

Helping Students: Lived Experience Provides Meaning For a World of Fiction

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One day last summer, I gave my kid a hug. She looked at me and said, "You showered." Then she threw a screaming fit.

What does this #toddlermomlife anecdote have to do with bar prep? There are several things, but today we care about how our lived experiences impact how we interpret the words used by bar examiners in MBE questions.

In my story above, context helped me discern my kid's meaning, i.e., "I hate it when your wet hair touches my face." But, for people without the full context of that encounter, equally plausible interpretations of that sequence of events include disappointment that she didn't get to shower, or that she didn't want a hug, or that she just felt like throwing a screaming fit.

In the context of the bar exam, examinees are left to ascertain whether their understanding of statements such as "you showered" matches the examiners' understanding when using those words in a problem. Inevitably an examinee's understanding is built from their experience, or lack thereof, with the factual scenario the examiners use to test a legal concept.

To illustrate one type of disconnect between content and perceived meaning, here is a sample MBE question that my Bar Examination Foundations students dissected in spring of 2019:

A seller sent an email to a potential buyer, offering to sell his house to her for \$150,000. The buyer immediately responded via email, asking whether the offer included the house's front porch swing. The seller emailed back: "No, it doesn't." The buyer then ordered a front porch swing and emailed back to the seller: "I accept your offer." The seller refused to sell the house to the buyer, claiming that the offer was no longer open.

Is there a contract for the sale of the house?

- (A) No, because the buyer's initial email was a counteroffer.
- (B) No, because the offer lapsed before the buyer accepted.
- (C) Yes, because the buyer relied on the offer by ordering the swing.
- (D) Yes, because the buyer's initial email merely asked for information.

In the grand scheme of MBE questions, this is a fairly simple one that tests an examinee's understanding of where the factual line between a "mere inquiry" and a counter-offer that serves as rejection exists. But, in the early bar prep courses I've taught, approximately 50% of students get that question wrong. Classroom conversation revealed that it was usually because their lived experiences affected how they understood the fact pattern.

"It also allows us to have rich conversations about the essays, MBEs, and MPTs, whereas in previous iterations of the course, students were largely doing that work at home."

¹ This question is in both Wanda Temm's *Clearing the Last Hurdle* & Steve Emmanuel's *Strategies and Tactics for the MBE* (6th ed.), the texts that were adopted for Bar Exam Foundations, so I assume it is an NCBE question.

To illustrate², with problem words italicized and reading thoughts/editorializing comments in brackets:

A seller sent an email to a potential buyer, offering to sell his house to her for \$150,000. [This explicitly tells me there is an offer.]

The buyer immediately responded via email, asking whether the offer included the house's front porch swing. [The buyer seems interested, but would like to explore whether a piece of furniture is included in the offer.]
The seller emailed back: "No, it doesn't." [Furniture not included.]

The buyer then ordered a front porch swing and emailed back to the seller: "I accept your offer." (emphasis added) [This particular sentence is where life experiences led to ascribing different meanings to the words used. Some students interpreted "then ordered" as something like two minutes searching before one-click ordering off Amazon before responding to the seller relatively quickly (I'll refer to these as "Group A" students below). Other students interpreted "then ordered" as an ordeal involving consumer reports, comparative customer ratings, etc., because of how they approach or have observed others approach the task of purchasing furniture where days, if not weeks, would pass before buyer emailed seller (I'll refer to these as "Group B" students below).]

The seller refused to sell the house to the buyer, claiming that the offer was no longer open. [No expiry in original offer; no words of revocation preceding buyer's acceptance; no facts provided to allow a reasonable inference that offer expired due to lapse of time. Seller is just being a jerk.]

Is there a contract for the sale of the house?

Based on their divergent understandings of "then ordered a front porch swing and emailed back" some students became susceptible to one particular attractive distractor provided by the exam-writers.

- A. No, because the buyer's initial email was a counteroffer. [Group A: This is bogus, it was just a question with no language of demand. Eliminate. Group B: This is bogus, it was just a question with no language of demand. Eliminate. Group C: That's a thing, counteroffer, and Buyer replied without immediately accepting, so I'll choose A (less than 10%).]
- B. No, because the offer lapsed before the buyer accepted. [Group A: Lapse occurs when stated time or an unreasonable time has passed which is not the case here, eliminate. Group B: Lapse occurs when stated time or an unreasonable time has passed which is the case here because Buyer took time to buy a porch swing, so this is the right answer (about 30%).]
- C. Yes, because the buyer relied on the offer by ordering the swing. [Group A: Huh? Eliminate. Group B: Huh? Eliminate. Group D: That's a thing, reliance is a thing, and the Buyer wouldn't have bought the swing but for buying the house, so I'll choose C (less than 10%).]
- D. Yes, because the buyer's initial email merely asked for information. [Group A: Well, duh. Select. Group B: This is irrelevant because the offer lapsed, eliminate. Group C & Group D: So? Eliminate.]

For some of us, bar prep is hard because we have to put a significant number of our experiences aside because they don't help us understand the universe that the characters in bar questions live in. And that's okay, because nearly everybody has this experience, just for different topics depending on their past life experiences.

For students, persevering with practice questions is important to discover precisely where lived experiences will help them do well on the MBE, and where they need to, temporarily, set lived experiences aside in favor of the perspective of a fictional reasonably prudent bar examinee.

For ASP and Bar professionals, our first task is to illustrate and affirm to our students that this is a thing so they don't feel gaslighted by the bar exam. The next thing is to provide systems and support to help students formalize their understanding of when their lived experiences may put them at odds with the question drafter's intent. Some of the suggestions I provide to students include a special flashcard deck for fact vocabulary vs lived experience vocabulary, or using an MBE autopsy tracker such as the one provided in Wanda Temm's book, or even playing with rewriting the questions themselves and discussing with study groups to ascertain the line between lived experience understanding and exam universe meanings.

² Christina Chong did a fantastic live-illustration of this process at the AASE Diversity conference in Baltimore several years ago (I could be misremembering which conference). She put an MBE nuisance problem about a lake house and a light up on the screen, provided us with the rule for nuisance on the other half of the screen, and then took our answers. Even with the relevant rule provided, a significant number of people in that audience (academic success and bar prep professionals) read the facts in the context of their life experiences and selected an incorrect answer. Thanks to her work, I began address this phenomena directly in class to help students realize this is a normal part of studying for the bar. Based on student feedback, it was useful to them to receive affirmation that the difficulty in divorcing our lived experiences causes some questions to be harder than others, but once that becomes a known source of error, it becomes easier to compensate for.