



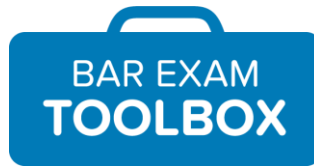
Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we are walking through a California Performance Test question. We are talking about the July 2018 question that we discussed in last week's previous podcast. If you haven't listened to that one first, please check that out before listening to this one. 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.

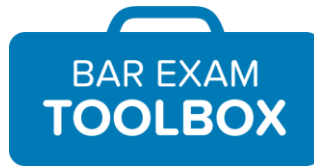
Lee Burgess: Welcome back. Today, we're walking through a performance test. This is another in our series of podcasts talking about how to approach questions on the California Bar Exam. And don't forget to subscribe to our podcast so you won't miss any upcoming discussions. Note that, for a performance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

Lee Burgess: Now, this episode is a little 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've divided this PT into two podcasts. Today, we will be talking about how to approach outlining and drafting your answer on the [July 2018 performance test](#). This particular performance test asks you to draft a Brief. If you have not listened to [part one of this podcast series](#), go ahead and check that out.

Lee Burgess: Before we dig into this specific PT, we want to highlight the timing aspect on the performance test again. You will only have 90 minutes to review the task memo, file, and library, and then write your document. This time moves quickly. We recommend that you spend the first 45 minutes reading and outlining, and the second 45 minutes drafting. You may be tempted to start drafting immediately, but try to resist the temptation. The drafting process is going to go so much more smoothly if you take the time to really understand the file and the library and construct a solid outline.



- Lee Burgess: So, in our previous podcast about the July 2018 performance test, we reviewed the task memo, the file, and the library. In this podcast, we'll dig into creating your outline and best practices for turning your outline into a strong answer. Now, from the task memo, we learned that we'll be drafting a Brief for a case that involves a Columbia State Bar disciplinary action against our client, Abigail Watkins.
- Lee Burgess: Watkins pled guilty to a single felony count of insider trading. Afterwards, the State Bar initiated disciplinary proceedings against Watkins, seeking disbarment. Watkins will be disbarred if the circumstances surrounding the insider trading constitute moral turpitude. After hearing testimony from Watkins about the insider trading, the judge requested Briefs on the issue.
- Lee Burgess: Now, the senior attorney at your law firm, Tia Lucci, wants you to draft a Brief that argues two things – number one, the conduct underlying Watkins's 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. Now, based on these two issues, you'll know that you'll have two primary segments in your outline. The first segment, you'll argue that the conduct underlying Watkins's plea does not justify a finding of moral turpitude. Now, in the second segment, you'll argue Watkins's testimony at the hearing does not justify a finding of moral turpitude.
- Lee Burgess: Before we head into the outline, here's a quick reminder of the facts we're dealing with from the file. We have the plea agreement and Attachment A to the plea agreement, which is the factual basis for Watkins's plea, and the transcript of Watkins's hearing before the court. From those, we learned that Watkins spoke with Fort's general counsel about Fort's merger on the same day that Watkins bought Fort stock. We also learned that during that time period, Watkins had undergone surgery, was in pain, and having trouble with her memory as a result of the pain and narcotics she was taking post surgery. Although Watkins agreed to the plea deal with the SEC about her insider trading charge, she testifies at her hearing that she doesn't remember Fort's general counsel discussing the merger. So you'll want to keep our two critical issues and the facts in mind as we construct our outline.
- Lee Burgess: Okay, let's jump into the first part of your outline. When you're drafting your outline for each section, keep in mind that you don't need to reinvent the wheel for the PTs. Stick to the IRAC formula that you know, or CRAC or CREAC – CRAC being Conclusion, Rule, Analysis, Conclusion; CREAC being Conclusion, Rule,



Explanation, Analysis, Conclusion, if the tone of the task suggests a conclusion-first writing.

Lee Burgess: No matter what type of essay we're drafting, including performance tests, we're still going to use our basic IRAC principles in California. This means that, in our outline, we'll be starting with the issue and then providing the rule or rules governing that issue that we took from the library. After that, we will analyze our client's situation based on those rules and the facts provided in the file. During that analysis section, we'll also want to pull in the cases from the library that we need to distinguish or want to analogize, too. Finally, we'll make a note in our outline about the conclusion.

Lee Burgess: In your outline, make a header that clearly states the first issue you'll be arguing. The conduct underlying Abigail Watkins's plea does not justify a finding of moral turpitude, because when she made the stock purchase, she did not remember being told about the merger, and therefore had an excuse at the time of the violation. In your outline, your issue header doesn't need to be quite that specific, but do try to flush it out. It'll remind you not only what the issue is, but also that you're drafting a Brief where you're trying to persuade the court of something.

Lee Burgess: Next up in your outline, let's hit on the rules that you need to know, and make sure to highlight the specific case that the rule comes from. Unlike your non-PT essays, your PT will want you to sight and highlight where a rule comes from, and here we can note the following quick points.

Lee Burgess: First, the State Bar must show cause to charge Abigail Watkins with willfully committing acts involving moral turpitude, which comes from Business and Professions Code Section 6101. Then, moral turpitude has been described as "an act of baseness, vileness, or depravity in the private and social duties that a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and woman", which is from Chadwick. Chadwick also said that moral turpitude is described generally as any crime or misconduct without excuse. We also got from Chadwick that excuse is tested as of the time of the violation to which an individual has pled guilty, not whether they had an excuse afterwards. And lastly, from Chadwick, we know that a court reviews the factual basis underlying the plea to determine if the conduct amounts to moral turpitude.

Lee Burgess: Now that we've got the overarching rules set out, it's time for a deeper case discussion of Chadwick – one of the main cases from the library. Remember that



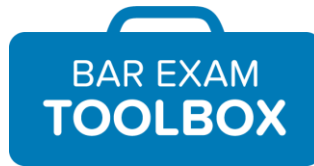
in Chadwick, we learned that moral turpitude is any crime or misconduct without excuse. Excuse relates to conduct done contemporaneously with the underlying crime. You'll keep these rules from Chadwick under the rules section in your outline with the main bullet or numbered point being Chadwick.

Lee Burgess: So, Chadwick pled guilty to the misdemeanor of insider trading and related conduct. He argued to the court that his willingness to comply with the SEC investigation showed excuse for his violation, such as it did not rise to a level of moral turpitude. And lastly, that the court ruled that because Chadwick's actions took place after he'd gone through with the insider trading and since the concept of excuse relates to the insider trading conduct itself, he was not excused and his conduct amounted to moral turpitude.

Lee Burgess: So, with the rules and our case discussion noted in our outline, it's time to make our outline for our analysis. Critical to the analysis section for the PT is that you analogize or distinguish the key cases from the library. Here, you'll need to discuss the factual background in Chadwick, and then distinguish Chadwick from our case. Recall that in Chadwick, the court ultimately 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 that we'll want to distinguish the facts in Chadwick. So, let's use this to create our outline.

Lee Burgess: We'll have a bullet point that says "Overview of Chadwick's Factual Background", and then another bullet point saying "Distinguish Watkins' Situation". Unlike Chadwick, Watkins was not aware that she was engaging in insider trading at the time she bought the security. We know that Watkins was not aware of the planned merger at the time of purchase. She testified that she believes Darmond's testimony, but was on Percocet at the time of purchase, which impacted her memory and abilities.

Lee Burgess: Our next bullet point will be the "Direct Application of the Rule to the Critical Facts". At the time of Watkins's crime, she had the excuse that she was unaware and did not remember being told about the merger, and but for her lack of memory, she would not have gone through with the trade. Watkins had also long been planning on buying the stock, and Watkins was trading on public information, including that from two major brokerage firms, and also technology message boards. We also know that Watkins followed through with the request of the phone order and gathering the patent files, but her testimony shows that she wasn't sure of the particulars of the phone call and the request for the patent files.



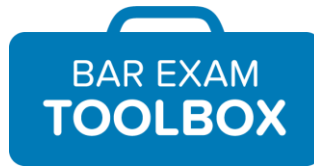
Lee Burgess: So, as you can see, our outline highlights the most critical facts that must go into our essay. When you're practicing these, you want to see how detailed your outline needs to be. You're always welcome to use shorthand and make these kind of as cryptic as they can be to somebody else, as long as you can follow them. You can also reference certain page numbers or points in the packet to go back to when you're actually writing out your rule statements.

Lee Burgess: Alright. Now that we've got our outline for the analysis section, it's time to just briefly note our conclusion for this section of our outline. Our conclusion is going to be that Watkins should not be disbarred or suspended, because she has an excuse at the time of the violation. Now, great job creating your outline for the first issue, so let's move on to the second issue. Just like we did for the first, we've got to IRAC it.

Lee Burgess: The first issue is Watkins's testimony does not justify a finding of moral turpitude, because she honestly believed that she was not aware of being told about the merger at the time of her August 16 purchase, and the record does not show any clear and convincing evidence that Watkins engaged in lack of candor. Now, again, while this issue statement may be more involved than what you need in your outline, a solid statement will consistently remind you of the analysis that you're doing and that you're aiming to argue the issue persuasively.

Lee Burgess: So, now let's go into the rule portion of our outline, which requires us to note from what cases or statutes in the library we're pulling the rules. Including the quick reference citations in your outline will allow you to move through the drafting portion more quickly, because you won't have to fumble around trying to remember where you pulled the rule from.

Lee Burgess: Alright, let's make our overarching rule list. Number one, when an attorney pleads guilty to a crime, the State Bar looks to the appropriate discipline under Section 6102A of the Business and Professions code. Number two, this turns on whether the attorney has committed an act of moral turpitude, which comes from Salas. Then, the State Bar must determine moral turpitude by clear and convincing evidence, including a determination that the attorney's testimony lacks candor, which also comes from Salas. An honest, if mistaken, belief in innocence is not a lack of candor, as a lack of candor cannot be found merely on different memory of events. This is from Salas. And reasonable doubts must be resolved in favor of the accused attorney, which is also from Salas.



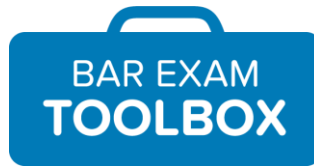
Lee Burgess: Now, importantly with the PTs, we don't just stop at the overarching rule list. We also need to go into any discussion of critical cases from the library that impact our governing rule. So, in this section, that means we need to talk about Salas. Recall that in Salas, the Review Department used Salas's testimony to conclude that the State Bar failed to establish moral turpitude by clear and convincing evidence. So, let's make a quick numbered outline with the key points we'll need to state in our discussion of Salas.

Lee Burgess: Salas pled guilty to the various felonies related to his conduct where he partnered with Bash, the owner and operator of Chekov Legal Services, and violated the law by sharing fees with her, a non-lawyer, in exchange for case referrals. He had lawfully partnered with Bash for certain services. At issue in testimony before the Review Department was a certain \$10,000 he'd paid to Bash. A plea agreement was silent. Salas insisted that it was lawful payment of two months of Bash's salary as a secretary, but Bash testified that he insisted that the \$10,000 represented a legal referral fee. Lastly, the Review Department determined that equal inference could be drawn as to whether Salas was lying or telling the truth. So the State Bar Court could not meet its burden of providing clear and convincing evidence of lack of candor, and thus, moral turpitude.

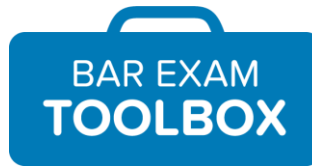
Lee Burgess: Alright, we've got our rules section down. Now, we've got to go to the heart of our PT and create the outline for our analysis. Recall again that, unlike the other essays on the bar, you will want to analogize to or distinguish key cases. In this section, you'll want to analogize to Salas. Let's create our outline points.

Lee Burgess: Number one, like Salas, Watkins is not testifying in conflict with her plea agreement, and her statements are consistent with her plea agreement. Number two, also like Salas, Watkins sincerely believes that she was not breaking the law with her conduct. Number three, Watkins testified to the exact same recollection that she told the SEC when they first confronted her, indicating she lacked awareness of the merger at the time of the purchase. And number four, Watkins never insisted that she was not, in fact, told about the merger. She simply testified as to her memory of the events.

Lee Burgess: Alright, we've got our outline for the analysis section in place. Let's round out the second half of our outline with the conclusion. You can quickly note the conclusion here by writing, "Watkins's testimony at the hearing does not justify a finding of moral turpitude, because the State Bar didn't meet its burden of establishing clear and convincing evidence of culpability."



- Lee Burgess: Now that we have our outline, we can start drafting. It is critical to your success on the PT to understand what type of memo you are drafting, whether it be objective or persuasive. Here, because you've been tasked with drafting a persuasive memo, you need to structure your writing in a way that argues for a certain position. Apply this throughout your essay, beginning with the issue statement. An example of a strong issue statement for the first section is, "The conduct underlying Abigail Watkins's plea does not justify a finding of moral turpitude, because at the time of the August 16 stock purchase, she did not remember being told about the merger, and thus, she has an excuse at the time of the violation to which she pled guilty." This statement is strong because it effectively tells the reader the issue, your position, and draws in the facts to show that that position is correct.
- Lee Burgess: Now, as we mentioned before while going through the outline, drafting the rule statement in the PT is also unique. Here, you'll want to start with the general contours of the governing rule or the rules that you gained from the library. From there, where applicable, use a case from the library to flesh out the rules even more. When doing so, quickly review the material facts from the case and show how the rules applied to those facts and the State Court's holding.
- Lee Burgess: You'll be able to use this case discussion as a jumping off point to analogize or distinguish the case during your application section. Knowing when to discuss a case in this way can be difficult, but a strong rule of thumb is to try and analogize to or distinguish at least one case from the file per overarching issue. Here, you need to utilize Chadwick in section one, while using Salas in section two.
- Lee Burgess: The application section is where you can highlight your persuasive skills. Impress the bar examiners by highlighting material facts from the file, and showing how the rules you just discussed can be leveraged to your client's benefit. It's easy to rush through the application section, but try your best not to. The application section provides a great place for you to quickly pick up some points and showcase your ability to argue for a position.
- Lee Burgess: Finally, you'll want to draw a strong conclusion. A strong conclusion states how the issues should be resolved, but it doesn't stop there. It also tells the reader why an issue should be resolved in a certain manner. When in doubt, introduce the word "because" in your discussion. Doing so will force you to highlight the material facts that got you to that conclusion.



Lee Burgess: In addition to incorporating persuasive language throughout, the bar examiners will also be reviewing your PT for basic writing skills. Don't abandon a full sentence in favor of bullet points in the PT. Because you will actually be graded on your writing, you need to follow general principles of good writing, including using correct grammar, drafting, cohesive paragraphs that contain a logical flow between sentences, and making your sentences clear and concise. The bar exam graders will thank you, and you'll be glad you did when you use those PTs to boost your score on exam day.

Lee Burgess: Alright, good luck on the PT, and remember that you can download sample answers from this PT on the California Bar Exam website. So, go ahead and try and draft your answer and compare it to the sample answers that were provided by the bar and see how you did.

Lee Burgess: With that, today, 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 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 58: The California Performance Test – Reviewing the Task Memo, File, and Library](#)
[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](#)