



- Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're doing another in our "Listen and Learn" series for the multiple-choice section, this time on evidence. 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: Welcome back! If you've caught the earlier ones in this series, you know the format. I walk you through four questions – two in the classic MBE style and two in the new NextGen style – all on the same general area of the law. Today, we're working through [hearsay](#) and [character evidence](#) – the two areas that swallow up most of the Evidence questions on the bar. You're going to hear how the same doctrine gets dressed up differently for the new exam. So let's get into it.
- Lee Burgess: Let's start with our first question. This one is on [hearsay exceptions](#), specifically two exceptions that students treat as interchangeable when they really aren't. While I read the facts, try something specific – predict the rule before I get to any of the answer choices. When you hear a fact pattern with someone making a statement near the scene of an event, your brain should already be reaching for both [present sense impression](#) and [excited utterance](#), and asking which one actually fits. See if you can name the elements out loud as I read. Here we go:
- Lee Burgess: A pickup truck and a sedan collided at a busy intersection. The driver of the sedan was seriously injured, and paramedics were still treating her at the scene about 20 minutes later. At that point, a bystander who had witnessed the collision from the sidewalk was still visibly trembling and crying. A police officer at the scene asked her what she had seen, and she told him, "The pickup truck ran the red light." The driver of the sedan later sued the driver of the pickup truck for negligence. At trial, the bystander is unavailable to testify. The driver of the sedan offers the bystander's statement through the testimony of the police officer. The defendant objects on hearsay grounds. Is the bystander's statement admissible?
- Lee Burgess: Answer A: Yes, the statement is admissible as a present sense impression.



- Lee Burgess: Answer B: Yes, the statement is admissible as an excited utterance.
- Lee Burgess: Answer C: No, the statement is inadmissible because the bystander's observation occurred too long before her statement to qualify under any hearsay exception.
- Lee Burgess: Answer D: No, the statement is inadmissible because it is offered to prove that the pickup truck ran the red light.
- Lee Burgess: Pause here if you want to try the question before I walk through it. So, here's the predict-the-rule beat: When you see an out-of-court statement made near the scene of a startling event, two exceptions should be lighting up at once – present sense impression and excited utterance. Different element tests, the question is which one actually fits. Two rules, said clearly. Present sense impression: a statement describing or explaining an event or condition made while or immediately after the declarant perceived it. Timing is the whole game. Excited utterance: a statement relating to a startling event or condition made while the declarant was under the stress of excitement that the event caused. Stress is the whole game. See the difference? Present sense impression watches the clock; excited utterance watches the declarant. So, apply that here. The collision was 20 minutes earlier. Twenty minutes is not “while or immediately after”. That kills present sense impression. But the timing test for excited utterance isn't a clock; it's the duration of the speaker's excitement, and our bystander is still visibly trembling and crying. The startling event caused her distress, and that stress hasn't disappeared. The statement relates to the event. Excited utterance fits. So let's walk through the options.
- Lee Burgess: Answer A reaches for present sense impression. Right instinct, wrong exception. The student who picks A is the student who treats describing what you saw as the whole test. Twenty minutes has passed immediately after. The clock ran out.
- Lee Burgess: Answer B names the rule correctly. Startling event, declarant still under stress, statement relates to the event. The chain is complete.
- Lee Burgess: Answer C says no, because too much time elapsed. Watch what this option does. It takes the temporal requirement from present sense impression and quietly applies it to all hearsay exceptions. Wrong. Excited utterance doesn't require that it happens immediately. It requires ongoing stress, and the fact pattern tells you the stress is still there.



- Lee Burgess: Answer D says no, because the statement is offered to prove the truck ran the red light. That part of the analysis is correct. The statement is offered for the truth of the matter asserted, so it is hearsay. But D stops there. Hearsay doesn't mean inadmissible; it means inadmissible unless an exception applies. D names the rule and forgets the exceptions exist. The right answer is B.
- Lee Burgess: The transferable habit here: When you see a statement made near the scene of a startling event, run both exceptions side-by-side. Was the statement nearly contemporaneous with the event? Is the speaker still under stress? Two different prongs, two different exceptions. Don't conflate them.
- Lee Burgess: Here's our second question. This one is on hearsay, but with a twist. Pay attention to the fact pattern. In a few minutes, I'm going to show you the same fact pattern again in the new NextGen format, and you are going to hear directly how the question shifts. Here we go:
- Lee Burgess: Maria Chen slipped on a puddle of liquid in aisle five of a Greenmart grocery store and fractured her wrist. She sued Greenmart for negligence. To prove that Greenmart knew about the hazard, Chen offers the testimony of another shopper, who would testify that 30 minutes before Chen's fall, she approached the Greenmart store manager and said, "There's a puddle on aisle five. Someone is going to slip." Greenmart objects on hearsay grounds. Is the shopper's statement admissible?
- Lee Burgess: Answer A: Yes, the statement is admissible as a present sense impression.
- Lee Burgess: Answer B: Yes, the statement is admissible because it is not hearsay. It is offered to show that the store manager had notice of the hazard.
- Lee Burgess: Answer C: No, the statement is inadmissible hearsay because it is offered to prove that there was a puddle in aisle five.
- Lee Burgess: Answer D: No, the statement is inadmissible because the shopper's prediction about the future harm is speculation.
- Lee Burgess: Pause here if you want to try it before I walk through. The single biggest mistake students make on hearsay questions is reaching for an exception when they should be running the "not for truth" check first. Out of court, offered for the truth. Both prongs have to be satisfied before you have hearsay at all. If the



statement isn't offered for the truth of what it asserts, you never get to the exceptions, because you don't need them. So the question to run first is always the same: What is the proponent trying to prove with this statement? So apply that here. Chen isn't offering the shopper's statement to prove there was a puddle. She fell in it, she can prove that herself. What Chen needs is notice – proof that Greenmart, through its manager, knew about the hazard and had a reasonable chance to address it. The shopper's statement does that job, whether or not what the shopper said was true. The statement is offered for its effect on the listener. Once those words reached the manager's ears, Greenmart was on notice. Not hearsay. Now let me walk the options.

- Lee Burgess: Answer A reaches for present sense impression. Watch what this option does. It assumes the statement is hearsay and then picks an exception to cure it. Present sense impression is colorable as to the "There's a puddle" description. That part is contemporaneous. The "Someone is going to slip" prediction isn't something present sense impression reaches. But either way, A does a job that doesn't need doing. The statement isn't hearsay in the first place, so it doesn't need an exception. A invokes an exception unnecessarily.
- Lee Burgess: Answer B names the right move. The statement is offered for effect on the listener, not for the truth of what was said. Not hearsay. Admissible.
- Lee Burgess: Answer C identifies the wrong purpose. It says the statement is offered to prove there was a puddle. That's not what Chen is trying to prove with the shopper's words. C reads the fact pattern's "offered for truth" question backwards.
- Lee Burgess: Answer D reaches for speculation as a ground for exclusion. The statement isn't being offered as a prediction of future harm; it's being offered to show the manager had notice. D imports a relevance or foundation framing into a hearsay analysis. Wrong doctrine. So the right answer is B.
- Lee Burgess: The transferable habit on hearsay questions: Before you reach for an exception, ask the threshold question: What is this statement being offered to prove? If the proponent's purpose doesn't depend on the statement being true, you're not in hearsay territory at all. Effect on the listener, verbal acts, [state of mind](#) shown circumstantially – these are [non-hearsay](#) purposes. No exception needed.
- Lee Burgess: Now I'm going to show you that same fact pattern again, but in the NextGen lawyer framing. The facts don't change – same grocery store, same puddle, same shopper, same manager, same fall. What changes is the perspective. You



stop being a neutral observer scoring a legal claim. You're a junior lawyer at a firm representing Chen. The call shifts, too. Instead of "Is the statement admissible?", it's "What's the strongest argument for admitting it?" And the answer choices stop being clean "yes or no" propositions. They become legal arguments – the same a real lawyer might actually pitch to a court. Some are strong, some are plausible but not the cleanest. Your job is to pick the strongest. Same law, different dressing. And then once we're past Question 3, Question 4 takes things one more step – the new six-option "select two" format, where you have to spot the two moves a lawyer can properly make out of a longer list. We'll get there. Lawyer-framed version first. Here we go:

- Lee Burgess: Your client, Maria Chen, slipped on a puddle of liquid in aisle five of a Greenmart grocery store and fractured her wrist. She sued Greenmart for negligence. To prove that Greenmart knew about the hazard, your client offers the testimony of another shopper, who would testify that 30 minutes before your client's fall, she approached the Greenmart store manager and said, "There's a puddle in aisle five. Someone is going to slip." Greenmart has filed a motion in limine to exclude the shopper's statement on hearsay grounds. Your supervising partner has asked you to identify the strongest argument for admitting the statement. What is the strongest argument that the court should admit the shopper's statement?
- Lee Burgess: Answer A: The statement qualifies as a present sense impression because the shopper described the puddle as she perceived it.
- Lee Burgess: Answer B: The statement is not hearsay because it is offered to show that the store manager had notice of the hazard, not to prove there was a puddle.
- Lee Burgess: Answer C: The statement qualifies as a statement against interest because warning the manager of liability was contrary to the store's legal interests.
- Lee Burgess: Answer D: The statement is admissible because the shopper would be available to testify and could be cross-examined about what she said.
- Lee Burgess: Pause here if you want to try it first. So, same facts as Question 2, same controlling doctrine. The statement is not being offered for the truth, so it isn't hearsay. But the way you have to think about the options is different. You're not eliminating wrong rules; you're ranking arguments, and there's a procedural posture you have to keep in mind. Greenmart has moved in limine to exclude the statement as hearsay. That's the question being litigated. Your job is to find



the argument that most directly defeats that motion. Let me walk through them.

Lee Burgess: Answer B puts the strongest argument on the table. The motion attacks the statement as hearsay. The cleanest defeat of a hearsay objection is to show that the statement isn't hearsay at all. The statement is offered for the effect on the listener – to show the manager had notice, not to prove the existence of the puddle. That argument doesn't depend on satisfying any exceptions element test. It doesn't require persuading the court of a contested rule. It directly removes the statement from the hearsay definition. This is the cleanest hook.

Lee Burgess: Answer A – the present sense impression argument – is the runner-up, and I want to spend a real minute on this one, because it's the option students reach for when they're uncertain about the "not for truth" analysis. And here's the thing – it's a colorable argument. A real lawyer would absolutely argue this as a backup. The shopper was describing what she was seeing – the "There's a puddle" part anyway – so the contemporaneous element is at least colorable. If you got past the question of whether the statement is hearsay, and a court said "yes", present sense impression would be your fallback. So, why isn't it the strongest argument? Because present sense impression does the wrong job for this question. Present sense impression is a hearsay exception. It assumes the statement is hearsay and rescues it. Argument B does something stronger. It shows the statement isn't hearsay in the first place. When the motion attacks the statement as hearsay, an argument that takes the statement out of the hearsay definition entirely beats an argument that smuggles it back in through an exception. A isn't wrong. It's just doing more work than the better argument needs to do.

Lee Burgess: Answer C says the statement is a statement against interest because the warning was contrary to the store's interest. Watch the doctrine. Statement against interest looks at the declarant's own interest at the time the statement was made – not the listener's, not the store's. The declarant here is the shopper, and she has no interest of her own that's harmed by warning the manager about the puddle. C names the right-sounding exception and applies it to the wrong party.

Lee Burgess: Answer D says the statement is admissible because the shopper is available and could be cross-examined. This confuses availability with hearsay analysis. Whether a declarant is available at trial doesn't change whether her out-of-court statement is hearsay. Some exceptions, like [former testimony](#) or [dying](#)



[declarations](#), require unavailability – but availability isn’t a path to admission for ordinary out-of-court statements. D answers the wrong threshold question. So, the right answer is B.

Lee Burgess: The transferable habit on a NextGen best argument question: When you have a strong runner-up, like the present sense impression argument here, your job is to ask not, “Is this argument wrong?” but, “Is this argument doing the right job for the motion that’s actually pending?” The motion frames the dispute. The strongest argument is the one that most directly defeats it.

Lee Burgess: Before we move on to Question 4, notice what just happened. You answered the same hearsay question twice. Same facts, same controlling doctrine, two different formats. The second one felt harder, didn’t it? The work is the same, but the dressing is different.

Lee Burgess: Alright, last question – this one is the new NextGen six-option “select two” format. You’re going to read a fact pattern, and the call is going to ask you to identify the two actions the prosecution may properly take. Six options, all real character evidence moves, but only two are actually available on these facts. The other four are real doctrines, too. They just don’t apply here because the necessary trigger hasn’t been pulled. Here we go:

Lee Burgess: Daniel Reyes is on trial for assault arising out of an altercation at a bar. The prosecution’s case-in-chief includes testimony from the alleged victim and from a bartender who witnessed the incident. After the prosecution rests, Reyes calls a longtime friend as a character witness. The friend testifies, “I have known Daniel for 15 years, and in my opinion, he is a peaceful, non-violent person.” Reyes does not testify in his own defense. After the friend’s direct examination, the prosecution wants to undermine the character testimony and offer its own evidence about Reyes’s character and conduct. Which two of the following actions may the prosecution properly take?

Lee Burgess: Now, before I read all six options, let me set the scene one more time. Daniel Reyes is on trial for assault. The defense has called a character witness – a longtime friend – who has given opinion testimony that Reyes is peaceful and non-violent. Reyes himself has not testified. The prosecution wants to push back. Six options, pick two. Here we go:

Lee Burgess: Answer A: Cross-examine the friend by asking whether the friend knows about Reyes’s prior fights at other bars.



- Lee Burgess: Answer B: Call its own witnesses to testify about Reyes's reputation for violent behavior in the community.
- Lee Burgess: Answer C: Introduce, in its case-in-chief through other witnesses, specific instances in which Reyes had previously assaulted others.
- Lee Burgess: Answer D: Impeach Reyes by introducing his prior conviction for misdemeanor theft.
- Lee Burgess: Answer E: Introduce evidence that the alleged victim had a peaceful character at the time of the incident.
- Lee Burgess: Answer F: Introduce evidence that Reyes had a habit of becoming aggressive after he had been drinking.
- Lee Burgess: Pause here if you want to try it before I walk through. The skill this question is testing is triage. You have a fact pattern with a lot of character evidence moves potentially available, and you have to figure out which two are actually on the table, given what's already happened in the trial. Two thresholds matter here, and you have to walk them in order. First threshold: Has the defendant opened the door under the Mercy Rule? In a criminal case, the defendant may offer evidence of a pertinent trait of his own character, and if he does, the prosecution may rebut. Reyes called a friend, who gave opinion testimony that Reyes is peaceful. "Peaceful" is a pertinent trait in an assault case. The door is open.
- Lee Burgess: Second threshold: What method of proof is available and against whom? When the door is open, character evidence comes in by reputation or opinion only on direct. Specific instances of conduct cannot be introduced on direct. But on cross-examination of the character witness, the court may allow inquiry into specific instances of the person's conduct. And on rebuttal, the prosecution may call its own reputation or opinion witnesses.
- Lee Burgess: So, apply that here. The two threshold answers are A and B. Answer A – cross-examining the friend about specific instances Reyes was involved in – is exactly what the rules permit on cross of a character witness. The friend testified in opinion form, and the proper inquiry on cross is whether the witness knows of specific instances that bear on the trait. Specific instances stay off the table on direct, but they're available on cross. The friend has to take the answer. The



prosecution can't introduce extrinsic evidence to prove the prior fights, but the question can be asked.

Lee Burgess: Answer B – calling reputation or opinion witnesses to rebut the friend's testimony – is the proper rebuttal method. The door is open, and reputation or opinion is the right vehicle on direct.

Lee Burgess: Now, the four that are real character evidence doctrines but not available here. Answer C – specific instances of prior assaults in the prosecution's case-in-chief – is wrong because of the "method of proof" rule. On direct, character comes in by reputation or opinion. Specific instances on direct are reserved for cases where character is an essential element of the charge, claim, or defense. And in an assault prosecution, the defendant's character isn't an essential element. It's circumstantial. So, specific instances on direct are out. C names a real doctrine and ignores its gating rule.

Lee Burgess: Answer D – impeaching Reyes with a prior conviction for theft – fails on the threshold. Reyes hasn't testified. Impeachment with prior convictions targets a witness's credibility, and to impeach, you need a witness to impeach. Reyes called his friend as the character witness; Reyes himself stayed off the stand. The trigger for prior conviction impeachment never fires.

Lee Burgess: Answer E – introducing the victim's peaceful character – fails on a different trigger. The defendant may put the victim's character at issue under the Mercy Rule's victim character branch, and if he does, the prosecution may rebut. Reyes didn't put the victim's character in issue. He put his own character in issue. The victim character trigger has not been pulled, so the prosecution can't go there.

Lee Burgess: Answer F – habit evidence about Reyes becoming aggressive when he drinks – sounds promising because habit evidence isn't subject to the character rule restrictions. But the word "habit" is technical. It means a regular, specific response to a specific situation, the kind of thing someone does semi-automatically. "Becomes aggressive when he drinks" is too general. It's character in a habit costume. The label doesn't unlock anything. So, the two right answers are A and B.

Lee Burgess: So, the teaching moment on this one: On a "select two" character evidence question, every option is going to name a real doctrine. If your strategy is "Find the wrong doctrines", you'll get stuck because they're all real. The right strategy is to ask which doctrines actually have their triggers met on these facts. The



Mercy Rule fires only when the defendant has opened the door to his own character or to the victim's. Specific instances are available on cross but not on direct. Prior conviction impeachment fires only when the defendant testifies. Habit needs specificity. Walk the triggers. The doctrines whose triggers are met are the ones you pick.

Lee Burgess: I want to close with two patterns that show up in everything we just walked through. Pattern one: On hearsay, run the “not for truth” check before you reach for an exception. This came up in Questions 2 and 3 most directly, but it's the threshold move on every hearsay exception. Effect on the listener, verbal acts, state of mind shown circumstantially – these aren't exceptions. They're reason the statement was never hearsay to begin with. When the proponent's purpose doesn't depend on the statement being true, you skip the exceptions entirely. Always ask “What is this statement being offered to prove?” If the answer doesn't require the statement to be true, you're done.

Lee Burgess: Pattern two: On character evidence, walk the triggers before you pick a method of proof. This came up in Question 4. Every character evidence rule has a trigger. The defendant opens the door, the witness testifies, the victim's character is put at issue. Until the right trigger fires, the rest of the analysis doesn't apply. Don't ask first “What method of proof is available?” Ask first “What has the trial done so far that opens which doors?” The method follows the triggers, not the other way around. Put these two habits together with the side-by-side exception comparison you ran in Question 1 – present sense impression watches the clock; excited utterance watches the declarant – and you're going to recognize the shape of an evidence question quickly, no matter which format the NCBE serves up.

Lee Burgess: If this kind of walkthrough is the way you learn best, that's part of what we built [RAMP](#) for. RAMP is our adaptive practice platform for the NextGen UBE and the Legacy UBE. It uses three tiers of scaffolding – rule cards visible at first, then a hint structure, then a clean exam-style fact pattern at the top tier, so your brain can focus on applying the law instead of trying to remember it. You can try a full module free if you want to see how it works without committing to a subscription. Learn more at BarExamToolbox.com/ramp, and we've also linked to it in the show notes. Try it out and see if the format works for you.

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