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 prior testimony and past recollection recorded. 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! On tap today are two hearsay exceptions: prior statements made under oath, and past recollection recorded. But first, let me take a minute to review the rule for hearsay, so that we are all on the same page. Hearsay is heavily tested both in essays and on the MBE, so it's really important to make sure you understand what it is. Here's the rule: Hearsay is an out-of-court statement that is offered for the truth of the matter asserted. A statement for purposes of the hearsay rule can be oral or written. Regardless of which it is, the maker of the statement is called the "declarant". "Out of court" just means that the statement was not made in the courtroom while the witness is testifying. That's what makes hearsay generally inadmissible – what a witness said or wrote on some prior occasion, when he or she was not under oath isn't considered reliable or trustworthy. Memories fade, and we don't have any way to test veracity through cross-examination.

Lee Burgess: The other key aspect of the rule is the "offered for the truth of the matter asserted" piece. This just means that the party introducing the hearsay statement is doing so in order to prove the contents of the statement, not for some other purpose. An example of a non-hearsay purpose might be a statement offered to show its effect on the listener, or as circumstantial evidence of the speaker's state of mind.

Lee Burgess: If a statement was made under circumstances that make it more likely to be trustworthy, it may be admissible. The many hearsay exceptions that you need to learn reflect these circumstances that boost reliability. As I mentioned, we'll be discussing two such exceptions today. But keep in mind as we go through our hypos that the bar examiners love to test multiple exceptions at once, so you'll almost always need to discuss a bunch in a given essay. For today, we will only

consider prior testimony and past recollection recorded, but if you want to brush up on the other exceptions, check out our other hearsay exception podcasts.

Lee Burgess: Okay, let's dig into today's hearsay exceptions. Remember, if any of these exceptions is established, a statement that would otherwise be considered hearsay is admissible – unless, of course, it's excluded for some other, non-hearsay-related evidentiary reason, but that's not our concern today.

Lee Burgess: First up we have an exception for written hearsay statements – past recollection recorded. This exception is tested pretty frequently, so it's a good one to know well. There are several components to this rule. A past recollection recorded is a record made on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately. Think notes about an event, or a diary entry. The rule is: A past recollection recorded is admissible if, one, the witness had personal knowledge at the time; two, the writing was made or adopted by the witness; three, the writing was made while the events were still fresh in the mind of the witness; four, the writing is accurate; and five, the witness can no longer remember the event.

Lee Burgess: If you remember the reason why we have hearsay exceptions, which is to allow for more reliable hearsay statements to still be admissible, a lot of the components of this rule make intuitive sense. You have a written statement about something the witness had personal knowledge of at the time he or she wrote it, and the witness wrote it while the events were fresh in his or her mind. The writing was made by the witness, not someone else (or at least adopted by them), and the witness will testify it is accurate. Most critically, the witness can't remember the event the writing talks about, so the writing is being introduced to help the witness to remember.

Lee Burgess: But that's not quite all, however. If admitted, the record may only be read into evidence. It can't be received by the court as an exhibit unless it is offered by an adverse party. So when you're answering a question where the past recollection recorded exception may apply, don't forget to consider how the court admitted the evidence (which you don't usually have to do when dealing with hearsay exceptions).

Lee Burgess: So, let's try a hypo featuring this exception, to make sure you're clear on how it works. This hypo is loosely adapted from an essay that appeared on the California bar in February 2012:

Lee Burgess: "Paul sued David in federal court for damages arising from an automobile accident. Paul's theory of the case was that David had been driving recklessly, causing the accident. At trial, David called Molly, who testified that she drove by the aftermath of the accident and stopped to help. She further testified that she spoke to Paul and, after Paul was taken away in an ambulance, carefully wrote down notes of what he had told her. She testified that she did not remember their conversation at all. David showed her a copy of those notes and she identified them as the ones she wrote down immediately after she spoke to Paul. The copy of the notes states that Paul told Molly he caused the accident because he was driving too fast. Did the court properly admit the notes into evidence?"

Lee Burgess: We can immediately see that we are dealing with a written statement made outside of the courtroom, at the scene of an accident, which is being offered to prove the truth of its contents, namely that Paul was speeding. 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 Molly's notes. You may also have caught that there is a multiple hearsay issue here – Paul's statements reflected in the notes are also hearsay. But we're not going to go into that today.

Lee Burgess: Does the past recollection recorded exception apply here? Let's proceed through the rule step by step. We've got a declarant who can't remember a conversation. She's identified the notes at issue as hers. We know that she had personal knowledge of the conversation at the time she took the notes, since she was speaking to Paul herself. Additionally, we are told that she wrote the notes right after speaking with Paul, as he was being driven away in the ambulance, so the conversation would have been fresh in her mind. We are also told that she "carefully" wrote down what Paul had told her. The bar examiners are always deliberate in their choice of words, but words like "carefully" should always raise your antenna. Here, it's included to satisfy the element of accuracy – the notes must be accurate, since Molly took them "carefully," right?

Lee Burgess: Looks like we have satisfied all the elements of the past recollection recorded exception. But don't forget the last piece – how were the notes admitted? Were they read to the jury or received in evidence? We are told the court admitted the notes. To be properly admitted, the notes must have been offered against an adverse party; otherwise, they should only have been read to the jury. Is that requirement met here? Yes! David is offering the notes against Paul, to prove

that the accident was actually Paul's fault. The court did not err in admitting Molly's notes as a past recollection recorded.

Lee Burgess: Now that we've got this exception down, let's tackle the exception for prior statements made under oath, which I'll abbreviate for our purposes as prior testimony.

Lee Burgess: You have probably already noticed that the hearsay exceptions can generally be divided into two categories – those that require the declarant is unavailable to testify, and those where the availability of the declarant doesn't matter. The prior testimony exception is in the former category; we need an unavailable declarant. So, let's quickly revisit the rule for unavailability before we discuss other requirements for this exception.

Lee Burgess: 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 a privilege; (b) refuses to testify despite a court order; (c) cannot be present due to 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: Got it? Now onto the rule for prior testimony. Prior statements made under oath are admissible if, one, the statements are offered against a party who was present in the previous trial or proceeding (or, in a civil case, a party who was in privity with the party in the previous case is sufficient); two, the same issues are involved; and three, the party who it is offered against had the same motive and opportunity to cross-examine the witness in the previous trial or proceeding. As I said, the declarant must be unavailable.

Lee Burgess: Alright, so what we are talking about here is testimony previously given under oath by a declarant who is now unavailable. The testimony could have been taken at a deposition, hearing, or trial; the key is that the witness was sworn. The testimony must be offered against a party who had an opportunity and similar motive to develop it by direct or cross-examination in the prior proceeding. As you can see, unlike other hearsay exceptions, this exception doesn't rely on some set of circumstances to substitute for the reliability and trustworthiness afforded by an oath to tell the truth, and an opportunity to be cross-examined. We've got that here already.

Lee Burgess: Okay, now we'll walk through another hypo to test our understanding of this exception. Let's return to Paul's lawsuit against David after their car accident. Imagine that our witness Molly, who stopped to help in the immediate aftermath of the accident, was deposed by David during discovery. At her deposition, she testifies about her conversation with Paul before he was taken away in the ambulance, stating that Paul told her he had been speeding and that the accident was his fault. Assume for this hypothetical that Molly did not take any notes of her conversation with Paul.

Lee Burgess: Now imagine that the trial gets continued a bunch of times for various reasons, including a global pandemic, and Molly isn't called to testify until nearly a year after her deposition. On top of that, Molly has recently recovered from a terrible virus that causes memory loss and mental fog. On the stand, she states that she now has no memory of her conversation with Paul after the accident. Should the court grant David's motion to admit her deposition testimony over Paul's hearsay objection?

Lee Burgess: To answer this question, we need to start with the threshold issue of unavailability. Molly is on the stand at trial, so you might be thinking, "Of course she's available." But is there any way she qualifies as unavailable, such that the prior testimony exception might apply? Remember the tests for unavailability. We've got privilege, death or illness, refusal to testify, beyond the court's subpoena power, and – ding ding ding! – inability to remember the subject matter. So, even though she is physically present at trial, Molly is unavailable for the purposes of the hearsay exception because she testified she couldn't recall the conversation with Paul.

Lee Burgess: Now that we've checked the box for unavailability, let's apply the requirements for the prior testimony exception to our facts. Is Molly's deposition a prior statement made under oath? Yes, witnesses are sworn during depositions. David is trying to offer the deposition testimony evidence against Paul. Was Paul present during the deposition proceeding? We can assume that either he or his attorney was. Are the same issues involved? Yep, the deposition was part of the same lawsuit by Paul against David arising out of their car accident. Lastly, did David have the same motive and opportunity to cross-examine Molly as he does now at trial? Yes, his attorney had the right to question Molly at her deposition and would have had the same motive then as at trial to discredit and/or disprove what she said about Paul admitting fault. It looks like the court should grant Paul's motion to admit Molly's statements at her deposition under the prior testimony exception.

Lee Burgess: And that wraps 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 and Alison at lee@barexamtoolbox.com or alison@barexamtoolbox.com. Or you can always contact us via our website contact form at BarExamToolbox.com. Thanks for listening, and we'll talk soon!

RESOURCES:

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California Bar Examination, February 2012
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Podcast Episode 115: Listen and Learn – Dying Declaration vs. Excited Utterance
Podcast Episode 132: Listen and Learn – Hearsay Exceptions: Government and Business Records
Tackling MBE Hearsay Questions