



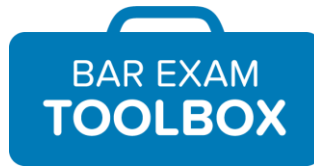
Lee Burgess: Welcome back to the Bar Exam Toolbox podcast. Today, we will be walking through a California 90-minute performance test. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience so you can study effectively, stay sane, and hopefully pass and move on with your life.

Lee Burgess: We're the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career related website [CareerDicta](#). Alison also runs [The Girl's Guide to Law School](#). If you enjoy the show, please leave a review on your favorite listening app, and check out our sister podcast, the [Law School Toolbox podcast](#). If you have any questions, don't hesitate to reach out to us. You can reach us via the [contact form](#) on BarExamToolbox.com, and we'd love to hear from you. And with that, let's get started.

Lee Burgess: Welcome back. Today, we are walking through a California performance test. This is another in our series of podcasts talking about how to approach questions on the California Bar Exam. Don't forget to subscribe to our podcast, so you won't miss any upcoming discussions. Note that for performance tests, you should check out our discussions about both the California and UBE, since the formats are extremely similar.

Lee Burgess: This episode is a little bit different from our discussions on how to approach essays, because instead of covering the law you'll need to know and then how to apply it to the question, we have divided this question into two podcasts. Today, we will be talking about how to approach the instructions, file, and library in the [July 2018 performance test](#). This particular performance test asks you to draft a brief.

Lee Burgess: Every performance test will contain instructions, a file, and a library. The instructions contain a memo that will either ask you to discuss specific issues listed in the memo or to resolve a general legal problem. The file will contain all of the facts that you are presented with to resolve the specific issue or issues you're tasked with in the memo. The file won't distill all of the facts for you, but instead will have things like letters, court documents, transcripts, wills, and other documents. The library will contain all of the legal research that you need to analyze the issues. That library can include cases and/or statutes, and from these, you need to pull the law that governs the issues you're analyzing. When reviewing the instructions, file, and library, it's best practice to start with the instructions. You want to understand the scope of the issues that you are and



aren't meant to dive into. This will help keep you on track as you dissect the file and the library.

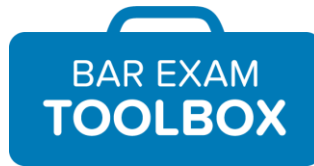
Lee Burgess: When it comes to reviewing the file and the library, bar takers typically have different preferences on whether to review the file first and then the library, or vice versa. Regardless of what you pick, make a plan, and stick with it. Here, we'll review the library first, after that the instructions. By reviewing the library first, we can distill the black letter law that we need, and have a strong understanding of the relevant facts that we need to pull from the file.

Lee Burgess: Remember that you only have 90 minutes to complete the performance test. This is different than the three hours you used to have when this was a three-hour part of the exam. Based on the timing constraints, we recommend that you spend 45 minutes reviewing and planning your answer, and the remaining 45 minutes drafting. A strong plan will make for a smoother drafting process. If you'd like more specific information on how to approach the performance test, you might like to check out our [Writing Of The Week program](#).

Lee Burgess: Now, let's start with the task memo we're presented with. Let's dissect it section by section so that we can make sure we don't miss any important points. I'm going to read it for you here. You can also download this performance test. We'll link to that in the show notes if you want to follow along if you're listening at your desk. So, the heading says "The Law Offices of Tia Lucci. Memorandum. To: Applicant. From: Tia Lucci. Subject: In the Matter of Abigail Watkins. Date: July 24, 2018".

Lee Burgess: Here, the header is a signpost of what hypothetical scenario we're in. It tells us that we're receiving a task memo from a partner, Tia Lucci, at the law firm. Back to the task memo: "This case involves a Columbia State Bar disciplinary action against our client, Abigail Watkins. On June 8, 2018, Watkins pled guilty to a single felony count of insider trading that occurred more than two years ago. The State Bar then initiated disciplinary proceedings against Watkins, seeking disbarment. Watkins hired us to prevent that."

Lee Burgess: Now, this first paragraph sets up who our client is and the general nature of the case we're working on. Our client, Abigail Watkins, is trying to prevent the State Bar from revoking her license after she pled guilty to an insider trading charge two years ago.



Lee Burgess: Now, back to the task memo: "We have just completed testimony in a hearing on the threshold issue of whether the facts and circumstances surrounding the insider trading by Watkins involved moral turpitude. The judge has requested simultaneous briefs on this issue. Please draft an argument for me to use in a brief asserting that, number one, the conduct underlying the plea does not justify a finding of moral turpitude, and number two, Watkins's testimony at the hearing does not justify a finding of moral turpitude."

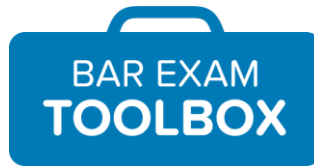
Lee Burgess: Now, the memo tells us the exact two issues that we're to address and argue. First, we need to argue that the conduct underlying the plea does not justify a finding of moral turpitude. We now know that from the file, we need to understand the facts surrounding our client's plea deal. From the library, we need to identify what constitutes moral turpitude, how guilty pleas affect that finding, and how any conduct surrounding her stock purchase affects that finding.

Lee Burgess: Second, we know we need to argue that Watkins's testimony at the recent hearing does not justify a finding of moral turpitude. From the file, we need to understand what Watkins said in her testimony. From the library, we need to understand how the testimony at the hearing affects a finding of moral turpitude.

Lee Burgess: Now, going back to the task memo: "At this point, we seek to avoid a finding of moral turpitude. Do not argue about appropriate discipline." The memo then limits the scope of what we're addressing. We know we're only supposed to discuss moral turpitude findings, not appropriate discipline.

Lee Burgess: Back to the memo: "Do not write a separate statement of facts. Instead, incorporate the facts into your persuasive argument, making sure to address both favorable and unfavorable facts." Again, the memo limits what we're supposed to address. Specifically, all facts should be incorporated into the argument section and not listed separately. Know that this is pretty typical for a 90-minute performance test. The bar examiners don't usually want examinees to spend time drafting facts when their time is limited.

Lee Burgess: Okay, so that is the task memo. Now, let's take a look at the library. From the library, we know that we have one court case and one opinion from the State Bar. The court case is *Chadwick v. State Bar*, Columbia Supreme Court, 1989, and the State Bar opinion is in the *Matter of Harold Salas*, a Member of the State Bar, Review Department of the State Bar Court, 2001. Going in order, let's



analyze the Chadwick case first. Remember, we're looking for the black letter law that will guide our analysis, as well as an opportunity to use the case to bolster our position and/or determine if we need to distinguish it.

Lee Burgess: The first paragraph in Chadwick sets up the basic facts and issues being addressed. The court is reviewing the recommendation of the Review Department of the State Bar Court on whether Chadwick should be suspended from the practice of law following his misdemeanor conviction for violating federal statutes prohibiting insider trading or for related misconduct. The court then tells us the specific issue it's reviewing – whether the facts underlying Chadwick's conviction constitute moral turpitude. Chadwick engaged in insider trading, and when the SEC contacted Chadwick, he informed the SEC that he had relied upon material nonpublic information concerning the Brunswick tender offer. Chadwick pleaded guilty to a misdemeanor count for insider trading.

Lee Burgess: Now, along with the facts, the court then directly provides the black letter law used to assess moral turpitude. Here's your rule: Moral turpitude has been described as any crime or misconduct without excuse. The meaning and test is the same whether the dishonest or immoral act is a felony, misdemeanor, or no crime at all. We can now use that definition to address whether Watkins's conduct constituted moral turpitude. Critically, the court tells us that moral turpitude is a crime or a misconduct without excuse. To determine what can constitute an excuse, we have to read on within the case to see how the court analyzes Chadwick's excuse.

Lee Burgess: Now, Chadwick argues to the court that his willingness to comply with the SEC investigation constitutes an excuse, but the court rejects this argument, determining that the concept of excuse relates to conduct done contemporaneously with the underlying crime, not something that takes place afterwards. In sum, from the Chadwick case, we can take away our black letter law on moral turpitude and what constitutes an excuse based on conduct at the time of the offense. This goes to the heart of the first issue that we are asked to argue, that the conduct underlying the plea does not justify a finding of moral turpitude. We also know Chadwick's specific situation and that he was disbarred, so we know that we'll likely have to distinguish his situation from our client's. Write that down.

Lee Burgess: Next, turn to "In the Matter of Harold Salas, a Member of the State Bar". In Salas, the opening paragraph sets the stage for what the Review Department of



the State Bar Court will be analyzing – the disbarment of an attorney based on false testimony. Based on our task memo, we know that the second issue we're arguing is that Watkins's testimony at the hearing does not justify a finding of moral turpitude. So we should read this case with an eye towards addressing that issue.

Lee Burgess: Next, the facts, which the subsequent six paragraphs set out for us. When reviewing the big set of background facts for our case in the library, try to quickly distill the meat of each paragraph with shorthand notes in the margin on the cases. The shorthand notes will help you develop a quick few sentences summarizing the case when you go to draft and will help you compare the case facts to your client facts. Also, remember that the legally significant facts will likely be discussed in the analysis section of the case or opinion, so any really important facts, you will see again, and then you know that those are likely the types of facts that you'll have to discuss in your answer.

Lee Burgess: Salas pled guilty to felonies related to his conduct for improper fee splits for case referrals with his partner, Bash. In addition to those improper fee splits, Salas also had employed Bash as a secretary. Bash's testimony before the Review Department concerned the \$10,000 he paid to Bash. Salas insisted it was lawful payment for Bash's salary as his secretary, but Bash testified and insisted that the \$10,000 represented an illegal referral fee.

Lee Burgess: Now that we've identified the basic facts of the case, the last two paragraphs give us the black letter law that we need. According to the Review Department, a determination of moral turpitude including a determination that a witness lacks candor, requires "clear and convincing evidence". Lack of candor does not include an honest but mistaken belief, and any reasonable doubts need to be resolved in favor of the accused attorney. Now, with that, the court lays out the black letter law that we'll use to assess the second issue that we must argue in our brief. Finally, the court applies the law to the facts of the case. This is crucial here, as focusing on this will tell us how to use this case in our arguments for our client. Here, because it is equally likely that Salas was telling the truth, the State Bar failed to establish moral turpitude by clear and convincing evidence. This favorable finding means that we will want to focus on similarities between our client and this case.

Lee Burgess: Based on what we've seen in the library and before we turn to the file, we can summarize the black letter law that we found. One, moral turpitude is any crime or misconduct without excuse, and excuse relates to conduct done



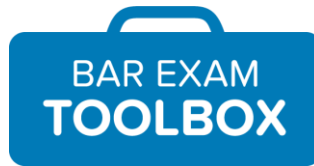
contemporaneously with the underlying crime, not something that takes place afterwards. Number two, any determination of moral turpitude, including a finding that a witness's testimony lacks candor must be found by clear and convincing evidence. Reasonable doubts must be resolved in favor of the accused attorney. Knowing the overarching black letter law that applies will help us hone in on the relevant facts as we turn to the file. We also have a grasp of the holding of each case, which tells us where we may need to analyze or distinguish each case during our analysis.

Lee Burgess: So, to summarize – first, in Chadwick, the court found that Chadwick did not have an excuse for his charge of moral turpitude. Because we'll be arguing that our client's conduct should be an excuse, we know we'll want to distinguish the facts in Chadwick. Next, in Salas, the Review Department used Salas's testimony to conclude that the State Bar failed to establish moral turpitude by clear and convincing evidence. Because we want to use our client's testimony to argue the same thing, we'll want to analogize our client's situation to Salas's case during our analysis.

Lee Burgess: Now, let's turn to the documents in the file. We have a plea agreement and Attachment A to the plea agreement, which is the factual basis for Watkins's plea, and the transcript from Watkins's hearing before the court. First, let's look at the plea agreement. We want to know the specific facts that Watkins pled guilty to, which are contained in Attachment A. Let's review each paragraph in the attachment.

Lee Burgess: Paragraph one states that Watkins represented Fort. In paragraph two, we learn that Fort's general counsel called Watkins about an urgent patient matter and told her that Silicon was planning to acquire Fort. In paragraphs three and four, we find out that Watkins placed a brokerage order for shares in Fort prior to the merger, and later sold those shares for profit. Finally, when Watkins spoke with the SEC, she admitted to purchasing Fort in her own name on August 16. Critically, Watkins told the SEC that at the time of the August 16 purchase, she was not aware of the planned merger. These facts are important in determining whether Watkins had an excuse for the conduct at the time it occurred. You can keep track of them by underlining them on your page or making notes in the margins on your booklet. You can also, if you have started an outline, just note the page numbers that you want to go back to, where you can find these facts.

Lee Burgess: Next, let's turn to Watkins's testimony. Based on what we know from the arguments, and the black letter law at issue, we should be reading the



testimony with an eye towards arguing that our client has an excuse for her misconduct. We should also be reading the testimony with an eye towards arguing that our testimony did not lack candor, that she wasn't lying. So, let's dissect the key portions of the testimony and pull out the relevant facts, both good and bad, that we'll need to use in our analysis. At the beginning of her testimony, Watkins identifies that she was aware of the Fort stock recommendations and had reviewed public information about its stock. Also, key is the timing of when she decided and did purchase the stock. At this point, based on the public information, she had not yet decided what to buy. We should note this fact as we'll have to address it in our analysis as to why Watkins is still not culpable.

Lee Burgess: Watkins identifies that in August, she saw that two major brokerage companies stated that Fort stock was a strong buy. She saw that the technology message boards were talking up for it as a likely merger target for its software, and she didn't want to lose out. Her explanation here is helpful to her case as it shows that she was now planning on purchasing based on public information.

Lee Burgess: Finally, we get to the real heart of the excuse argument. When Watkins discusses that her doctor gave her prescriptions for Percocet and Ambien after surgery in July, she says that she took it a lot, even though it had some side effects. Critical to our analysis is that Watkins says she isn't sure if she was still taking the narcotics at the time of the Fort-Silicon merger. She explains that her memory from the surgery in July until September is very poor. She was very distracted by the pain and the medications.

Lee Burgess: These statements show that Watkins had limited memory during the time that she made the stock purchase, even though she can't pinpoint exactly when she stopped taking the narcotics. Note that she couldn't remember exactly when she stopped taking the narcotics. Because the State will use that fact against her, you'll need to address it in your analysis. Watkins also says she returned to work five days after surgery, but was in considerable pain. The State will want to use the fact that Watkins returned five days after surgery to contend that she was lucid at the time, so Watkins's response is also critical to our analysis.

Lee Burgess: Highlight the fact that even when she returned to work, she was in pain and lacked mobility. The testimony then keys on what Watkins heard about the merger before she purchased Fort stock. She recalled that she did receive a call from Fort's general counsel, Samantha Darmond, but she couldn't remember exactly what was said.



Lee Burgess: A critical point here is that Watkins specifically states that she doesn't remember anything being said about the pending merger, due diligence, or the need for confidentiality. This helps support the argument that she doesn't recall hearing about the merger, and that wasn't why she placed the order for the shares. Watkins testifies that she placed the stock purchase on the same day as the call. The timing here though is a bit suspicious and will be something for the State to rely on. Be sure to address it in your analysis, and then use the other facts to show why the timing issue shouldn't be dispositive.

Lee Burgess: Watkins then specifically states that she did not make the trade based on the merger, which is key to showing excuse and reasonable doubt that she did not trade based on material nonpublic information. Next, Watkins's responses to the cross examination by Assistant Chief Trial Counsel Simonds provides us with more facts to use in arguing that Watkins had an excuse and provided truthful testimony.

Lee Burgess: In Simonds's first line of questioning, he asked Watkins about the effect the narcotics had on her. Key here is that Watkins agrees that she didn't commit insider trading because of the narcotics she was taking. She just indicates that they clouded her memory and had a negative effect on her. Simonds goes on to probe Watkins about the number of Percocets she's had, suggesting that she no longer had any left at the time of the stock purchase. Because this undermines Watkins's testimony, we'll want to know her response to this issue. Watkins responds that she had been taking the narcotics infrequently, so she very well could have been taking them by mid-August when the purchase occurred. Simonds further probes Watkins about whether the narcotics caused her to commit an insider trading purchase. Watkins's response is critical to the analysis. She explains that she was distracted by the pain she was in at the time she made the purchase. With this, Watkins is providing the basis for the excuse argument and an explanation that shows the honesty in her testimony.

Lee Burgess: Finally, Watkins acknowledges what she agreed to during her plea agreement and explains why her testimony doesn't contradict that. This fact is critical for arguing the second issue. Her testimony at the hearing does not justify a finding of moral turpitude. She explains that she honestly doesn't remember clearly that Darmond discussed the merger. Importantly, for our fact investigation, Watkins, again, emphasizes that her memory is simply different than the facts in the plea agreement. She does not dispute what Darmond would recall if she testified. Moreover, Watkins first told the SEC, and then provided in her



testimony, that she didn't know about the merger when she made the stock purchase. This bolsters the argument that Watkins's testimony was truthful.

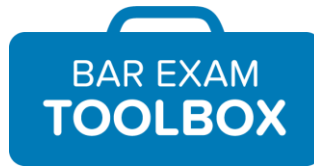
Lee Burgess: So, reviewing the file can take a long time, especially in the middle of a tough bar exam, but making notes on the key facts you read will make your drafting process even more efficient. And with that, you've now finished reviewing the instructions, the file, and library. Each section weaves together all of the information you need to complete the assigned task. Think of it as puzzle pieces. It's your job to put all of the puzzle pieces together that you found in the instructions, the library, and the file to create your outline.

Lee Burgess: Even though every PT is slightly different, we can develop a strategic approach to tackle any PT the bar exam testers throw at us. In some, first start by reading the instructions – the task memo, which outlines exactly what you're meant to do. It will tell you the type of document that you're drafting and define the scope of the issues you're supposed to address. Next, you'll tackle the library and the file, hone in on the black letter law in the library, and identify whether you need to distinguish or analogize to a given case. When you hit the file, review it with an eye towards pulling those facts, both good and bad, that you'll need to use in your analysis.

Lee Burgess: So, in the next podcast, reviewing this PT, we'll go over outlining and drafting your answer. It might be a good idea to go ahead and try and draft your own outline to this answer, so you can see how it compares to ours.

Lee Burgess: But today, 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 you 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.

Lee Burgess: If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you're still in law school, you might also like to check out our popular [Law School Toolbox podcast](#) as well. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website contact form at barexamtoolbox.com. Thanks for listening, and we'll talk soon!



RESOURCES:

[California Bar Examination – Performance Test and Selected Answers, July 2018](#)

[Podcast Episode 9: Mastering the Performance Test \(w/Doretta McGinnis\)](#)

[Bar Exam Toolbox blog: Managing the Clock on a 90-Minute Performance Test](#)

[Writing of the Week \(WOW\) Bar Essay Workshop](#)