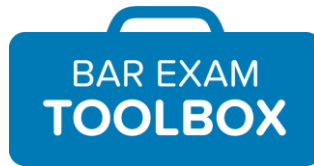


- Lee Burgess: Welcome to the Bar Exam Toolbox podcast. Today, as part of our “Listen and Learn” series, we’re discussing Evidence – specifically, the rules around the authentication of evidence. Your Bar Exam Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the bar 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 our “Listen and Learn” series. Today, we’re discussing Evidence, and specifically the rules around authentication of evidence. Rules requiring authentication come into play when you’re dealing with physical or documentary evidence – as opposed to testimonial evidence. The evidence in question might be a document, or a photograph, or a voice recording – just as a few examples.
- Lee Burgess: Let’s start with the general rule. Any physical or documentary evidence must be authenticated before it can be admitted in court. That means that the person offering the item into evidence must provide enough evidence to show that the item truly is what they are claiming it to be.
- Lee Burgess: So, how do you authenticate something? The exact methods are different depending on what kind of evidence it is. But remember, the primary goal of authentication is to provide sufficient evidence to show that the item in question really is what you say it is.
- Lee Burgess: First, let’s talk about physical evidence generally. Usually, physical evidence can be authenticated through witness testimony. For example, a witness with personal knowledge of an item might testify that it is what it is claimed to be, or an expert witness might offer expert testimony that the evidence is what it is said to be. If it’s a handwritten document, authentication can be done with testimony by someone familiar with the author’s handwriting.
- Lee Burgess: Sometimes witness testimony will not be sufficient – if for example, the evidence in question cannot be easily distinguished from other similar items. Consider, for example, a criminal case in which a blood sample taken from the scene of the crime is relevant evidence in the case. Witness testimony alone cannot prove that this blood sample is the blood sample that was taken from



the scene of the crime. In order to authenticate this evidence, therefore, it is necessary to show that the chain of custody has been substantially unbroken – that is, the blood sample can be accounted for at every step of the way, from the moment it was collected till the moment it was introduced in court.

Lee Burgess: Another type of evidence requiring authentication is voice recordings. Voice recordings can be authenticated by the testimony of anyone who has heard the person speak and can identify the recorded person as the speaker.

Lee Burgess: Remember, there's not one hard and fast rule about what's required to authenticate a piece of evidence. What's important is that there is enough evidence to prove that the item is really what it is claiming to be. This can even be done with circumstantial evidence, if it is sufficiently persuasive.

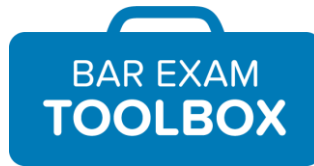
Lee Burgess: Finally, there are a few items that are considered self-authenticating, because by their very nature they are what they claim to be. These include things like notarized documents, official public records, or newspapers.

Lee Burgess: So, let's look at our first hypo and see how this actually looks in practice. This one is adapted from the [February 2017 California bar exam](#):

Lee Burgess: "Pete sued Donna's Pizza in federal court. At trial, Pete testified that as he was driving his car one day, he entered an intersection with the green light in his favor. He further testified that when he entered the intersection, Erin, an employee of Donna's Pizza, was driving a company van, ran a red light, and collided with his car. Pete testified that at the accident scene, Erin told him, 'I was in a hurry to make a pizza delivery and that's why I ran the red light.'

Lee Burgess: Pete testified that he sustained serious injuries as a result of the accident and was taken to the hospital. Pete called Nellie, a nurse, who testified that she treated Pete when he was at the hospital. Nellie testified that Pete told her that during the collision, his head struck the windshield and that he was still in a great deal of pain. Nellie, pursuant to standard hospital procedure, recorded the information on a hospital intake form. Pete moved the hospital intake form into evidence."

Lee Burgess: Let's consider any authentication issues with respect to, (1) Pete's testimony; and (2) the hospital intake form. Remember, authentication is only required for physical or documentary evidence, i.e. not testimonial evidence. Authentication is therefore not an issue with respect to any of Pete's testimony.



Lee Burgess: On the other hand, Pete has offered the hospital intake form into evidence. This is a form of physical evidence and is therefore subject to authentication requirements. Witness testimony is usually sufficient to authenticate physical evidence. In this case, Nellie the nurse had recorded Pete's information into the form herself, and she has testified to that effect. That should provide sufficient proof that the intake form is what Pete says it is. Nellie's testimony will therefore serve to authenticate the document.

Lee Burgess: Let's look at another hypo. This one is adapted from the [July 2018 California bar exam](#):

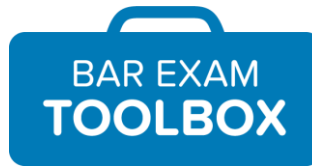
Lee Burgess: "Deb was charged in a California state court with battery of a spouse. Vic, Deb's live-in husband, was beaten when he stepped out of his car in their driveway. Vic called 911 about two minutes after the beating and reported that Deb, his girlfriend, had beaten him.

Lee Burgess: At trial, the prosecution called Vic as a witness. He admitted making the 911 call in which he reported that Deb had beaten him. The prosecution properly authenticated the 911 tape, moved the tape into evidence, and played it for the jury.

Lee Burgess: Deb took the stand in her own defense. She testified that she was working at her desktop computer in her office at the time of the assault, 20 miles away. She offered a printout of a list of file names, which contained the dates and times they were created, indicating that they were created on her computer at the time of the beating. She testified that her computer clock was set to the correct time and keeping time accurately on the day of the beating."

Lee Burgess: So, let's consider any authentication issues there might be here. The facts tell us that the 911 call was properly authenticated, so we don't need to worry about that. And we know that authentication is not required for testimonial evidence, so we don't need to worry about authentication of either Deb or Vic's testimony.

Lee Burgess: And that leaves us with the computer printout. Has that been properly authenticated? Remember, an item may only be admitted into evidence if the moving party presents enough circumstantial evidence to allow a jury to find that the evidence is what it purports to be. Here, Deb has testified to the nature of the list, where she obtained it, and that her computer clock was accurate. Assuming that creating such a list is a relatively straightforward process, Deb's testimony is likely sufficient to authenticate the printout.



- Lee Burgess: Now, let's look at another example. This one is adapted from the [July 2014 California bar exam](#):
- Lee Burgess: "Joe was a passenger on ABC Airlines, and was severely injured when the plane in which he was flying crashed because of a fuel line blockage. Joe sued ABC in federal court, claiming that its negligent maintenance of the plane was the cause of the crash.
- Lee Burgess: At trial, among other witnesses, ABC's lawyer called Chuck, ABC's custodian of records, who identified a portion of the plane's maintenance record detailing the relevant preflight inspection. Chuck testified that all of ABC's maintenance records are stored in his office. Chuck further described the function of the maintenance records and their method of preparation. ABC then offered into evidence the following excerpt: 'Preflight completed; all OK. Fuel line strained and all valves cleaned and verified by Mac'. A name, which appeared to say 'Sal Jones', was signed next to this comment. Sal Jones is the name of the ABC supervisor who was responsible for clearing Joe's plane for takeoff. Is everything properly authenticated here?"
- Lee Burgess: It looks like the maintenance record had been properly authenticated by Chuck, ABC's custodian of records. Chuck testified that all ABC's maintenance records are stored in his office, and he discussed the function of the maintenance records and their method of preparation.
- Lee Burgess: What about the signature of Sal Jones – has that been properly authenticated? We may not have enough information here to know. In order to authenticate Sal's signature, Chuck would likely need to have testified that he was familiar with Sal's signature, and the signature in the record excerpt matched Sal's signature. Absent that information, we can't be sure whether the signature itself was properly authenticated.
- Lee Burgess: Let's look at one last hypo, this one adapted from the [February 2012 California bar exam](#):
- Lee Burgess: "Paul sued David in federal court for damages for injuries arising from an automobile accident. At trial, Paul testified that he was driving westbound, under the speed limit, in the right-hand lane of a highway with two westbound lanes. He further testified that he saw David driving a black SUV behind him, weaving recklessly through the traffic. He also testified that about 30 seconds later, he saw David appear in the left lane and swerve in front of him. He testified that David's black SUV hit the front of his car, seriously injuring him and killing his passenger.



Lee Burgess: David testified that Paul was speeding, lost control of his car, and ran into him. David called Molly, who testified that on the day of the accident, she had been driving on the highway, saw the aftermath of the accident, stopped to help, and spoke with Paul about the accident. She testified further that as soon as Paul was taken away in an ambulance, she carefully wrote down notes of what Paul said to her. David showed her a photocopy of her notes and she identified them as the ones she wrote down immediately after the accident. The photocopy of the notes was admitted into evidence. The photocopy of the notes stated that Paul told Molly that he was at fault because he was driving too fast, and that he offered to pay medical expenses for anyone injured. What, if any, authentication issues do you see here?"

Lee Burgess: By now you know that authentication is required for all physical or documentary evidence – in other words, non-testimonial evidence. So, you should immediately be thinking about the photocopy of Molly’s notes as a prime area for authentication analysis. Everything else is testimonial evidence, and so authentication will not be necessary.

Lee Burgess: Here, Molly has testified that she was there on the day of the accident, and that she remembers that she carefully wrote down notes of what Paul had said to her. Moreover, David showed Molly the copy of the notes while she was on the stand, and she identified them as the ones she took that day. This would suffice as authentication, and so the notes should be admitted.

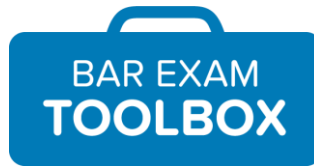
Lee Burgess: That’s all we have time for today. Hopefully you found these hypos to be helpful examples of how to work through an authentication issue on an exam. If you enjoyed this episode of the Bar Exam Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. 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 at our website [contact form](#) at BarExamToolbox.com. Thanks for listening, and we’ll talk soon!

RESOURCES:

[“Listen and Learn” series](#)

[The Brainy Bar Bank: Streamlining Bar Study](#)

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



[California Bar Examination – Essay Questions and Selected Answers, July 2018](#)

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

[California Bar Examination – Essay Questions and Selected Answers, February 2012](#)