



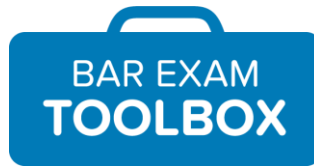
Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're doing another episode in our "Listen and Learn" series – this one on hearsay, specifically excited utterance and dying declarations exceptions. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that's me. We're here to demystify 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: Hello, and welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast! Today we are talking about hearsay. When you're faced with an MBE question that appears to be about hearsay, before you even look at the answer choices, you need to first evaluate whether the statement or statements are hearsay, then consider whether any of the exceptions to the hearsay rule apply, and finally assess whether there is a Confrontation Clause issue.

Lee Burgess: Our focus today is on the second step of this approach – the hearsay exceptions. As you know from when we have previously covered [hearsay](#) on this podcast, there are quite a few exceptions. Today, we are going to focus on two often-tested exceptions: dying declaration and excited utterance. These are often triggered by the same facts, and they're easy to confuse, so we'll cover them together to help you really understand them both and distinguish between them quickly and effectively.

Lee Burgess: A great way to tackle MBE hearsay questions is to approach the question like you would an essay. Think through the answer fully before trying to select an answer choice. Today we'll focus on hypotheticals taken from past bar exam Evidence essays, since the way we approach answering those questions will benefit both your MBE score and how well you do on the essay section.

Lee Burgess: When you're writing an Evidence essay, you'll often find you have a lot of issues to cover quickly; so many that Evidence questions are sometimes called "racehorse essays". The questions are likely to be open-ended, such as "Was the evidence properly admitted?" To get all the available points for a question like that, you'll need to quickly identify as many relevant bases for admitting or excluding the evidence as possible, including hearsay and hearsay exceptions. In contrast, a non-racehorse-type essay might ask, "Is Defendant guilty of robbery?" In your answer to a question like that, you'd want to spend your time



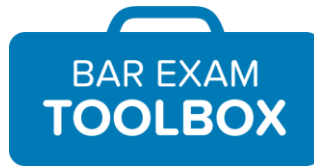
delving more deeply into the sub-issues, with IRACs for each of the elements of the crime of robbery.

Lee Burgess: Now accordingly, it's super important to learn how to effectively identify and distinguish between all of the relevant issues triggered by the facts for Evidence essays and MBE questions. There are numerous hearsay exceptions, and it can be confusing to figure out which ones apply when. As I said, in today's podcast we're going to focus on two exceptions that come up fairly frequently in essays and on the MBE – the exceptions for dying declaration and excited utterance. There are quite a few elements to keep track of for the dying declaration in particular, so these are good ones to spend some time practicing, to make sure you have a clear mental checklist in your mind of when they apply. So, let's get to it.

Lee Burgess: Before we take a deep dive into dying declarations and excited utterances, we'll quickly review what hearsay and hearsay exceptions are generally. Remember, hearsay is an out-of-court statement offered for the truth of the matter asserted. I'll briefly break that down before we go on, to make sure we're all on the same page. A "statement" within the meaning of the hearsay rule can be verbal or written, or even a non-verbal assertion. "Out-of-court" means that the declarant was not testifying at the current trial or in a hearing at the time the statement was made. "Offered for the truth of the matter asserted" means that the party seeking to admit the statement is trying to prove its content.

Lee Burgess: For example, say Wendy seeks to testify that Debbie told her last week that she saw a mouse nibbling a hole in her ceiling. Debbie's alleged statement to Wendy wasn't made in the courtroom or as part of any testimony; it was made somewhere else a week prior. This makes it an "out-of-court statement." If the prosecutor is eliciting Wendy's statement to prove that a mouse was in fact eating through Debbie's ceiling, then the statement is being "offered for the truth of the matter asserted" in Debbie's statement, and it is hearsay. If not, such as the prosecution just wants to show that Debbie had knowledge of a problem with her roof, or that Debbie had not lost her voice due to laryngitis at the time, it's not.

Lee Burgess: As we know, even if a statement does technically qualify as hearsay, an exception might apply to make it admissible anyway. Most of these exceptions have to do with the reason that hearsay isn't generally admissible in the first place, which is that we can't really trust that a declarant's statement, made out of court and not under oath, is true and not fabricated. It is just not reliable. In this example I just gave, how can we be sure that Debbie was telling the truth about the mouse? We can't, unless there is some circumstance surrounding



Debbie's statement that makes it more likely to be true. The specific circumstances surrounding hearsay statements that make them more reliable are captured as exceptions to the hearsay rule: situations where courts have recognized that a declarant's out-of-court statement is more likely to be sufficiently reliable to justify admitting it.

Lee Burgess: Now, whenever you're writing an Evidence essay, make sure to give the hearsay exception that is triggered by the facts its own header, followed by the rule statement and the exception. Make sure those rule statements and your analyses are concise and to the point. It's critical to know your rules for when each hearsay exception applies cold, especially for exceptions like dying declaration, which has multiple elements and a prerequisite that must be met for it to apply, as you'll soon see. As I said, you don't want to waste any time on Evidence essays, since typically you need to identify and discuss so many issues. You also don't want to get tripped up on your hearsay MBE questions, where the facts might trigger one or two elements of the dying declaration, but not all three.

Lee Burgess: Okay, now on to the rules. We'll begin with excited utterance. Here's the rule that you'll want to write down under your header for this exception: "A statement in relation to a startling event or condition, made while the declarant was under the stress of excitement that the event or condition caused, is admissible."

Lee Burgess: Okay, so we have a declarant who has experienced some sort of startling event or condition making a statement while still under the stress of that startling situation. There can be a slight delay between the startling event or condition and the statement. The policy reason behind this exception is the belief that a declarant who has just been startled and is still under stress from that is not likely to fabricate a statement about what has happened to her. She doesn't have time to lie, since her statement is being made at the time or right after the startling event, and courts assume she doesn't have an incentive to lie in the moment either. So the statement is considered to be reliable enough to admit, despite technically being hearsay.

Lee Burgess: Some examples would be: "Look out, he's got a gun!" or, "Oh no, he's passed out at the wheel! We're going to crash!" or, "Call the police! Dave shot John!" The idea is that the declarant doesn't have time to reflect on what she is saying – she is just making a spontaneous statement, precipitated not by a desire to fabricate but rather by a traumatic, shocking, or unexpected event or situation.



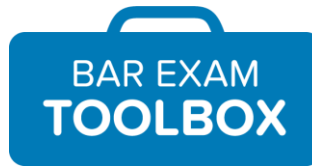
Lee Burgess: Now we'll move on to the dying declaration exception which, as you'll see, has some distinct similarities but also some critical differences. First, a big difference: unlike the exception for excited utterances, the dying declaration exception only applies in civil cases or in criminal homicide cases. You'll want to write this down in your essay under your "Dying Declaration" header. Then state the rule, which is: A statement made by, one, an unavailable declarant; two, under a sense of impending death; three, about the cause or circumstance that put the declarant in the position of the impending death, is admissible. And, if you are in California, make sure you notice the differences between the FRE dying declaration rule and the California Evidence Code.

Lee Burgess: As you can see, there are more elements that need to be met for this exception to apply than for excited utterances. So, let's unpack them, because some of these elements have sub-elements, of course. First, what does it mean to be "unavailable"? It's important to know the test for unavailability well, because there are other hearsay exceptions triggered by an unavailable declarant besides dying declaration, such as testimony under oath and statement against interest, and the bar examiners love to test multiple exceptions in the same essay or MBE question. Notably, unavailability is *not* required for excited utterance.

Lee Burgess: So, to be unavailable, does the declarant have to have actually died after making her dying declaration? Well, that is one of the criteria for unavailability, but there are several others as well. Here's the rule for what it means to be unavailable to write down on your essay: A declarant is deemed unavailable as a witness if he or she is, (a) exempt from testifying due to privilege; (b) refuses to testify despite a court order; (c) cannot be present due to a death or illness; (d) testifies that he or she cannot remember the subject matter; or (e) is beyond the reach of the court's subpoena power, and his or her attendance cannot be procured by reasonable means.

Lee Burgess: Next, the second element. We have a declarant who is saying something while she believes her death is imminent. This is similar to the excited utterance – we are dealing with a statement made under stress. As with excited utterance, this is the key circumstance that makes the declarant's statement more reliable than an out-of-court statement would otherwise be, because courts assume that a person who believes he or she is about to die has no incentive to fabricate. Note that it's the belief that matters, not the ultimate result; the declarant doesn't actually have to die.

Lee Burgess: Lastly, the declarant has to be making a statement about whatever cause or situation is causing her to believe her death is imminent, just like the excited



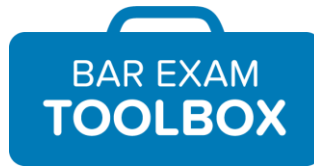
utterance declarant's statement must relate to the startling event. With a dying declaration, this would be something like, "Dan is about to shoot me!" This last element reflects the policy reasons supporting the dying declaration exception. If the victim does die, it seems unjust to prevent the admission of her statement identifying the killer or the circumstances of the murder.

Lee Burgess: Okay, so let's recap dying declarations, since there are multiple requirements for this exception to apply. First, we need to make sure that the question concerns either a civil case or a criminal homicide; the dying declaration exception won't apply under the FRE in a robbery case for example. Assuming we have the right kind of case, we have three requirements. First, we need a declarant who is unavailable to testify about the statement. The unavailability can be because he has died or cannot appear due to illness, or because he holds a privilege, like the spousal privilege, that prevents the court from being able to compel him to testify. He's also "unavailable" for the purposes of the rule if he's beyond the reach of the court's subpoena power, or if he simply testifies that he can't remember the situation in which he allegedly made the statement.

Lee Burgess: Next, assuming our declarant is unavailable, we need to look at the timing of the statement. It must have been made during the time when the declarant believed his death was imminent – not before, and not after. Lastly, we focus on the substance of the statement. Was it about the circumstance that caused the declarant to believe his death was imminent? If the answer is yes, then we have satisfied the requirements for the exception to apply.

Lee Burgess: Okay, seems pretty straightforward now that we have broken it down, right? So, let's get onto some hypos to make sure you're able to apply all of these elements and sub-elements to the facts and distinguish between the two exceptions. Here's the first example, which is adapted from the [2009 California bar exam](#). Notice that this question asked for California law, and here, we are going to use the federal rules. So if you happen to look this one up, just know that some of the rules and analysis will be different:

Lee Burgess: "Debra is charged with robbing a bank. Her ex-husband William is happy to testify against her at her trial in federal court. Specifically, William wants to testify about his conversation with his friend, Ned. When the prosecutor asks William on direct examination to describe his conversation with Ned on the evening of the day that the bank was robbed, William states, 'I spoke with Ned just before he died. He told me that he and Debra pulled off a big job that afternoon.' The prosecutor asks William what he believed Ned meant by 'pulled off a big job'. William responds, 'I assume he meant that he and Debra



committed some sort of crime.’ Did the court properly admit William’s testimony? Answer according to federal law.”

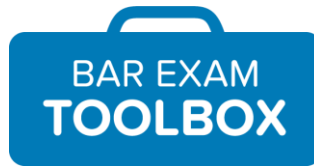
Lee Burgess: So, before you tackle any exceptions, always first address whether the statement at issue is hearsay. Remember the two elements that must be met to qualify as hearsay: a statement, written or verbal, made out of court, that is being offered for the truth of the matter asserted. If you need a refresher on how to apply this general hearsay rule, check out our [podcast called “What Is Hearsay?”](#) For today, we’re going to assume Ned’s statement about pulling off a big job with Debra is hearsay and skip the analysis so that we can focus on potential exceptions.

Lee Burgess: So, let’s focus on dying declaration first, since we have a declarant who’s dead. We need to first address our prerequisite: the case must be a civil matter or a criminal homicide. Is this a civil case? No. Criminal homicide? No. So right off the bat, we know that the dying declaration exception won’t apply since we are told that we need to answer according to the federal rules. The state law exception might apply, however, so it’s important to make sure you know your state rules for this exception too. For purposes of this podcast, we are focused on the federal rules.

Lee Burgess: But let’s pretend for now that Debra is charged with murder instead of robbing a bank, to give us an opportunity to apply the elements of the exception. The first question is whether Ned is unavailable. We are told that Ned allegedly made the statement at issue to William “just before he died”, so it appears Ned is dead. Death is one basis for unavailability, so we’ve got that element met.

Lee Burgess: The next question is whether Ned made the statement to William about the big job while believing his death was imminent. Answering this question requires a bit more analysis than the unavailability issue. We are told that William spoke to Ned “just before [Ned] died.” So, it’s possible that Ned’s death was imminent as he was speaking to William. We don’t know for sure, so it’s important to state in your answer that this element could go either way.

Lee Burgess: Now, let’s look at the last element – the requirement that Ned’s statement concerned or caused or the circumstances of his impending death. Well, we don’t know why or how Ned died, but we do have some facts about the timing and the sequence of events that could be helpful here. The statement seems to be about the robbery. Could something have happened during the robbery that caused Ned’s death? We know that the robbery occurred in the afternoon, but William spoke to Ned in the evening – so, some time after the robbery. We know that Ned died some time after speaking to William. We don’t know how



soon after, but we know that it was after he talked to William, and after the robbery. Given that the robbery occurred at a different time of day from Ned's statement, it's pretty unlikely that it caused his death. Therefore, Ned's statement really can't be said to be about the case or circumstances of his impending death.

Lee Burgess: So, the dying declaration exception doesn't apply here. Now, what about excited utterance? Let's recall the rule: A statement in relation to a startling event or condition, made while the declarant was under the stress of excitement that the event/condition caused, is admissible. So, was or had Ned experienced a startling event or condition while he was talking to Wendy? Nothing in the facts suggests that. Does Ned seem to have been under any stress during their call? Again, we don't have any information to suggest that. So it seems pretty clear that the excited utterance exception is not triggered here.

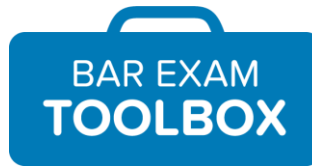
Lee Burgess: Now, in your essay, you'd want to go on to discuss whether any other exceptions might apply, and would have allowed the court to properly admit the statement. But we're focusing on the dying declaration and excited utterance exceptions today. So we'll go on to our next example now. This one is loosely based on the [February 2012 Evidence essay from the bar exam in California](#):

Lee Burgess: "Paul sued David in federal court for damages arising from an automobile accident. Paul testified that he was driving below the speed limit when his passenger, Vera, calmly told him that there was a black SUV weaving recklessly through traffic behind them. He also testified that 30 seconds later, he saw David driving a black SUV which then swerved in front of them and hit Paul's car, killing Vera and leaving Paul seriously injured. Did the court properly admit Vera's statement?"

Lee Burgess: What do you think? Does the dying declaration or excited utterance exception apply here? Do both? As I mentioned in the prior hypothetical, remember to always start with whether the statement is hearsay first, before getting into any exceptions. For our purposes today, we'll assume that you've done that already, and get right to the exceptions.

Lee Burgess: Okay, let's begin with dying declaration. Is the prerequisite met? Are we dealing with a civil case or a criminal homicide? Yes! The facts say that Paul sued David for damages, letting us know this is a civil matter.

Lee Burgess: Moving right along, let's tackle the three elements of the exception. Remember our rule: A statement made by, one, an unavailable declarant; two, under a sense of impending death; three, about the cause or circumstances that put the



declarant in the position of impending death, is admissible. First things first: Do we have an unavailable declarant? We do! We know that Vera was killed in the accident, so she is dead and, thus, unavailable.

Lee Burgess: Second, did Vera make her statement while believing her death was imminent? This is less of a slam dunk, so let's look closely at the timing again. The facts tell us that Vera told Paul she saw the swerving black SUV just 30 seconds before David's black SUV hit them. That means Vera's statement was definitely close in time to her death – just 30 seconds before impact. But the timing doesn't tell the whole story here. Remember, there are virtually no superfluous words in these fact patterns, so never ignore an adjective like "calmly". We are told that Vera *calmly* told Paul about the black SUV. Would someone who believed she was about to die speak calmly? Probably not. Thus, even though we know from the timing that Vera's death actually was imminent, Vera doesn't seem to have known that. She didn't believe her death was imminent when she made the statement, so the second element is not met.

Lee Burgess: Even though we know the exception won't apply here, it's best to address all of the elements every time to make sure you earn all available points. So, let's quickly tackle the third element. Does Vera's statement concern the cause or circumstances of her imminent death? Arguably, yeah. She's relaying to Paul that a black SUV behind them is weaving recklessly. If the same black SUV hit Paul's car immediately after, which is Paul's theory, because David – the driver – was driving recklessly, then Vera's statement directly relates to the cause of her death.

Lee Burgess: What about the excited utterance exception? Does that apply to Vera's statement? Well, let's see. First, is Vera making a statement in relation to a startling event or condition? Maybe. Depending on how recklessly the driver of the SUV was driving, seeing him in the rearview mirror might have been enough to startle Vera and cause her to fear an accident. However, we know that Vera's statement also must have been made while she was under the stress of that startling event or situation. Once again, we need to look closely at every word, particularly adjectives that might give us clues as to Vera's emotional state. The facts say that she spoke "calmly," not that she was "worried" or "panicked" or anything to suggest that Vera was under any stress. So it looks like the excited utterance exception doesn't apply here either.

Lee Burgess: Okay, let's walk through another example. This one is adapted from the [February 2016 bar exam](#):





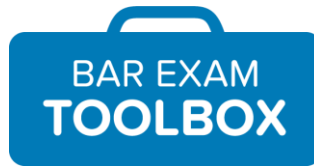
Lee Burgess: “Pam sued her former coworker David in federal court for defamation. Pam had been fired from the company where she and David worked. Shortly after Pam was fired, David circulated an email around their office stating, among other things, that Pam was fired because she stole from the company and had an affair with another coworker, Mike, which had ended just before Pam’s termination. A month after David sent the email, Mike died. At trial, David testified that before Pam was fired, he overheard Pam and Mike yelling at each other in Mike’s office. According to David, Pam cried, ‘Please don’t leave me!’ David added that Mike responded, in a measured tone, ‘Our affair is over – you need to get on with your life.’ Did the court properly admit David’s testimony?”

Lee Burgess: First off, as always, we need to isolate the statement or statements at issue and evaluate whether or not they are hearsay. Here, we have a fairly common situation for Evidence essays, which is we have more than one statement at issue. We have Pam’s cry of “Please don’t leave me!” and Mike’s reply. So, let’s look first at Pam’s statement.

Lee Burgess: Does it qualify as an excited utterance? We know that Pam is speaking loudly enough that David has overheard her, and we know that her statement is described as a “cry”. This suggests that she is under some stress. She’s yelling “Please don’t leave me!” which also suggests that Mike has either just threatened to leave her or told her that he is leaving her. This arguably qualifies as a startling event. Therefore, it appears that the excited utterance exception applies to Pam’s statement. She was startled by Mike breaking up with her and made a statement in relation to that breakup, while under the stress of the breakup.

Lee Burgess: Now, could her statement also be a dying declaration? Don’t forget to look first at the type of case we have. This is a civil action for defamation, so we know that dying declaration exceptions are a possibility. Next, is Pam unavailable? Presumably she is alive because she is suing David, and there are no facts suggesting she is incapacitated by illness or injury. She has filed a lawsuit, so she presumably consents to the court’s jurisdiction. What about privilege? Pam and Mike are said to be having an affair, which means they’re not married and have not been married. So the spousal privilege does not apply. The facts don’t indicate any other privileges either. We also have not been told that she refuses to testify or does not recall the conversation with Mike.

Lee Burgess: Moving on to the second element, which is whether Pam believed her death was imminent at the time of the statement to Mike – this element is not met either. While Pam may have been devastated by the breakup, there is nothing in the facts to suggest she thought she was going to die. Similarly, nothing about



her statement relates to impending death, so the third element is not met either. Pam’s statement is not a dying declaration.

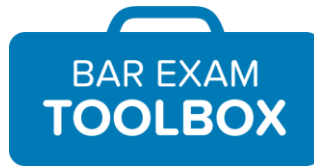
Lee Burgess: So, let’s look now at Mike’s statement. We know that Mike has died, so maybe we have a dying declaration there? Let’s look more closely. First, we know that we have the right type of case for dying declaration to apply – a civil lawsuit. Is Mike unavailable? Yes, he is dead. Does it appear that Mike believed his death was imminent when he told Pam their relationship was over? Nope. The statement also doesn’t appear to be about the cause or circumstances of Mike’s death. We don’t know how Mike died, but nothing in his statement relates to anything that causes death, so the dying declaration doesn’t apply here.

Lee Burgess: Turning to the excited utterance exception – does Mike’s statement qualify? Well, probably not. Even if we assume for the sake of argument that the breakup was a startling event for Pam, that doesn’t mean that it was for Mike. He appears to be initiating the breakup, such that he can’t be startled by it. Also, his statement to Pam does not appear to be made under any stress; the facts tell us that he “spoke in a measured tone”. A declarant under stress from a startling event or condition is not likely to speak in a measured tone. It does not appear that the excited utterance exception applies to Mike’s statement.

Lee Burgess: Lastly, let’s try one more example for dying declaration and make sure we know the ins and outs of that exception, since it has so many elements:

Lee Burgess: “David was charged in federal court with the murder of Victor. Before Victor died of complications from a gunshot wound, police interviewed him at the hospital and showed him a photo lineup of suspects in the shooting. He identified David from the photos. A few hours before Victor spoke to the police, doctors had operated on his wound. He was extubated after the surgery so that he could speak to the police, and he continued to recover, beginning physical therapy just a few days later. After a week, however, he took a turn for the worse and died from an infection that resulted from the surgery. At David’s trial, the court admitted testimony from the police officer who showed Victor the photo lineup and Victor’s identification of David as the man who shot him. Did the court properly admit the police officer’s testimony?”

Lee Burgess: Okay, as always, you need to first find the statement at issue and evaluate whether it’s hearsay. As with all of our prior examples, we’ll assume you’ve done this step and cut straight to whether the dying declaration exception applies. Step one: Is our case either a civil matter or a criminal homicide? Yes, homicide, check! Step two: Apply the elements of the rule. Do we have an unavailable declarant? We do – Victor is dead. Was Victor’s statement made to



the police officer while Victor believed his death was imminent? Well, Victor was in the hospital recovering from an operation for a potentially fatal injury, a gunshot wound. But we are told that he was recovering and had been extubated, so it appears that at least when he spoke to the police officer, Victor was not imminently dying. He likely believed he was getting better. After all, he did not die for another week, and in the intervening time period, he was well enough to start physical therapy. Thus, this second element – belief death is imminent – isn't likely met.

Lee Burgess: As I said, we still need to address the third element to maximize your points, even though we know that dying declaration won't apply. So, the last piece: Did Victor's statement concern the cause or circumstances of his death? Well, his statement identified David as the man who shot him from an array of photos. Ultimately, Victor died from complications from a gunshot, therefore, it seems fairly clear that Victor's identification of David to the police officer concerned the cause and circumstances of his death.

Lee Burgess: And that's it for our hypos. Hopefully these examples will help you remember the elements of the dying declaration and excited utterance exceptions, and to quickly recognize when each one is triggered. It's critical to have a quick way to shuffle through all possible hearsay exceptions and pick out the ones that are being triggered by the facts. If you haven't done so already, listen to the general hearsay podcast and come up with your own mnemonic for all the exceptions. Each exception is distinct and unique, but some pieces, like unavailability of the declarant, overlap here and there, which can get confusing. You want to know these like the back of your hand, because on exam day, there won't be any time to waste!

Lee Burgess: And that wraps up our podcast for today. 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 won'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 contact us via our website [contact form](https://www.barexamtoolbox.com/contact-form) at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

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