



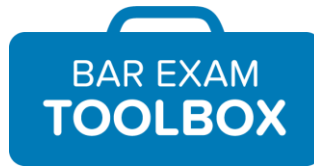
Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're doing another in our "Listen and Learn" series – this one's going to cover inchoate crimes. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify the bar exam experience, so you can study effectively, 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.

Lee Burgess: Hello, and welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast! Today, we are focusing on Criminal Law, specifically inchoate offenses. These include attempt, solicitation, and conspiracy. Students often overlook these specific crimes, but questions about inchoate offenses commonly appear on both law school and bar exam questions.

Lee Burgess: Since we're talking about criminal law, let's quickly brush up on the lingo. Criminal law questions always have a star of the show: the defendant – that's the person who is charged with the crime or crimes. You may also come across the prosecutor, who brings criminal charges against the defendant on the government's behalf.

Lee Burgess: Before we get into the rules for each of these crimes, let's start with a general question: How do inchoate offenses differ from other crimes? The three inchoate offenses – attempt, solicitation, and conspiracy – are "incomplete" crimes. These crimes are triggered on exams where a defendant is preparing for or planning a crime or taking steps towards the commission of another crime. I say "another" crime because attempt, solicitation, and conspiracy are all completed crimes themselves, even though the defendant may not have completed the underlying crime he or she intended or prepared to commit.

Lee Burgess: Now that we've got some context, let's dive into the rules. We'll start with the most heavily tested inchoate offense – attempt. Here's the rule to write down for attempt: A person is guilty of attempt if the person, one, had the specific intent to commit a crime; and two, took an overt act sufficiently beyond mere preparation toward the completion of the crime. The "specific intent" element is satisfied where the defendant intended to commit the underlying crime, such as murder, robbery, kidnapping, etc. Now what exactly is an "overt act sufficiently beyond mere preparation", you might ask? In most states, and

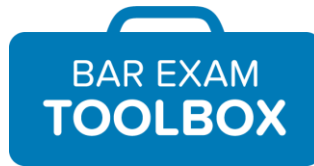


under the Model Penal Code, this means that a person must take a “substantial step” toward the crime.

Lee Burgess: There’s one last piece of the rule for attempt that you want to make sure you don’t miss. The attempt merges with the underlying crime. This principle is known as the merger doctrine, which comes into play where the defendant actually completed the underlying crime. So, in a situation where a defendant attempted to murder their victim and did in fact commit the murder, the defendant cannot be convicted of both attempted murder and murder. Why? Because the attempted murder charge merged with the murder as soon as the murder was actually committed. Keep in mind that you’ll still need to IRAC both the attempt and the underlying crime in your answer if the facts suggest it, but you’ll also need to point out when the attempt merges with the underlying crime.

Lee Burgess: Now let’s move on to conspiracy, which is another specific intent crime, although the elements are quite different from attempt. Don’t worry though, we can use these differences to our advantage. For example, the differences help with issue spotting, because the rules for attempt and conspiracy will only be triggered by specific but different sets of facts. So, you won’t be sitting in the exam scratching your head trying figure out if you’re being tested on attempt or conspiracy. Let’s get to the rule and you’ll see what I mean.

Lee Burgess: The rule to write down is this: Conspiracy is a specific intent crime that requires, one, an express or implied agreement between two or more people; two, intent to enter into the agreement; three, intent to pursue an unlawful objective; and four, the commission of an overt act in furtherance of the unlawful objective. Under the common law, all parties in the conspiracy must intend to pursue an unlawful objective. But, under the Model Penal Code, this element is satisfied even if only one party has the requisite intent. This distinction is important to keep in mind, because you’ll need to discuss both rules on an exam, unless the question says something like, “Apply the common law.” This tells you that you don’t need to discuss the Model Penal Code distinction in your answer. Now, unlike attempt, any act (including preparation) a co-conspirator does in furtherance of the unlawful objective is sufficient. The key thing to remember here is that conspiracy requires an agreement to commit a crime between two or more people. If you have a situation where multiple defendants are in cahoots with each other about some unlawful objective (a crime), you know you should be thinking about conspiracy.

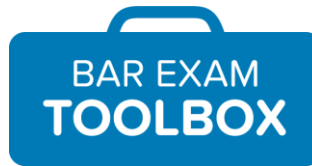


Lee Burgess: Two last things about the rule for conspiracy that you want to take note of: First, a conspirator is liable for the conspiracy, plus all foreseeable crimes committed by co-conspirators in furtherance of the unlawful objective. This is known as the Pinkerton rule. A co-conspirator's liability under this rule depends on the foreseeability of the other crime committed, so the "foreseeability" element should be the crux of your analysis here. Lastly, conspiracy does not merge with the completed crime. This means that a defendant can be charged with the conspiracy to commit the crime and the crime itself. So, if you and your friend conspire to rob a bank and a teller dies from a heart attack during the robbery, you both can likely be charged with conspiracy to commit robbery, robbery, and murder.

Lee Burgess: Our last inchoate offense, solicitation, is a bit more straightforward. A person is guilty of solicitation if, one, he or she requests another person to commit a crime; two, with the specific intent that the crime be committed; and three, the other person receives the request. A Dateline-worthy illustration of this is an angry wife who asks a hitman to murder her cheating husband. If the wife asked the hitman to commit the murder because she wanted her husband dead, and the hitman heard or otherwise received the wife's request, she is guilty of solicitation to commit murder. Solicitation merges with the substantive crime when the substantive crime is completed. So, if the hitman murders the cheating husband at the wife's request, the wife will only be charged with murder, because the solicitation merges with the completed crime.

Lee Burgess: Okay, now you have the rules for all the inchoate offenses. Before we tackle our first hypo, I want to briefly talk about the defenses that you'll need to know for inchoate offense questions. Our first defense is abandonment/withdrawal, which applies to the crimes of attempt and conspiracy under certain circumstances. Now, I say "certain circumstances" because the key to this defense is knowing its limitations.

Lee Burgess: Let's start by looking at when this defense applies to attempt crimes. In most states, abandonment/withdrawal is not a defense once a defendant has taken a substantial step toward the crime. In a minority of states and under the Model Penal Code, abandonment before the crime is completed is an affirmative defense if, one, the defendant voluntarily renounces his or her criminal purpose; and two, completely abandons the effort to commit the crime or otherwise prevents its commission. So, if you have a defendant who abandons or withdraws from an attempt crime, you'll want to focus on when the defendant abandoned the crime, as well as what the defendant did to abandon the crime. These are the limitations I mentioned and will either make or break



this defense to an attempt, so you'll need to discuss both of these limitations in your answer.

Lee Burgess: Now, let's talk about how withdrawal applies to conspiracy. Withdrawal is not a defense for the conspiracy, but it is a defense for crimes committed by co-conspirators after the withdrawal. So, even if a co-conspirator successfully withdraws before the unlawful objective (the crime) is achieved, he or she is still liable for the conspiracy. However, if the remaining conspirators do commit the intended crime after the co-conspirator withdrew from the conspiracy, the co-conspirator who previously withdrew can assert withdrawal as a defense to the intended crime and any other crimes the conspiracy committed after he or she withdrew.

Lee Burgess: I know I'm throwing rules at you left and right today, but there's one last defense we need to briefly discuss before we tackle some hypos. Our last defense is renunciation, which applies to solicitation. Renunciation is an affirmative defense if the defendant, one, voluntarily and completely renounces; and two, prevents the commission of the crime. Sound familiar? Hopefully so, because this rule is nearly identical to our withdrawal/abandonment rule under the Model Penal Code for attempt. Embrace these similarities – it will help you remember the rules. We'll touch on some of these defenses in our hypos. And on that note, I think we're ready for our first hypo:

Lee Burgess: "Dan's neighbor, Vicki, had a habit of playing loud music at all hours of the day and night. Dan repeatedly asked Vicki to turn the music down because it kept him up at night, but Vicki scoffed at Dan's requests and played her music even louder. One day, Dan decided he couldn't take it anymore. He called his friend, Alex, and asked if he could borrow one of Alex's hunting rifles. When Alex asked Dan why he wanted to borrow a rifle, Dan responded, "It's time I taught my neighbor a lesson." Thinking Dan just wanted to scare Vicki, Alex gave Dan the rifle. The next day, Dan took the rifle and sat on his front porch as he waited for Vicki to leave her house. As soon as Vicki stepped outside, Dan pointed the rifle at her and put his finger on the trigger. Before he pulled the trigger, Dan's phone rang. Dan went inside and answered the phone. By the time he went outside, Vicki was gone. Could Dan be guilty of attempted murder?"

Lee Burgess: We have some good news here! This question is very narrow because it specifically tells you to analyze attempted murder, as opposed to a broader question, such as "Discuss all possible crimes that may be brought against Dan." We'll take a look at an open-ended question later in this podcast. But first, let's



talk about Dan. We know from the question that we need to discuss attempt. So let's quickly restate the rule: A person is guilty of attempt if he or she had the specific intent to commit a crime, and took an overt act sufficiently beyond mere preparation toward the completion of the crime. One last thing before we get to our analysis: When you see an attempt question, it's important to identify the underlying crime (the crime the defendant attempted to commit), because we need to know the requisite intent for the underlying crime so we can plug it into our rule elements for the attempted crime. Going back to our hypo, we know that the underlying crime is murder. The requisite intent for murder is the specific intent to kill. That is what we'll need to write in our attempted murder rule so we can discuss it in our analysis.

Lee Burgess:

Now that we've identified our underlying crime and its requisite intent, let's go through our rule elements one at a time. First, Dan must have the specific intent to commit murder. Here, Dan had a grudge against Vicki because she played her music so loud that Dan couldn't sleep. Further, after Vicki ignored his requests to turn the music down, Dan borrowed a firearm and pointed it directly at Vicki because he wanted to teach her a lesson. These facts clearly prove Dan didn't like Vicki, but are they enough to prove he intended to kill Vicki? Probably. Dan's anger gave him a motive to kill Vicki and he specifically asked to borrow a hunting rifle, a dangerous weapon that could easily be used to kill someone. We know that Dan didn't actually say, "I have the specific intent to kill Vicki", but let's take a look at his conduct. After all, actions often speak louder than words. Dan sat outside with the rifle and waited for Vicki to leave her house. He could have left the rifle in the house, but he chose to take it outside because he knew exactly what he was going to do with that rifle. And why did Dan sit outside and wait for Vicki? Because he wanted to kill her the first chance he got. He even went so far as to point the rifle at Vicki and put his finger on the trigger at the same time. He didn't waste any time either – this all happened the very next day after he borrowed the rifle. All together, these facts point us toward Dan intending to kill Vicki. So, we can check off our first element.

Lee Burgess:

On to element two: Dan must have taken an overt act sufficiently beyond mere preparation toward completion of the murder. Remember, this just means that Dan must have taken a substantial step toward killing Vicki. Well, we know Dan sought out a hunting rifle, which could easily be used to kill someone. Borrowing a firearm is certainly one step toward committing murder, but it doesn't quite amount to a substantial step. When Dan got home with the rifle, did he come to his senses and return it to his friend? No. No more than 24 hours after he got the rifle, Dan waited for Vicki with the rifle in his hands. That's another step. When he saw Vicki, Dan pointed the rifle at her and put his finger on the trigger. This is where Dan took a "substantial step" and went "beyond mere



preparation”, because borrowing a firearm and waiting for the victim with the firearm could be argued as simply preparing to commit murder. But as soon as Dan put the rifle up, pointed it at Vicki with his finger on the trigger, he took a substantial step toward committing murder. In fact, if the phone didn’t ring when it did, Dan assuredly would have pulled the trigger. The question didn’t tell us to discuss any potential defenses, but we know from our withdrawal/abandonment rule that this defense went out the window when Dan took a substantial step toward killing Vicki. Therefore, Dan is guilty of attempted murder.

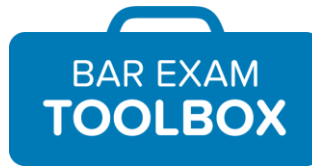
Lee Burgess: Now, let’s stick with the same hypo, but we’re going to change a couple of facts:

Lee Burgess: “Assume Dan’s phone never rang. He used the scope on the rifle to aim it directly at Vicki’s head. As soon as he had a clear shot, he pulled the trigger and shot Vicki. Paramedics arrived moments later and pronounced Vicki dead. Dan was charged with murder and attempted murder. Discuss.”

Lee Burgess: More good news! This is another specific question. Even though the question says “Discuss”, it still tells us the two charges we need to analyze – murder and attempted murder. So, let’s get to it. What makes this hypo different from before? Here, Dan actually killed Vicki. This means the merger rule is triggered, because if the elements for murder are met, the attempted murder will merge and Dan will only be charged with the murder. In your answer, you’d want to do a separate header for both attempted murder and murder, and IRAC both, and then explain how Dan would only be charged with murder, if the elements are met, under the merger doctrine. We won’t spend time discussing homicide today, but if you’re looking for an in-depth discussion on how to analyze a homicide question, you can check out another [episode of our podcast](#).

Lee Burgess: Alright, let’s tackle another hypo. This one is loosely adapted from the [October 2020 California bar exam](#):

Lee Burgess: “Donna’s business partner, Victor, lost several of their company’s largest clients, which left the company bankrupt. Donna was willing to do anything to get money to save the company. She knew a wealthy client, Oliver, had a painting worth \$1 million in the foyer of his home. Donna and her friend, Carl, came up with a plan to steal the painting, sell it to an art dealer, and split the profits equally. As they walked to Oliver’s house to steal the painting, Carl told Donna, ‘I’m not so sure about this anymore. What if we get caught?’ And Donna responded, ‘We worked on this plan for two weeks. We won’t get caught.’ When Donna and Carl approached Oliver’s front door, security alarms started ringing. Startled, Donna and Carl ran away from Oliver’s house.



Lee Burgess: William, who happened to be walking in Oliver's neighborhood that night, saw Donna and Carl running away from Oliver's house. Afraid that William had called the police, Carl ran up to William, took out his pocketknife and told William, 'You've seen too much. You're coming with us.' Carl grabbed William's arm and forced William to go to Carl's apartment with he and Donna. When they got to his apartment, Carl locked William in the bathroom. Donna then yelled, 'This is all Victor's fault! If it weren't for him, we wouldn't be in this situation!'

Lee Burgess: That night, Donna called and hired a hitman to kill Victor. The hitman said he would kill Victor the next day for \$7,000. Donna agreed and transferred \$7,000 to the hitman's account. The next morning, Donna frantically called the hitman and said, 'I changed my mind! I don't want you to kill Victor anymore.' The hitman responded, 'No problem. But I'll need \$5,000 for wasting my time.' Donna hung up and transferred an additional \$5,000 to the hitman. The hitman made no effort to kill Victor. William escaped from Carl's bathroom and told the police everything. Donna and Carl were arrested. With what crime or crimes can Donna and Carl be charged, and what defenses, if any, can they assert? Discuss."

Lee Burgess: This is an example of a completely open-ended question, as opposed to the narrow questions from our earlier hypos. When you see an open-ended question on an exam, this is a big clue that there are several issues you'll need to issue spot and IRAC, rather than just one or two like we saw before. To prepare for an open-ended question, you need to be able to identify the facts that trigger the rule elements for each of the crimes and defenses. This hypo is also an example of how different inchoate offenses can, and often do, overlap with each other.

Lee Burgess: Okay, let's get started. We know that Donna and Carl concocted a plan to steal the expensive painting from Oliver, which tips us off that we're dealing with a conspiracy to commit larceny. Do you remember the elements for conspiracy? First, we need an express or implied agreement between two or more people. Here, Donna and Carl agreed to steal the painting. We know this because they discussed their plan for two weeks, which tells us this was an express agreement. Next, we are looking for a specific intent to enter into the agreement. Here, Donna and Carl both agreed to steal the painting and planned out the theft together, so our second element is met.

Lee Burgess: Third, did they have the specific intent to pursue an unlawful objective? Remember the distinction between common law and the Model Penal Code for this element. While the common law requires this element to be met by all



parties in the conspiracy, the Model Penal Code only requires one party's intent. Since any party's intent can satisfy the element under the Model Penal Code, you can save time and brain power by discussing the party whose intent is most obvious. Looking at our facts, Donna's intent is going to easily satisfy this element, so let's apply those facts to the Model Penal Code element – did Donna have the specific intent to pursue an unlawful objective? The answer is "Yes." How do we know? Because she wanted to steal the painting in order to sell it and pocket the cash. Donna clearly intended to pursue the theft, which is an unlawful objective because theft is a crime, and we know she wanted to pursue the theft because she convinced Carl to stay in the conspiracy when he was having second thoughts.

Lee Burgess: Our last element is commission of an overt act in furtherance of the unlawful objective. As I said earlier, any act by any party in the conspiracy will satisfy this element, including preparation. Here, Donna and Carl not only prepared to carry out the theft by planning for two weeks, they also committed an additional overt act when they walked to Oliver's house the night they planned to steal the painting. Therefore, Donna and Carl are guilty of conspiracy to commit larceny here.

Lee Burgess: Remember, our question asked us to identify and discuss any defenses that Donna or Carl might assert. So, what about withdrawal? Well, we know Carl started to get cold feet on the way to commit larceny because he told Donna, "I'm not so sure about this." The key to successfully asserting withdrawal as a defense is that the defendant must completely withdraw from the conspiracy, or completely abandon his or her efforts to commit the crime. So, Carl's wishy-washy statement won't amount to a complete withdrawal. But remember that withdrawal is not a defense to the conspiracy itself, so even if we had facts of a complete withdrawal or abandonment, Donna and Carl are still guilty of conspiracy to commit larceny.

Lee Burgess: Are we done with our conspiracy answer yet? Not quite. We know that a conspirator is liable not only for the conspiracy, but for all foreseeable crimes committed in furtherance of the conspiracy. So, let's think about what other crimes may have been committed. What about kidnapping? Since our discussion today is focused on the inchoate offenses, we won't spend time discussing whether the elements of kidnapping are met. Generally, though, you'd want to continue your essay by doing an IRAC and analyzing this issue. Let's assume the elements of kidnapping are met here. Is kidnapping a foreseeable crime in furtherance of larceny? Well, probably not. Larceny is not a crime of violence such that you might expect some other violent crime to occur in the process of the theft. That means it's Donna's lucky day, because even though Carl may well





be guilty of the kidnapping, Donna will not be liable as a co-conspirator because the kidnapping was not a foreseeable crime here.

Lee Burgess:

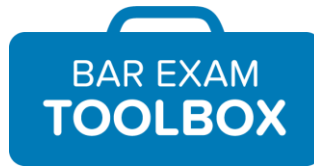
Moving on to solicitation. Remember what triggers this issue? One person asking another to commit a crime. You'll usually see the "asking" in-person between two people or during a phone call. That's what we have here. Donna called a hitman and asked him to kill Victor. Sounds like solicitation. Let's quickly restate the rule and go through it together. Solicitation occurs where one person requests another person to commit a crime and has the specific intent that the crime be committed, and the other person receives the request. We know the "request to commit a crime" element is met because Donna specifically asked the hitman to kill Victor. Now, what about Donna's intent – did she call the hitman, did she specifically intend that he kill Victor? Well, probably. She was mad at Victor for bankrupting their company and blaming him for the crimes she committed, which will likely land her in an orange jumpsuit. Plus, Donna paid the hitman a pretty penny to carry out the murder, even though she probably didn't have too much cash to spare, considering her company was bankrupt. So, it's safe to say she intended for the hitman to kill Victor. Lastly, we know the hitman received Donna's request because their conversation was over the phone and the hitman gave Donna a price for his "services". The hitman couldn't have told Donna a dollar amount if he didn't receive her request. Therefore, the elements of solicitation to commit murder are met.

Lee Burgess:

If the elements are met, isn't Donna guilty? Maybe not. She may be able to assert the defense of renunciation. Do you remember that rule? Renunciation requires a defendant voluntarily and completely renounce the crime and prevent the commission of the crime. We know Donna called the hitman the next morning because she changed her mind and didn't want Victor killed. There's nothing to suggest that she didn't call the hitman off voluntarily, and we know Donna completely renounced the crime because she paid the hitman another \$5,000 just so he wouldn't go through with the murder. Lastly, Donna prevented the commission of the crime because after she transferred the \$5,000 "inconvenience fee", the hitman didn't commit the murder. Donna will be able to assert renunciation as a defense, and is therefore guilty of solicitation to commit murder.

Lee Burgess:

Phew! We've tackled a lot of today, and we're not quite done. Let's jump back to conspiracy. When you have a conspiracy essay where any of the co-conspirators commit separate and additional crimes, remember to keep that pesky Pinkerton rule in the back of your mind. In your answer, you'll want to do a separate IRAC that explains whether the rest of the conspirators will be liable



for the other crime or crimes committed by the co-conspirator. For example, we discussed Donna’s potential liability under Pinkerton for the kidnapping committed by Carl. And since the solicitation came up in a conversation between Donna and her co-conspirator, Carl, this tells us that we need to do a header for Carl’s liability for solicitation to commit murder, and IRAC it. We can rule this out pretty quickly, which is what you’ll need to do on an exam. Solicitation to commit murder is obviously not a foreseeable consequence of larceny, nor did Donna commit the solicitation in furtherance of the conspiracy. Therefore, Carl is not responsible for solicitation to commit murder.

Lee Burgess:

And with that, we’ll wrap up our podcast for today. I want to take a second to remind you to check out our [blog](#) at BarExamToolbox.com, which is full of helpful tips so you can 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. 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 Lee and Alison at [lee@barexamtoolbox.com](mailto:lee@barexamtoolbox.com) or [alison@barexamtoolbox.com](mailto:alison@barexamtoolbox.com). Or you can always contact us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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