



Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, we're doing another in our "Listen and Learn" series – this one is on the Best Evidence Rule. 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: Welcome back to the "Listen and Learn" series from the Bar Exam Toolbox podcast! Today we are going to focus on an important topic in Evidence – the Best Evidence Rule. The Best Evidence Rule is heavily tested on law school essays and the bar exam, but students often spend so much time focusing on the dreaded hearsay exceptions that they get caught off guard when the Best Evidence Rule comes up on an exam. But we're going to fix that today!

Lee Burgess: Before we dive into the rules, let's briefly discuss Evidence questions and how they're different from most other exams in law school and on the bar exam. Have you ever heard Evidence questions referred to as "racehorse essays"? Here's why – Evidence essays are usually packed with a lot of issues that you need to IRAC and discuss quickly. The questions are generally open-ended, such as "Did the court properly admit the evidence?" If you see a question like this on an Evidence exam, you'll need to quickly identify as many applicable bases of admitting or excluding the evidence as possible, including the Best Evidence Rule.

Lee Burgess: In contrast, other types of exams are likely to have a more specific question, like "Is the Plaintiff likely to succeed in her Negligence claim?" Your answer to this question would be more of a "deep dive" into the sub-issues, with IRACs for each of the elements of negligence.

Lee Burgess: There's no time to spare on a racehorse essay, which is why it's super important to be able to quickly identify the relevant issues triggered by the facts. The good news is that the Best Evidence Rule is usually pretty easy to issue spot on an exam – when it's being tested, you'll know it! We'll talk about this when we get to our hypos, but for now let's dive into the rules.



Lee Burgess: Here's the rule to write down: Under the Best Evidence Rule, a party must provide the original document, or a reliable duplicate, when a witness, (a) testifies to the contents of the writing; or (b) testifies to knowledge gained solely from a writing. It's important to note that the Best Evidence Rule applies to any writing, recording, or photograph. So anytime you see an Evidence exam where a witness is testifying about the contents of some sort of document, or about something that a witness learned from the document, that's your hint to discuss the Best Evidence Rule in your answer.

Lee Burgess: So, let's talk about the document itself. We know from our rule that when the Best Evidence Rule requires a party to introduce the actual document, they must introduce either the original or a reliable duplicate. By this point, you're probably asking yourself, "How do we know a duplicate is reliable?" And I'm glad you asked! A reliable duplicate is one that accurately reproduces the original document, such as a photocopy. However, it's important to note that handwritten copies are not admissible under the Federal Rules of Evidence.

Lee Burgess: Now, we wouldn't be talking about Evidence if there weren't any exceptions to the rule, right? Even the Best Evidence Rule has a few exceptions that tell us when an original document or reliable duplicate is not required to prove their content. So let's dive right in and go through the exceptions. An original writing, recording, or photograph, or a reliable duplicate is not required to prove its contents if, (a) all the originals are lost or destroyed, and not by the offering party acting in bad faith; (b) an original cannot be obtained by judicial process; (c) it was not produced after proper notice was given to the party in control and against whom it would be offered against; or (d) it's not closely related to a controlling issue.

Lee Burgess: The main thing to keep in mind here is that, if any of these four exceptions apply, a witness can testify about the contents of a writing, recording, or photograph, and the proponent of the evidence is not required to produce the original document or even a reliable duplicate. On that note, I think we're ready for our first hypo:

Lee Burgess: "Dan is on trial for murdering his neighbor. During the trial, the prosecution called Dan's best friend, Frank, as a witness. Frank testified that he was visiting Dan before he was arrested. During their visit, Dan told Frank he needed to get something off his chest but didn't want to say it out loud. Frank told Dan to write it down. Dan grabbed a notepad and wrote, 'I murdered my thieving neighbor last week.' When Dan showed Frank the note, Frank folded it up and put it in his pocket. Frank went home and hid the note under his mattress for safekeeping. A few weeks later, Frank's house tragically burned down in a



wildfire that destroyed all his possessions, including Dan's note. Was Frank's testimony properly admitted?"

Lee Burgess: It's important to note that on an Evidence exam, you would typically want to start with logical and legal relevance before moving on to the other issues you spotted. But, since you can find an in-depth discussion of [relevance in another episode of this podcast](#) that we will link to in the show notes, we're going to keep our discussions today focused on the Best Evidence Rule. So, let's get to it! Remember that the Best Evidence Rule is only triggered when a witness is testifying about either the contents of a document or something they learned from a document.

Lee Burgess: Here, that document is a handwritten note. Now that we know the Best Evidence Rule is triggered, the next step in our analysis is to identify what the witness is testifying about. Frank is testifying about the handwritten note, right? More specifically, he's testifying about the contents of the note – Dan's confession to murder. Therefore, the Best Evidence Rule requires the prosecution to produce the original note or a reliable duplicate to prove Dan's confession, unless an exception applies.

Lee Burgess: Now, let's refresh our memory and restate the four exceptions to the Best Evidence Rule. An original document or reliable duplicate is not required to prove its contents if, (a) all the originals are lost or destroyed, and not by the offering party acting in bad faith; (b) an original cannot be obtained by judicial process; (c) it was not produced after proper notice was given to the party in control and against whom it would be offered against; or (d) it's not closely related to a controlling issue. Note that you won't have time to analyze each and every exception in your essay. To be efficient, you can mentally tick off all irrelevant exceptions, so you don't waste time discussing a non-issue.

Lee Burgess: Let's go back to our hypo. Are there any irrelevant exceptions that we don't need to discuss? Well, the facts don't mention anything about either side giving proper notice, so we can tick that one off. The note is definitely related to a controlling issue, since Dan is on trial for the murder he confessed to in the note, so there's no need to discuss exception (d) either. Let's take a look at exception (a). The original note was destroyed in the fire that burned down Frank's house. The note wasn't destroyed in bad faith, because it was destroyed by a natural disaster. Therefore, this exception is met, and the prosecution is not required to produce the original note. Are there any reliable duplicates that can be admitted to prove the contents of the note? Probably not. The facts don't mention that Frank made any copies or duplicated Dan's note in any way, so we can reasonably infer that there aren't any reliable duplicates. Therefore,



Frank's testimony about Dan's confession in the note was properly admitted after all.

Lee Burgess: Alright, let's tackle another hypo. This one is loosely adapted from an Evidence question on the [July 2005 California bar exam](#):

Lee Burgess: "David is on trial for vandalizing a local business. The prosecution called Wanda, who testified that she was walking near the business when she heard glass breaking. Seconds later, she saw a man with blonde hair quickly run away from the business. During Wanda's testimony, the jurors looked at David and noticed that he had jet-black hair. The prosecution then called Detective Rogers. The detective testified that he checked DMV records and found that David had blonde hair in his most recent driver's license photo. Detective Rogers never saw David in person before he testified at the trial. Should the court have admitted Detective Roger's testimony?"

Lee Burgess: See what I meant earlier when I said the Best Evidence Rule is typically a quick issue to spot on an exam? If the Best Evidence Rule is at issue, there's always going to be some sort of physical document mentioned in the hypo. And looking at our hypo, right away we know that we need to discuss the Best Evidence Rule, right? The detective is testifying about a photograph, which is a document for purposes of the Best Evidence Rule.

Lee Burgess: So, let's use our approach from the first hypo and identify what the witness is testifying about. Detective Rogers testified that David had blonde hair in his driver's license photo. Since the detective had never seen David before the trial started, his testimony is based on knowledge that he learned from the photo itself. In other words, Detective Rogers would have never known that David had blonde hair if he didn't see the driver's license photo. Since the facts don't mention anything that would trigger any of the exceptions like our first hypo, we can safely conclude that the court should have excluded the detective's testimony under the Best Evidence Rule. Therefore, the prosecution would be required to produce the original driver's license photo, or a reliable duplicate, such as a photocopy or printout of the photo.

Lee Burgess: Our analysis here was pretty quick, right? On a typical "racehorse" Evidence exam, your IRACs are probably going to be shorter than they would be on a non-racehorse exam that required you to do more of a "deep dive" analysis on just a few issues. Remember that there are a lot of issue you need to get through on Evidence exams, so it's not unusual for your analysis section to be more "breadth" than "depth". But don't ignore the analysis, because that's where the points come from!



- Lee Burgess: Let's do one more example together so we can nail this down. This one is adapted from the [February 2012 California bar exam](#):
- Lee Burgess: "Paula sued Daniel for damages for injuries she sustained in a car crash. At trial, Paula testified that she was driving the speed limit in the slow lane of a two-lane highway. She also testified that she looked in her rearview mirror and saw Daniel driving recklessly and swerving in the fast lane. Paula further testified that a few seconds later, Daniel sideswiped her car, causing her to sustain serious injuries.
- Lee Burgess: Daniel testified in his own case-in-chief that Paula was speeding, lost control of her car and crashed into him. Daniel also called Walter, who testified that he was driving down the highway and saw the aftermath of the crash. Walter stopped to help, and spoke with Paula about the accident. Walter further testified that as soon as paramedics arrived to treat Paula's injuries, he wrote down meticulous notes about what Paula said to him. Walter testified that he couldn't remember their conversation before the trial started, so reviewed his notes before he testified. His notes said Paula told him she was at fault for the accident, because she lost control of her car and crashed into Daniel's car. Paula objected and demanded that Walter produce his notes. Walter told the judge that he did not have the original, but he made a photocopy of his notes. Daniel showed Walter a copy of his notes, which Walter identified as the notes he wrote after the accident. The photocopy was admitted into evidence. Should the court have admitted the photocopy of Walter's notes?"
- Lee Burgess: Well, what do you think? Is there a physical document in our hypo? Yes, the photocopy of Walter's notes. That means we're dealing with a Best Evidence issue, so let's quickly restate our rule: A party must provide the original document, or a reliable duplicate, when a witness testifies to the contents of the writing; or testifies to knowledge gained solely from a writing. Remember the next step in our analysis? What is the witness testifying about? Walter is testifying about the notes he took after the accident. And we know he's testifying to the contents of the notes because he's testifying about the notes he wrote down, which detailed his conversation with Paula. Therefore, the Best Evidence Rule requires Daniel to produce the original notes or a reliable duplicate, because Walter is testifying to their contents.
- Lee Burgess: Let's go back to the document itself and see if it satisfies the Best Evidence Rule. Walter made a photocopy of his notes and that photocopy was ultimately admitted into evidence. What do you think? Is the photocopy a reliable duplicate that accurately reproduces the original? Yes – Walter identified the



photocopy as the notes he wrote after the accident, which tells us that the photocopy accurately reproduced his original notes. And voila! We can conclude that the photocopy was a reliable duplicate that satisfies the Best Evidence Rule. And there's no need to run through the exceptions, since Daniel complied with the Best Evidence Rule by producing the photocopy.

Lee Burgess: That's it for our hypos. Hopefully these examples will help you remember when and how to apply the Best Evidence Rule on an Evidence exam. It's important to know this well, so keep practicing because on exam day, there won't be any time to waste!

Lee Burgess: And that wraps up our podcast for today. Thanks for joining! 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 Lee 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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[California Bar Examination – Essay Questions and Selected Answers, February 2012](#)

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