



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're talking about hearsay, as part of our "Listen and Learn" series. 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: Hi and welcome back to the "Listen and Learn" series. Today we are covering a topic you'll remember if you took Evidence in law school, and that you're sure to at least have heard about on TV now and then. That's hearsay.

Lee Burgess: "Hearsay" is a term that gets thrown around pretty casually on movies and TV as a way to say that a statement is unreliable: "I heard Lucy wasn't let go, she actually got fired." "Oh, whatever, that's hearsay." But, the actual legal definition is more complicated than that. And, on the bar, there are a lot of exceptions to remember.

Lee Burgess: So, what is hearsay anyway? Well, there are two parts. First, it's a statement that was made outside of the courtroom in the current proceedings. Second, it is being offered to the judge or jury in order to show that the content of the statement is true. The rule to remember is that "hearsay is an out-of-court statement offered for the truth of the matter asserted". And that's exactly how you should phrase it on an essay exam.

Lee Burgess: As a law school and bar exam tutor, I can tell you that almost every student has no trouble remembering the text of this rule – "out-of-court statement offered for the truth of the matter asserted". That's not the hard part. What gets tricky is its application. And, on the bar, doing the analysis fast enough. Today, we are going to be talking about qualifying a statement as hearsay. And just as a heads up, it's usually that second part – the "truth of the matter" part – that gives students trouble, so we'll spend some time focusing on that.

Lee Burgess: Before we get into all the nuts and bolts, let's take a step back and talk about why we have these rules. Hearsay is something the law has deemed unreliable. If my friend tells me her uncle burned down his house to collect the insurance money, I really don't know whether that's true or not. So, if I am on the witness



stand testifying about the juicy story someone told me, it definitely makes the jury's ears perk up, but it doesn't actually mean it's true.

Lee Burgess: This situation can get dangerous because it is so easy to spread misinformation. Think of hearsay as something courts do not want to allow in. In fact, the general rule is that hearsay is inadmissible. But then there are a lot of exceptions. Those are situations which the law has made room for because there are moments when regular hearsay might actually be reliable – situations when we should let an otherwise unreliable statement come into court.

Lee Burgess: We won't get into the exceptions to hearsay today – that's a separate topic that would take up several podcasts. But you do need to know them for your bar exam, so here's what I would recommend: Make a list of the hearsay exceptions. If your black letter law materials make them hard to distinguish from each other, read the Federal Rules of Evidence on each one and see if you can boil them down into just one sentence each. Each one covers a unique situation. You need to know what all those situations look like in a fact pattern.

Lee Burgess: The important thing here is that you can see from a fact pattern when these situations come up. For example, there's a hearsay exception called "dying declaration." If you see someone in a fact pattern dying or thinking they're about to die, this exception is likely being triggered. Do they actually need to die for the exception to work? That actually depends on whether you're applying state or federal law. In California, the answer is "Yes". Try to visualize scenarios in which the different hearsay exceptions come into play. And make sure you know state and federal distinctions if they're tested on your bar exam.

Lee Burgess: Finally, see if you can come up with a mnemonic of sorts to help you remember what all the hearsay exceptions are. I like to use superscripted numbers. You know? Like the little numbers that show X to the power of 2 or whatever? Use those numbers to remind yourself in your acronym how many words start with that letter. For example F superscript 3 (F<sup>3</sup>) tells you that there are three exceptions that start with the letter F. This is just an example. You should make your own based on your own study materials. And really, the weirder and funnier, the better and more likely you are to remember it.

Lee Burgess: Okay, back to our plan for today. We are going to be focusing on how to make the decision whether a statement is hearsay or not. Remember, the first rule we need to look at is the part about there being an "out-of-court statement." On the bar, this is usually pretty easy to identify. But you'd be surprised how many bar students miss easy points for adding this one quick sentence.



- Lee Burgess: First, let's look at what qualifies as a statement. It could be something spoken or written down. It could even be a gesture that does not involve any words at all, but is still nonetheless an action that is used to convey meaning. For example, if I nod my head up and down, that means "Yes." That is called "assertive conduct" because I am motioning in a way that communicates something.
- Lee Burgess: Even some motions that are not assertive conduct could be considered a statement for hearsay purposes. For example, if I take my index finger and draw it along my throat with a serious expression on my face, could this mean the person we are talking about was murdered? Maybe. What about if I ask a question? "What kind of person texts while they're drunk driving?" I'm not really asserting anything because I'm asking a question, but is it hearsay? Courts might actually disagree about that last one.
- Lee Burgess: The thing to keep in mind here is whether the statement is one that conveys something. On the bar, you'll usually be dealing with oral or written words, but just keep it in the back of your mind that you might find some non-verbal conduct on an exam. This has been tested before. But, if it's clear something is a statement, don't waste time during the real bar exam explaining why. Save explanation for the things that have debatable facts.
- Lee Burgess: Okay, so that takes care of the "statement" part. What about the "out-of-court" part? What does that mean? Well, luckily, this one is pretty straightforward. "Out-of-court" literally means that the statement was said or written down in some place other than our courtroom in this case. The fact pattern will almost always give you a tiny background fact to help you quickly answer this question. For example, "While waiting for the ambulance, Paul said X." Or, "Dan stormed into the party and exclaimed Y."
- Lee Burgess: The fact pattern will usually give you something to answer the question "Did this happen in court?" Don't miss points for skipping this part. And remember, when we say "in court", it means "in the courtroom during this present case". So, something from another courtroom at some other time could actually fit the rule, but it gets a little complicated, so we'll put a pin in it. Look for a hearsay exception to cover this situation.
- Lee Burgess: So, out-of-court statement. What about "truth of the matter asserted"? This is where things can get a bit tricky. Here, when we say "offered", it means "offered as evidence in the case". The proponent, or person giving the evidence, is asking the judge to look at some piece of information. Then, "truth of the matter asserted" is about whether the statement being offered is going to show that the thing being said is actually true and not false.



Lee Burgess: I'll say that in another way. Are we giving the statement to the court because we want to use it to show what we are saying in the statement is true? Here's an example. Say your landlord refused to fix the heater and you sued him. If I am trying to find evidence that shows your house is cold and I remember one time I came over and said, "Wow, your house is super chilly" – this is something I could offer for its truth. The thing you were saying – the actual words of your statement "It's chilly" is the same as the thing I want the court to see is true – it is in fact chilly.

Lee Burgess: What about if you came over and said "Jeez, this would make a great place for a polar bear"? Now, I can't imagine anyone actually coming over and saying this, because that would be weird. But imagine that this is their way of telling me that my house is cold. Is this statement being offered for the truth? Is it true that my house is a great place for a polar bear?

Lee Burgess: Take this very literally, and you'll see that the answer is "No". I'm not offering this evidence to show my house is actually tricked out in a way that my new pet polar bear would really enjoy. That is the truth of the statement. But no, I'm offering it for some other reason – to show that it's too cold. Make sense? When looking at potential hearsay, the question you should ask is, "If the literal words of the statement were true, does that match up with what this person is trying to show the court?"

Lee Burgess: Now let's try some examples. This one is from a [July 2003 Evidence essay from the California bar exam](#). But we've shortened it to keep the issues focused on basic hearsay without getting into the exceptions. Ready? Okay:

Lee Burgess: "Dan was charged with aggravated assault on Paul, an off-duty police officer, in a tavern. The prosecutor called Paul as the first witness at the criminal trial. Paul testified that he and Dan were at the tavern and that the incident arose when Dan became irate over their discussion about Dan's ex-girlfriend, Gina. Then the following questions were asked and the answers given:

Lee Burgess: Question: What happened then?  
Answer: I went over to Dan and said to him, 'Your ex-girlfriend Gina is living with me now.'

Lee Burgess: Question: Did Dan say anything?  
Answer: He said, 'Yeah, and my buddies tell me you're treating her like dirt.' Then he jumped up and attacked me."



- Lee Burgess: So, were either of those statements hearsay? Let's look at the sentence "Gina is living with me now." First step: Was this an out-of-court statement? Well, it's clearly a statement, and it was said at a tavern. A tavern is clearly not in the courtroom, so this element is met. The whole reason that you were given the "tavern" fact is to check off this rule element, so this is where to plug that in.
- Lee Burgess: Next step: Is the statement being offered for the truth of the matter asserted? Well, to figure that out, we need to ask, "What is the matter being asserted?" Paul said, "Gina is living with me now." In this case about two guys fighting at a bar, does it really matter where Gina was living?
- Lee Burgess: Another question you might want to ask yourself: "Who is the proponent of the evidence?" Who is on the stand testifying? Who wants this evidence to get into court? Here, the prosecutor called Paul and asked him about the conversation. The prosecutor wants Dan on the hook. She wants to get into evidence stuff that makes Dan look bad. Keep that in mind.
- Lee Burgess: Is she offering the evidence of the ex-girlfriend Gina living with the cop because she really wanted to show the court that Gina and Paul live together? No, that doesn't matter. She wants to get this statement into court because it shows that Dan got enraged. This statement started the fight. So, in other words, the substance of what it says in those quotation marks – "Gina lives with me now" – doesn't matter. What matters is how it made Dan react. The answer here is that this second element of the hearsay rule is not met. The statement is not being offered for the truth of the matter asserted in the statement. That means it fails the test for hearsay. Make sense?
- Lee Burgess: So now let's try the next part. Dan said his buddies told him Paul was treating Gina "like dirt". First step: Yep, this was an out-of-court statement – same reasons as we discussed above. Second step: Is the statement being offered for the truth of the matter asserted? No. Why? Does it have any bearing on the case whether Paul was in fact treating Gina "like dirt"? No. Why not? Because we don't actually care if the words in the statement are true or not.
- Lee Burgess: And that's what to look at: Do we care if the exact words in the statement happen to be true? The case is about Dan beating up Paul. This statement is not being offered to show that Paul really was treating Gina badly. That's beside the point. The statement is being offered to show how the fight broke out and Dan's friends telling him that Paul was mean to Gina made him angry enough to try to fight Paul.



- Lee Burgess: Okay, let's get into another hypo. This is from an Evidence essay from the [February 2016 bar exam in California](#). Here we go:
- Lee Burgess: "Mike supervised David and Pam at Ace Manufacturing Company. Pam was fired and a week later, David circulated the following email to all the other employees: 'I just thought you should know that Pam was fired because she is a thief. Sue caught her stealing money from the petty cash drawer after Pam's affair with Mike ended.'
- Lee Burgess: Pam sued David for defamation and offered the email as evidence. Is the statement hearsay?"
- Lee Burgess: First, was this email an out-of-court statement? Sure. David didn't say the words in court, he said them in an email. On the bar, use that fact to check off this part of the rule quickly.
- Lee Burgess: Next, is the email being offered for the truth? What do we do first? Well, we need to look at what "matter asserted" really means here. The matter asserted is what the words of the email say. The words of the email say Pam is a thief and that she had an affair with her boss. So, the question is, are these words being offered into court to show that these things are really true? Well, let's look at who is offering the evidence. It's Pam. And importantly, this case is about defamation.
- Lee Burgess: So, is Pam really trying to convince the court that she is a thief? Is she trying to tell the court that she had an affair with Mike? No, of course not. She is actually trying to show that these things David said are not true. So, the answer to the "truth of the matter asserted" question is "No". Pam is not offering the email to show that the words of the email are true. That means that this is not hearsay.
- Lee Burgess: As you study for the bar, keep track of the categories of "non-hearsay" versus "hearsay exceptions". What we just discussed with this email is called a "fact of independent legal significance". If the words in the statement have some legal meaning, for example, they would form a contract or create a basis for a legal claim, like defamation. They might fall into this category and be considered "non-hearsay".
- Lee Burgess: Another classic example that comes up when discussing statements that are offered for something other than the truth – in other words, statements that will end up being labeled a "non-hearsay" – goes like this:



Lee Burgess: “The case is about a dispute over a will. The decedent is an old man who writes a will at his home. As he is signing the document and placing it in an envelope, he tells his nephew, ‘I am the King of Mars, so it’s important I leave the planet in good hands. Otherwise, the Martians will never forgive me.’ Then later he dies. Is the statement hearsay?”

Lee Burgess: First, it’s an out-of-court statement, so yes. It happened in his house. Next, is it being offered for its truth? Do we care whether or not this guy is actually the King of the Martians? No. That’s a strange thing to say, sure, but it’s not something we would want to prove in court. So, it’s not being offered for its truth, which means it won’t pass the test for hearsay.

Lee Burgess: So, what’s really going on here? Bringing in a statement like this could show the old man’s state of mind. In other words, if he was not competent enough to write a will because he really did think he was the King of the Martians, that would mean that his will was not valid. What you’re looking for here is a situation where the state of mind of the person talking is actually at issue in the case. When contesting a will or writing a contract, or something along those lines, the court will care whether the person was in their right mind or not. This kind of statement could be admissible to show that they were not.

Lee Burgess: And with that, we’re out of time! Today, we looked at some examples of how different statements could fail the part of the test about “truth of the matter asserted”, meaning that they are not hearsay. You should cull through your black letter law and make sure you know any non-hearsay categories, as well as the hearsay exceptions that could be on your bar exam.

Lee Burgess: 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 reach out to us via our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we’ll talk soon!

## **RESOURCES:**

[Private Bar Exam Tutoring](#)

[California Bar Examination – Essay Questions and Selected Answers, July 2003](#)

[California Bar Examination – Essay Questions and Selected Answers, February 2016](#)

[Podcast Episode 79: Tackling an MEE Criminal Law/Procedure and Evidence Essay](#)



[Podcast Episode 87: Listen and Learn -- Homicide](#)

[Podcast Episode 88: Listen and Learn – Negligence Per Se](#)

[Tackling MBE Hearsay Questions](#)

[Targeted Bar Exam Study Strategies for Memorization, Different Learning Styles, and More](#)