



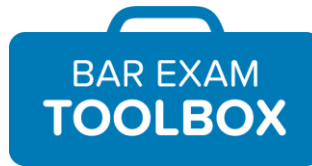
Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we are going to be doing another in our “Listen and Learn” series – this one on hearsay, specifically the business records exceptions. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar 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 going to talk about two hearsay exceptions – public records and business records. These exceptions apply to writings, as distinguished from verbal statements. Because writings often reflect statements that could in and of themselves qualify as hearsay, we’ll also discuss multiple hearsay.

Lee Burgess: But before we dive into what exactly these exceptions cover, let’s do a quick refresher on exactly what hearsay is, since this can be a confusing topic, and it’s heavily tested. Here’s the rule that you’ll want to know well enough to recite in your sleep: Hearsay is an out-of-court statement that is offered for the truth of the matter asserted. Hearsay is only admissible if it falls under an exception.

Lee Burgess: You’ll know you’re dealing with hearsay when the question asks whether a statement (verbal or written) made outside the courtroom should be admitted. The person who made the statement is referred to as the “declarant”. “Out-of-court” means the statement was made when the declarant was not on the witness stand at trial or in a hearing. “Offered for the truth of the matter asserted” just means to prove the statement’s content, as opposed to some other purpose, like showing that the declarant was on notice of a hazardous condition, or to prove a statement was made where that’s an essential element of a claim, like in a defamation case. We have an [entire podcast devoted to hearsay](#), so I’m not going to spend a ton of time generally defining it today. If you have any additional questions, definitely revisit that podcast. We’ve linked to it in the show notes.

Lee Burgess: Alright, now let’s get to the reason that we’re here – the public records and business records exceptions to the hearsay rule. Just to be super clear, if these exceptions are established, a document that would otherwise be considered



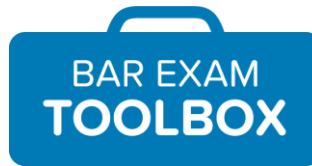
hearsay is admissible, unless it's excluded for some other, non-hearsay-related reason.

Lee Burgess: Before we tackle our first hypo, I'll address multiple hearsay. As I mentioned, this issue often comes up when we're dealing with writings and documents, which can have hearsay within hearsay. The rule to write down is: When evidence contains hearsay within hearsay, each level of hearsay must fall within an exception to be admissible. For example, say you have a witness's diary, written over the course of the last year. We know this is hearsay, unless an exception applies, because it's a written statement by the witness made outside the courtroom. Imagine also that there is a diary entry describing a conversation between the witness and her friend. The statements from the conversation recorded in the diary are also hearsay if offered for their content, right? You've now got a multiple hearsay situation.

Lee Burgess: If you see this on an essay, it's really important to organize your answer carefully. Start with the rule for multiple hearsay and IRAC that. Then move on to the writing itself and analyze whether it is hearsay and whether any exceptions apply, such as the public records or business records exceptions. IRAC each of the exceptions. Next, address the statement within the writing and do the same thing. IRAC whether it's hearsay and IRAC each applicable exception.

Lee Burgess: So let's dive into our first exception now – business records. This exception is heavily-tested, so it's super important to know it well. It also has multiple elements, so you'll want to practice it to make sure you've got all of them down. The rule to write down is: A business record is admissible if it is, one, a record of events, conditions, opinions, or diagnoses; two, kept in the regular course of business; three, made at or near the time of the matter described; four, by a person with knowledge of the matter; five, when it is the regular course of business to make such a record; and six, the opponent party does not show that the record was made under circumstances indicating a lack of trustworthiness.

Lee Burgess: A mouthful, I know! Let's break it down a little bit. You're looking for a written record that is kept in the regular course of business when it's part of the regular course of business to make that record. This means not just a one-off statement of someone's opinion or a personal diary, even if that diary records daily events. The record also needs to have been made concurrently with when the recorded event or situation is happening, or soon thereafter. Also, the person making the record needs to have personal knowledge of what they're recording. Lastly, make sure there are no facts suggesting that the record isn't reliable or trustworthy.



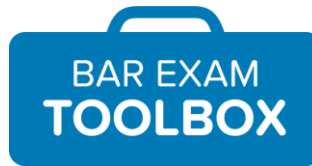
Lee Burgess: One other thing to keep in mind with the business records exception is that the witness who lays the foundation for the business records exception does not need to be the author of the record. The witness also need not attest to its accuracy.

Lee Burgess: Now we'll tackle a hypo featuring this exception, which is the best way to get a handle on all the elements of the rule and to make sure you understand how to apply them. This hypo is loosely adapted from an essay on the [February 2017 California bar exam](#):

Lee Burgess: "Pete was driving his car one day when it collided with a pizza delivery driver's car. Pete sustained some serious injuries in the accident and was hospitalized. Pete later sued the pizza company, Donna's Pizza, in federal court. At trial, Pete testified that he had entered the intersection on a green light when his car was hit by the Donna's Pizza driver, Erin, who ran a red light. He also called as a witness Nellie, the nurse who testified that she treated Pete in the hospital. Nellie testified that Pete told her that his head struck the windshield in the accident and that he was still in a lot of pain. Pursuant to standard hospital procedure, Nellie recorded this information on a hospital intake form. Upon Pete's motion, the court admitted the form into evidence. Did the court properly admit the hospital intake form?"

Lee Burgess: We can immediately see that we are dealing with a document that was written outside of the courtroom, and which is being offered to prove the truth of its contents, namely that he was badly hurt as a result of the accident because he hit his head on the windshield. So, we know we're dealing with a hearsay issue. Therefore, you'll want to state the general rule for hearsay – an out-of-court statement offered for the truth of the matter asserted, which is inadmissible unless an exception applies – and apply it to the hospital intake form. We also have a multiple hearsay issue here, as is so often the case with documents. This is because Nellie recorded a statement from Pete, which also was made outside the courtroom (in the hospital). In your essay, then, state the rule for multiple hearsay next. Tackle the document first and then Pete's statement. Because we are only focused on records exceptions today, we'll focus only on the hospital intake form. Just know that on the exam, you'll need to address both layers of hearsay before you could conclude that the form was properly admitted.

Lee Burgess: So, does the business records exception apply here? Let's proceed through the rule step by step. Do we have a record of events, conditions, opinions, or diagnoses? It seems like we do – Pete has told Nellie about his medical condition and his opinion as to what caused it, describing the accident event.



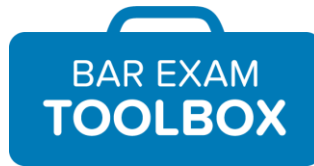
From the facts, we know that it was “standard hospital procedure” for Nellie to record what Pete told her on a hospital intake form, in the regular course of treating Pete. So, the second and fifth requirements for the exception – kept in the regular course of business when it is the regular course of business to make such a record – are met here. Nellie spoke directly with Pete. She didn’t hear his statements from someone else, so she has personal knowledge of what she recorded. Pete was presumably hospitalized very soon after the accident, and he told Nellie he was still in pain, so Nellie’s record appears to have been made at or near what Pete was describing. Lastly, we don’t have any indication that the defendant pizza company showed there were circumstances suggesting that the intake form was untrustworthy or unreliable. It looks like the court properly admitted the form under the business records exception.

Lee Burgess: Nice work! Hopefully this hypo demonstrates that the business records exception is usually pretty straightforward and relatively easy to apply, even though there are a bunch of elements. Typically, you’ll see similar language like “standard procedure” and “form” in all of the questions where this exception is in play, so it will be pretty obvious when you need to raise it.

Lee Burgess: Let’s move on to our second hearsay exception for today – the government/public records exception. There are three types of documents admissible under this exception. Here’s the rule to write down: The following records are admissible under the government/public records exception: one, a record describing the policies and practices of a public office; two, observations made by someone in accordance with his duties by law, except police reports in criminal cases; and three, factual findings from a legally authorized investigation when offered against the government in a criminal action or against any party in a civil action. Also, similar to the business records exception, if the opposing party shows that the record was made under circumstances indicating a lack of trustworthiness, the record will not be admissible.

Lee Burgess: Our hypo for the government/public records exception is adapted from the [July 2009 California bar exam](#). That question asked exam takers to apply California law, and we are applying federal law today, so keep that in mind if you go back and do that essay for practice:

Lee Burgess: “Paula and Dan’s cars collided one afternoon. Both Paula and Dan sustained injuries and damage to their cars. Paula sued Dan for negligence, claiming that Dan failed to yield to her right-of-way. Dan filed a cross-complaint for negligence against Paula. At trial, the court granted Paula’s motion to admit into evidence the accident report prepared by Officer Olivia. Officer Olivia’s report, which she prepared back at the police station shortly after leaving the scene of



the accident, states, ‘When I arrived at the scene 3 minutes after the accident occurred, an unnamed bystander immediately came up and stated that Dan pulled right into the path of Paula’s car. Based on this information, my interviews with Paula and Dan, and the skid marks, I conclude that Dan caused the accident.’ Should the court have admitted Officer Olivia’s accident report?”

Lee Burgess:

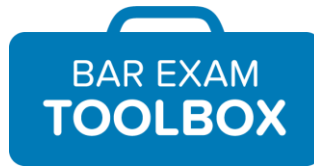
Once again, we have a writing that was prepared outside of the courtroom, which should immediately sound the hearsay alarm in your head. And, the writing appears to be offered to prove the truth of its contents – that a bystander saw Dan cut Paula’s car off, causing the accident. State the rule for hearsay, or refer back to it if you already have in your essay, and apply it. We also have multiple hearsay again, so you need to state the rule for that and break out the layers of hearsay. Just like with our prior hypo, I won’t be addressing the hearsay within the accident report today, because we are specifically focusing on the government/public records exception. Don’t forget, however, that to make a conclusion on whether the report was properly admitted, you’d need to make sure there was a hearsay exception for the bystander’s statement within the report, as well as the report itself.

Lee Burgess:

Okay, back to the report. Does it qualify under any of the three tests for what is a public/government record? It’s not a record describing the policies and practices of a public office, but it does reflect the observations of Officer Olivia – a government employee – who made the report as part of her job. Nothing in our facts suggests any circumstances indicating a lack of trustworthiness either. Putting aside the multiple hearsay issue and focusing only on the report itself, it looks like it was properly admitted as a public/government record. As a general rule, always raise this exception when you have a writing prepared by a government employee, like a police officer.

Lee Burgess:

What about the business records exception? Does that apply here too? Often these two exceptions go hand-in-hand if you have a writing prepared by a government employee, which of course was not the case in our prior hypo with Nurse Nellie. Officer Olivia recorded his opinion as well as what the bystander told him in a police report, which is a document kept in the regular course of police business and made as a regular part of his job. However, we know that he did not arrive at the scene of the accident until three minutes after it occurred. Facts like that always matter, and they’re always included for a reason. Here, that reason is probably to raise the question as to whether Officer Olivia had personal knowledge of what she wrote down in the report, as well as whether it was made “at or near the time of the matters described”. You should argue both ways to maximize your points.



Lee Burgess: On the one hand, Dan would argue that Officer Olivia did not see the accident, so she doesn't have the requisite personal knowledge, and that three minutes after the fact is not sufficiently at or near the time of the accident. Paula would argue the opposite – that three minutes is very close in time and that Paula was able to observe the skid marks she described and clearly had personal knowledge of the statements she recorded, which were made to her directly. We know we don't have any circumstances that call into question the trustworthiness of the report. In sum, the court likely properly admitted under the business records exception, as well as the public/government records exception.

Lee Burgess: And with that, we'll wrap up our podcast for today. Thanks for joining me! 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:**

["Listen and Learn" series](#)

[California Bar Examination – Essay Questions and Selected Answers, February 2017](#)

[California Bar Examination – Essay Questions and Selected Answers, July 2009](#)

[Podcast Episode 89: Listen and Learn – What Is Hearsay?](#)

[Podcast Episode 101: Listen and Learn – Present Sense Impression vs. State of Mind](#)

[Podcast Episode 114: Listen and Learn – Non-Hearsay](#)

[Podcast Episode 115: Listen and Learn – Dying Declaration vs. Excited Utterance](#)