

Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today we're talking about the importance of attack plans. 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](#), 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.

Alison Monahan: Welcome back. Today we're talking about attack plans. Now, attack plans may be something you used in law school to study for...

Lee Burgess: Hopefully.

Alison Monahan: Hopefully. I'm not making assumptions here. You hopefully used in law school, so the concept hopefully is not totally unfamiliar to you. But you also hear this terminology thrown around for the bar exam as well. And today we wanted to talk about what attack plans are, in case you are not familiar with this, why they can be so important on the bar, and how to use them on exam day. So, Lee, why are we thinking about this lately?

Lee Burgess: Well, the reason this is such a hot topic in our office is that we are currently updating our [Writing of the Week course](#), especially for the California bar exam. And we are starting to add new content where we talk a lot about attack plans.

Alison Monahan: Right, so we're actually adding attack plans on all of the California videos, which is pretty exciting.

Lee Burgess: We are. It's very exciting.

Alison Monahan: It's because we think they're really important.

Lee Burgess: We think they are really important, and I think they're important in California. And we can dive in a little bit more during this discussion about why California specifically, I think, makes the need for attack plans so critical. But I think they're important to have when you're studying for all jurisdictions, because



where students often go wrong studying for the bar is, they forget to see the subject as a universe of potential issues. We see this with folks that we talk to who have failed all the time. An attack plan is going to help you run through all the list of possible issues in a given subject area, and allow you to discuss the ones that are appropriate for your answer. It's also going to help you organize that answer, which is very important. And you've got to have this stuff memorized, so when you read a given question you can quickly run through a mental checklist of what you need to talk about. So, this stuff is critical, and it actually in the end makes your bar exam life easier, even though I think some people are like, "I don't want to memorize one more thing."

Alison Monahan: Right, but if you haven't memorized the basic things that you might need to talk about in criminal law or something, that's kind of a problem.

Lee Burgess: Yeah, for sure.

Alison Monahan: Sometimes I think people focus on trying to learn every single exception to the exception, to the detail. And then when they take a step back, they don't really have the big picture. So really right now we're talking about the big picture.

Lee Burgess: Right, the universe.

Alison Monahan: Right, this is the universe, and not every single rule is going to be... I think this is the other problem. Not every single rule is going to be in your attack plan. That's not an attack plan. That's an outline.

Lee Burgess: Right. You should have that memorized too.

Alison Monahan: Right, but that's a little more aspirational. You might not memorize every single detail of every rule. Of course you want to, but if you don't have the one to two-page cheat sheet overview in your head, you can be really flailing pretty quickly on a lot of these topics. You might just miss entire things. You might think three parts of a question are about negligence, when really they are about intentional torts in one part, or something that. And you just totally miss that, because you don't have this structure for how you approach a torts question in your head.

Lee Burgess: Yeah. So I think the easiest way to really show why we think this is so important is to talk about what's in an attack plan. Let's start with criminal law. And I'm just going to list off what we think are the big topics. So if you're imagining, let's all visualize together a document where you are creating this list. And this is your highest level list of all the topics that you can really raise in crim. We're



only going to focus on crim. We're going to leave criminal procedure for another day. So, here's your list. You have property crimes, crimes against the person, homicide, inchoate crimes, specific intent crimes, general intent crimes, complete defenses, partial defenses, justifications, and other defenses. This is the overview of the universe of criminal law. Basically anything in your outline is going to fall into one of those buckets.

Alison Monahan: Right. And when you read the question, you can see how this might be a useful way of looking at it. You're reading the hypo, and you're thinking, "Well, someone's stealing property. Okay, I need to think about my property crimes. Did someone get injured, or killed, or whatever? Okay, that's probably a crime against the person. Are they dead? Alright, look at homicide. Are there multiple people working together? Okay, I need to think about all these other things." So, you've got to go through that checklist to make sure you're not missing, "Oh wait, there are several co-conspirators. Hm, maybe I need to talk about that."

Lee Burgess: Right. And then within each of these higher overview areas, you have then additional mini attack plans within them. So, going back to your mention of the fact that if somebody's dead, you likely have to look at homicide.

Alison Monahan: If there's a dead body, go to homicide.

Lee Burgess: If there's a dead body, always a good place to start. So you think, "Okay, homicide. What's my attack plan for homicide?" And so, within homicide you have common law murder, which you have four theories for malice, intent to kill, intent to commit great bodily harm, intent to... Now I'm blanking on them. Let me try that again. I was trying to do this from memory. It's intent to kill, intent to commit great bodily harm, reckless disregard for life, and felony murder.

Alison Monahan: And this is a great example of why you actually need to write your attack plan down, because you might think, "There's literally no way I would forget the four theories for murder."

Lee Burgess: Oh wait, we weren't going to edit that part out?

Alison Monahan: No, no.

Lee Burgess: Edit that part out.



Alison Monahan: I think this is a great learning opportunity actually, because here you see someone who literally does this all day, tutors, and still forgets in the moment when they're on the spot literally what are the four theories of murder, which is probably some of the most basic law that you would think you'd never forget. And I frankly couldn't remember them either, so...

Lee Burgess: There you go. So, when you're thinking about this attack plan, you've got common law murder with our four theories that I won't mumble through again. And then you need to think about first degree murder and second degree murder, which is statutory murders. And then you have voluntary manslaughter and involuntary manslaughter, and negligent homicide. So, this attack plan list are all the possible things that you could talk about if someone is dead. And the reason why you need to keep this list in mind is that sometimes you might have an open ended prompt, so you may have to talk about many different crimes within this universe. You might want to talk about all of them, depending on the fact patterns.

Alison Monahan: Get those points!

Lee Burgess: But you may only need to talk about a few. You may talk about common law murder, but then maybe you have mitigating circumstances that raise voluntary manslaughter. So, by keeping this checklist in your mind, that allows you to make sure that you are not leaving anything on the table. If you don't discuss one of these issues that is raised by the facts, because you just said, "Oh well, I've talked about common law murder. I must be done." Well, you're not going to pass.

Alison Monahan: Right. Yeah, and sometimes the questions even get much more specific. They might ask you what degree of murder would this person be liable for? And again, you need to know that analysis pretty cold, bee like, "Okay, I know that there are different degrees of murder, and then I have to analyze this and that and whatever." So, it might be general or it might be specific, but either way your attack plan gives you that roadmap of what you need to talk about.

Lee Burgess: Right. The other thing you need to think about is the order in which you talk about stuff. So you always typically talk about common law murder first, before you even talk about first degree or second degree murder.

Alison Monahan: Right, because you can't have degrees unless you have a murder.

Lee Burgess: That's true.



- Alison Monahan: Logically speaking, establish the murder, and then figure out what degree it might be. Sorry, I was a programmer. That's how I think, like a computer.
- Lee Burgess: And you typically would never discuss voluntary manslaughter first, because usually what's going to happen is the prosecution is always going to try and argue for the highest charge possible, so that's going to be common law murder, or in the first or second degree. And then you're going to have the defendant trying to show circumstances that should mitigate it down, because it's better for the defendant to be convicted of voluntary manslaughter than it is even second degree murder.
- Alison Monahan: Definitely going to jail for less time for that.
- Lee Burgess: Less time for that. That's why you also want to organize it in your mind this way, because this is how you organize it on paper. And unfortunately, most students don't memorize material in this very structured way, other than you, who are a very structured linear thinker.
- Alison Monahan: Well, I think a lot of people think, "Oh, I see something that points towards a mitigating factor. That's really important. I'm going to talk about that." And it's like, "Okay, well, what are you mitigating?" So I think if you take nothing away from this particular attack plan, when you're talking about homicide crimes, always start with the worst one and move down the list.
- Lee Burgess: Exactly. Basically, you pretty much always start with common law murder, the four theories of malice aforethought.
- Alison Monahan: Right, if you're a prosecutor, think, "Can I show that they're guilty of common law murder? That's going to be awesome for my career." Just query whether that makes sense in the broader scheme of things.
- Lee Burgess: Having greater criminal justice reform dialogue. Probably a different podcast.
- Alison Monahan: Yeah, that's a different podcast. Yeah. But anyway, if you're thinking from the prosecutor's standpoint, what are you going to be able to establish? And then you do that analysis. And if you're thinking from the defense perspective, what are you going to argue that's going to mitigate what they might be able to show? So you're coming at it from both directions, but first you have to establish what could they reasonably show? And that's starting at the top of the list.



- Lee Burgess: And I think that this goes against what we mentioned earlier in the podcast, is this idea of falling in the trap of just memorizing facts. This is why I hate flashcards. So let's say that you've memorized a bunch of flashcards. So you've had a stack of flashcards about criminal law.
- Alison Monahan: Involuntary murder, or involuntary manslaughter.
- Lee Burgess: You can't even remember the names of the crimes.
- Alison Monahan: I know. I'm like, "I know definition of that." You're like, "Great, how does that definition fit into this bigger picture?"
- Lee Burgess: Right, exactly. So it's like, "Okay." And you get to the inchoate crimes, and it's conspiracy. What is conspiracy? How does it relate to other things? You need to not know just that something is a specific intent crime. You need to also understand what defenses relate to specific intent crimes.
- Alison Monahan: Right, it's very specific.
- Lee Burgess: Yes, it's a very specific defense to a very specific intent crime.
- Alison Monahan: Yeah, and some of it's basic logic. Again, you can almost think through some of this if you can't quite remember in the moment. You can get close enough if you're like, "What intent was required, and would this have negated that?" If I get voluntarily drunk, how is that different from someone slipping me acid when I don't know about it? You can kind of logic some of this out, but it's better just to have that checklist.
- Lee Burgess: Right, so the factoids, where you're just like playing Jeopardy. You're memorizing facts. That often times doesn't help you remember this universe. And it doesn't even help you come up with, like you were saying, if you've forgotten something, sometimes you need to be creative and think through what you do know, and try and make it fit in something.
- Alison Monahan: The law is kind of logical in certain ways.
- Lee Burgess: Sometimes.
- Alison Monahan: Yeah, sometimes. But I think having this attack plan is what allows you to quickly get on paper what you know, and to quickly write down what the facts are pointing you to discuss, versus just... You can even think about it. If I have



this one page attack plan, I'm going through check, check, check, check, check. Okay, I know what I need to talk about. Even if I had those same 20 flashcards, it's just a pile of flashcards. Where do I even start? That's not going to help me write that essay.

- Lee Burgess: It's so true. So, leaving the crim realm, another area where, if you haven't bought into this already, is super useful, is hearsay and evidence. Because you have to just memorize this whole list of hearsay exceptions. And in the moment, when you are working on your hearsay answer, you have to be able to say, "Okay, is it?" And then you have basically this list, and you need to go through it. And you're like, present sense impression, yes. Maybe do excited utterance. And then, no, no, no, maybe yes, yes. And I think that that is very handy to have some sort of mnemonic or a quick checklist on your scratch paper, so you can just go through and make a list. I will not make our listeners suffer through us coming up, off the top of our heads, with a list of hearsay exceptions.
- Alison Monahan: That would not happen.
- Lee Burgess: I think people would turn it off. I do. And that's okay. We won't do that to you. But it would be much less efficient for us to come up here and start brainstorming all the exceptions. Although eventually I'm sure we could get to the full list.
- Alison Monahan: Like, "Oh, there's one about being in a hospital bed, right? Oh yeah, yeah."
- Lee Burgess: Dying declaration and all this stuff. We could come up with the list, but if we're in the moment, what you don't want is a nonsensical discussion with yourself about...
- Alison Monahan: "I remember something about a hospital bed." You're like, "Okay, this is not helping me on the bar exam."
- Lee Burgess: Right. You'd want to have this linear checklist, so you can be much more confident and efficient than we are in this moment.
- Alison Monahan: The other thing I think that's really important in evidence, even backing out of hearsay, which is that sub attack plan, once you're in the universe of an out-of-court statement...
- Lee Burgess: Offering for the truth of the matters, so people get through the whole rule.



Alison Monahan: Yeah. No, I was going to say that you're in the hearsay universe, because then you get into like, it's not really assertive for the truth of the matter, but it kind of looks hearsay. I would say anything out-of-court, you're probably in the universe, in your attack plan, of something approaching hearsay.

Lee Burgess: Fair point.

Alison Monahan: Then you have to figure out that this is the point. You have to figure out, is it actually hearsay? That's probably step one. But even backing out of that, before you do this – and now you see so many people losing points on this – is they don't do the, "Is it relevant? Is it more probative than prejudicial?" That kind of discussion. You need to do that in evidence, and that should be top of your attack plan. It's a similar thing of, you start with common law murder. It's like you have a piece of evidence – you've got to figure out if it's relevant. That kind of thing.

Lee Burgess: Yep, and you've got to practice that. And you don't want to be like, "Should I talk about relevance? Should I not talk about relevance?"

Alison Monahan: Pro tip, talk about it.

Lee Burgess: Talk about it, yeah. By having that checklist, you don't have to do the debate. And you also have to really see what the universe of a subject like evidence is. Relevance. Does somebody have personal knowledge? Then it's like, is it an out-of-court statement? Then you have all these rules about that. Is this character evidence? And then you have all these rules about character evidence. Privileges, you have all these rules about privileges. But again, when you read a fact pattern, if you see someone trying to assert a privilege, or somebody's married to somebody else, or was married to somebody else, or somebody's a lawyer, or somebody's a doctor – then in your brain you're like, "Oh, I'm now in the privilege universe. Now what's my attack plan for privilege? What are all the possible things I could raise?" And then you have to be able to quickly identify all of them, because if it's a spouse, there are multiple types of privilege that you may have to raise.

Alison Monahan: Right. But before you even get to that, you've got to establish, is this even relevant?

Lee Burgess: Well, yeah, that's true.



- Alison Monahan: You kind of have to go quickly. And this is the point – this allows you to do it quickly. And evidence is one of those where you're going to be writing a lot, typically. It's like if there are seven pieces of evidence, each one of them you're going to have to quickly do that, "Is it relevant? Is it blahdy blah?", before you even get to the point of talking about it being a spousal situation.
- Lee Burgess: Right. But if you're taking the UBE, it's probably not going to be seven pieces of evidence in 30 minutes.
- Alison Monahan: I thought we were mainly talking about California right now.
- Lee Burgess: Well, we are mainly, because that's where we've been digging into right now.
- Alison Monahan: And also, I think the UBE is a little more specific. Obviously, they can't give you seven pieces of evidence because you only have 30 minutes. They're going to give you a couple of pieces of evidence.
- Lee Burgess: But you still have to have these attack plans, like the hearsay attack plan memorized, because under the intense time pressure of the UBE, I think it's even more critical that you have this list of hearsay exceptions to think about. And make sure that you know what's going through, check off what applies, talk about it, and move on.
- Alison Monahan: And the other thing you might consider doing on your attack plan is actually looking at which hearsay exceptions are most likely to show up, and putting those at the top so you think about them first.
- Lee Burgess: That's very true. So, you can see here that attack plans are really going to help you make sure you don't miss things, which is very important, and make sure that you can think quickly. But they also sometimes can help us organize our answer. And this is something that comes up more in California than in other jurisdictions, because of the hour-long essays that we do here in California. And they love to throw out a couple of prompts that just say, "Discuss."
- Alison Monahan: Discuss, whatever you feel like. What do you feel talking about today? Just talk about that.
- Lee Burgess: "Here's a really long contract fact pattern. Discuss it." And you're like, "Cool."
- Alison Monahan: "Okay, well, I like frogs, and it's about frogs." That's not what they're looking for.



Lee Burgess: I got one of these prompts on my bar, and I literally read the whole fact pattern, and my thought was, "Huh?"

Alison Monahan: Yeah, that's not what they're looking for.

Lee Burgess: I didn't start my essay with, "Huh?"

Alison Monahan: Right, be like, "Hmm, That's interesting." You do sometimes read these and you're like, "Huh, yeah. Hmm. Curious question."

Lee Burgess: I think I did go back to the top and was like, "I'm going to read it again, and try again."

Alison Monahan: But I bet you had some sort of mental attack plan. You're like, "Okay, I understand it is a question about whatever this topic is, and I have some knowledge of this. So let me think through that and then see if there's anything that's ringing a bell."

Lee Burgess: And thank goodness in California on a contracts question you always have to talk about whether it's the common law or the UCC. So no matter what, I at least had one paragraph that I knew what to answer.

Alison Monahan: Right, yeah. Once you get started, it probably starts making more sense.

Lee Burgess: Yeah. But the thing about having these open ended prompts on some of these bar exams is that the attack plans give you structure. So for instance, in contracts you're going to see in your attack plan that you start with the applicable law, just like I mentioned. Then you go onto formation. And then you have defenses to formation, and the modification, and you kind of go through all this. So, if you have a contracts fact pattern, and you're scratching your head saying "Huh", because you don't know what to write about – one, in California you always start with the applicable law. So check mark you got something on the paper that's a good chunk of points. If you write your name, you get some points. Well, you don't write your name. I guess if you write a header.

But then it's like, the next question is, is there a valid contract? So you can start to go through those issues, and all of a sudden, even with these questions that make you scratch your head, you start to see that there are little facts that are starting to come to light, and issues are starting to come to light, and the thing will start to come together. But what you don't want to do is have an open ended fact pattern and then maybe you even start with the applicable law,



because you remember that you have to write that down. But then you skip to defenses or damages, and then you go back and talk about formation. Because the graders are not going to look for where you talk about stuff. You have to organize it.

Alison Monahan: Right. They're looking for, what is the applicable law? Is there a contract? What are the terms of that contract? Was this contract breached? Were there damages? This is the answer they're looking for. And if you're talking about damages before you talk about the terms of the contract, that doesn't make a lot of sense.

Lee Burgess: Mm-hmm (affirmative). So, hopefully by this point in the conversation you have realized how important attack plans are, because we, who have been writing all of this curriculum on attack plans, are still screwing up our attack plans, because I didn't memorize the script. So, where do you find attack plans if you need them? Of course, we've talked about, if you're in California, our new Writing of the Week release, which is coming out any day now – get on our mailing list if you want to know when it's released – we're going to give you attack plans for most of the highly tested topics in California. You can definitely make your own, and you should be making your own as you learn and condense material provided by your bar provider. Again, an outline is not the same thing as an attack plan. Attack plan should be a page.

Alison Monahan: This is like if you had an open book exam in law school, this is what you'd put in front of you as your checklist.

Lee Burgess: Yep. And then I think some bar materials that are floating around there do a better job of getting you towards this. So, [Lean Sheets](#) or [SmartBarPrep](#), I think both have that level of condensed material that's going to help you get closer to this if you're really one of those people who can't condense down the material. But the reality is, you should really be able to take the headers in your outline and create an attack plan once you understand the material.

Alison Monahan: Yeah, absolutely. I think you don't want to start from scratch on this, particularly if it's a topic you've never seen before, like community property or something, you're trying to learn that. And so I think the process here is probably you go through some materials, maybe you watch a video, or you read a basic outline. You get the universe of what we're talking about. You're like, "Okay, I generally understand what this topic is approaching. What are the questions that will be addressed?" Then is when you start circling back, and look at the big picture areas here. Like, "What's the process I would follow if I have a community



property question?" Probably, you're going to have to classify the property. That kind of thing. That seems like probably what you're going to do first. And hopefully that's probably at the top of your essay, or your essay and also these outlines.

So, these are big picture formative questions, and then you dive deeper into the details of things that may or may not come up. And this is another one of those we're going to have buckets – like, is there a business? Was there an inheritance? Is there a property? Did they move to a different state and move back? These are the big buckets that you need to be thinking about, that are going to be in your attack plan.

Lee Burgess: I think every time we do any sort of curriculum upgrade, and we do a deep dive into the material, I always come out wishing that I had simplified the material so much for myself when I was studying for the bar. Because we always come out with these, "Here's your attack plan."

Alison Monahan: Yeah, here it is, one page. Community property, there you go.

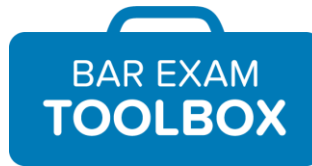
Lee Burgess: Here it is, boom! Wow, I wish I had had that when I was studying for the bar. Because even though I did a little bit of this, I did not do it to the extent that I think I should have done when I was studying.

Alison Monahan: I think I did more of it, but I think that's only because I had such a limited time to study.

Lee Burgess: Yeah, you were cramming.

Alison Monahan: So I was literally like, "I cannot get bogged down in all these details. I just have to figure out, if they give me a question on this topic, how can I get through this question in a way that is going to enable me to write a minimally passing essay, knowing that I will not remember every single detail?" So, I had to think of it at a much higher level, which in some ways actually I think ends up working well, because I've talked to a number of people that are looking at their score reports after failing and they're like, "I don't understand. This question I thought I knew nothing about the topic is the one I did best in. And then I practiced in this other area and I got a terrible score." I'm like, "Well, that's because you knew too much."

Lee Burgess: Right. You did memorize the outline. You didn't memorize the attack plan.



Alison Monahan: Yeah, this other question that you are literally basically going in almost cold on, all you had done is like a day of review of a really high level outline, but when you got that question, you only had 30 minutes. So that was more than sufficient knowledge. You don't need all this knowledge.

Lee Burgess: Yeah. Yeah. Alright, well, as we wind up this conversation, I think the takeaways here from this somewhat goofy conversation that's happened...

Alison Monahan: Yes, it's early.

Lee Burgess: It's early. We both agreed we were not fully caffeinated to do this podcast recording session. But I think the big takeaways are, attack plans are very important and they need to be part of your setting. And I think one of the ways you can test yourself if you're getting ready for the test, as you get closer to the exam, is I should just be able to say, "Hey, Alison, write down your criminal law attack plan." And then you should be able to do it.

Alison Monahan: Be like, "Yeah, got it."

Lee Burgess: Got it. Knock it out. And that should start to make you feel you're more confident and comfortable around this material as you get closer to the exam. If you are not at that place and you're getting close to the exam, it's time to press Pause on what you're doing, take a step back and try and make sure that, like you said that you did, when you had those last few weeks to prepare – that you are making sure that you understand the universe of this material, and how you're supposed to present it. And don't get lost in the minutiae of the details.

Alison Monahan: Yeah. And I think the other thing to takeaway is, this is actually not that easy to come up with. So this is not something you probably want to leave until the last couple of days, thinking you're just going to do it. I remember in law school I really didn't contracts and I was very confused. And I sat down and I tried to just do a flow chart of basically the entire class on a couple of pieces of paper. And I still have that, and it's actually very useful. But it took me two days. But at that point I thought through all of this, and so now I can still envision that in my head years later. So, this is not something that you can just be like, "Oh yeah, I'll put that off and deal with it a couple of days beforehand." This should really be part of your thinking and practicing as you start to review a topic area. Also, this is what you can study off of later.

Lee Burgess: That's true.



Alison Monahan: So, do these throughout the process, not as some add-on that you think you're going to do and memorize in the last few days.

Lee Burgess: Very true. Alright, well, with that, we're out of time. I want to take a second to remind you to check out our [blog](#) at BarExamToolbox.com, which is full of helpful tips to help you prepare and stay sane as 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.

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