



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we have another in our “Listen and Learn” series – this one is on competence, a topic in Professional Responsibility. 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 going to talk about competence. This issue comes up in many California bar essays addressing Professional Responsibility. While not difficult to understand, it is not always an obvious issue to spot when quickly reading through a fact pattern. There are some common twists and nuances you should remember if you want to get full credit for addressing the issue on an exam.

Lee Burgess: So, let’s start with the rule. The ABA rule addressing competence provides: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Lee Burgess: The California rule provides a lot more detail on the issue of competence. The actual rule is rather long, but the essential language states: A lawyer shall not act intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence. The ability to perform the services mentally, emotionally, and physically are also specified in the rule. If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer may provide competent representation by, one, associating in another lawyer whom the lawyer reasonably believes to be competent; two, acquiring sufficient learning and skill before performance is required; or three, referring the matter to another lawyer whom the lawyer reasonably believes to be competent.

Lee Burgess: Interestingly, the California rule also states: A lawyer may give advice or assistance in an emergency, even when the lawyer does not have the skill ordinarily required, if referred to, or association or consultation with another



lawyer would be impractical. However, assistance provided in an emergency must be limited to that reasonably necessary in the circumstances.

- Lee Burgess: These vastly different versions of the rule beg the question – are these completely different rules? Well no, mostly. Much of what is spelled out in the California rule has actually been interpreted into the ABA rule over the years. The only difference between the two is the carve out in the California rule for emergencies, and the heightened standard for committing a breach of the duty. Therefore, a more concise phrasing of the rule that would work for both an ABA and California discussion might read as follows: A lawyer has a duty to act competently, which requires providing competent representation to a client using appropriate skills, knowledge, and thoroughness. A lawyer who is not initially competent, may still take on a case if the lawyer is committed to becoming competent, one, through research and becoming familiar with that area of law; or two, by associating with a lawyer who is already competent. If a lawyer is unable to take either of these measures, then a referral should be made to a lawyer who can properly represent the client.
- Lee Burgess: In California, a lawyer who is not competent is allowed to take a case in an emergency, but must end that representation once the emergency is over. The California rule also provides that the lawyer only breaches the duty of competence if the lawyer acts intentionally, recklessly, or repeatedly without competence.
- Lee Burgess: There is a lot you can do with this rule depending on the facts you are given in a question. So, let's consider how to use this rule in a bar essay. The following hypo is part of a [California bar question from July of 2018](#):
- Lee Burgess: “Betty and Sheila, who have been friends for a long time, were charged with armed robbery. They decided to hire Betty’s uncle, Lou, as their lawyer. Lou is an estate planning attorney and has never represented defendants in criminal cases before.
- Lee Burgess: Two days later, Lou represented both defendants at the joint arraignment. He angered the court during the arraignment because of his unfamiliarity with criminal procedure, and the court relieved Lou and appointed new counsel for Betty and Sheila.”
- Lee Burgess: Okay, remember, for purposes of this podcast we are going to focus on the issue of competence and ignore, for now, the potential conflicts posted by this scenario. The question tells you right away that Lou is an estate planning attorney and has never represented defendants in a criminal case before. So,



you will need to address the question of competence. It is probably safe to assume he lacks the appropriate skills and knowledge at this time, especially since he has never represented criminal defendants before. However, you want to mention that Lou can take on this representation as long as he is willing to spend the time to get competent by researching the law in this area, or by associating in another lawyer who would be considered competent to represent these criminal defendants. Because the fact pattern does not tell us Lou did either of these things, we might be able to conclude Lou violated his duty of competence. This conclusion seems to be confirmed later in the hypo, when we are told the court became angry with Lou because of his unfamiliarity with criminal procedures.

Lee Burgess: So, Lou acted incompetently, right? Well, not so fast. Remember, in California attorneys are allowed to take cases that might challenge their competency when there is an emergency. Here, Lou appeared with Betty and Sheila for their arraignment just two days later. That short timespan might support the conclusion that this was an emergency. Additionally, other than being told Lou was lacking basic knowledge of criminal procedure, there are no other facts here supporting the conclusion he was acting intentionally, recklessly – although maybe a little, or with gross negligence. We also have not been provided with any facts suggesting Lou’s incompetence happened more than this one time. So, while Lou may have violated his duty of competency under the ABA standard, he might be able to avoid a violation under the California rules.

Lee Burgess: Let’s consider another hypo from [July 2008](#):

Lee Burgess: “Alex is a recently licensed attorney with a solo law practice. Booker, a college friend, asked Alex to perform legal work to form a partnership between Booker and Clare. Because Alex had no experience with forming partnerships, he hired Dale, a recently disbarred attorney, as a paralegal. Although Dale had no paralegal training or certification, he did have many years of experience in the practice of law, including the formation of partnerships. Alex notified the State Bar about hiring Dale and notified Booker and Clare about his disbarred status.

Lee Burgess: Dale spent four hours on his own preparing the partnership documents and meeting with Booker and Clare about them. Alex spent a total of two hours on the partnership matter, including the initial meeting, reading the documents to learn about partnerships, and a final meeting with Booker and Clare.”

Lee Burgess: The California rules allow an attorney to hire a disbarred attorney as long as the information is fully disclosed to the relevant parties. That is not an issue we are going to discuss here, but I wanted to address the “elephant in the room”.



Lee Burgess: Here there are a few facts that trigger the issue of competence. First, Alex is a new attorney, who has a solo practice, and has no experience forming a partnership. There is the additional fact that Alex only spent two hours on the partnership matter. While that should probably be part of the discussion, don't simply assume that means he was acting incompetently, given the full context of the facts.

Lee Burgess: So, when addressing this on the bar, you would probably start by acknowledging Alex's inexperience with partnerships, evidencing his lack of competence when he agrees to do the work for Booker and Clare. The fact he is a solo practitioner suggests he has no one to consult with immediately to help him with this matter. However, Alex displays a desire to get competent by hiring Dale, who does have this experience. Dale spends about four hours preparing the documents, and Alex spends another two. If this is not a complicated partnership matter, this might be enough, but since part of that time was spent in meetings, how much time did he really spend learning about the subject? This is a potential problem that should be discussed.

Lee Burgess: The discussion should also address Dale's status as a disbarred attorney who does not have a paralegal certificate. Does this meet the standard set out in both the ABA and California rules for "associating" in another attorney who is competent? Well, maybe not, but it might help Alex meet the requirement that he put in the time to learn about this particular area of law. Dale might be viewed as a resource that educated Alex.

Lee Burgess: Finally, you can quickly dispose of the idea that under California rules an emergency may have justified this representation. The facts present no emergency. Finally, don't forget to mention whether you think this conduct is intentional, reckless, or grossly negligent, which would be necessary to find a violation of the rule in California.

Lee Burgess: That's all we have time for today! We hope you found these hypos to be helpful examples of how to work through competency issues. 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 have any questions or comments, please don't hesitate to reach out to Lee and Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website [contact form](https://www.barexamtoolbox.com/contact-form) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!



RESOURCES:

["Listen and Learn" series](#)

[Private Bar Exam Tutoring](#)

[The Brainy Bar Bank: Streamlining Bar Study](#)

[California Bar Examination – Essay Questions and Selected Answers, July 2018](#)

[California Bar Examination – Essay Questions and Selected Answers, July 2008](#)

[Podcast Episode 24: Tackling a California Bar Exam Essay: Professional Responsibility and Evidence](#)

[Podcast Episode 47: Preparing for the MPRE \(w/Brittany Raposa\)](#)

[Professional Responsibility: ABA Rules New to California](#)

[Do the Changes to the California Rules on Professional Responsibility Really Mean "Change?"](#)