burgess: All right, so let's dive into each section and talk about what needs to be discussed to get all the points possible. So, number one was, should the court compel Luke to testify about what Wendy told him and discuss the answer according to California law.

Lee Burgess: So, the rule here is that, "Attorney-client privilege requires communications between the attorney and client, made during professional consultation to be privileged from disclosure. Client must be seeking professional services at the time of the communication. Attorney-client privilege applies and attaches even if a lawyer is later removed from the case. Disclosures made before and after a lawyer accepts and declines the case are covered by privilege and apply indefinitely. Attorney-client privilege ends when a client dies and the estate is disposed of."



- Lee Burgess: Now, that's our rule. So, our analysis here is Don's decision to fire Luke didn't prevent attorney-client privilege from applying. However, once Don died and his estate settles Claire's claim, Luke would not be able to claim attorney-client privilege. So, next we have to make sure that we discuss 'does the attorney-client privilege cover the conversation between Wendy and Luke where Wendy was not Don's agent?'
- Lee Burgess: So, the rule here is that the communication must be by a client or the client's agent and it must be confidential and made to facilitate the legal relationship. Here, Claire wants Luke's testimony about talking with Wendy, not with Don, Luke's client. Wendy's statements to Luke are not privileged because she not Luke's client or Don's agent. Don disclosed fraud to Wendy, who's a third party, and Wendy was not Don's agent. So, Don's statement to Luke is likely not protected and no longer confidential. So, Luke should be compelled to testify about what Wendy told him.
- Lee Burgess: Number two. Should the court compel Luke to produce his memorandum, subsection A, to the extent it recounts what Wendy told him? Discuss the answer according to California law.
- Lee Burgess: "The California Evidence Code follows the California Rules of Civil Procedure regarding attorney work product. Attorney work product doctrine protects materials prepared by an attorney in preparation of litigation regardless of content."
- Lee Burgess: Here, there's a distinction between a qualified privilege, which attaches to statements of fact recounted in work product, and absolute privilege which attaches to statements of belief or opinion by the attorney.
- Lee Burgess: "A qualified privilege may be overcome if the opposing party can show substantial hardship and that unfair prejudice would result from an ability to pursue a claim or a defense. Work product doctrine survives the death of the client."
- Lee Burgess: So, here we know the facts that we are looking at are that Luke prepared a memo recounting an interview with Wendy. The memo was created after Don retained Luke and it was made in anticipation of litigation. Here, our analysis is that Wendy's description of what Luke said is factual, subject to only qualified privilege and Claire may be able to overcome it. However, Claire could subpoena Wendy or notice Wendy's deposition during discovery to obtain Don's admission from Wendy herself. If Wendy is unavailable then Claire may be able to compel production of Luke's memo.



- Lee Burgess: So, the conclusion is that qualified privilege is likely to protect the memo from discovery.
- Lee Burgess: Sub-section B. To the extent it expresses his belief that Wendy would be a good witness for Claire? Discuss. Answer according to California law.
- Lee Burgess: So, here with have the same rules already discussed so we would just say, "See above for rule," and our analysis is here there is a belief expressed in a memo that Luke prepared in anticipation of litigation and this brief is absolutely protected by the work product doctrine since it is Luke's beliefs and opinions about proper strategy. Therefore, regardless of Claire's showing, it is protected and the courts cannot compel production.
- Lee Burgess: All right, now, question number three. What ethical violations, if any, has Luke committed? Discuss the answer according to California and ABA authorities. So, here, they are telling you very clearly that this is about professional responsibility because they have called out the California and ABA authorities, and that's one of the ways that you know that you're switching to professional responsibility. So, here, you want to first discuss the duty of confidentiality which is going to relate to Luke's statement to Wendy.
- Lee Burgess: So, under ABA and California rules, an attorney owes a client the duty of confidentiality. Luke may not reveal information relating to the representation of a client acquired before, during or after the relationship existed. So, here, we know that Luke told Wendy that Don admitted fraud to him and our analysis is that Don told Luke about the fraud during an interview in the course of Luke's representation of Don and then Luke then told Wendy about the statement.
- Lee Burgess: But the conclusion is that Luke violated the duty of confidentiality by telling Wendy about Don's statement.
- Lee Burgess: We want to note that there is an exception for financial fraud. Under the ABA, a statement can be disclosed if a client is using the attorney to perpetuate fraud and disclosure would prevent financial harm. But under California there is no fraud exception, so the previous conclusion stands.
- Lee Burgess: So, the facts here are that Don admitted fraud but said that he has not defrauded anyone else before or after. So, Luke may say he disclosed to prevent further fraud by Don, but Don expressed no intent to defraud Wendy and was not using Luke to perpetuate or continue fraud. So, the ABA exception is likely not applicable and, since there's no California financial exception, Luke likely breached his duty of confidentiality.



Lee Burgess: Safeguarding and returning client's property. The rule here is that Luke has a duty to return to client all materials related to the representation at the end of the representation. He can't keep the property to get a fee. Here, Don fired Luke. There is no discussion of whether he returned the work product to Don after. So, our analysis is that Luke had to return all of Don's materials on termination. There is no discussion of whether this was done. If Luke failed to return the memo and other materials when Don terminated the relationship, he breached his duty.

Lee Burgess: So, this one is kind of a minor issue. I think some students may have even left out because there aren't a lot of facts. But since they did terminate the relationship, I think it's something that you could definitely raise.

Lee Burgess: So, do you see how planning out this answer would help it almost write itself? You could try giving yourself some time planning next time you do a practice question, and you might be surprised how much you can streamline your bar essays.

Lee Burgess: Here, this second part on professional responsibility is very clean as long as you break it up issue by issue. But if you kind of talked about all of this stuff as more of a stream of consciousness, the graders may not be able to follow your train of thought. And remember that the graders are only spending a couple of minutes to grade your essay. If it is sloppy and they cannot easily find things, they are not going to go hunting for them. You need to make their job as easy as possible and you do that by having thoughtful and organized and professional answers.

Lee Burgess: So, take a few minutes and really try and make sure that you're presenting your best self on your essays. This does not mean that everything has to be spelled perfectly or that there can be no typos, but it needs to look professional and that means that it needs to have headers, it needs to be thoughtfully written, it needs to have sub-sections, it needs to follow the calls of the question, it just needs to be clean and look professional. Remember, you're trying to prove to another licensed attorney, who's the person grading this exam, that you're ready to be a lawyer.

Lee Burgess: All right, well, with that we are 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 and we'll talk soon. Remember to check out the resources and links to find this question on the California bar page, and you can also see real student answers that were the highest scoring answers in the State if you'd like to evaluate your answer.

Lee Burgess: Good luck with your bar studying!

Resources:

- [Professional Responsibility and Evidence Question – July 2017](#)
- [The State Bar of California: Past Exams and Selected Answers](#)
- [Professional Responsibility: ABA Rules New to California](#)
- [How to Skeleton Outline Your Essay](#)
- [Private Bar Exam Tutoring](#)