



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're doing another in our "Listen and Learn" series – this episode is on hearsay within hearsay. 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 multiple hearsay, also known as "hearsay within hearsay". If this sounds confusing, that's because it is! Multiple hearsay is a commonly-tested issue that can trip up even students who really feel like they understand hearsay. We're going to fix that today! Here's the rule to write down for multiple hearsay: When evidence contains hearsay within hearsay, each level of hearsay must fall within an exception to be admissible.

Lee Burgess: If you're still confused, don't worry. We have a step-by-step approach you can follow for recognizing and writing about multiple hearsay. The first step is to make sure we understand how to apply the rule for hearsay generally.

Lee Burgess: I know you know this one: Hearsay is an out-of-court statement offered for the truth of the matter asserted. Memorizing that rule isn't the problem for most students. What makes hearsay a difficult issue is applying the rule. It's important for our purposes today that we are all on the same page about how to apply the rule and quickly determine if a statement is hearsay or not. We do have a [separate podcast dedicated to the question of what is hearsay](#); if after I finish my relatively brief explanation today you feel like you need more of that, don't hesitate to check it out, because we'll link to it in the show notes.

Lee Burgess: Alright, let's apply the hearsay rule. On an exam, the first clue that you're entering the hearsay realm is when an Evidence question asks whether a statement made outside the courtroom should be admitted. The statement could be verbal or written, or some other kind of assertive conduct. The key is that it is not being made in front of the court in the current case. Next, you need to consider why the statement is being offered. Is it to show that the thing being said is actually true and not false? Or is there some other purpose? If you're



stumped, think back to why you found the evidence relevant – which you should have addressed as one of your first issues.

Lee Burgess: You can also think about who is seeking to admit the statement and why they need to show it to prove their claim. Take, for example, a statement by a 90-year-old man that he is the superhero Batman. If that man dies and leaves all his worldly possessions to his pet iguana, and his daughter seeks to admit the statement in her case contesting his will, we know that she is most likely not offering the statement to prove that her father actually was Batman. Rather, she seeks to admit the statement for some purpose other than its truth, such as to show that her father was not mentally competent to execute his will. If that's the reason, the statement is not hearsay, because it's not offered for the truth of the matter asserted.

Lee Burgess: Now that we understand how to apply the hearsay rule, we'll move on to multiple hearsay. Basically, multiple hearsay is just more than one layer of hearsay within the same piece of evidence. For example, imagine you have written notes taken outside the courtroom by a witness about what some other witness has said (also outside the courtroom). Assume for now that the notes and the verbal statement are offered for the truth of the matter asserted. Within the notes, then, you have two separate pieces of hearsay: one, the writing itself; and two, the verbal statement recorded in the notes. This is multiple hearsay. Not too hard, right?

Lee Burgess: Once you understand how to apply the hearsay rule, the toughest thing about multiple hearsay is how to write about it in a clear and organized way, so you'll earn all the available points. Not separating out the layers of hearsay is the biggest mistake students make and the quickest way to lose points. Start with one piece of evidence and work through the entire analysis before you move on to the next piece.

Lee Burgess: We'll start with the verbal statement. State the rule for hearsay and analyze whether the statement itself is hearsay. If it is, tackle any hearsay exceptions that might apply to make the statement admissible, one-by-one. After you draw a conclusion as to whether the statement should be admitted, move on to the notes themselves and do the same thing. First, apply the general hearsay rule again, and make a conclusion as to whether the notes are hearsay. If they are, proceed one-by-one through each applicable exception. If you conclude that both the notes and the verbal statement recorded in the notes are hearsay, but that there is a hearsay exception that makes each one admissible, then the notes may be properly admitted. If you don't have an exception for both the notes and the statement, however, the notes are not admissible.



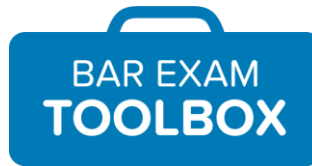
Lee Burgess: We'll do a couple of hypos now to illustrate what I mean. As we work through them, keep in mind the key takeaways. First, keep your eyes peeled for oral statements within written documents, which are often hearsay within hearsay. Second, each layer of hearsay must be analyzed separately, with its own IRAC.

Lee Burgess: And now for our first multiple hearsay hypo:

Lee Burgess: "Dave brought his truck to the local gas station for an oil change. The mechanic, Melanie, checked the brakes and noticed they needed repair. When Dave picked up the truck later, Melanie's assistant, Will, overheard Melanie tell Dave, 'I think your brakes are bad. You'd better get them fixed.' About an hour later, Will was completing the paperwork relating to Dave's repair. He wrote, 'Customer was told brakes were bad and in need of repair.' That evening, Dave, driving his truck, ran a red light and crashed into Polly's Porsche. Polly sued Dave on the theory that Dave hit her Porsche because his brakes failed, that Dave knew or should have known that his brakes were bad, and that driving the truck under those circumstances was negligent. Polly sought to admit the paperwork Will completed relating to the repair. Should the court admit his notes?"

Lee Burgess: Did you catch the multiple hearsay? First, we have Melanie's statement to Dave, and then we have Will's notes recording that statement. Two possible pieces of hearsay within the same writing. State the multiple hearsay rule, which reminds us that we need to address each piece separately. So, let's begin with Melanie's statement. Does it qualify as an out-of-court statement? Yes! We know that Will overheard Melanie at the gas station, not in the courtroom. Is it being offered for the truth of the matter asserted? Ask yourself who is offering the statement and why. What is it being offered to prove? Polly might want to prove that the content of Melanie's statement is true, namely that Dave's truck's brakes were bad. If that's the case, then the statement is offered for the truth of the matter asserted, and it is hearsay and inadmissible unless an exception applies. But Polly might also want to admit the statement to prove that Dave was on notice of the problem with his brakes and thus was negligent in continuing to drive the truck, which is a non-hearsay purpose.

Lee Burgess: Next, since there is an argument to be made that Melanie's statement is hearsay, you'd want to look at the hearsay exceptions to see which one(s) might apply to make the statement admissible. If you need a refresher on those, check out our previous podcasts, which cover several commonly-tested exceptions. Those will also be linked to in the show notes. For today, we'll skip that part of



the analysis and move on to Will's notes, the second layer of potential hearsay in this question.

Lee Burgess: As we did with Melanie's statement, we'll start with the threshold issue of whether the notes are hearsay. We know they qualify as an out-of-court statement because Will wrote them at the gas station. We also know that Polly is likely offering them for the truth of their contents, to prove that Will's brakes were faulty. Therefore, the notes likely qualify as hearsay. As with Melanie's statement, our next step is to IRAC any possible hearsay exceptions that might apply to make the notes admissible, like the business records exception.

Lee Burgess: Here, it seems likely that the court would conclude that Melanie's statement was non-hearsay, if it was indeed offered to show Dave was on notice of the danger his brakes posed to other drivers and continued to drive anyway. If Will's notes qualify as a business record or for some other hearsay exception, the notes, and Melanie's statement therein, will be admissible.

Lee Burgess: Let's do one more hypo to make sure we're all clear on multiple hearsay. This question is loosely adapted from the [July 2014 California bar exam](#):

Lee Burgess: "Pete was a passenger on ABC Airlines who was severely injured when the plane in which he was flying crashed because of a fuel line blockage. Pete sued ABC, alleging that ABC's negligent maintenance was the cause of the crash. At trial, ABC called Chuck, its records custodian who identified a portion of the plane's maintenance records detailing the relevant pre-flight inspection. Chuck testified that all of the records are stored in his office. After asking Chuck about the method of preparation of the records and their function, ABC offered into evidence the following excerpt: 'Pre-flight completed; all OK. Fuel line strained and all valves clean and verified by Mac, ABC mechanic.' Chuck authenticated the signature of Sal, an ABC supervisor, next to the entry. Did the court properly admit the excerpt from the maintenance record?"

Lee Burgess: Do we have multiple hearsay here? If you said "Yes", then you're correct. A really big hint that multiple hearsay is in play is when you have a business record or other document containing one or more statements. Usually, this means that you need to do a multiple hearsay analysis, addressing both the document and whatever statements are contained in it. Start with the rule for multiple hearsay. Then pick either the record itself or the statement. We'll choose the maintenance record. Next, we'll need to state the rule for hearsay and apply it. Here, the record is likely hearsay because it was made out of court when Sal recorded it before the flight. It appears to have been offered for its truth as well, that Mac completed certain steps of the pre-flight inspection.



- Lee Burgess: Now we need to move to the possible hearsay exceptions. As I mentioned, we won't go into depth on those today, since we have several other podcasts addressing them in detail. Most likely, the maintenance record qualifies as a business record.
- Lee Burgess: So, let's move on to the next layer of hearsay, the sentence beginning, "Pre-flight completed..." As we already established, this is hearsay because it was written outside the courtroom and it appears to be offered for the truth of the matter asserted. So, we move on to hearsay exceptions. There are several that might apply here. Additionally, it's possible that what Sal has written qualifies as non-hearsay, for example if it satisfies the requirements for a statement by a party opponent. We have a [non-hearsay podcast](#) too, if you need a refresher on that.
- Lee Burgess: Hopefully through these examples, you've learned the importance of following an approach to hearsay questions that doesn't miss multiple hearsay, and which addresses it in an organized and clear way. As I said, start with whether there are layers of hearsay within a single piece of evidence. If there are, separate them out. For each one, state the rule for hearsay, apply it to your facts, and make a conclusion. Then, you can address whether any of the many exceptions to the hearsay rule apply. Next, tackle the second layer of hearsay, following the same approach. Start with the general rule, apply it, then go through each applicable hearsay exception, or address whether the statement might be non-hearsay.
- Lee Burgess: And that wraps up our podcast for today. Thanks for listening! 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 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:

["Listen and Learn" series](#)
[California Bar Examination – Essay Questions and Selected Answers, July 2014](#)
[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](#)

[Podcast Episode 132: Listen and Learn – Hearsay Exceptions: Government and Business Records](#)

[Podcast Episode 138: Listen and Learn – Hearsay Exceptions: Prior Testimony and Past Recollection Recorded](#)

[Podcast Episode 143: Listen and Learn – More Hearsay Exceptions](#)