

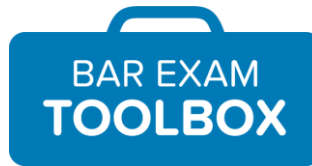
Lee Burgess: Welcome back to the Bar Exam Toolbox podcast. Today, we have another episode of our “Listen and Learn” series – this one discussing consideration. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar exam experience, so you can study 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 or rating 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 will be discussing consideration – a subtopic of Contract law. Consideration is one of the most important concepts in Contracts, because it is one of the three requirements of [contract formation](#). A contract is validly formed when there is an offer, acceptance, and consideration. Today’s episode will just focus on consideration, but for a discussion on offer and acceptance, be sure to check out previous podcast episodes we have linked to in the show notes.

Lee Burgess: With that, let’s start with the basics. What is consideration? At its core, consideration deals with the commitment to perform a promise in the future. There can be a valid offer, and valid acceptance of that offer, but the contract will not be enforceable unless the promisor receives consideration from the promisee, and the promisee receives consideration from the promisor. This means both parties must give consideration for there to be a valid contract.

Lee Burgess: So, how does a party provide consideration? There are two tests: bargained-for exchange, and the benefit/detriment theory. You do not need to satisfy both to have valid consideration; you only need to satisfy one of the tests for each party. You can satisfy both for a single party, but it is not necessary. I’ll explain each of these one by one.

Lee Burgess: First, bargained-for exchange is when one party’s promise or performance induces the other party’s promise or performance. This can also be known as mutual inducement, where one party induces the other party to do something. For example, let’s say that Stan and Fiona enter into an agreement where Stan promises to give Fiona a car if she gives him \$10,000. There would be valid consideration here under bargained-for exchange because Stan’s promise of a



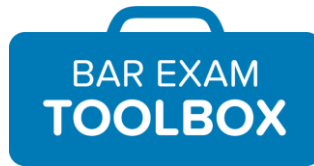
car induced, or caused, Fiona to give him \$10,000, and Fiona giving Stan \$10,000 induced him to give Fiona a car. Fiona would not give Stan \$10,000 without this agreement; she was induced to do so because of the promise of a car. Likewise, Stan is not giving Fiona the car out of the goodness of his heart; he is doing it because Fiona gave him \$10,000.

Lee Burgess: The second way to satisfy consideration is through the benefit/detriment theory. This is where there is valid consideration if there is a benefit to the promisor or a detriment to the promisee. In other words, there has to be a benefit to the person making the promise or a detriment to the person accepting the promise. The key word here is “or”. You do not have to have both a benefit to the promisor and a detriment to the promisee; you only need one or the other.

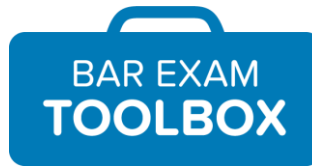
Lee Burgess: Under this theory, a “detriment” is any relinquishment of a legal right or an action taken that the promisee would not otherwise take. Try not to get confused by this. It is normal to think that “detriment” means harm, loss, or injury. However, a detriment can be something beneficial to the promisee. For example, a detriment could be to stop smoking. This, although would be beneficial to the promisee, is considered a detriment because the promisee would be giving up his legal right to smoke.

Lee Burgess: What is the purpose of consideration? The purpose of consideration is to separate enforceable promises from unenforceable promises. If there is valid consideration, then the promise is enforceable. If there is not valid consideration, then the promise is not enforceable.

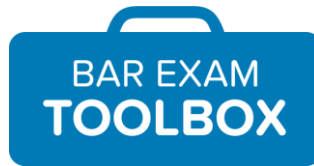
Lee Burgess: An example of a promise without consideration is a gift. A purely gratuitous promise is not enforceable as a contract. To show how gifts are not supported by consideration, let’s look at an example. Imagine your birthday is coming up. I promised to give you a new laptop. However, the day before your birthday we got into a big fight and I decided to not get you the laptop. You would likely be very upset about this, but would have no recourse because this is not a promise supported by consideration. First, there is no bargained-for exchange, or mutual inducement. There is nothing you are doing for me that is causing me to give you the laptop. Rather, I am doing it out of the goodness of my own heart. Second, the benefit/detriment theory is not satisfied. I, the promisor, am not gaining a benefit, and you, the promisee, would not be incurring a detriment. Let's see how well you understand consideration by looking at a couple California bar hypos. This one is adapted from the July [2008 California bar](#):



- Lee Burgess: “On May 1, Owner asked Builder to give her an estimate for the cost of building a wooden fence around her back yard. Builder gave Owner signed written estimates for \$4,000 for a cedar fence, and \$7,000 for a redwood fence. Owner said she liked the idea of a redwood fence but wanted to think about it before making a decision. In any case, she wanted the fence completed by June 1.
- Lee Burgess: By May 14, Builder had still not heard from Owner. He was concerned he would not finish by June 1 if he did not start work immediately. Thus, he bought the redwood and completed construction of the fence on May 24. When Owner saw the completed fence, she sent Builder a letter saying, ‘You did a great job, but I never agreed to go ahead with the fence, and I certainly hadn’t decided on redwood.’
- Lee Burgess: May Builder recover all or any part of \$7,000 from Owner?”
- Lee Burgess: You might be thinking there is not a valid contract here because of the lack of acceptance on the owner’s part. Although that might be true, let’s assume there is a valid offer and acceptance and focus just on consideration.
- Lee Burgess: First, there would be bargained-for exchange here. The reason Builder is building the fence is induced by Owner’s promise of money. Likewise, the reason Owner is going to give money to Builder is induced by Builder constructing the fence. This means there is mutual inducement, and under the bargained-for exchange theory there is valid consideration.
- Lee Burgess: Second, there is also valid consideration using the benefit/detriment theory. Builder is the promisor and he received a benefit of money from Owner. In addition, Owner, the promisee, incurred a detriment because she took an action she would not otherwise have taken – she paid Builder money.
- Lee Burgess: Remember, we do not need to satisfy both tests to have valid consideration, but in many instances you will be able to satisfy both.
- Lee Burgess: Let’s look at one more – this one is adapted from the [July 2006 California bar exam](#):
- Lee Burgess: “On Monday, Resi-Clean advertised its house cleaning services by hanging paper handbills on doorknobs in residential areas. The handbills listed the services available, gave Resi-Clean’s address and phone number, and contained a coupon that stated, ‘This coupon is worth \$20 off the price if you call within 24 hours and order a top to bottom house cleaning for \$500.’



- Lee Burgess: Maria, a homeowner responding to the handbill, phoned Resi-Clean on the same day and said she wanted a top to bottom house cleaning. Maria said, 'I assume that means it would be \$480 because of the \$20-off coupon, right?' The employee responded, 'That's right.'
- Lee Burgess: When Resi-Clean finished cleaning the house, Resi-Clean billed Maria \$480. Is there valid consideration to support this agreement?"
- Lee Burgess: Remember, for a contract to be enforceable, both parties must provide consideration through either bargained-for exchange or the benefit/detriment theory. In this example, both Resi-Clean and Maria gave valid consideration through bargained-for exchange. The reason Resi-Clean cleaned Maria's house was because of her promise to pay, and the reason Maria paid Resi-Clean was because they cleaned her house.
- Lee Burgess: Now that we have a good foundation of consideration, let's go a little deeper. Not every situation where a consideration test is satisfied will result in enforceable consideration. There are five situations where there is never valid consideration: conditional gifts, past consideration, pre-existing legal duties, large disparities, and illusory promises. I'll explain these one by one.
- Lee Burgess: First is a conditional gift. A conditional gift is where the promisee incurs something that seems like a detriment, but in reality it is just a gift. For example, let's look at a hypo adapted from the [July 2002 California bar exam](#):
- Lee Burgess: "Travelco ran a promotional advertisement which included a contest, promising to fly the contest winner to Scotland for a one-week vacation. The advertisement stated: 'The winner's name will be picked at random from the telephone book for this trip to Golfer's Heaven. If you're in the book, you will be eligible for this dream vacation.' Polly called the telephone company and had her number changed from an unlisted telephone number to a listed one.
- Lee Burgess: Luckily for Polly, her name was picked, and Travelco notified her. That night, Polly celebrated her good fortune by buying and drinking an expensive bottle of champagne. The next day she purchased new luggage and costly new golfing clothes for the trip. A week later, Travelco advised Polly that it was no longer financially able to award the free trip that it had promised.
- Lee Burgess: Can Polly sue for a breach of contract?"
- Lee Burgess: Let's think about this one, again just focusing on consideration. First we can start with Polly. You might be thinking that there is valid consideration under



the benefit/detriment theory. You could make an argument that Polly incurred a detriment of having to call the telephone company up to change her number to a listed one, which is an action she would not have taken but for the promise. Although this could be true, there is still not valid consideration, because this is a conditional gift. The reason is because Travelco did not give any consideration. Travelco, as the promisor, did not gain a benefit. In addition, there is no bargained-for exchange, because that detriment is not the reason Travelco is giving away the free trip. In other words, Travelco is not being induced by the fact that Polly put her number as listed in the phonebook. To have valid mutual inducement, and not a conditional gift, there has to be a relationship between the promises or performances inducing each other.

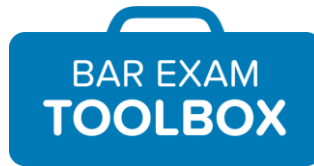
Lee Burgess: You could be thinking there is another route of recovery for Polly – [promissory estoppel](#). Promissory estoppel can be used as a substitution for consideration. For a further discussion on promissory estoppel, check out one of our earlier episodes listed in the show notes.

Lee Burgess: The next situation that invalidates seemingly valid consideration is past consideration. Past consideration is where the promisee's detriment was suffered before the promisor made the promise. In these situations, the detriment could not have been induced by the promise and as a result cannot constitute valid consideration. This is true unless the consideration has substantially changed. Try this example:

Lee Burgess: “Sally is an independent contractor for Publishing Co. Her boss asked her to write a story about growing up in the city in exchange for \$500. Sally immediately thought of a paper she wrote in college about that very same topic. She quickly pulled up the story, changed a few names, and submitted it. Did Sally give proper consideration?”

Lee Burgess: This is a classic example of past consideration. Whenever you see facts indicating that something done in the past is being used as consideration, you should do a past consideration analysis. You could be thinking that Sally suffered a detriment by writing the story. However, the entire story was already written, meaning the detriment Sally suffered was not induced by the promise. In addition, the consideration did not change substantially. All Sally did was change a few names, which cannot be seen as substantial enough to make this not past consideration.

Lee Burgess: The next situation where there is never consideration is when there is a pre-existing legal duty. The pre-existing legal duty rule is when the “detriment”



suffered is really just a promise to act in the same way as the promisee's then existing legal obligation. Imagine this:

Lee Burgess: "Joel was 22 and in college. His uncle, Uncle Tom, was concerned about Joel's grades due to his excessive drinking. Uncle Tom promised Joel if he refrained from drinking alcohol for the rest of the year, he would give him \$1,000. At the end of the year Joel informed Uncle Tom he refrained from drinking. Did Joel provide valid consideration?"

Lee Burgess: In this example, Joel did provide valid consideration. Joel, the promisee, suffered a detriment by forgoing drinking alcohol for the remainder of the year, which is a relinquishment of a legal right.

Lee Burgess: Let's change the facts slightly to illustrate the pre-existing legal duty rule. This time instead of being 22, Joel is 19. The rest of the facts stay the same. If Joel was 19, there would no longer be valid consideration because the "detriment" he suffered is not any more than what he was already legally obligated to do. In America the legal drinking age is 21. If Joel is only 19, he is already legally obligated to refrain from drinking, meaning there is no valid consideration because it is a pre-existing legal duty.

Lee Burgess: The fourth situation where there is never consideration is when there is a large disparity in the exchange. For example:

Lee Burgess: "Josie is a car fanatic and has been eyeing Tyrone's car for a few months now. She finally worked up the courage and offered Tyrone a broken record player for his Mustang. Tyrone initially agreed, but when the time came for the exchange Tyrone backed out of the deal. Was there proper consideration to warrant this agreement enforceable?"

Lee Burgess: This example is pretty obvious. There is not valid consideration because the disparity between the exchange is too large. A broken record player is not equal to a Mustang. The situations you see, though, will likely not be this obvious. There is not a set number for when the disparity is too large, so it will be a very fact-specific analysis and will depend on the arguments you make in support of your position.

Lee Burgess: The final situation in which there is never consideration is when there is an illusory promise. An illusory promise is where, after the agreement has been made, the terms are so indefinite that the promisor has the choice to perform or not. Imagine this example:



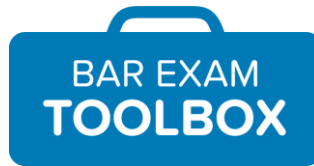
Lee Burgess: "Aaron's boss sent a staff-wide email saying, 'You will get a holiday bonus of \$5,000 if the company does well.' Is there valid consideration?"

Lee Burgess: There would not be valid consideration, because the statement is too indefinite. What does "does well" mean? That phrase is too vague and it leaves discretion completely in the hands of the boss. The boss can, then, ultimately choose whether they want to give the bonuses or not. This would be different if the email said, "You will get a holiday bonus of \$5,000 if the company raises its profit margins by 10% by the end of the year." This is no longer indefinite and the boss no longer has a choice to decide whether to give the bonuses or not. If the profit margins increase by 10%, the boss has to give the bonuses.

Lee Burgess: We are running out of time, so let's recap what we've learned. We started this episode with what consideration is. Consideration is an element of an enforceable contract. This means that to be enforceable, both parties must give valid consideration. Consideration can be satisfied in one of two ways. First is bargained-for exchange, where the promise or performance of one party is what induces the promise or performance of the other party. Second is the benefit/detriment theory. This is when either the promisor gains a benefit, or the promisee induces a detriment.

Lee Burgess: We also talked about the five situations where there would never be consideration, even if it seems like there is. The first is a conditional gift, where you need to ask yourself if that specific detriment is really what induced the promisor. The second is past consideration, where actions taken in the past cannot constitute valid consideration unless they have substantially changed. The third is the pre-existing legal duty, where it is not consideration to act in a way you are already required to. The fourth is when there is too large of a disparity in the exchanges. The fifth is an illusory promise, which is where the terms are so indefinite that the promisor retains the choice to perform.

Lee Burgess: Alright, that's a wrap for today. Glad you could join me as we discussed consideration! 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 myself or 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!



**RESOURCES:**

[“Listen and Learn” series](#)

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

[California Bar Examination – Essay Questions and Selected Answers, July 2006](#)

[California Bar Examination – Essay Questions and Selected Answers, July 2002](#)

[Podcast Episode 95: Listen and Learn – Promissory Estoppel](#)

[Podcast Episode 161: Listen and Learn – Contract Formation](#)