

# Tips for Passing Day One of the California Bar Exam

Only 32.5% passed the February 2023 California Bar Exam. Failure to know the law after three years of law school and an extensive bar review course is not a logical reason for a 67.5% failure rate. Knowing the law is not enough. You must also be able to approach the law and take the test as a practicing lawyer would. I am a 28-year Texas and now California attorney who passed the February 2023 California Bar Exam on my first attempt. These are my lawyer tips for passing day one of the California Bar Exam.

If you don't want to fail, you must start by understanding why so many people do. California's unique day one is the cause of the low pass rate. Day one consists of five one-hour essay questions and a one-and-a-half-hour performance essay. Day two is the same multistate multiple-choice test administered in most US states. Since there is no reason to believe that California exam takers perform substantially worse on day two, California's low pass rate can only be attributable to poor scores on day one. A quick internet search of bar exam pass rates shows that other states have roughly double the pass rate of California.

Day one is an unfair test. Any test with a 67.5% failure rate is not fair. Since day one scores bring the higher day two pass rate down, a guestimate of the day one failure rate is probably close to 80%. Additionally, there is little separation between passing and failing. About half of all test takers fail by less than 4 points on a 100-point scale. Of those who pass, more than 2/3rds pass by less than 4 points. In other words, 70% of all test takers score between a failing D+ and a passing C-. Get over any thought that day one is a special test that tests your knowledge of the law. It does not.

Attorneys do much better on the test than recent graduates. Attorneys licensed in another state can take only the day one test and skip day two. Those attorneys have a 57% pass rate, about double the regular pass rate. While attorneys seeking to be licensed in a second state tend to be higher skilled, they are not fresh on the material like a recent graduate, tend to practice in a limited or specialized field, are confused by already learned law contrary to California law, and have less time to study. What these attorneys do have, as Liam Neeson would say, "is a very particular set of skills they have acquired over a very long career."

Experienced attorneys can comfortably write with style in a persuasive, non-formulaic manner, state the law concisely, creatively analyze the facts, and apply the facts to the law. They can do it naturally, confidently, efficiently, and quickly. They understand the concept of being a specialist or having specific areas of law entirely under their dominion and control. They understand the need to be the most knowledgeable person in the room and know the work it takes to achieve a teacher's mastery of an issue. They are experienced at teaching a client, a judge, or a jury. They can be confident even when wrong, see both sides of an issue, argue point and counterpoint, and use the facts to make their arguments. Experienced attorneys are used to hearing the facts first and letting the facts guide them into the law. They have in-practice and life experience that makes learning more straightforward because they relate the new material to those past experiences.

Everyone has these skills to some degree. If you are a recent graduate, this article will call your attention to these skills and instill some confidence to use them on the test. If you are an attorney taking the exam, the article will help you to use what you already know.

## **Lawyers Work Quickly**

Speed matters most. Lawyers are used to working efficiently and quickly. Most are used to billing by the hour and have a demanding workload. Time is always a concern, and speed matters. Several other lawyer skills, including confidence, conciseness, and experience, also make you faster.

The test is highly time-pressured, and simply having more writing time will significantly increase the likelihood of passing. An extra 15 minutes per question would significantly increase the pass rate. To get that extra time, you must work to increase your speed. Ask yourself how fast you read and comprehend. Do you need to get faster at this skill alone? Can you type or handwrite more quickly?

If you are doing something for the first time, you probably will not be able to do it fast. If you are writing in a new style or manner, you will probably be slow, so it is vital to stay true to your existing writing style unless you plan to spend hundreds of hours learning a new style. If possible, take the skills that you have and tune them for the test rather than learning new writing skills.

## **The Performance Essay**

Nowhere is speed more important than the performance essay. Ideally, when taking the performance essay, you need to review the materials in 30 minutes or less, and you need to be writing for an hour or more. This advice may contradict your bar prep courses, which have you writing for far less time.

The performance essay material is not that difficult. The law is not complicated, consisting of a general rule and some exceptions. Highlighting the law in yellow and the facts in green as you go. Make very few notes, maybe a mini-outline or some topics to cover on scratch paper. On case law, make notes, not a full brief on the case itself. But most importantly, read and comprehend and have the information in your head. It is not complicated, and it is not too much material. You should be able to take the facts and law in and spit them back out quickly.

You do not have time to have a pretty outline, to take your time, to read the material once, and then to reread it. Don't waste 5 minutes or 10 with an initial review of the materials. This is a read-once, and start writing as soon as possible assignment. You need headings and guidance for the grader so they can quickly find your points on their grading key, but you can add them as you go. You can have paragraphs out of order. You can forget a heading and then go back. You can cut and paste or write headings in the margins. Your strategy should be to type or write as fast as possible for an hour to get all your points onto your paper. Even writing for an hour, you will run out of time. When time is up, you should have more that you want to say.

While the quick review of the materials and one hour of writing may not work for the skill set of all test takers, such an approach is what you want to strive towards. The performance essay has more points per minute than any other portion of the two-day test. When you are done, all the rules/laws in yellow and all the facts in green should be in your answer. The idea of "no orphan facts" applies as much, if not more, to the performance essay than the other essays. Every minute that you are not writing on the performance essay, you are losing points.

## **The Essays**

You need extra time to run down the wrong rabbit trails. All the essays are time-intensive, and you will run out of time. The essays are classic law school issues spotting and applying the law. Many times, you are going to erroneously see an issue that is not the point of the question. You want to be fast enough that you have time to occasionally go down the wrong rabbit trail while still having time to address the correct issues. Sometimes, you will run down the wrong rabbit trail because you do not know the material well enough. Sometimes, knowing the material so well has you running down the wrong rabbit trail on issues that are not key to a passing answer. Either way, you need to be quick to have time to overwrite the answer. You do not lose points for discussing issues not on the grader's scoring sheet, but you do lose time.

Reviewing the model sample answers from past tests, I always think the answers are so short. Most people could rewrite a model answer in 15 minutes. Remember, these are the best answers from test takers who spotted all the issues and did not overwrite the wrong topics. You will overwrite incorrect issues, so you must ensure you have the time to do so. If you are lucky enough to be in the 10% of test takers who see every issue and pass easily, you do not need to be so quick.

The approach to use on the essays is to have an issue outline for each subject and to issue spot from that outline as quickly as possible. A great deal of time can be lost recreating your outline once the subject matter of the question is identified. Additionally, cross-over questions that address two or more subject matters can require the re-creation of multiple outlines. It is imperative that you can recreate these outlines quickly. Practice time should be used to get faster at doing so.

To be fast, you must be comfortable with the writing style needed for the essays. You need to be comfortable stating the rule to show the graders that you know the law, applying the facts to the law, and then asserting a conclusion. While this may seem like test taker or lawyer 101, it is not. You must do it

repeatedly, even when the rule may seem obvious to you. If you are not a lawyer and went to a law school where multiple-choice tests were common, this may be harder for you to do comfortably. If you are not comfortable writing in this style, you will not be fast enough and need to practice.

## **Endurance and Planning**

Day one of the test is long, and you will not be fast if you are tired. The afternoon part of day one of the February 2023 bar started almost two hours late because of poor administration at my testing center. There was a significant delay to the morning start and the afternoon start. The line to get into the testing center in the morning actually wrapped around the building. The administrator's reading out of the test rules before the morning and afternoon sessions seemed to take forever. The lunch break was shortened, and finding good food nearby was difficult. When I started the 1.5-hour performance essay question at 4:30 in the afternoon, I was tired, and my back hurt from sitting and test-taking. The most crucial 1.5-hour performance essay question comes last after the five essay questions. When you need to be at your best and sharpest, you are the most worn out. Because of the delayed start, I was done testing at about 6 p.m. Since I was on central time, it seemed like 8 p.m. Prepare for a day like that. This is an endurance test.

You need to be fresh for the test day. You know yourself and know what it takes to make that happen. You need to give being at your best real attention. I traveled to the testing center two full days before the test and stayed those nights at the hotel connected to the testing center. You should have food in your room with you. You should be able to review a few notes during lunch and not have to fight to get food. If you are a coffee drinker, ensure you have had the right amount and maybe a lunchtime coffee pick-up.

While not for everyone, reviewing my checklist during lunch was a big help. The professional responsibility question was not on the morning portion of the test, so I used about 30 minutes of the lunch break to ensure PR was fresh in my head.

## **Lawyers are Specialists**

To ensure you pass the test, you must create some separation between yourself and other test takers by having near-complete teacher-level mastery of some subjects. These are your "please be on the test subjects." These are the essays that you are trying for as close to a perfect score as possible. These are essays that you are probably going to overwrite the answer.

Practicing law requires complete mastery in some areas. Lawyers are faced with specific problems that require taking a limited area of law and fully understanding that area. Lawyers understand, preparing hours for a 10-minute hearing, writing a 10-page brief on one legal question, or explaining multiple possible outcomes to a legal dilemma. Lawyers know what they know, they focus on it, they find the correct answer, they are prepared to answer any question the judge may have, and they try to know their topic better than the judge and opposing counsel. They write long E-mails to clients dwelling on every fact and law, trying to cover every possible issue and outcome. They tend to practice in concentrated or specialized areas. In contrast, the law school experience is learning a large volume of material without

such specialization. It is that level of mastery preparation that is needed to write near-perfect essay question answers.

Subjects that come naturally to you, the ones that you are already good at, and the ones you like and enjoy learning more about are worth mastering to try for a near-perfect score on those questions. Maybe you are a lawyer who practices in these areas of law or a recent grad who wants to work in this field. These subjects should be refined to the masterly level rather than overlooked because you think you have them down. The goal is to score 9 out of 10 points when they are on the test. The other purpose is to give yourself a break during the test, where you feel good and highly confident. Which areas you focus on mastery level prep depends on you. If starting from scratch, certain subjects are less conceptual, and it is easier to get this level of mastery. PR is a great area to master because you know it will be on the test, and it is not complicated to learn.

## **You Need to Be a Professional Responsibility Specialist**

PR is the ultimate speed checklist specialization question. It takes time to learn and master, but it is not hard. Why not annihilate the professional responsibility question?

On the February 2023 test, PR was an entire essay question. While PR can be a crossover question, it usually has its own essay. On the February test, it was an afternoon question, so it was easy to review PR at lunch and go directly to that question to start the afternoon session. While usually, it is the best strategy to do the questions in order and within the time allowed for each question, attacking the professional responsibility question first in the afternoon session is a good approach. Remember that the afternoon session has only two essays, and the performance essay is the last question. Spending one or two minutes looking for the PR question in the morning session might also be a good approach if you are comfortable with a little bit of skipping around the test questions.

While it is not a novel approach to have a checklist and address each item on the checklist when answering an essay, PR is the ultimate checklist question. I took the approach that I would list every duty a lawyer owes anyone and discuss it to answer the PR question. I am not sure if that is always the best approach. Still, it worked for the February 2023 bar question because the fact pattern had the lawyer arguably violating almost every duty. The fact pattern should allow you to use the facts to discuss almost every duty. You must use the facts and have no orphan facts in answering the PR question.

## Checklist of Duties

I used the following rather dull list of letters as the basis for my checklist of duties

### CCCC SS FF DRWPH:

**Conflicts (aka the duty of loyalty):** Potential and actual, always discussing what to do when a conflict is discovered.

**Communicate:** Client updates and significant developments.

**Confidentiality:** Current and past, always discuss conflicts.

**Competency:** Skill and knowledge.

**Safekeeping of property:** Usually regarding fees or other funds in IOLTA trust funds but also property safekeeping.

**Scope of Representation:** Fee contracts and breadth of representation.

**Fee disputes:** Retainers, contingent fee rules, amount of fee.

**Fairness:** To the public, the client, opposing counsel, and the court. Fairness overlaps with professionalism.

**Diligence:** Can often argue either way.

**Reporting:** Violations of the Rules.

**Withdrawing:** And action after withdrawal.

**Professionalism:** Fairness, honesty, and candor.

**Honesty:** Included under fairness and professionalism, one act can trigger the discussion of multiple duties.

You must discuss the differences between the ABA and California rules. It takes extra work to learn these differences, but they are easy points. When you can say that under one set of rules, a violation occurred, and under another set of rules, the action is allowed, you know you are getting some points.

The fact patterns tend to have a lawyer doing something wrong to trigger a discussion of the rules. When in doubt, the attorney is probably breaking the rules. Your conclusion needs to take a position on whether a rule was violated or if there is a valid defense of the lawyer. A good answer will explain what happens after the rule violation. Should the attorney withdraw? Should or could opposing counsel move to disqualify? What happens after the withdrawal? Should fees be forfeited? Is there a cause of action against the attorney?

There are a handful of other topics to be on the lookout for in PR in addition to the rules outlined above, such as advertisement rule violations, unauthorized practice of law, and liability for the action of other attorneys.

## **Lawyers Know the Facts**

When a lawyer talks with a client, the client tells the lawyer facts, and the lawyer seeks out the law to apply to the factual situation. In contrast, law students are much more focused on learning the law. Lawyers are used to finding the facts, trying to get better facts, and arguing the facts. When first approached by the client, the lawyer often does not know the law. Often, the lawyer thinks he knows the answer to the client's question but must find the law to support his or her foregone conclusion. Often, a lawyer wishes the facts were just slightly different for the case or the client. You may also learn to focus on the facts for law school test taking, but it comes more naturally to an experienced attorney. Practicing law is a fact-intensive profession.

The essay, and especially the performance essay, are fact-intensive. If a fact is not being used in your answer, you probably missed something. No orphan facts! If you have good fact analysis skills, you need to be bold about using them. If not, work on it.

## **The Fact Forward Performance Essays**

The task of the performance essay needs to be looked at as applying the facts to the law. The format of the performance essay assignment does not matter because the actual assignment is to apply the facts to the law. Sure, you can see it as applying the law to the facts, but the performance essay is far more fact-intensive than law-intensive. The law is typically not complicated, there is usually a general rule or two and a few exceptions.

You will be asked to do a task like writing a letter to the client, a brief to the court, or a memorandum to your boss, but always remember the actual assignment is to apply the facts to the law. Do not let the format of the assignment throw you. If you go into the performance essay with that understanding, it relieves that stress about the manner of the assignment. Naturally, some of us are more comfortable doing one type of assignment over another, but seeing through the format is essential.

The format of the February 2023 test was startling to some test takers, particularly law students. That test asked you to write (make) an oral argument. As a trial attorney, I was glad to have the assignment of making an oral argument. However, the actual assignment was to apply the facts to the law. Always follow the rules of proper format, but the format does not have to be perfect. Do not let the form of the question cause you too much grief.

The February 2023 test gave a transcript of a first hearing to prepare for a follow-up hearing. The judge ended the first hearing by saying that the law was straightforward. I started my oral argument by saying, "Your Honor, it is just as you said at the last hearing; the law is not complicated; what matters is the facts." I then gave a massive recitation of the facts that were beneficial to my argument, then discussed the law and how it applied to the facts. I, of course, contrasted the other facts and laws. That was my natural writing style and natural oral argument style. If you can state the facts in an oral argument in a way to have the judge on your side before even discussing the law, you win. Is that the best way to do it for the graders? I am not sure. But I am sure it is the best way to do it in real court. I was also sure it

was the best way for me to do it quickly. Stay true to your style and normal practice. To be safe, I put in many headings for the graders.

### ***Lawyers are used to being creative with the facts and making inferences.***

The February 2023 performance essay asked the test taker to argue that a hospital bed confession was voluntary. The transcript of the confession was given. At the end of the confession, the defendant says to the police, “I may stay awake. I am going to try to watch the University of Columbia game on TV. I went there for a couple of years”. That simple statement is a massive dumping of facts and can be used to discuss many aspects of the voluntariness of the confession.

From those 3 sentences that total 26 words, you can argue a great deal. The defendant is not rushing to call for help after the interview; he is not calling his mother or an attorney; he is not immediately remorseful that he talked; he is not exhausted; his main concern is the game; he is college-educated for at least two years, maybe more; he is smarter than the average person; he is in good enough physical shape that he thinks he can stay awake; he thinks he can stay awake till midnight since the interview is at 8 p.m., he is friendly with the detectives at the end of the interview enough to mention sports; he is relaxed and not stressed; he is mentally alert enough to know that a game is about to start on TV and knows which teams are playing. You can add to that list; use the facts!

### **Lawyers are Confident**

You will not b.s. your way through passing the bar exam. You must learn the material. However, confidence might pick up a few points when hit with a challenging question or two. Every lawyer has run across that point where most people panic, but they make the best of the situation. For me, it was the February 2023 constitutional law question.

When that happens, go to your checklist and remember the rules/laws as best you can. Maybe you do not recall the rule by name and cannot precisely state the law. Still, you remember the principles of the law enough to recreate the rule. When you do not know the law, look at the facts and argue the facts. You are going to lose points, but at least get the points that you can.

If you must do this more than a couple of times, you will probably have a hard time but do not crumble. You can get 5 out of 10 points on 3 of the essays if you get a 90% on the other two and the performance essay. You can do even worse than that if you can make up points on day two. You must be confident to fight for every point that you can get. Argue your point as best you can; even if you are wrong, there are points to get. If you know what the answer should be, you can work backward from the answer. Whatever you do, do not crumble, skip a question, run out of time, or get a zero.

Confidence comes from practice and life experience. No matter your level of life experience, use what you have available to work with. The most significant difference between learning law as a young law student and learning it decades later was that I had a real-life situation in my head to apply the law to. I always wondered why the older law students seemed to be some of the best students, and this is why. If

you do not have much real-world or life experience, still be confident to draw on the experience that you have. When studying, especially new subjects, try to relate and compare the law to what you know, even if it is a what-if situation or a TV show. If possible, think of the test questions as real-world people and real experiences. If you are lost on a question, think about it logically and practically.

I end with a thought for repeat test takers because the numbers are staggering. Of the 3,765 exam takers in February 2023, 2,665 (71%) were repeat test takers. Those repeat test takers still had only a 28% pass rate. That means that many test takers are third or more-time test takers. Many of them barely failed. Many of them failed even though they knew the material. Reconsider your overall approach to the test and consider some of these tips in addition to more studying.

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## **Appendix 1**

### **Those Who Fail Barely Fail**

47.5% of all test takers barely failed the test. Performing a little better on just one question is often the difference between passing and failing.

Here is the approximate breakdown for the February 2023 test.

20% bombed the test.

47.5% failed the test by less than 4 percentage points.

22.5% passed the test by less than 4 percentage points.

And 10% passed the test with ease.

The 1.5-hour performance essay is worth 20 points and each of the 5 essays is worth 10 points out of 70 test points. Since 69% is passing, 48 or 49 out of 70 points is passing. Had 47.5% of test takers turned one 5-point essay score into an 8-point score or a 10-point performance essay score into a 13-point performance essay score, they would have passed.

### **Percentages Based on a 70-Point Scale**

45 points of 70 is 64.3%

46 points of 70 is 65.7%

47 points of 70 is 67.1%

48 points of 70 is 68.6%

49 points of 70 is 70.0%

50 points of 70 is 71.4%

51 points of 70 is 72.9%

## **Appendix 2**

### **My Bar Review Strategy**

The most important tip I can give on studying is to be careful to use a bar review specific to California on day one.

I only took day one of the test. I used the blue Mary Basick book to memorize and learn the material. It is an outstanding comprehensive California-specific outline for day one. All the material I needed to know to pass day one of the exam was in that book. I bought and watched the Bar MD videos to prepare for the essay questions. The videos were excellent and, most importantly, designed for the California test. The videos greatly help with preparing the subject outlines and knowing what the graders want. I bought the Mary Basick performance essay book and the Bar MD performance essay videos, but I did not have time to use them except for 5 or 10 hours. Also, I did not want them to change my writing style. The performance essay products were also helpful in quickly bringing me up to speed on what to expect and what the graders wanted in this section.

Most of my time studying was spent memorizing the material in the Mary Basick outline and developing my version of the issue checklists. I found the essay questions with answer grids in the Basick book excellent for helping me practice issue spotting. Those answer grids were a significant time saver, allowing me to do an in-depth review of past test questions in 30 minutes each instead of an hour or longer. I did not do many practice test questions where I sat down and wrote out the whole answer. My plan for the performance essay was just to do it.

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