Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we are discussing Relevance, 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 Bar Exam Toolbox podcast's "Listen and Learn" series. Today we are going to be talking about a topic you will see on every Evidence essay on the bar exam, and probably on the MBEs too: relevance.

Lee Burgess: On a gut level, most people already have an idea of what "relevance" means, right? If somebody says, "That's not relevant", we know they mean that it's outside the scope of what matters. As you'll remember from law school, in a courtroom situation, relevance is an important first-step hurdle to get over when introducing any kind of evidence, whether that be a document, witness testimony, or a piece of physical evidence.

Lee Burgess: Relevance is a low bar, meaning that evidence may be deemed relevant if it meets some pretty easy criteria. Keep in mind though, "relevance" is not the same as "admissibility". Just because evidence passes the relevance test does not mean it will actually get into court. It could be thrown out by the judge under some other rule later on, like hearsay or character.

Lee Burgess: Now, every bar exam will cover the Federal Rules of Evidence on the MBEs, but Evidence essays may either be based on the Federal Rules or state-specific rules, or both. Remember, California also tests on the California Evidence Code. To keep our discussion generally applicable, we're going to focus on the federal rules today. But make sure you're studying your jurisdiction's specifics, as well as memorizing any places where they depart from the FRE, since those may be tested on an Evidence essays. So, let's jump in, shall we?

Lee Burgess: There are two basic kinds of relevance – logical relevance and legal relevance. Each one has a different rule. Evidence is logically relevant if it tends to make a fact of consequence more or less likely than it would be without the evidence. What does that mean? Well, a fact of consequence is a fact that the law deems important. So, basically evidence is relevant if it says something about an

important fact in the case. The evidence can make a key fact look more likely to be true, like the same murder weapon makes it likely our guy was the killer. Or evidence can make an important fact less likely to be true. For example, he was on vacation at the time, which means he was probably not at the crime scene.

Lee Burgess: On the other hand, we've got legal relevance. Evidence is legally relevant if its probative value is not substantially outweighed by some kind of danger. The most commonly tested danger is risk of prejudice. Legal relevance is about balancing. Under FRE 403, there is a test that weights what is called the "probative value" of the evidence against the "risk" of admitting the evidence into court. The risks could be for things like prejudicing a party, wasting time, or misleading the jury. The most commonly tested on the California bar is the risk of unfair prejudice. In any case, the question for the judge here is basically, how useful is this piece of evidence versus how problematic is it going to be? To simplify, if the evidence is more helpful than hurtful, it will be admitted.

Lee Burgess: These concepts are pretty straightforward, but they can get more confusing when applied. So let's jump into a hypo to try them out. This question is based on the July 2009 bar exam in California. We've taken just one small piece of the fact pattern at a time to limit the discussion to relevance. Here we go:

Lee Burgess: "While driving their cars, Paula and Dan collided and each suffered personal injuries and property damage. Paula sued Dan for negligence and Dan filed a cross-complaint for negligence against Paula. At the ensuing jury trial, Paula testified that she was driving to meet her husband, Hank, and that Dan drove his car into hers. Dan testified that as he and Paula were waiting for the ambulance immediately following the accident, Wilma handed him a note. Wilma had been identified as a witness during discovery, but had died before she could be deposed. The court granted a motion by Dan to admit the note into evidence. The note says: 'I saw the whole thing. Paula was speeding. She was definitely negligent.' Is Wilma's note relevant?"

Lee Burgess: Let's go through the logical relevance first. I think the easiest way to do this is to ask, one, what is the fact of consequence we're talking about; and then two, does this piece of evidence make that fact more or less likely to be true? So, what's the fact? In other words, what's the question the court is trying to answer in this case? Well, Paula sued Dan for negligence, so the main question is whether Dan was negligent. You shouldn't get into a full-blown negligence analysis from Torts. This is not a crossover essay question, and it's not asking whether Dan was negligent. It's sufficient to just have a general idea of what negligence means. In other words, was Dan not acting carefully enough? That's our fact of consequence we are getting at here – facts about Dan being careful.

Lee Burgess: Next, let's look at the evidence. Here, we are talking about Wilma's note. To figure out relevance, we should go back to the fact pattern and see exactly what the note said. Wilma said she saw the accident and Paula was speeding, and she stated that Paula was negligent. For the final step of logical relevance, we look at whether the note makes the negligence of Dan more or less likely to be true. So, if Paula was speeding, that makes it less likely that Dan caused the accident, right? It makes it look like Paula herself caused the accident. Because the evidence in question makes the fact of consequence less likely to be true, the evidence is logically relevant. Make sense?

Lee Burgess: Now let's move on to legal relevance. For this part, remember we are doing a balancing test. I think the easiest way to accomplish this is to take the prejudicial, or "bad" effect on one side, and the probative value, or "good" effect on the other side. Then see which one outweighs. Here, the prejudice of the note is that it makes Paula look like a negligent driver. That hurts Paula. Remember though, the standard is "unfair" prejudice. Is it unfair to call Paula "negligent" or say she was speeding? Not really; that's the whole point of what the case is about.

Lee Burgess: Next, look at probative value. The note, if true, solves the case, right? If Paula was negligent, that probably means that she is the person who caused the accident, or at least contributed to causing it. That means the probative value is very high.

Lee Burgess: So, on one hand we have the note making Paula look like a less-than-careful driver, which she's not going to be happy about. On the other hand, we have some very valuable information. The probative value will outweigh, and the note will be deemed legally relevant. Remember, this does not mean that it will necessarily be admissible in court. This is just the very first hurdle. The note may get thrown out for some other reason later in the analysis, but that's a separate issue and analysis.

Lee Burgess: So, let's try another hypo. This one's from the same bar question as before:

Lee Burgess: "In his case-in-chief, Dan called a paramedic who had treated Paula at the scene of the accident. Dan showed the paramedic a greeting card, and the paramedic testified that he had found the card in Paula's pocket as he was treating her. The court granted a motion by Dan to admit the card into evidence. The card states: 'Dearest Paula, Hurry home from work as fast as you can today. We need to get an early start on our weekend trip to the mountains! Love, Hank.' Is Hank's note relevant?"

Lee Burgess: Let's go through the steps. Logical relevance first. What's our fact of consequence? Same thing as before – who caused the accident – whether Dan was the one who was negligent, or whether it was Paula. Okay, what's our evidence here? The note from Hank, who we know from before is Paula's husband. He said, "Hurry home so we can get started on our vacation." That sounds pretty irrelevant at first, right? Who cares if he wants to go on vacation? What does that have to do with anything? But let's look at the whole situation. This is a car crash, and there are allegations that Paula was speeding. The evidence is about telling Paula to hurry. Could that card saying to hurry up make it more likely that Paula would drive home super quickly? Yes. The card is logically relevant. Remember, this is a very low hurdle.

Lee Burgess: The next step is legal relevance. What's our prejudicial effect? Again, the note makes it look like Paula was speeding, which is not a good look for Paula. Is that "unfair" prejudice? No. So, what's the probative value? Same – super high. If Paula was speeding, that helps solve the case. So, the card is also legally relevant. Are you starting to get the hang of it? Now let's try some more examples from this same hypo:

Lee Burgess: "Paula also testified that as she and Dan were waiting for an ambulance immediately following the accident, Dan said, 'I have plenty of insurance to cover your injuries.' Is Dan's statement relevant?"

Lee Burgess: First, logical relevance. What is the fact of consequence? Who caused the accident, right? What's the evidence in question? Dan saying his insurance will cover Paula. Does saying this make it more likely Dan is at fault? Well, maybe Dan was just trying to be nice. Or maybe he knows he caused an accident and feels bad. But how does insurance work? Is Dan's insurance going to cover Paula if Dan did not cause the accident? Nope. That means the insurance statement makes it more likely that Dan was at fault. He knew he caused the accident, so he knew they'd be using his insurance. Do we know Dan's thought process for sure? No. But again, it's a very low bar. Logical relevance is met.

Lee Burgess: Next, legal relevance. What's our prejudicial effect? Well, regardless of the reason that Dan offered to have his insurance cover Paula, this statement does make him look like he caused the accident. Is this prejudice unfair? No. What's the probative value? Well, if Dan caused the accident, that solves the case, so the probative value is very high. The probative value outweighs, so legal relevance is met. Now remember, there are other policy concerns there, so don't end your analysis there.

Lee Burgess: Okay, here's another fact pattern. This one is from the July 2005 California bar exam on Evidence. We'll take a bigger chunk of facts this time to make this look more like something you might see on a real exam:

Lee Burgess: "Dan was charged with arson. The prosecution attempted to prove that he burned down his failing business to get the insurance proceeds. It is uncontested that the fire was started with gasoline. At a jury trial, the following occurred: The prosecution called Neighbor, who testified that fifteen minutes after the fire broke out, he saw a blue Corvette speed from the scene.

Lee Burgess: The prosecution next called Detective Pry. Pry testified that he checked Motor Vehicle Department records and found out that a blue Corvette was registered to Dan. Pry also testified that he observed a blue Corvette in the driveway of Dan's house.

Lee Burgess: The prosecution then called Scribe, the bookkeeper for Dan's business. Scribe testified that, two months before the fire, Dan told Scribe to record some phony accounts receivable to increase his chances of obtaining a loan from Bank. Scribe then testified that she created and recorded an account receivable from a fictitious entity in the amount of $250,000, but that Bank denied the loan anyway. Scribe further testified that, two days after the fire, Dan again told her to create some phony accounts receivable, but that she refused to do so. Are Pry and Scribe's testimonies relevant?"

Lee Burgess: Alright, let's jump in. On the bar exam, whenever you see a fact pattern that asks about two separate pieces of evidence, like the two witness' testimony here, you should break them up and discuss each one in turn. Use sub-headers for each one so the grader can easily see that you hit both parts. Let's look at Pry first. You'll notice that Pry's testimony actually said a couple of different things, right? He said the DMV records showed a blue corvette registered to Dan. He also said he saw a blue corvette parked at Dan's house. We should consider both of these. On bar essays, always consider breaking up statements into two parts if needed. Sometimes one statement will be relevant and the other won't be.

Lee Burgess: Going back to our attack plan, logical relevance is always first. So, question one: What is the fact of consequence? Here, the fact of consequence is whether Dan started the fire. Question two: What's the evidence we're dealing with? The things Pry said about the blue corvette. So, let's match them up. Does Dan having a blue corvette registered to him make it more likely that he started the fire? Well, the neighbor said that 15 minutes after the fire broke out, he saw a blue corvette speeding away from the scene. Was that Dan? We don't know. It

could have been someone else driving the same kind of car. We don't have a plate number, so no one actually saw Dan in the car.

Lee Burgess: But remember, relevance is not an exact science and it's not a high bar. We don't need to know that it was Dan for sure, we just need to know if it was more likely to be Dan. A blue corvette leaving the fire scene and Dan owning a blue corvette are enough of a match for relevance. If Dan had a blue corvette, that makes it more likely it was him speeding away, which means it's more likely that he started the fire.

Lee Burgess: What about Pry seeing the car parked in Dan's driveway? Does this make it more likely that Dan was at the scene of the fire? Yes, because it shows that Dan still had the car and makes it more likely that it was him driving the car on the day of the fire. Logical relevance is met.

Lee Burgess: Moving on to legal relevance. First question: What is the potential prejudice of the piece of evidence we are looking at? Well, Dan having the same car as the getaway car does make Dan look guilty, so that's prejudicial to him. On the other hand, when we take the next step and look at the probative value, we see that if Dan was fleeing the scene, that pretty much solves the case of who the arsonist is. That means the probative value is super high. The probative value will outweigh. Legal relevance is met. See any patterns here? On the bar, it is pretty likely that the evidence will be relevant. Again, it is a low threshold.

Lee Burgess: So let's look at our second witness, Scribe. Logical relevance first. What's our fact of consequence? Same – whether Dan started the fire. Now, let's see what the piece of evidence in question was. This involves going back to the fact pattern and finding anything Scribe said. Gather up every statement she made. On exam day and as you practice your writing, you may find it helpful to highlight different people's statements, or maybe just their names, in different colors, so you can find them more easily as you plan out your essay on scratch paper.

Lee Burgess: Okay, so who is Scribe? She's the bookkeeper for Dan's business. What did she say? She said Dan wanted her to basically lie to get money from a bank, and she tried but the bank said "No". Does that make it more likely Dan burned down the building? Let's go back to the facts again. And remember that the building in question is Dan's own "failed business", and that he was charged with arson for trying to get insurance money after the fire. Does Dan telling the bookkeeper to lie and try to get a bank loan, and that loan then getting denied make it more likely that Dan burned down his own building to get the insurance money? Yeah, sure. Dan needed the money. He was desperate enough to lie. The lie failed and

all of this gives him a motive to start the fire. Again, here, do we know for sure that it was Dan? No. But relevance is not an exact science. The fact that the evidence makes it even a bit more likely to be Dan means that we have enough to check off logical relevance.

Lee Burgess: Okay, next up – legal relevance. First question: What is our potential prejudice? Well, this testimony about lying to get money from the bank makes Dan look like a pretty bad guy, right? If true, he's pretty dishonest and trying to get Scribe to be dishonest as well. That's definitely prejudicial to him. The jury would see that and think Dan was a horrible person. On the other hand though, the second question: What is the probative value? Well, the story about Dan telling Scribe to lie to the banks, and then getting denied, show a great motive for Dan to burn down the building to try and get some money from the insurance company. The probative value of Scribe's testimony is very high and would outweigh the prejudice of making Dan sound like a fraud. Once again, legal relevance is met.

Lee Burgess: Okay, so that wraps up the hypo part of our discussion. But before we conclude, let's talk about exam taking techniques. Something we often see our bar students doing with relevance that will cause you to lose points on the bar is to not be specific enough. A good way to check is to go back and read your hypo answer, and ask if you could have written it without knowing what the facts were. For example, if you said something like, "Pry's testimony is legally relevant because the probative value substantially outweighs any risk of prejudice to Dan" – that's a problem. Why? Because it doesn't tell the grader anything more than the party names. The rest of that statement is basically just reiterating the rule, but there's no analysis. And analysis is where most of the points are.

Lee Burgess: Reading a statement like that, I as a grader, would have no idea why you thought the statement was relevant, what you thought the probative value was, what you thought the prejudice was, or why you concluded the way you did. Believe it or not, we see this all the time. It just goes to show that sometimes you might have the idea right in your head, but then write something down that is so conclusory that it doesn't show your thought process at all. The important takeaway here is don't do this on the bar! Just like what we did in our examples today, get precise with what the evidence in question is, what the fact of consequence is, what the probative value and prejudicial effect are, and explain how you're matching the facts to the rule elements. As we always say, you should use "because" when you write, because it will force you to explain, and that explanation is what bar graders are looking for.

Lee Burgess: Okay, two more small points: First, even if you find relevance is not met, continue the analysis. Like I said above, relevance is a low bar, and generally the evidence presented in an essay fact pattern will be relevant. At least that's our experience with many bar exam essays. But if it's not, don't stop there, especially if you have a lot of facts pointing you to other evidence issues. Remember that you can save time on the real bar exam by combining logical and legal relevance discussions into one IRAC where appropriate to do so. Usually, this means splitting it into two IRACs the first time you discuss relevance, and then combining thereafter. Either way, we've seen from coaching countless students through their bar that even if you are very comfortable with these rules, it takes a lot of writing practice to get to the point where you can get through relevance quickly and succinctly. So I would definitely recommend that you begin as soon as you can.

Lee Burgess: And with that, we are out of time. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a moment 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. Feel free to stop by our website at BarExamToolbox.com to get more podcasts and our tried and true bar exam taking tips. If you have any questions or comments, please don't hesitate to reach out to myself and Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website contact form at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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