



Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we have another episode as part of our “Listen and Learn” series – this one discussing hearsay. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the law school and early legal career experience, so you’ll be the best law student and lawyer you can be. 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 or rating on your favorite listening app. And if you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we’d love to hear from you. And with that, let’s get started.

Lee Burgess: Hi, and welcome back to the “Listen and Learn” series from the Law School Toolbox podcast. Today we are covering a topic from Evidence that you’re sure to at least have heard about on TV every now and then, and that is hearsay. “Hearsay” is a term that gets thrown around pretty casually on movies and TV as a way to say a statement is unreliable: “I heard Lucy wasn’t let go, she actually got fired.” “Oh, that’s hearsay.” But the actual legal definition is more complicated than that. And, on an exam, there are a lot of exceptions to remember.

Lee Burgess: So, what is hearsay anyway? There are two parts. First, it’s a statement that was made outside of the courtroom in the current proceedings. Second, it is being offered to the judge or jury in order to show that the content of the statement is true. The rule to remember is that hearsay is an out-of-court statement being offered for the truth of the matter asserted.

Lee Burgess: As a law school and bar exam tutor, I can tell you that almost every student has no trouble remembering the text of this rule – out-of-court statement offered for the truth of the matter asserted. That’s not the hard part. What gets tricky is its application. Today, we are going to be talking about qualifying a statement as hearsay. And, just as a heads up, it’s usually that second part – the “truth of the matter asserted” part – that gives the students trouble, so we will focus on that.

Lee Burgess: Before we get into all the nuts and bolts, let’s take a step back and talk about why we have these rules. Hearsay is something the law has deemed unreliable. If my friend tells me her uncle burned down his house to collect the insurance money, I don’t really know whether that’s true or not. So, if I am on the witness stand testifying about the juicy story someone told me, it definitely makes the jury’s ears perk up, but it doesn’t actually mean it’s true.

Lee Burgess: This situation can get dangerous because it’s so easy to spread misinformation. Think of hearsay as something courts do not want to allow in. In fact, the general rule is that hearsay is inadmissible. But, then there are a lot of hearsay exceptions. Those are situations in which the law has made room for, because



there are moments when regular hearsay might actually be reliable – situations when we should let an otherwise unreliable statement come into court.

Lee Burgess: Now, we won't get into the exceptions to hearsay today – that's a separate topic that would make up several podcasts – but you do need to know them for your exam. Here's what I would recommend. Make a list of the hearsay exceptions you're responsible for knowing on your exam. And read the Federal Rules of Evidence on each one and see if you can boil them down to just one sentence.

Lee Burgess: The important thing here is that you can see from a fact pattern when these situations come up. For example, there's a hearsay exception called "dying declaration". If you see someone in a fact pattern dying or thinking they're about to die, this exception is likely being triggered. Try to visualize scenarios in which the different hearsay exceptions come into play.

Lee Burgess: Now, learn your one-sentence rule language by heart, even if your exam is open book. Believe me, you will not have time to look this stuff up during the exam without risking falling behind. Other people in your class will have all the rules memorized, and that will allow them to move fast. And you should do the same.

Lee Burgess: Finally, see if you can come up with a mnemonic of sorts to help you remember what all of the hearsay exceptions are. I like to use superscripted numbers. You know? Like the little numbers that show x to the power of 2 or whatever? Use numbers to remind yourself in your acronym how many words start with that letter. For example F superscript 3 (F^3) tells you that there are three exceptions that start with the letter F. This is just an example. You should make your own based on your professor's phrasing and what rules your class actually covers. Also, pay very close attention to all the hypos from lecture. If your professor walks through a hearsay situation, it's crucial that you know the rules well enough to follow along and understand all the twists and turns.

Lee Burgess: Alright, let's get back to our plan for today. We are going to be focusing on how to make the decision whether or not a statement is hearsay or not. Remember, the first rule we need to look at is the part about there being an out-of-court statement. On an exam, this is usually pretty easy to identify.

Lee Burgess: First, let's look at what qualifies as a statement. It could be something spoken or written down. It could even be a gesture that does not involve any words at all, but is still nonetheless an action that is used to convey meaning. For example, if I nod my head up and down, that means "Yes". That is called "assertive conduct", because I am motioning in a way that communicates something.

Lee Burgess: Even some motions that are not assertive conduct could be considered a statement for hearsay purposes. For example, if I take my index finger and draw



it across my throat with a serious expression on my face, could this mean the person we are talking about was murdered? Maybe. What about if I ask this question: “What kind of person texts while they’re drunk driving?” I’m not really asserting anything because I’m asking a question, but is it hearsay? Courts actually might disagree about this last one.

Lee Burgess: The thing to keep in mind here is whether the statement is one that conveys something. You’ll usually be dealing with oral or written words, but just keep it in the back of your mind and you might find non-verbal situations on the exam. If these come up in class hypos, write them down! And if it’s clear something is a statement, don’t waste time on your exam explaining why. Save explanation for the things that you have debatable facts about.

Lee Burgess: Okay, so that takes care of the “statement” part. Now, what about “out-of-court”? What does that actually mean? Well, luckily, this one’s actually pretty straightforward. “Out-of-court” literally means the statement was said or written down in some place other than the courtroom in this case. The fact pattern will typically give you a tiny background of facts to help you quickly answer this question. For example, “While waiting for the ambulance, Paula said X” or, “Dan stormed into the party and exclaimed Y.” The fact pattern will usually give you something to answer this question: Did this happen in court? And remember, when we say “in court”, that means in the courtroom during this present case. So, something from another courtroom at some other time could actually fit the rule, but it gets a little complicated, so we’ll put a pin in it. Look for a hearsay exception to cover this situation.

Lee Burgess: So, out-of-court statement. What about “truth of the matter asserted”? This is where things can get a bit tricky. Here, when we say “offered”, it means offered as evidence in the case. The proponent, or person giving the evidence, is asking the judge and jury to look at some piece of information. Then, “truth of the matter asserted” is about whether that statement being offered is going to show that the thing said is actually true and not false.

Lee Burgess: I’ll say that another way. Are we giving the statement to the court because we want to use it to show what we are saying in the statement is true? Here’s an example. Say your landlord refuses to fix the heater and you sued him. If I am trying to find evidence that shows my house is cold and I remember one time you came over and said, “Wow, your house is super chilly” – this is something I could offer for the truth.

Lee Burgess: The thing you were saying – the actual words of your statement, “It’s chilly” – is the same thing I want the court to see is true – it is in fact chilly. What about if you came over and said, “Jeez, this would make a great place for a polar bear.” Now, I can’t imagine anyone actually coming over and saying this, because that would be weird, but imagine that this was their way of telling me my house was



cold. Is this statement being offered for the truth? Is it true that my house is a great place for a polar bear? Take this very literally, and you'll see that the answer is "No". I'm not offering this evidence to show that my house is actually tricked out in a way that my new pet polar bear would really enjoy – that is the truth of the statement. But no, I'm offering it for some other reason – to show that it is too cold. Make sense? When looking at potential hearsay, the question you should ask is: If the literal words of the statement were true, does that match up with what the person is trying to show the court?

Lee Burgess: So let's try some examples. This first one is from the [July 2003 Evidence essay from the California bar exam](#). We've shortened it to keep the issues focused on basic hearsay without getting into the exceptions:

Lee Burgess: "Dan was charged with aggravated assault on Paul, an off-duty police officer, in a tavern. The prosecutor called Paul as the first witness at the criminal trial. Paul testified that he and Dan were at the tavern and that the incident arose when Dan became irate over their discussion about Dan's ex-girlfriend, Gina. Then the following questions were asked and answers given:

Lee Burgess: Question: What happened then?
Answer: I went over to Dan and said to him, 'Your ex-girlfriend Gina is living with me now.'

Lee Burgess: Question: Did Dan say anything?
Answer: He said, 'Yeah, my buddies tell me you're treating her like dirt.' And then he jumped up and attacked me.

Lee Burgess: Were either of these statements hearsay?"

Lee Burgess: So, let's look at the sentence "Gina is living with me now." First step, was this an out-of-court statement? It's clearly a statement, and it was said at a tavern. A tavern is clearly not our courtroom, so this element is met. The whole reason you were given the "tavern" fact is to check off this rule element, so this is where to plug it in.

Lee Burgess: Next step: Is this statement being offered for the truth of the matter asserted? Well, to figure that out, we need to ask, "What is the matter being asserted?" Paul said, "Gina is living with me now." In this case about two guys fighting at a bar, does it really matter where Gina is living?

Lee Burgess: Another question you might want to ask yourself is, who is the proponent of this evidence? Who is on the stand testifying? Who wants this evidence to get into court? Here, the prosecutor called Paul and asked him about the conversation. The prosecutor wants Dan on the hook. She wants to get into evidence stuff that makes Dan look bad. Keep that in mind.



- Lee Burgess: Is she offering the evidence of the ex-girlfriend Gina living with the cop because she wants to show the court that Gina and Paul live together? No. That doesn't matter. She wants to get this statement into court because it shows Dan got enraged. This statement started the fight. So, in other words, the substance of what it says in those quotation marks – "Gina lives with me now" – doesn't matter. What matters is how it made Dan react. The answer here is that this second element of the hearsay rule is not met. The statement is not being offered for the truth of the matter asserted in the statement. And that means it fails the test for hearsay. Make sense?
- Lee Burgess: Let's try the next part. Dan said his buddies told him Paul was treating Gina like dirt. First step: Yes, this was an out-of-court statement. Same reasons as we just discussed. Second step: Is the statement being offered for the truth of the matter asserted? No. Why? Well, does it have any bearing on the case whether Paul was in fact treating Gina like dirt? No. Why not? Because we don't actually care if the words in the statement are true or not.
- Lee Burgess: And that's what to look at: Do we care if the exact words in the statement happen to be true? The case is about Dan beating up Paul. This statement is not being offered to show that Paul really was treating Gina badly. That's beside the point. The statement is being offered to show how the fight broke out and that Dan's friends were telling him that Paul was being mean to Gina, and that made him angry enough to try to fight Paul.
- Lee Burgess: Now, let's get into another hypo. This one is from the [Evidence essay on the February 2016 bar exam in California](#):
- Lee Burgess: "Mike supervised David and Pam at Ace Manufacturing Company. Pam was fired. A week later, David circulated the following email to all the other employees:
- Lee Burgess: 'I just thought you should know that Pam was fired because she is a thief. Sue caught her stealing money from the petty cash drawer after Pam's affair with Mike ended.'
- Lee Burgess: Pam sued David for defamation and offered the email as evidence. Is the statement hearsay?"
- Lee Burgess: First question: Was this email an out-of-court statement? Yes. David didn't say the words in court; he said them in an email. On an exam, use that fact to check off this part of your rule.
- Lee Burgess: Next, is the email being offered for its truth? What do we do first? Well, we need to look at what "matter asserted" really means here. The matter asserted



is what the words of the email say. The words of the email say Pam is a thief and that she had an affair with her boss. So, the question is, are those words being offered into court to show that these are really true? Well, let's look at who is offering the evidence. It's Pam. And importantly, this case is about defamation.

Lee Burgess: So, is Pam really trying to convince the court she is a thief? Is she trying to tell the court she had an affair with Mike? No, of course not. She is actually trying to show these things David said are not true. So, the answer to the "truth of the matter asserted" question is "No". Pam is not offering the email to show that the words of the email are true. That means that this is not hearsay.

Lee Burgess: As you study, keep track of the categories of non-hearsay that your professor has covered. Every class covers slightly different material. What we just discussed with this email is called a "fact of independent legal significance". If the words in the statement have some legal meaning – for example, they would form a contract or create a basis for a legal claim, like defamation – they might fall into this category and be considered non-hearsay.

Lee Burgess: Another classic example that comes up when discussing statements that are being offered for something other than their truth – in other words, statements that will end up being labeled "non-hearsay" – goes like this:

Lee Burgess: "The case is about a dispute over a will. The decedent is an old man who writes a will at his home. As he is signing the document and placing it into the envelope, he tells his nephew, 'I am the King of Mars, so it is important that I leave the planet in good hands. Otherwise, the Martians will never forgive me.' Then later he dies. Is the statement hearsay?"

Lee Burgess: First, is it an out-of-court statement? Yes. It happened at his house. Next, is it being offered for the truth? Well, do we care whether or not this guy actually thinks he's the King of the Martians? No. That's a strange thing to say for sure, but it's not something we want to prove in court. So, it's not being offered for the truth, which means it won't pass the test for hearsay.

Lee Burgess: So what's really going on here? Bringing in a statement like this could show the old man's state of mind. In other words, if he was not competent enough to write a will because he really did think he was the King of the Martians, that would mean his will wasn't valid. What you're looking for here is a situation where the state of mind of the person talking is actually the issue in the case. When contesting a will or writing a contract, or something along those lines, the court will care whether a person was in their right mind or not. This kind of statement could be admissible to show that they were not.



- Lee Burgess: Again, though, Evidence classes cover different topics when it comes to non-hearsay and hearsay exceptions. What's important for you is that you take note of anything that will be up for grabs in the exam for your class.
- Lee Burgess: Okay, so today we looked at some examples of how different statements could fail the part of the test about the "truth of the matter asserted" – meaning that they are not hearsay. You should cull through your class notes and make sure you know any non-hearsay categories, as well as any "hearsay exceptions" that could be on your exam.
- Lee Burgess: And with that, we're out of time. If you enjoyed this episode of the Law School 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@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website [contact form](https://www.lawschooltoolbox.com/contact-form) at LawSchoolToolbox.com. Thanks for listening, and we'll talk soon!

RESOURCES:

[Tutoring for Law School Success](#)

[California Bar Examination – Essay Questions and Selected Answers, July 2003](#)

[California Bar Examination – Essay Questions and Selected Answers, February 2016](#)

[Podcast Episode 215: Listen and Learn – The Commerce Clause](#)

[Podcast Episode 218: Listen and Learn – Supplemental Jurisdiction \(Civ Pro\)](#)

[Podcast Episode 244: Listen and Learn – Negligence Per Se](#)

[Podcast Episode 245: Listen and Learn – Promissory Estoppel](#)

[Podcast Episode 248: Listen and Learn – Introduction to Homicide](#)

[Podcast Episode 257: Listen and Learn – The "Reasonable Person" Standard](#)

[Podcast Episode 259: Listen and Learn – Relevance in Evidence](#)

[Evidence 101 – A Quick Look at Upperclassmen Courses](#)